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Rethinking Copyright and The Internet: A New Model for Users' Rights

Ph.D. Thesis by Mitchell Longan

University of Sussex

Submitted October 2020

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree. However, the thesis incorporates material already submitted as part of required coursework and/or for the degree of:

Juris Doctor which was awarded by Tulane University Law School. (Explained below)

Signature:.....

The only section that incorporates coursework from my J.D. is: Chapter 1 F(ii) which contains explanations of the American law of fair use that I previously wrote for a paper in the final year of my J.D. That paper also was subsequently published as part of the book: *Video Games and the Law*, Routledge 2020.

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Introduction.....	7
A. Research Question and Abstract	7
B. Methodology	9
C. Thesis Outline.....	11
I. Copyright: Its History, Purpose, and the Digital World.....	15
A. Introduction.....	15
B. The Purpose of Copyright Law	15
C. Copyright as a Property Right.....	17
D. How Technology has Surpassed the Scope of Copyright Law.....	23
E. Piracy	25
<i>i. Piracy and the Law</i>	<i>25</i>
<i>ii. Notice and Takedown Systems and the Rise of Filtering Software.....</i>	<i>26</i>
<i>iii. Anti-Piracy Litigation.....</i>	<i>28</i>
<i>iv. The Streaming Service Business Model and Piracy.....</i>	<i>30</i>
F. User-Generated Content.....	34
<i>i. Fair Dealing Systems: The U.K. and its Progeny.....</i>	<i>37</i>
a. Fair Dealing:	39
b. Shortcomings of the Fair Dealing System in the Modern World:	40
c. User Generated Content.....	41
<i>ii. The Derivative Right, Fair Use and Transformation: The U.S. and Elsewhere.....</i>	<i>42</i>
a. The Derivative Right:	43
b. Fair Use:	43
c. Fair Use and User Generated Content	44
d. Transformative Use:	46
e. The Development of Legal Uncertainty in Fair Use Cases:	48
<i>iii. Miscellaneous Jurisdictions: The E.U. and Others</i>	<i>52</i>
a. Exceptions to Infringements in Europe	52
G. Chapter Conclusions	53
II. The Inefficacy of Property-Based Enforcement Mechanisms in Copyright Law	55
A. Introduction.....	55
B. The Property Model is No Longer Suitable	56
C. Modern Copyright as Grasping to this Antiquated Model - Solutions Seeking Control	58
<i>i. Notice and Takedown Procedures</i>	<i>59</i>
b. Abuse of the Notice and Takedown System.....	61
c. The system is Overwhelmed and Cannot Function Adequately.....	65
<i>ii. Gatekeeping Software and Digital Locks</i>	<i>67</i>
a. DRM/TPM.....	68
b. Gatekeeping Software.....	71
E. The Myth of the Inferiority of Liability Rules in IP	78
F. Conclusions	82
III. A Theoretical Analysis of Users' Rights and How to Balance them Against those of Creators..	83
A. Introduction.....	83
B. Philosophical Theories of Copyright Law	84
<i>i. Introduction.....</i>	<i>84</i>
<i>ii. Appropriation Theories.....</i>	<i>85</i>
a. Labour Theory: Locke	86
b. Personality Theory: Hegel.....	91
c. Economic Theory	94
d. Utilitarian Theory	100
C. The Disenfranchisement of the Common Creator	103
<i>i. Extension of copyright terms</i>	<i>104</i>
<i>ii. Increased protectionist treatment of secondary uses.....</i>	<i>108</i>
a. Lack of access to proper licensing mechanisms	109
D. How Liability Rules are Ideally Situated to Open Access and Rebalance the Rights of Users Against Owners	111
E. Conclusions	111
IV. Legislative Attempts to Address these Issues: A Comparison of the Copyright Modernisation Act in Canada and Article 17 of the New European Copyright Directive.....	114
A. Introduction.....	114
B. Canada: An Evolved Standard.....	115

i. Introduction.....	115
ii. Hybridizing the Two Systems.....	115
iii. The Copyright Modernization Act:.....	117
iv. Legislative Suggestions Borrowing the Canadian Model.....	119
v. Criticising the Canadian Model.....	121
vi. The Copyright Modernization Act of Canada: Conclusions.....	124
C. The E.U.: The Directive for Copyright in the Digital Single Market.....	125
i. Introduction.....	125
ii. The Inevitable Result is Filtering Technology.....	128
iii. Who to Hold Accountable for Online Infringement.....	131
iv. An Erosion of Intermediary Liability Protection Regimes.....	132
v. Failure to Address Current Industry Demands.....	134
vi. Conclusion.....	136
D. Comparison and Conclusions.....	136
i. Focusing on Users' Rights.....	136
a. The Value Gap.....	137
ii. Neither Solution is Ideal.....	139
V. Private Sector Solutions as Copyright's Crutch: Creative Commons, Tolerated Use, and Content ID.....	142
A. Introduction.....	142
B. Creative Commons.....	143
i. Introduction and the System.....	143
ii. Flaws in the System.....	145
C. Tolerated Use: Then and Now.....	147
i. Tolerated Use in 2007.....	148
ii. No-Action Policies.....	149
a. Fan Fiction/Films.....	149
b. Video Games.....	150
c. Video Games- Machinima.....	151
D. Tolerated Use and Users' Rights- The Issues.....	152
i. Jurisdictions Without Fair Use.....	152
ii. Fair Use Jurisdictions.....	153
iii. Implications.....	154
E. Controlled Monetisation- The Future of Tolerated Use and Copyright Law.....	154
i. Amazon Kindle Worlds- A Licensing Scheme for Fan Fiction in the U.S.....	155
ii. Video Games- Modding.....	157
iii. The BBC's Mission Dalek and Crowdsourcing Content from Fans.....	160
iv. Implications.....	161
F. YouTube's Content ID and Copyright Match Tool.....	163
i. Flaws.....	164
a. False Positives and Exceptions to Infringement.....	165
b. Higher Transaction Costs and Lack of Tolerated Use Provisions.....	166
c. Unfair Royalties Splits and Unjust Enrichment.....	166
d. Lack of a Fair System of Review.....	167
ii. Implications.....	168
G. Conclusions.....	169
VI. Rebalancing the Scales of Copyright Rights: A New Philosophy for Copyright Policy and a Compulsory License for Derivative Authors.....	172
A. Introduction.....	172
B. Abandoning the Role of Gatekeeping in Copyright Enforcement.....	174
i. The Gatekeeping Philosophy in Action.....	175
ii. Gatekeeping is a Poor Philosophy: The Economic Perspective.....	176
iii. Gatekeeping is a Poor Philosophy: The Moral Perspective.....	177
iv. Interim Conclusions.....	177
C. Protecting Derivative Rights with Liability Rules, Not Property Rules.....	178
i. DeLisa's Compulsory Synchronisation License for UGC.....	181
ii. Rachum-Twaig's Compulsory License System.....	183
iii. An Alternative Model.....	188
a. Setting an Appropriate Rate.....	188
b. A Percentage Based Royalty and Underpriced or Noncommercial Works.....	193
c. How to Apply the Percentage Royalty.....	194

d. Tempering the Compulsory License for Derivatives	196
e. The Balance of Rights of Reproduction with Derivative Rights	197
f. Employing a Waiting Period Before the License Takes Effect	199
D. An Example of What the Statutory License May Look Like	202
E. Exceptions for Non-Commercial Works	204
F. Retroactive Application	206
G. Conclusion	207
VII. Conclusions of this Thesis	209
A. Copyright Law is Antiquated and Must be Changed to Function in the Digital Space	211
B. The Law Must Distinguish Between Piracy and Derivative Creativity	212
C. The Law is Overprotective and Must be Rebalanced	213
D. The Appropriate Solution is a Compulsory License for Derivative Creativity	214
E. Final Words	215
Bibliography	216

Abbreviations and Acronyms Commonly Used in this Thesis

ALAC- ‘Artists and Lawyers for the Advancement of Creativity’

CD- ‘Compact Disc’

CDPA- ‘Copyright Designs, and Patents Act’ (United Kingdom)

CMA- ‘Copyright Modernisation Act’ (Canada)

CPA- ‘Compulsory Primary Author’

CRT- ‘Copyright Royalties Tribunal’

CTEA- ‘Copyright Term Extension Act’ (United States)

DMCA- ‘Digital Millenium Copyright Act’

DRM- ‘Digital Rights Management’

EU- ‘European Union’

InfoSoc- ‘Information Society’ (referring to the EU Directive)

ISP – ‘Internet Service Provider’

MP3- ‘Mpeg-1 Audio Layer 3’

OCSSP- ‘Online Content Sharing Service Provider’

SA- ‘Secondary Author’

TPM- ‘Technical Protection Measures’

UGC- ‘User-Generated Content’

UK- ‘United Kingdom’

UNEC- ‘Union des Ecrivaines Quebecois’

US- ‘United States’

Introduction

A. Research Question and Abstract

The laws of copyright can be slower to adapt and evolve than the industries they regulate. As the landscape of how protected works are made and how the public views how those works should be treated changes, the law does not seamlessly follow in course. Rather, it typically slowly grows obsolete and then undergoes periodic points of drastic redefinition in order to adapt.

Since the Statute of Anne, the foundation for modern copyright law across the globe, many nations have implemented subsequent reforms to their copyright acts to adapt both to the modern world and to previous failures of the law. The British Copyright Act of 1956 adapted the law to a world connected in trade by expanding protection for works whose initial publication was outside of Britain.¹ In 1998, the United States enacted one of the most important pieces of copyright legislation as a reaction to the effects of the internet and technology on the enforceability of copyright law. This law is known as the Digital Millennium Copyright Act (DMCA). The DMCA, among its many alterations and additions to the law, created a safe-harbour provision so that online service providers could avoid vicarious liability for the actions of their members- moulding the law to the digital space.² In 2012, Canada passed its groundbreaking Copyright Modernization Act which sought to address the rise of user-generated content by legitimising transformative works made for non-commercial purposes.³

Thus, the overarching trend in copyright law is for it to gradually grow obsolete or ineffective within the scope of the industrial or technological power of the market until a great force of legislation brings the law back in line.

This thesis will argue that we have reached such a turning point. It asserts that an inability to adequately apply current law, seen through impotent enforcement mechanisms online, coupled with

¹ Copyright Act 1956 (UK)

² Digital Millennium Copyright Act 1998 (USA)

³ Copyright Modernisation Act 2012 (CA) 29.21

vague legal boundaries has brought about a need for redefinition within copyright law. Further, it hypothesises that the property-law model used as a basis for copyright law today is the root of issues with balancing user's rights against creators' rights and is no longer the ideal means to protect creative works online. It will demonstrate how technology and global communication have changed the culture of creativity and creative dissemination in such a way that copyright law is no longer a competent tool in protecting and fostering the development of a large body of creative works. It will examine current would-be solutions to the problem of online infringements and analyse their inadequacies. In analysing the current relevant legal mechanisms, their failures and successes, as well as how the notion of property-like rules influence these failures and successes, it comes to the conclusion that stepping away from this property model and towards a system of liability rules online will not only help to foster new works, but will benefit those who own the rights to existing works as well. It concludes with a suggestion for a newly constructed system of liability rules, targeting areas previously discussed where the law is failing, to be applied in lieu of property rules for certain aspects of copyright protection.

The overarching research question this thesis serves to answer is *how can we appropriately balance author's rights with the dissemination of information in a digital world in a way that leads to a system of copyright law that is practical, fair, and enforceable?* It is intended to highlight and address the growing inefficacy of copyright law in the digital world, analyse the weaknesses of modern attempts to adapt the law to the digital space, and offer unique solutions to the problems it addresses. It analyses copyright law from a global perspective through the lens of online infringements. I adopt this global perspective for two reasons. First, while copyright law is strictly territorial, it serves at the behest of a global economy and has been largely unified through treaties with respect to minimum requirements for protection and framework standards.⁴ Second, a global perspective is important for the comparative analyses I employ. The comparisons target the successes and failures resulting from enacted solutions to online infringement in an attempt to offer

⁴ Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971)

a workable solution that may be applied anywhere. Thus, this thesis sets out to be a policy analysis that dissects copyright law and online infringement as a whole.

B. Methodology

The methodology for the research involved in creating this thesis is a combination of theoretical approaches. In many instances, it is doctrinal and comparative, though it also takes a reform-oriented approach. Doctrinal research methodology is a general strategy based upon the “synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent, or justifies a segment of the law as part of a larger system of law.”⁵ Most commentators in the area of legal methodology agree that “[s]ome element of doctrinal analysis will be found in all but the most radical forms of legal research.”⁶ Van Gestel and Micklitz have identified three crucial aspects of doctrinal research.⁷ First, in doctrinal work, “arguments are derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications.”⁸ Second, “the law somehow represents a system” so that “through the production of general and defeasible theories, legal doctrine aims to present the law as a coherent net of principles, rules, meta-rules and exceptions at different levels of abstraction.” Third, “decisions in individual cases are supposed to exceed arbitrariness because they have to fit into the system. Deciding in hard cases implies that existing rules will be stretched or even replaced but always in such a way that in the end the system is coherent again.”⁹ As a contribution, this thesis represents a “recasting project” which is a subset of the doctrinal method¹⁰ described by former dean of Harvard Law School, Martha Minow. A recasting project is designed to

- (a) Gather more than one ‘line’ of cases across doctrinal fields, categories, or historical developments, and show why they belong together or expose unjustified discrepancies.

5 Kelly, J.M., *A Short History of Western Legal Theory* [1992] Clarendon Press pg.8

6 Chynoweth, P., ‘Legal Research’ in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 31.

7 Van Gestel, R. and Micklitz, H., ‘Revitalizing Doctrinal Legal Research in Europe: What about Methodology?’ (2011) EUI Law, <<http://hdl.handle.net/1814/16825>>

8 Ibid. at 26

9 Ibid.

10 See: Watkins, D., & Burton, M. (Eds.). *Research Methods in Law* [2017] Routledge, pg. 15

(b) Offer a new framework or paradigm that can recognize past, present and future material.¹¹

This thesis analyses the legal doctrine and its historical development as well as its application in a way that demonstrates the presence of discrepancies and failures of the law. In turn it offers a new framework.

While this thesis is largely doctrinal, it, like many other works of doctrinal research, includes additional disciplines and may best be categorized as an interdisciplinary doctrinal work.¹² Taekema and Van Der Burg state that one applicable discipline that may be combined with the doctrinal method is philosophy. They go on to claim that “for almost any doctrinal subject, there is a relevant philosophical dimension so that philosophical analysis could provide more depth to the research.”¹³ In chapter four, I employ a philosophical analysis in order to demonstrate that the underlying theories upon which copyright law is based no longer align with how copyright law has evolved. One of the many purposes of this thesis is to demonstrate how the law has strayed adrift from its prescribed purpose. I use the underlying theory upon which the law was built as a spirit level to show how the law is no longer aligned with the values that support it.

This thesis is also, at times, comparative. Sacco claims that “like other branches of legal science, [comparative law] seeks knowledge of the law.”¹⁴ Patrick Glenn addresses cases where comparative methodologies may be usefully employed. These cases are: comparative law as an instrument of learning and knowledge, as an instrument of evolutionary and taxonomic science, contributing to one’s own legal system, and harmonization of the law.¹⁵ I employ a comparative methodology throughout this thesis using it as both an instrument to demonstrate legal evolution and as a tool to contribute to the reconstruction of existing legal systems and harmonization. This

11 Minow, M., ‘Archetypal Legal Scholarship: A Field Guide’ (2013) 63 J. Legal Educ. 65, 66

12 Taekema, S. and Van Der Burg, W., ‘Legal Philosophy as an Enrichment of Doctrinal Research Part I: Introducing Three Philosophical Methods’, (2020) Law and Method, DOI: 10.5553/REM/000046

13 Ibid.

14 Sacco, R., ‘Legal Formants. A Dynamic Approach to Comparative Law’, (1991) American Journal of Comparative Law, p. 1-34 (part I) and p. 343-401 (part II)

15 Glenn, P.H., ‘The Aims of Comparative Law’, in: Smits, J.M. (ed.), *Elgar Encyclopedia of Comparative Law*, [2006] Cheltenham: Edward Elgar, pg. 57-65.

thesis takes a global approach to copyright law and does not focus on any particular territory. However, in chapter 5 I focus on two pieces of legislation with similar purposes from two specific legal jurisdictions- Canada and the European Union. In comparing these pieces of legislation and their effects, I am able to illustrate the way in which disparate solutions to address the same legal problem have created separate results and, in turn, solved certain aspects of the problem while exacerbating others. The comparison is intended to highlight which aspects of the solutions are successful compared to those that are not in order to inform my own conclusions and suggestions in the concluding chapter of this thesis. The conclusion of this thesis is neither a contribution to my own legal system nor a harmonization but rather something in between. It represents a solution, derived in part from the previous comparisons, that may be applied to any legal system.

Practically speaking, all research was conducted by surveying published academic writing, legislation, judicial opinions, archived political arguments, news articles and other published sources of raw materials. One of the many goals of this dissertation is to advocate for works of remix and, in many ways, it qualifies as such itself. It represents the analysis of the actions and ideas of others moulded together and coupled with my own perspective with the intention of presenting an entirely new and valuable contribution to this field of knowledge.

C. Thesis Outline

Chapter one outlines the history and evolution of copyright law, how it functions as a property right, and how technological advancements have surpassed the scope of the law in a way that renders it inadequate. It specifically addresses how the advancement of consumer technology to make and adapt content coupled with the dissemination power of the internet have lead to a state of near chaos with respect to piracy and its grey areas- namely user-generated content. It also addresses the traditional ways the law has combatted piracy and made way for user-generated content (“UGC”). It serves to undermine these legal and enforcement mechanisms by highlighting their impotence in the digital environment.

Chapter Two makes the case that the problem lies in the foundational aspects of copyright law—namely the property-like model around which it is built. It argues that, up to this point, copyright legislation has been focused on maintaining control over creative works in a newly connected and digital world. The notion of control is absolutely necessary in a property system yet, in the digital space where most copyrighted works live, it is functionally impossible. It argues that any solution to the problem of piracy or user-generated content that relies on re-establishing control over the original work will fail in the digital space and calls for a restructuring of the property-model foundation that requires this control via the implementation of liability rules.

Chapter Three aims to show that regardless of the law's ability to function adequately in the digital space, it has evolved into an overprotective scheme in which the foundational purposes of copyright law are lost. It offers a unique theoretical analysis of copyright law from the perspective of users' rights to demonstrate that the law has disenfranchised common creators and should be rebalanced accordingly. This chapter again teases the idea that the best way to do so is by stepping away from property rules and using liability ones to govern certain aspects of the law.

Chapter Four focuses on recent legislative measures designed to adapt copyright law to the digital space. It compares the Copyright Modernisation Act of 2012 in Canada to the Directive for Copyright in the Digital Single Market of the European Union. It outlines how the Canadian system of legitimising non-commercial secondary uses of creative works is a step in the right direction but fails to go far enough. It compares this to the more recent and impending European legislation that takes an opposing stance on the solution and seeks to try and tighten control over online user publications via filtering technology. It claims that neither solution is adequate and argues that abandoning the property model of copyright protection, or at least some aspects of it, are necessary.

Chapter Five looks at the private sector's influence on copyright law enforcement. It argues that legal uncertainty has led to the evolution of pseudo-laws crafted and enforced by the private sector without intervention by legislative or judicial bodies. These private sector initiatives, while looking to address the wants of users in the digital space, do so to the benefit of their corporate authors. They often undermine legal protections for secondary creativity but go unchallenged because of the expense of doing so coupled with the uncertainty of victory on the claimant side. This chapter ultimately argues that the private sector initiatives have a lot to offer in terms of copyright enforcement in the modern era, but without legislative or judicial oversight, they largely serve as oppressive tools.

Chapter Six offers a two-part solution to the problems discussed in the previous chapters- namely the balancing of users' and authors' rights. First, we must abandon the gatekeeping role of technology in online enforcement. Filtering technology should not be used to prevent the dissemination of creative works. The private sector has shown that this technology can be used to create substantial revenue streams for content owners, but without some form of legislative backing and oversight it will be abused. Second, leaving the right of reproduction intact, derivative rights offered by copyright law should be enforced with liability, not property, rules. The chapter outlines a detailed guide to establishing a compulsory right to make derivatives, its limitations, and applications.

Section One: Introduction, the Problems, and a Glimpse at the Solution

I. Copyright: Its History, Purpose, and the Digital World¹⁶

A. Introduction

This thesis looks to answer the question of how we may appropriately balance author's rights with the dissemination of information in a digital world in a way that leads to a system of copyright law that is practical, fair, and enforceable. This first chapter seeks to set the foundation for how to answer this question. It provides necessary background information, analyses of the cultural behaviours that are legally problematic, as well as how the law currently treats these behaviours. The goal of this chapter is, therefore, to establish that a problem exists and introduce the legal issues in ways that may be developed further in the coming chapters. It will outline the historical purpose of copyright law; argue that copyright law, first and foremost, is a property right; and describe how technology has outgrown the scope of current copyright law specifically related to issues of internet piracy¹⁷ and user-generated content.¹⁸

B. The Purpose of Copyright Law

To argue that the laws of copyright are no longer able to serve their prescribed purpose first entails an understanding of what that purpose is. Because copyright law is strictly territorial, there is no singular stated purpose. However, these national laws have not come about arbitrarily and an analysis of copyright's inception coupled with a sampling of the themes found in current laws allows one to synthesise an overarching trend that unifies copyright law in an identifiable purpose.

Copyright law is first and foremost a response to technology. Even the most superficial understanding of copyright law- a law governing the right to make copies- grants the first step to

¹⁶ Elements of this chapter have been published in: Longan, M.E., 'The inadequacy of U.K. law to address user-generated content: a comparative analysis with the United States and Canada' (2017) Queen Mary Law Journal, special conferences issue, p. 109-122.

¹⁷ The act of illegally reproducing and/or disseminating copyrighted material.

¹⁸ Any form of content- including text, images, artwork, memes, scripts, films, videos, etc.- created and disseminated by users of online content sharing sites.

understanding this notion. While today it is hard to imagine such a world, until the mid-15th century making a “copy” of something was impractical to such a degree that laws were not necessary to protect the practice. It was not until the invention of the printing press and its later introduction throughout Europe that the governance of copies even came about. With the introduction of the press, so came a legal fight for control of its use in various jurisdictions. The Venetian Republic granted the first known “patent” for printing privileges to Johannes of Speyer in 1469 for a term of 5 years.¹⁹ As the printing press later found its way to England, the foundation for modern copyright law was built. The Statute of Anne was the British Parliament's response to a centuries long battle for control of printing rights in England.²⁰ At the time of the Act, Parliament saw a world where authors were unable to profit from their works to such an extent that there was no motivation to create. The Statute of Anne created a copyright for authors with the intention of incentivising new creation.²¹

This stated purpose represents the “cultural rationale”- one of four rationales for copyright law described by legal scholar, Willen Grosheide.²² The Cultural rationale argues that copyright acts as an incentive to create and thereby advance knowledge and contribute to cultural heritage.²³ The first copyright law was based on this rationale and other nations echo this philosophy in their copyright laws. For example, the Copyright Clause of the United States’ Constitution states that the purpose of Copyright law is “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁴

19 Bently L., Kretschmer, M., and Deazley, R.(eds), *Privilege and Property: Essays on the History of Copyright* [2010] Open Book Publishers Pg. 23

20 Ibid. See also: Gomez-Arostegui, H.T., ‘The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710,’ 25 Berkley Technology Law Journal 1247

21 Statute of Anne 1710 (England) 8 Anne, Ch. 19.

22 Grosheide, F.W., ‘Auteursrecht Op Maat: Beschouwingen over De Grondslagen Van Het Auteursrecht in Een Rechtspolit.’ Context = Tailored Copyrights (Kluwer 1986) pgs.128-45

23 Ibid. at 128

24 US Const. Article 1 Section 8.

Grosheide describes three other rationales for copyright.²⁵ First there is the “Personality” rationale, or the notion that creative works bear the personal imprint of their creators and that an author’s right is an extension of the right to privacy.²⁶ Second, Grosheide describes the “Justice” rationale.²⁷ From this perspective, “author’s rights are not created by law but always existed in the legal consciousness of man.”²⁸ Finally, there is the “economic” rationale whereby copyright is used to turn information into a traceable good which ultimately benefits the public.²⁹

Various copyright systems differ in premise. European nations often offer “justice” and “personality” rationales for their author’s-rights focused systems and other nations like the United States make use of “economic” and “cultural” rationales. However, many of the distinctions between systems are disappearing.³⁰ Moreover, despite nuanced differences in rationales from jurisdiction to jurisdiction, the means of achieving the stated goals of copyright are roughly the same across the globe. There is an apparently universal belief that the ideal way to execute these purposes is by granting authors an exclusive right to use their works however they choose for a limited period of time- as this notion is echoed in copyright law across the world. However, this thesis seeks to challenge that paradigm and offer a new one instead.

C. Copyright as a Property Right

With an established purpose of promoting the creation of new works, copyright law sets out to achieve that purpose by granting authors a bundle of exclusive rights in their creations for a set period of time. While both the length of term and rights granted vary from nation to nation, these differences are generally negligible and certain rights are ubiquitous. Moreover, the theory of

25 Grosheide (1986) Supra n.22 at 128-45

26 Ibid.

27 Ibid. at 130

28 Ploman E.W. and Hamilton L.C., *Copyright: Intellectual Property in the Information Age* [1980] Routledge and Kegan Paul. pg. 13

29 Grosheide (1986) Supra n.22 at 128

30 Goldstein, P. and Hugenholtz, P.B., *International Copyright*. [2001] Oxford University Press, pg. 4

copyright as a property right³¹ as opposed to a right of economic recompense ('economic right') is universal. For example, the European Union specifically mentions intellectual property as a subsection of the fundamental right to property in its Charter of Fundamental Rights.³² However, some academics have criticised this notion, arguing that copyright falls into a vague realm of pseudo-property.³³ As this thesis hypothesises that a property law system for copyright protection leads to various problems in the digital world, it is therefore important to lay to rest any claims that the legal framework is anything but such. This section will dispel these notions and set forth the argument that copyright is, in fact, a right in property, both in title *and* application.

In comparing the generic rights granted under copyright law to those of traditional property, it becomes clear that copyright functions in the same way as a right of property. These property rights are: Rights of Exclusion, Use, Alienation, Acquisition, Preservation, and Compensation.³⁴ Tom Bell uses a comparison of these rights to argue that copyright *does not* actually represent property, but rather a "privilege."³⁵ Bell makes salient points about the lack of exclusionary aspects of copyright law, term limits, termination of transfer and moral rights limiting alienation powers. However, Bell's arguments are misguided and I will offer a contrary analysis under the same structure to establish the idea that copyright today is very much a property right.

a. The Rights of Exclusion and Use

Bell describes the importance of the right to exclude non-owners in property law as its "signature attribute."³⁶ Similarly, "some scholars cast the right to use- to employ, to occupy, or to

31 This term will be used throughout this thesis, often along side the term "economic right." Within the context of this thesis, I use the term property right to refer to aspects of copyright that function similarly to rights granted in property law (as explained later in this chapter). I use the term "economic right" to describe a right that grants monetary recompense for access or use, but does not grant the right holder the ability to exclude uses. This concept will be developed further in chapter 3.

32 Article 17(2)

33 Bell, T.W. 'Copyright as Intellectual Property Privilege,' (2008) Syracuse Law Review, vol. 58, no. 3. Pg. 523-546.

34 Ibid. at 533

35 Ibid.

36 Ibid. at 533

profit from- property as one of its most fundamental attributes.”³⁷ The rights to use and exclude the use of others are most notably seen in copyright law within the right of reproduction- though the rights of public display, performance, transmission, and the right to make derivatives and adaptations all have a basis in this notion as well. These are, likewise, the signature attributes of copyright law. They grant authors the exclusive right to reproduce, communicate or adapt their works. However, Bell notes that copyright law fails to prevent the *private* use of others in a way that is wholly unique from traditional property law.³⁸ Bell uses an example of the absurdity of a landowner being unable to prevent others from private use of her land to materialise this crucial difference.³⁹ He also cites examples of fair use as a requirement that “copyright holders must forbear not only unauthorised uses of their works, but even unauthorised uses that profit others.”⁴⁰ It is true that copyright law allows for exceptions to infringement such as private use or other fair uses. It is also true that, in some cases, the unauthorised user may be allowed to profit from those uses with no payment to the copyright owner. However, if we are operating under an analogy to land ownership, these exceptions function as easements created by public policy- a notion not uncommon in real property law. In the United States, courts have held that landowners seeking discretionary permits from government agencies may be required to give up something in the form of an easement or otherwise in return for those permits.⁴¹ However, such action which would ordinarily constitute a taking will only be allowed without compensation if there is a “substantial nexus” between “the condition and the original purpose of the building restriction.”⁴² If one were to apply the exception to the takings doctrine established in *Nollan* to copyright law and the exception to infringement of fair use, a clear argument can be made that the government has an interest in making works available to users for private and other “fair” uses and that condition has a substantial

37 Ibid. at 535

38 Ibid.

39 Ibid. at 534-5

40 Ibid.

41 *Nollan v. California Coastal Commission*. 483 U.S. 825, 837 (1987)

42 Ibid.

nexus to the granting of a copyright. Thus, exceptions to infringement are harmonious with the notion that copyright is a right of property.

b. The Right of Alienation, Preservation, and Acquisition

“Commentators understand the power of alienation- the power to transfer title to another party- as a fundamental feature of property.”⁴³ Bell admits that copyright holders “enjoy broad alienation powers”⁴⁴ but cites the right of termination of transfer as a crucial difference between copyright and real property rights.⁴⁵ Furthermore, he argues that “nobody stands to lose real estate or chattel goods after some specified term”⁴⁶ and cites copyright’s fixed term of ownership as a violation of the right of preservation. Moreover, moral rights present in copyright law are a unique privilege not seen in traditional property law.

The right to acquire copyrights is indisputable. It is granted by the right of transfer of ownership in copyright law. Copyright owners are free to transfer copyrights just as they could any other piece of property. However, there are certain rules that temper this right of transference specific to copyright law that distinguish it from tangible property. The first is the notion of moral rights. While a copyright may be transferred limitless times over its lifetime, moral rights will remain vested in the original author and may not be transferred.⁴⁷ However, while the idea that certain aspects of a property right are absolutely inalienable may not be present in tangible property laws, the spirit of moral rights rules in copyright are enforced in real property as well. Preservation societies and commissions protect historic architecture, limiting the rights new owners have to adapt and exploit their real property in the interest of preserving the integrity of historic architecture.⁴⁸ The key distinction here is that moral rights are granted universally and the

⁴³ Bell *Supra* n.33 at 536

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 537

⁴⁷ Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971) Article 6*bis*(1)

⁴⁸ See *e.g.*: The Historic Buildings and Monuments Commission for England created by The National Heritage Act 1983 (UK)

protections offered by preservation commissions are more discriminate. However, moral rights are not a universal construct in copyright law. The United States, for example, offers moral rights protections in only the narrowest of circumstances.⁴⁹ Moreover, while no direct comparison to moral rights exists elsewhere in property law, there are circumstances where the rights transferred to the new owner may be tempered in the interest of protecting the creator's intentions.

The final distinctions between copyright and property law with respect to rights of alienation are termination of transfer laws in the United States⁵⁰ and the fixed-term nature of copyright law generally. While these rules seem to conflict with notions of real property law, analogies are present that Bell ignores. For instance, reversionary interests in real property act in a way similar to the terminations of transfer of copyrights. And, while, in the United States, terms of ownership for real property are almost always granted in fee simple absolute- or an infinite period of time- finite terms of real property ownership were very common in early property law and still exist elsewhere in the world.

c. Interrum Conclusions

While Bell and others have focused on the differences between copyright and traditional property law, I would focus on the similarities. In his paper, Bell argues that while it perhaps represents an argument based in semantics, semantics are wholly important with respect to legal interpretation.⁵¹ However, by choosing to categorise what is commonly called “copyright” as “*copyprivilege*,”⁵² semantically, Bell fails to offer a viable solution. Black’s Law Dictionary defines a “right” in a concrete legal sense as “a power, *privilege*, demand, or claim possessed by a particular person by virtue of law.”⁵³ What, then, is the difference?

49 17 U.S.C. §106(a) applies only to visual art.

50 17 U.S.C. §§ 203, 304(c) 304(d) (referring to an author’s right, under certain circumstances, to terminate a previous transfer of a copyright.)

51 Bell Supra n.33 at 543-4

52 Ibid.

53 Blacks law dictionary. Emphasis added

Therefore, while accepting that there is academic literature to support the idea that copyright does not function *entirely* as a right of property, I argue that such literature is misleading. Perhaps copyright is more like a circular peg able to fit into the square hole of property law, albeit imperfectly, as opposed to a square peg completely unable to fit into a circular hole.

Copyright law, as it stands, grants a bundle of exclusive rights to authors. Among these rights are, generally, the right of reproduction, the rights of public performance and display, the right to transmit, the right to make derivative works or adaptations, and the right to transfer ownership of a copyright. These rights have a basis in property law and function in a way most similar to a right of property. For example, as the owner of a plot of land I have the right to build on it or alter what is built on it (adaptation) and the right to sell that land (transfer ownership). I would also have the ability to control who should have use of my land and for what purpose- a sentiment analogous to the right of reproduction in copyright law. Just as a landowner may exclude those she wishes from entering or using her land, a copyright owner may likewise exclude others from using her copyright as she pleases. There are exceptions in copyright law which are not present in traditional property law such as the inability to exclude private uses. However, exceptions to infringement like private use or other fair uses can best be described in traditional property law terms as easements created by public policy.

While there are distinctions between the rights granted to authors in copyright and those granted to owners of real property, they are generally without difference. Furthermore, any actual differences can best be attributed to the inherent differences between creative expressions and traditional property. Copyright is best described as a right of property. It is one of ownership- albeit temporary- but ownership nonetheless.

Thus far I have discussed what copyright is and why it exists. The following sections of this chapter will begin to outline the factors emerging in the modern world that have disrupted this very system I have described.

D. How Technology has Surpassed the Scope of Copyright Law

The world of “content”- entertainment, films, literature, music, the things copyright was designed to protect- as we know it, has undergone drastic redefinitions in stride with technological advancement. The days are long gone since families tuned in at a certain time on a certain day to watch their favourite television program together. The ability to record television onto VHS revolutionised this practice. Later, digital video recording devices ultimately gave way to on-demand content providers like Netflix, Hulu, Disney+, and Amazon Prime Video. These services now dominate the space and are slowly supplanting cable television altogether.⁵⁴ The music industry has gone through an almost identical evolution as vinyl gave way to cassettes which gave way to CDs that could be downloaded as digital files to a computer and placed on portable players. Those digital files could also, however, be uploaded to the internet for anyone in the world to download for free. The Napster boom of the late 90s and early 2000s yielded to the rise of iTunes as music on-demand slowly supplanted piracy. Now we see subscription-based, on-demand music library services like Spotify and Apple Music dominating the market.⁵⁵ The literary world has also been forced to adapt as consumers continue to require on-demand content and Ebooks are forging a stronghold in their respective market.

However, these changes are not merely limited to *when* and *how* we experience media. Consumers are now experiencing an expansion of the *kind* of content they demand- a desire to make their own content or to adapt the content they have been fed by the industry and make it their own. The E.U. Commission acknowledged this notion in its Green Paper on Copyright in the Knowledge Economy by stating: “[c]onsumers are not only users but are increasingly becoming

54 Snyder, B., ‘Everything TV networks feared about Netflix is coming true.’ (*Fortune*, 2015) <<http://fortune.com/2015/03/11/cable-tv-ratings-netflix/>> accessed 16 November, 2016. (“People familiar with the Cable television Advertising Bureau told the newspaper that as much as 40% of TV-rating declines in the third and fourth quarters were attributable to streaming services.”... “We believe the U.S. television industry is entering a period of prolonged structural decline, caused by a migration of viewers from ad-supported platforms to non-ad-supported or less-ad-supported platforms”)

55 ‘Have Spotify and Apple Music Just Won the Streaming Wars?’ <<https://musicindustryblog.wordpress.com/2016/09/16/have-spotify-and-apple-music-just-won-the-streaming-wars/>> accessed 12 January 2017

creators of content.”⁵⁶ This concept was also echoed by the Irish Committee for Copyright Review as it described the world in a state where while “innovation is traditionally presented as a linear top-down process where innovation is the sole preserve of the producer, it is increasingly an iterative and interactive one in which users play increasingly important roles.”⁵⁷

As accessibility has grown, bringing consumers better tech for lower prices, with it has come the rise of user-generated content. User-generated content (“UGC”) is a broad term that can describe a wealth of genres of creative expression. It is a phrase that encompasses the creative outputs made by those who typically consumed content- “users.” UGC is often derivative in some way as it is a reflection of the consumer’s newfound ability to interact with the content they love. These expressions are often performed without any commercial goals, though some become commercially successful works in their own right.⁵⁸ The Reda Report described UGC within the context of the E.U.’s need to welcome transformative creation. It provided the following examples of this type of creativity:

Audiovisual remixes and mashups (like songs created from dozens of found video clips), lip dubs (creative reenactments of songs), supercuts (assemblies of similar movie scenes), mods (modifications and conversions of computer games, for example to change the characters or add new environments), remakes of/homages to out-of-commerce classics, Machinima (movies recorded using game environments as the “studio”), Let’s Plays (live video transmissions of computer gaming sessions), and many more.⁵⁹

However, the laws that govern content- copyright laws- have generally gone unchanged in comparison to the drastic changes within the industries they regulate. There have been adjustments to copyright law to try to address the changing landscape of the content industry. However, these amendments and updates have either been ineffective altogether or serve as treatments to the growing symptoms of the disease technology has created within copyright law rather than a cure.

The massive expansion of technological capabilities for the average consumer has had profound impacts on copyright law in two notable areas. These are piracy and UGC. While piracy feels like a remittent issue (it’s not), user-generated content, and particularly the blurred legal

56 Commission of the European Communities, ‘Green Paper: Copyright in the Knowledge Economy’ (COM(2008) 466/3)

57 Irish Copyright Review Committee, ‘Modernizing Copyright’, 2013, page 58

58 Reda report, section 12, <<https://juliareda.eu/copyright-evaluation-report-explained/#transformative>> accessed 17 May 2021

59 Ibid.

distinction between legitimate creativity and piracy associated with it, has created the turning point we face today.

The following sections will generally discuss these two phenomena and the complications they create for copyright law.

E. Piracy

i. Piracy and the Law

Over the last 20 years, the law has struggled to counteract piracy. Copyright law at its very foundation, theoretically, serves to protect against piracy. However, the internet made the act of pirating content so easy that it felt innocuous and the law has been unable to overcome the rapid expansion of piracy resulting from this phenomenon. While the nature, popularity, and perceptions of internet piracy have evolved since its inception, it remains alive despite global attempts to prevent it. This is perhaps because internet piracy is largely unenforceable in an economically sensible way.

Content owners typically combat online piracy in one of two ways. First, the system of notice and takedown is used to remove infringements efficiently but offers no recourse other than removal for rights holders. The system also struggles to effectively stamp out acts of piracy online and serves more to slow it down than anything else. Apart from notice and takedown procedures online, rights holders are also free to enforce their copyrights through traditional litigation. Piracy litigation, however, has largely been a fruitless endeavour for right holders. In fact, the most effective measure at reducing piracy has not been any sort of legal or enforcement mechanism offered by copyright law at all. It has actually been the evolution of private sector business models that facilitate legitimate transactions that have lead to the strongest decreases in online piracy. This section will look at the notice and takedown system as the primary tool for removing pirated material online, the evolution of anti-piracy litigation and its effects, as well as the evolution of business models that have had the best success at decreasing piracy online.

ii. Notice and Takedown Systems and the Rise of Filtering Software

The notice and takedown system is the primary mechanism for the assertion of copyrights and protection for rightsholders against infringements online. The system originated in the United States in 1998 as part of the Digital Millennium Copyright Act.⁶⁰ Later, in 2000, a similar system was adopted in Europe as a part of the Electronic Commerce Directive of the E.U.⁶¹

The premise of the system is that if traditional rights of intermediary liability were allowed to be enforced against online service providers, there would be little incentive for these bodies to exist because of the huge risk for liability they would adopt. Therefore, viewing these hosting platforms as potentially culturally, economically, and educationally valuable resources, laws have been passed to foster their development by limiting their liability. The notice and takedown system is a byproduct of that limited liability. Online service providers are given safe-harbour protections from infringement liability actions based on the storing, uploading, or downloading of infringing material by users to their sites.⁶² A requirement for maintaining this safe-harbour status, however, is compliance with the notice and takedown system.⁶³ Under this system, content owners will provide notice of infringing material stored on a service provider's platform. Assuming this notice complies with requirements of a good faith belief that the material in question is infringing, the service provider is required to expeditiously remove the content from its platform or block access to it.⁶⁴

This system has been used as the first line of defence against online piracy for the last 20 years, though its success is disputable. As a means of enabling valuable online services to develop, the system is an unquestionable success. Websites like Google, Facebook, Instagram, Reddit, and Youtube would never have been able to exist without safe-harbour provisions to protect them from

⁶⁰ 17 U.S.C. §512

⁶¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') *OJ L 178, 17.7.2000*

⁶² 17 U.S.C. §512(c)

⁶³ *Ibid.* (c)(1)(A)(iii)

⁶⁴ 17 U.S.C. § 512(c)(1)(C)

secondary liability. However, as a means of preventing the existence of or efficiently removing pirated material from the internet, the notice and takedown system is hardly a success. The Recording Industry Association of America related the process of using the notice and takedown system to remove infringing material to “an endless game of whack-a-mole” where as soon as the infringing content is removed from one place it immediately reappears in another.⁶⁵ Moreover, because the system is essentially a guideline for good faith behaviour between two corporate actors with almost no judicial oversight, it is subject to abuse and misuse.⁶⁶

As technology has developed since 1998, we see a new frontline defence to online infringements developing. Filtering software, which uses digital fingerprinting software to automatically identify when an infringing work is uploaded to a website, is becoming the new norm in anti-piracy efforts online. Essentially, it automates the entire process of the notice and takedown system from the detection and location of infringing material to the ensuing takedown of that material. Legislation implicating the use of copyright filters has already been passed in the European Union.⁶⁷ This directive was passed in spite of adamant criticism from the academic community based on the system's censorship potential.⁶⁸

Despite the thousands worldwide who are employed with the sole purpose of scouring the internet for infringing material online and reporting it for takedown and the huge technological progress we have made that can automate much of this process, online piracy still appears much like the analogy to a game of “whack a mole” described by the RIAA. In the extreme cases, however, content owners have the option to litigate.

65 Kravets, D., 'Forget DMCA Takedowns—RIAA Wants ISPs To Filter For Pirated Content' (*Ars Technica*, 2020) <<https://arstechnica.com/tech-policy/2017/02/forget-dmca-takedowns-riaa-wants-isps-to-filter-for-pirated-content/>> accessed 21 May 2020

66 This is developed further in the following chapter.

67 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

68 Again, this is discussed in depth in the following chapter as well as chapter 6.

iii. Anti-Piracy Litigation

For the last 30 years, content owners have struggled with where, when, and most importantly, *who*, to sue when it comes to online piracy of their works. As a result, rights holders and representative groups have tried their hand at suing everyone from the services allowing piracy to occur, the individual users committing acts of piracy, to trying to hold the internet service providers responsible for the actions committed by their subscribers. Ultimately we see a three-decade long game of “who can we sue” that often ends with little economic recompense, poor public relations, and no actual deterrence to online piracy- in other words, a failure.

The late 90s music downloading service, Napster, brought about the notion of internet piracy. Just months after its inception, the Recording Industry Association of America filed a lawsuit against Napster.⁶⁹ Nearly two years later, the site was shut down as a result of the lawsuit. However, one month before Napster was forced to shut down, a nearly identical software client known as Limewire was released. Limewire offered a service similar to Napster in the form of a peer to peer (“P2P”) sharing network and likewise the same opportunities for piracy. A decade later, Limewire was shut down and paid out over \$100 million to record companies in an out-of-court settlement for copyright infringements.⁷⁰ Since the rise and fall of Napster, a multitude of similar software systems have been developed to facilitate piracy with many finding themselves the subject of civil and criminal charges.⁷¹ Just as in the case of Limewire’s appearance only months before the shutdown of Napster, content owners may be able to seek economic reprieve from the most successful of these software companies, but they have been wholly unsuccessful at stamping out their existence. The legal battles surrounding internet piracy hubs like Napster and Limewire have been, in many ways, fruitless, where one lawsuit only prompts the creation of a new technology to continue serving the wants of the patrons to the old. While these lawsuits sometimes result in

⁶⁹ *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001)

⁷⁰ ‘LimeWire Pays \$105m Illegal Filesharing Settlement.’ (*FACT Magazine*, 13 May 2011) <www.factmag.com/2011/05/13/limewire-pays-105m-settlement-over-illegal-filesharing/> accessed 15 May 2021

⁷¹ Audiogalaxy, Kazaa, Limewire, Grokster and The Pirate Bay, are all file sharing companies that sought to replace the service offered by Napster and have faced litigation for copyright infringement.

compensation for damages from infringements, those damages cannot and will never represent the actual damages suffered from internet piracy as a whole.

Recognising the relative futility of suing online companies that enable piracy, the early 2000s were marred by a string of hard-learned lessons in public relations stemming from lawsuits targeted at thousands of end users who illegally downloaded pirated content online. In September of 2003, the RIAA began its campaign against P2P users with 261 individual lawsuits.⁷² Over the next five years, this campaign would ultimately lead to lawsuits filed against approximately 35,000 individual users- many of which were less than ideal defendants for public-relations purposes.⁷³ This campaign found some success early on⁷⁴ but later demonstrated that the strategy of suing one's own fans- especially children- created such backlash that it was abandoned by 2008.

The futility of trying to police direct infringers and/or the software and websites that host illegal content has led to a new method of seeking recompense for infringements. In the United States, the music industry has begun to try to hold internet service providers responsible for the illegal actions of their users.⁷⁵ Grande Communications, a Texas-based ISP, has argued in Federal Court that the music industry is attempting to turn internet providers into "its de-facto copyright agents."⁷⁶ Grande Communications was sued in 2017 by 18 of the music industry's largest companies for more than one million infringements of copyrighted works committed by its users over BitTorrent systems.⁷⁷ The lawsuit has put Grande Communications in the impossible position of choosing between terminating its users' accounts based on hundreds of thousands of (often

72 Bruno, A., 'A New Battle Plan,' (*Billboard*) vol. 120 no. 42, pg. 16

73 Silverman, D., 'Why The Recording Industry Really Stopped Suing Its Customers' (*Harvard Business Review*, 2008)
<<https://hbr.org/2008/12/why-the-riaa-stopped-suing>> accessed 4 August 2020

74 Initial data in 2003 showed the number of people over 13 who reported illegally downloading music dropping from 20% to 11.8% after the campaign began. Bruno (2008) Supra n. 72 at 16

75 'Texas ISP Slams Music Biz For Trying To Turn It Into A 'Copyright Cop' (*The Register*, 2020)
<https://www.theregister.co.uk/2018/08/21/texas_isp_copyright_police/> accessed 21 May 2020

76 See: *UMG Recordings, Inc. et al. v. Grande Communications Networks, LLC.*, Defendant Grande Communications Networks LLC's Motion for Summary Judgment. Document 140, filed 08/18/2018. Available at: <<https://regmedia.co.uk/2018/08/21/grande-copyright-response.pdf>> accessed 2 April 2021. (Herein after, 'Grande Communications Motion for Summary Judgment').

77 *UMG Recordings, Inc. et al. v. Grande Communications Networks, LLC.* 384 F.Supp3d 743 (2019 U.S. Dist. Ct. W.D. TX)

unsubstantiated) copyright complaints it receives each year or facing such legal action.⁷⁸ The copyright complaints are generated via a software system developed by Rightscorp that supposedly can identify infringements and the perpetrators of those infringements by monitoring the BitTorrent network.⁷⁹ However, the actual efficacy of the software is dubious as Grande claims that the software is unable to log any actual evidence of infringement.⁸⁰ The legal arguments of this case hinge upon whether Grande communications had a duty to respond to each of the hundreds of thousands of complaints generated by this questionable software because, if so, it may be seen to have contributed to each of the infringements of its users by not doing so and thereby be ineligible for the safe harbour protections of the DMCA. The case is ongoing, but the key takeaway is that it represents the latest iteration of the content industries trying to find someone, and most importantly someone with money who does not represent a public relations risk, to sue for online copyright infringement because other efforts to stop piracy have failed.

iv. The Streaming Service Business Model and Piracy

Despite various legal efforts to thwart piracy, it remains a major competitor to its legitimate counterparts. The hit American television show turned global phenomenon, Game of Thrones, was used as an example to illustrate the continued pervasiveness of piracy by London-based anti-piracy group Muso. Muso tracked piracy data for season seven of the show from its release date on July 16, 2017 through September 3, 2017 (one week after the season's finale aired).⁸¹ During this time, Muso found that the show was pirated over *one billion* times, with each individual episode averaging just under 150 million downloads/views during this time frame.⁸² To put these numbers into perspective, as of August 2, 2017, the season 7 premier had accumulated a record-breaking 30

⁷⁸ Grande Communications Motion for Summary Judgment Supra n.76

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Horton, S., 'Game Of Thrones Season 7 Pirated Over 1 Billion Times' (*Muso*) <<https://www.muso.com/magazine/game-of-thrones-season-7-pirated-over-1-billion-times/>> accessed 21 May 2020

⁸² Ibid.

million views across HBO's global platforms.⁸³ Muso, however, found that the same episode had been pirated over 187 million times as of September 3, 2017.⁸⁴ Despite the fact that determining the actual economic impacts of piracy remains an uncertain science, this small set of data indicates that HBO is perhaps collecting revenue from only approximately 17% of the massive Game of Thrones viewer base. This is a surprisingly small figure for the most popular show in the world, especially considering that HBO's service fits into the modern mould of digital, on-demand content delivery- a model that most research indicates is the largest contributor to decreased internet piracy.⁸⁵ While data from Game of Thrones is unlikely to be representative of the film and television industry as a whole, this study shows that piracy is far from under-control despite over 20 years of legislative measures to try to reign it in.

In fact, piracy must be viewed by content industries as a *legitimate* competitor.⁸⁶ Regardless of one's moral position on piracy, the reality is that an argument remains that it cannot be stopped by traditional legislative and policing attempts. Data currently shows that the most effective way to decrease piracy is to increase access to content legitimately.⁸⁷ Australia's Prime Minister responded to piracy concerns in 2016 by stating that "rights holders' most powerful tool to combat online copyright infringement is making content accessible, timely, and affordable to consumers."⁸⁸ However, while the slow growth of streaming services globally has had an impact on piracy, HBO's Game of Thrones is legally available in 186 countries despite garnering hundreds of millions of pirated views per episode. If piracy is to be seen as a global epidemic that has economic effects that

83 Scott, R., (2020) 'Game Of Thrones 'Sets Worldwide Ratings Record As It Climbs To 30M Viewers.' (*TVweb*, 2020) <<https://tvweb.com/game-of-thrones-season-7-worldwide-ratings-records/>> accessed 21 May 2020

84 Horton Supra n. 81

85 Intellectual Property Office, 'Online Copyright Infringement Tracker Latest Wave Of Research Mar 16 – May 16 Overview And Key Findings' (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546223/OCI-tracker-6th-wave-March-May-2016.pdf> accessed 15 May 2021

86 Van der Sar, E., 'Disney Says Piracy is a Business Model' (*TorrentFreak*, 2006) <<https://torrentfreak.com/disney-says-piracy-is-a-business-model/>> accessed 3 March 2021

87 Titcomb J, 'Internet Piracy Falls To Record Lows Amid Rise Of Spotify And Netflix' (*The Telegraph*, 2020) <<https://www.telegraph.co.uk/technology/2016/07/04/internet-piracy-falls-to-record-lows-amid-rise-of-spotify-and-ne/>> accessed 4 August 2020

88 Reichert, C. 'Piracy 'Significantly' Declining Due To Availability Of Streaming Services' (*Zdnet*, 2020) <<https://www.zdnet.com/article/piracy-significantly-declining-due-to-availability-of-streaming-services/>> accessed 21 May 2020

merit legal intervention, then perhaps the best solution is to facilitate transitions for piracy hubs to become legitimate.

However, the model of removing illegitimate content and/or seeking to license existing content and switch from a free (pirate) service to that of a paid (legitimate) one is historically unsuccessful. Crunchyroll, a former pirate site that is largely responsible for the rising popularity of Japanese anime cartoons in the United States was able to successfully shift to a legitimate business model. However, it remains the only successful example of such a transition with a slew of failures such as Napster and Limewire to compare it to. Crunchyroll's successful transition can most likely be attributed to its huge market share of a niche sector of content with no meaningful competitors during its transition to legitimacy. For traditional online piracy venues whose business models rely on offering the same and/or more products than their legitimate competitors do for free, transitioning them to paid services will often remove their only competitive advantage and most likely direct the attention of their users to other or emerging free sites. However, as data indicates that those who pirate material are most likely paying subscribers to at least one legitimate service,⁸⁹ perhaps a better solution lies in making content more easily accessible for legitimate services.

It is important to note that the private sector has had the most success reducing piracy simply by altering its business models. While online streaming services that have increased access to and reduced the cost of digital content have had noticeable effects on reducing piracy, most of the data indicating this effect was collected from the music industry or at a time where there were only a few major film and television streaming platforms for users to choose from. That landscape is very much in transition. As film and television streaming services were once competing with traditional content delivery services, they are now competing with each other in a way that echoes the very systems they sought to replace. Netflix created a generation of "cable cutters," or those

89 Bode, K., 'Study Again Shows 'Pirates' Tend To Be The Biggest Buyers Of Legal Content' (*Vice*, 2018)

<https://www.vice.com/en_us/article/evkmz7/study-again-shows-pirates-tend-to-be-the-biggest-buyers-of-legal-content> accessed 10 August 2020 (Citing a MUSO survey in which 91% of respondents who admitting to pirating content online also stated that they were paying subscribers to at least one streaming service)

willing to abandon traditional cable television, by offering a product that was cheaper, easier, and arguably better. However, Netflix and its competitors now vie for customers by offering exclusive and original content and are growing to look more like the cable television networks they arguably have replaced. Streaming services thrive because they are inexpensive compared to cable television while offering a product of similar or better quality. However, when consumers are forced to subscribe to multiple services to have access to all the content they want, the price gap disappears and what we are left with is simply a newer version of cable television that operates over the internet. This becomes especially true when we consider the increasing number of streaming services available or coming soon that offer exclusive content.⁹⁰ This is not a model that can compete with piracy the way it has up to this point. This is strongly evidenced by research that focuses on the streaming services in the music industry. A recent United Kingdom study shows that the amount of Britons who pirate music has been reduced by nearly 50% over the last 5 years.⁹¹ The study also indicates that over 60% of those who have stopped pirating music now subscribe to legitimate streaming services.⁹² Streaming services in the music industry thus far do not rely on exclusive content to compete with each other in the way that services in the film and television industry do. However, the study indicates that when popular albums are released exclusively on one provider, the practice boosts piracy.⁹³ Since such practice is the future of the entire business model for the film and television streaming industry, it is likely that we will see an uptick in piracy in this area of content as film content becomes nestled more discreetly in exclusive providers.

90 As of now, many American cable television networks are beginning to offer streaming services similar to Netflix and both Apple and Disney have also launched streaming platforms.

91 Yougov.co.uk., 'Number Of Britons Illegally Downloading Music Falls' (*Yougov*, 2020) <<https://yougov.co.uk/topics/arts/articles-reports/2018/08/02/number-britons-illegally-downloading-music-falls>> accessed 21 May 2020.

92 Ibid.

93 Ibid. (51% of respondents found it frustrating when music was released exclusively on one provider- particularly Apple Music and Tidal. 44% turned to piracy when they could not access the music they wanted legitimately.)

F. User-Generated Content⁹⁴

The Irish Copyright Review Committee noted technology's influence on UGC by stating that interactive innovation is "particularly [increasing] online, where technology is making it increasingly easier for users to innovate, and for that innovation to be based upon the transformation of existing content."⁹⁵ People are no longer forced to merely consume content, but rather now have the option to create their own and share it with the world. From Letsplay videos on Youtube that entertain and instruct video-gamers all over the world, to fanfiction.net where thousands of literary remixes are posted daily,⁹⁶ to actual remixed music, we are in a world where people want to *engage* with content rather than simply absorb it. With this shift, public perception as to what constitutes an infringement has clearly changed. Ideas are now expressed through digital collage and it has become a way of cultural communication. Internet memes are the quintessential example of this practice. Alice Marwick describes the birth of a meme as such: "If someone uploads a photo of her cat, another adds a poorly-spelled caption and posts it to a message board, and months (or years) later, someone else changes the caption, this string of reappropriated words and images is called a 'meme,' in Internet parlance."⁹⁷ Such practice notably ignores the concept of ownership. The entire culture is about taking something that belongs to someone else, such as a photograph, and presenting it in a different light through commentary, often using quotations or homages to popular culture- more borrowed content- to present an entirely new idea. This section will discuss the interactions between copyright law and user-generated content.

At its core, copyright law provides three basic rights. First, it grants the author the right to make copies of her work. Whether these are actual copies or take the form of performances, displays, etc., control over the use of the actual work and its reproductions is the most important goal of copyright protection. Second, copyright also grants the author the right to make adaptations

⁹⁴ Much of the work for this section has been subsequently published in Longan, M.E., "The inadequacy of U.K. law to address user-generated content: a comparative analysis with the United States and Canada" (2017) Queen Mary Law Journal, special conferences issue, p. 109-122.

⁹⁵ Irish Copyright Review Committee, 'Modernizing Copyright', 2013, pg. 58

⁹⁶ Ibid.

⁹⁷ Ibid.

of her work. Adaptations may take the form of translations, sequels, or other derivations that build upon the copyrighted material. Third, copyright law grants authors the sole right to make their works available to the public. While the first right is more clearly and uniformly expressed across all jurisdictions, the right of adaptation goes by many names and the rights offered differ. The differences will be discussed as they become relevant.

The right of making available, while recently has become more important to the dissemination of user-generated content, has limited application to the creation of it. The WIPO Copyright Treaty creates a global umbrella solution to this right.⁹⁸ It has been incorporated into national laws,⁹⁹ as well as the EU Information Society ('InfoSoc') Directive, which grants authors the exclusive right to communicate their works to the public.¹⁰⁰ This right covers all forms of communication where the public is not present at the place where the communication originates.¹⁰¹ It includes two distinct forms of making works available, namely: (1) the right to broadcast the work to the public, and (2) the right to make the work available from a place and at a time individually chosen by members of the public.¹⁰² The United States recognizes this same right through a combination of the Copyright Act's exclusive rights of distribution, public performance, public display, and, where an act of communication or making available involves the creation of a copy, the right of reproduction.¹⁰³

98 WIPO Copyright Treaty, Art. 8; See also: WIPO Performances and Phonograms Treaty Articles 10, 14

99 For example, in the U.K. the Right of Communication to the Public is covered in Section 20 of the Copyright, Designs and Patents Act of 1988.

100 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, art 3(1); See also: Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, art 4(1)(c)

101 Ibid. Information Society Directive

102 For example, the corresponding provision of the UK Copyright Act reads: "Reference in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include (a) the broadcasting of the work; (b) the making available to the public of the work by electronic transmission in such a way that the members of the public may access it from a place and at a time individually chosen by them." (Copyright, Designs and Patents Act 1988, as amended, Sec. 20(2))

103 U.S. Copyright Office, 'The Making Available Right in The United States,' (Feb 2016)

<https://www.copyright.gov/docs/making_available/making-available-right.pdf> accessed 7 May 2021; see also: *See, e.g., Perfect 10, Inc. v.*

Amazon.com, Inc., 508 F.3d 1146, 1161 (9th Cir. 2007) ("Nothing in the Copyright Act prevents the various rights protected in section 106 from overlapping. Indeed, under some circumstances, more than one right must be infringed in order for an infringement claim to arise."). See also: Foong, C 'Making Copyright Content Available in the Cloud vs the Making of Copies: Revisiting Optus TV and Aereo,' (2015). 41 Monash U. Law Review. 583, 599 ("The making of copies could be part of a process of making content available, but making a work available to the public does not necessarily require the making of copies."

User-generated content, when it runs afoul of the law, typically represents a violation of the derivative or adaptive right. This is because the term encompasses a diverse body of creativity that looks to make use of existing works in the creation of new ones. Not *all* UGC is adaptive, and not all adaptive UGC is an infringement. Generally, adaptive UGC finds safe havens in exceptions to infringement. These exceptions vary in breadth and title according to jurisdiction. However, there are international treaties that govern limitations on how exceptions to infringement may be applied. The ‘Three-Step Test’ first implemented in the Berne Convention sets out a rough guideline for the requirement of a right of reproduction as well as how signatories may limit that right.¹⁰⁴ Article 9(2) gives leave to territories to implement their own exceptions to infringement of the right of reproduction “provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”¹⁰⁵ This standard is echoed in many other international treaties and various EU directives governing copyright.¹⁰⁶ Therefore, copyright laws across the world differ in the limitations and exceptions to the right of reproduction, though generally within the confines of this standard. Analysing the copyright laws of every jurisdiction across the globe would be both impractical and repetitive. Instead, this section discusses the law in generalised groups based on common legal principles. Currently, 47 countries containing over a third of the world’s population have adopted into their laws either a system of fair use or fair dealing¹⁰⁷ and much of the remaining nations have adopted laws that are similar in function under different titles.

Therefore, the first group I will discuss is composed of those countries that have adopted a system of fair dealing to address exceptions to infringement. This group is composed of many nations across the globe, but the law originates in the United Kingdom and has nearly identical

104 Berne Convention Article 9

105 Ibid. Article 9(2)

106 See: WIPO Copyright Treaty Article 10; WIPO Performances and Phonograms Treaty Article 16(2); EU Computer Programs Directive Article 6(3); EU Copyright Directive Article 5(5)

107 ‘Fair Use Handbook’ (*Infojustice*.2020) <<http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf>> accessed 21 May 2020

execution across all adopting countries. The second group is those countries that have adopted a system of fair use. This is mainly composed of the United States, but some fair dealing countries have switched or been vocal about considering a switch to fair use.¹⁰⁸ Finally, the third group is represented by a variety of jurisdictions that have neither adopted fair use nor fair dealing but have similar components in their laws under different names. Each legal theory addresses the issues presented in different ways and each theory has its own unique strengths and weaknesses. However, they all find common ground in an ultimate failure to adequately address user-generated content.

i. Fair Dealing Systems: The U.K. and its Progeny

This section will focus largely on the laws of the United Kingdom. However, it is important to understand that 38 other countries have nearly identical provisions in their laws.

United Kingdom copyright law grants two relevant rights to a copyright holder. The first, the right of reproduction, is more like a bundle of rights that adds up to the right to make and distribute actual copies of the work whether they are in the form of sales, performances, rentals, communications or displays.¹⁰⁹ When determining whether the right of reproduction has been violated, courts will ask whether the defendant's work competes in the same market as the claimant's.¹¹⁰

The second right granted by copyright is to make an adaptation of the work or perform any of the previously described rights in the relation to an adaptation.¹¹¹ The adaptive right only applies to literary, dramatic, or musical works.¹¹² An adaptation is defined by the statute in various ways for each form of media. Adaptations for literary works include translations, conversions from dramatic to non-dramatic and vice versa, and versions where the work is conveyed by pictures in part or

108 Australia considered adopting fair use in 2016. Australian Government Productivity Commission, 'Intellectual Property Arrangements, Inquiry Report,' <<https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>> accessed March 29 2021.

109 Copyright Designs and Patents Act 1988, Chapter II, Section 16(1)(a-d).

110 Goold, P., 'Why the U.K. Adaptation Right is Superior to the U.S. Derivative Work Right' [2013-14] 92 Nebraska Law Review Page 875.

111 Copyright Designs and Patents Act 1988, Chapter II, Section 16(e).

112 Ibid. at section 21

whole.¹¹³ Adaptations for musical works include arrangements or transcriptions of the work.¹¹⁴ These rights are narrowly construed and limited purposefully. During Parliamentary debates concerning this statute, members of Parliament pushed for a more open-ended wording of the statute.¹¹⁵ However, following a persuasive argument by Lord Mancroft, Parliament voted to keep the narrow wording of the statute to avoid an influx of litigation.¹¹⁶

Therefore, with a narrowly constructed adaptive right, unlike other jurisdictions, such as the United States, most forms of UGC will violate a copyright owner's right of reproduction rather than the adaptive right. However, such a violation will only occur if the allegedly infringing work is found to occupy a similar market as the base work.

In theory, any work of remix or collage can be argued on both sides- that it either does or does not occupy the same market of its base work. For example, internet memes often make use of watermarked stock photos without licenses paid to the owners. The photos are typically used in full, but whether or not they serve a commercial purpose is unclear and whether that purpose undermines the market for stock photo licensing is also unclear. Remixed and sampled music fall into even blurrier territory, yet the policy of all major record labels is that *any* sample of a copyrighted recording needs to be licensed.¹¹⁷ Nevertheless, the case law on the issue is sparse because many remixers opt for licenses or out-of-court settlements in lieu of potentially expensive litigation and judgements.¹¹⁸ Some, possibly most, ignore the law in the hope that the work will go unnoticed by rights-holders.

113 Ibid. at Section 21.

114 Ibid. at (3)(b).

115 Goold, P., 'Why the U.K. Adaptation Right is Superior to the U.S. Derivative Work Right' (2013-14) 92 Nebraska Law Review Pg. 872

116 Ibid.

117 Jacques, S., 'Mash-Ups And Mixes: What Impact Have The Recent Copyright Reforms Had On The Legality Of Sampling?' (2016) Entertainment Law Review, pg. 5

118 Ibid.

With a presumption in favour of original copyright holders, it is fair to say that for creators seeking to borrow another's work for the purpose of remix, collage, appropriation etc... the current law will not act in their favour.¹¹⁹

From there, the only saving grace that an appropriated work might find would be in the law of fair dealing. However, the current statute lacks the forward-looking nature of similar systems in other jurisdictions and will be little help to most creators in this realm.

a. Fair Dealing:

The concept of fair dealing first appeared in the UK in the copyright act of 1911. Section 2(1)(i)-(vi) of the Act set forth six circumstances whereby infringement would be excused.¹²⁰ These six circumstances can be summarised as:

where the work is used for the purpose of private study, research, criticism, review or newspaper summary; for artistic works, preparatory works such as molds, studies, sketches, casts etc may be used for the purpose of a work as long as it does not repeat or imitate the main design of that work; with artistic works, making or publishing two- dimensional representations of a three-dimensional work; the publication of short passages of literary works by schools subject to limitations; newspaper publications of lectures delivered in public; public reading of an extract of any published work.¹²¹

These provisions were later repealed when the 1956 Copyright Act replaced the Act of 1911.¹²² The 1956 Act created provisions for fair dealing generally for research or private study, criticism or review, and reporting.¹²³ In the United Kingdom, aside from relevant E.U. Law, the governing law on copyright is the Copyright, Designs and Patents Act of 1988 (CDPA). This act grants exemptions for fair dealing in an enumerated manner similar to the 1911 Act but more reflective of modern norms seen in the 1956 Act.

The CDPA enumerates six separate infringements that will be considered permissible under the act.¹²⁴ These are: research and private study; personal use; copies for text and data analysis for

¹¹⁹ Ibid.

¹²⁰ Copyright Act 1911 (UK)

¹²¹ Ibid.

¹²² Copyright Act 1956 (UK)

¹²³ Ibid.

¹²⁴ Copyright, Designs and Patents Act 1988 (UK)

non-commercial research; criticism, review, quotation and news reporting; caricature, parody, and pastiche; and incidental inclusion of copyrighted material.¹²⁵

A fair dealings analysis has essentially two parts. First, a defendant must show that her use falls into one of the enumerated categories of the statute. Courts interpret these exceptions narrowly.

Second, the dealing must be shown to be fair within the context of the exception. Fairness is an objective test. "It is ... essential not to apply inflexibly tests based on precedent, but to bear in mind that considerations of public interest are paramount."¹²⁶ In *Hyde Park*, Aldous LJ stated that it is essential to "judge the fairness by the objective standard of whether a fair minded and honest person would have dealt with the copyright work in the manner" in question.¹²⁷ Furthermore, the consequence of the infringement is essential to determine fairness.¹²⁸

Courts will also look to two primary factors to make a determination of fairness. First is the quantity and quality of the work taken.¹²⁹ Second, the work in question must contain sufficient acknowledgement to the source work to make a viable claim for fair dealing. There are exceptions where it may be impossible to acknowledge an author due to anonymity or other reasons.

Courts, on rare occasions, are also willing to look outside the narrow list of exceptions to find a determination of fair dealing. For instance, a defence claiming that the infringement was necessary "in the public interest" will be allowed in exceptional circumstances.¹³⁰

b. Shortcomings of the Fair Dealing System in the Modern World:

The structure of the fair dealings statutory provision is inherently unprogressive and unduly constraining. In 2004, Shunmugam Jayakuma, Deputy Prime Minister and Minister for Law of

¹²⁵ Ibid.

¹²⁶ *Ashdown v. Telegraph Group Ltd.* [2002] Reports of Patent, Design and Trade Mark Cases 119(6) 235-256 (Court of Appeal).

¹²⁷ *Hyde Park Residence Ltd. v. Yelland and Others* [2001] Ch. 143 (Court of Appeal).

¹²⁸ *Hubbard v Vosper* [1972] 2 Q.B. 84.

¹²⁹ Ibid. At 94.

¹³⁰ *Hyde Park Residence Ltd. v. Yelland and Others* [2001] Ch. 143 (Court of Appeal).

Singapore at the time, argued for Singapore's need to move away from its U.K. Model of fair dealing because such model has proven "restrictive."¹³¹ Other British copyright scholars have argued similarly that fair dealing "offers no principles or vision and that it contains too many obstacles undermining its operation."¹³²

By limiting permitted uses to six explicit categories, the law allows no room for natural growth or expansion as technology and societal norms progress. In other words, it lacks the ability to adapt to what it cannot anticipate. The law serves as a reflection of what Parliament viewed to be fair and reasonable exceptions to copyright infringement given the available technology and common practices at the time. However, time has passed and its inflexibility is already felt as technology and the way we experience content has surpassed the scope of the law.

c. User Generated Content

In the United Kingdom and most other Fair Dealing jurisdictions, there are little to no protections or avenues for protection of adaptive user-generated content ("UGC"). With the mass availability of content-creation technology, coupled with a world interconnected by instantaneous communication, "remix culture" is ubiquitous. Yet the laws of copyright are tailored to the wants and needs of content owners, represented in majority by but a few large corporations.¹³³ Just as the public perceives the act of copying the sound files of a CD to an Mp3 player as justified, the public's views have likewise become more liberal with concern to the use of copyrighted material to create their own content. Yet the U.K. has failed to address this.

Currently the only piece of U.K. legislation that could be construed as intended to protect UGC is the section of the Copyright, Designs and Patents Act that preserves works of parody, caricature, and pastiche as exceptions to infringement.¹³⁴ However, this legislation protects

¹³¹ Sing, (2004) 78 Hansard Parliamentary Debates 10 (Jayakumar) [Debate 2004]

¹³² D'Agostino, G., 'Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use,' 53 McGill Law Journal, 312

¹³³ Patry, W., *How to Fix Copyright* [2011] Oxford Univ. Press, 35

¹³⁴ Copyright, Designs and Patents Act 1988 (UK)

arguably only two small pieces of a much larger pie. First, while parody inarguably merits protection, caricature is likely merely a subcategory of parody not needing separate notation. However, the limitations imposed on parodists by the law seem to undermine what should have been its very purpose. For example, derogatory treatment of a work will disqualify it from a fair dealings defence.¹³⁵ Such an argument could be made against nearly every work of parody ever made. Second, pastiche, while it has not been defined by a British Court, is “an artistic work in a style that imitates that of another work, artist, or period.”¹³⁶ Such a work should not need the protection of an exclusion to infringement as it should never be treated as an infringement to begin with. If Shakespeare were alive and writing today and tried to copyright iambic pentameter, he would surely fail. Therefore, we likewise do not need a law that protects such stylistic generalities.

Otherwise, the United Kingdom has failed to grant protection to the growing movement of amateur creators who are forging their own share of the content market. Truthfully, very few nations have sought to address this issue. Instead, regulation has been left to the hands of content owners who have established their own sets of rules for user-generated content- an issue discussed in more depth in chapter 5.

ii. The Derivative Right, Fair Use and Transformation: The U.S. and Elsewhere¹³⁷

The United States system involves two key distinctions from that of the United Kingdom. First, the United States grants separate protection for derivative works that expands on the adaptive right in the U.K. Second, the system of Fair Use is far more liberal than that of Fair Dealings. This section will focus on United States law, but similar systems have been adopted in seven other jurisdictions across the world and others are publicly considering adoption.

¹³⁵ Ibid. paras 11-51.

¹³⁶ Oxford English Dictionary.

¹³⁷ Some portions of this section also appear in: Townsend-Gard, E., Gard, R., *Video Games and the Law*, Routledge 2020 for which I was a contributing author (credited Chapter 4) and are from my contributions to this manuscript.

a. The Derivative Right:

While the right of reproduction is almost identical in U.S. law, America offers a broad set of derivative rights to copyright owners that go well beyond the adaptive rights offered in the U.K. A “derivative work” in the U.S. is a

work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.¹³⁸

A derivative work uses a preexisting copyrighted work and relies substantially on the protected expressions in the preexisting work. Copyright law was intended to promote the creation of new works by protecting the pecuniary interests of those who create them.¹³⁹ The derivative right is in place to ensure the ensuing profitability of a successfully expressed concept is retained or controlled by the original author.

Many works that make use of appropriation in the United States will be found to infringe either the right of reproduction or the derivative right, depending on how the base work is incorporated into the new work. This legal construct provides a much broader set of rights to copyright owners. However, users’ rights are balanced out with a far more liberal system of fair use.

b. Fair Use:

The law of fair use in the United States and others represents an entirely different approach from fair dealings in the United Kingdom. Instead of enumerating specific uses that qualify as exceptions for infringement, the U.S. copyright act lists four factors for courts to consider and balance when determining a work’s status as a fair use.¹⁴⁰ This creates the potential for *any type* of use to be considered fair as long as it passes the balancing test of the four factors. This system has

¹³⁸ 17 U.S.C.A. § 101.

¹³⁹ U.S. Const. art. I, § 8, cl. 8.

¹⁴⁰ 17 USC §107.

lead the U.S. fair use approach to be championed by scholars as the most flexible method, in contrast to the laws of the U.K. and Canada.¹⁴¹

The Australian Law Reform Commission produced a paper considering a shift towards a U.S.-based standard in Australia because fair use “would be more responsive to rapid technological change and other associated developments than the current specific, closed-list approach to exceptions.”¹⁴² The report also championed the legal framework as being more encouraging to innovation.¹⁴³ It noted that Google could not have created its search engine under the current regime in Australia and that “other stakeholders shared the view that the current copyright regime puts Australian companies and individuals at a disadvantage compared with those in the US, or other countries that have a fair use exception.”¹⁴⁴ The Commission also concluded that a fair use system “restores balance to the copyright system” by reducing what is a broad set of rights granted to copyright holders in favour of users, and that fair use “assists with meeting consumer expectations” by legitimising many practices that are ubiquitous. For example, the posting a photograph of a book to an Ebay auction in order to sell it is a “technical infringement” that does no harm to rights holders and is expected by consumers. Fair use easily settles the issue of these harmless infringements.

However, fair use, while broader and more flexible than fair dealing, still suffers from problems in addressing certain forms of UGC. Many of these problems stem from its flexibility and open-ended nature.

c. Fair Use and User Generated Content

The factors of a fair use analysis are: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the copyrighted work used, and the effect on

¹⁴¹ D’Agostino Supra n.132 at 344

¹⁴² Australian Law Reform Commission, ‘Copyright and the Digital Economy,’ (2012) [4.36]

¹⁴³ Ibid.

¹⁴⁴ Ibid.

potential markets.¹⁴⁵ No one of these factors is meant to be determinative, and courts are free to consider other factors they may find important.¹⁴⁶

The first factor is the purpose and character of the alleged “fair use” of the copyrighted work.¹⁴⁷ This factor has several facets, the most important of which is whether the alleged fair use serves a commercial, nonprofit, or educational purpose. The Supreme Court has stated that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹⁴⁸ Therefore, even a commercial work, though it will require a more arduous showing, may still be found to be a fair use.¹⁴⁹

The second factor is the nature of the copyrighted work.¹⁵⁰ This factor “recognizes that there is a hierarchy of copyright protection in which original, creative works are afforded greater protection than derivative works or factual compilations.”¹⁵¹ For example, “original work[s] of fiction” are “entitled to the greatest degree of protection.”¹⁵² Furthermore, works made for the purpose of publication will be given a higher degree of protection than those made for private purposes.¹⁵³ It is important to note, however, that this factor is given little weight in parody cases.¹⁵⁴

The third factor is the amount and substantiality of the portion used.¹⁵⁵ This factor will vary depending on the alleged fair use. For defendants who rely heavily on the copyrighted work, it will cut against a finding of fair use. Likewise, for defendants who borrow only a little from the original work, this factor will play in their favour.

¹⁴⁵ 17 USC §107.

¹⁴⁶ Ibid.

¹⁴⁷ 17 USC §107.

¹⁴⁸ *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 562 (1985)

¹⁴⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)

¹⁵⁰ 17 U.S.C. §107.

¹⁵¹ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001)

¹⁵² Ibid.

¹⁵³ Leval, P.N., ‘Commentary: Toward a Fair Use Standard’(1990) 103 Harvard Law Review 1105

¹⁵⁴ Ibid.

¹⁵⁵ 17 U.S.C. §107.

The fourth factor is the effect on the market for the copyrighted work.¹⁵⁶ Despite the statutory mandate that the factors should be balanced equally against one another, this is largely considered to be the most important of the four factors.¹⁵⁷ Under this factor, uses that economically substitute for the original work, thereby reducing market demand for it, are generally not protected by the fair use doctrine.¹⁵⁸ However, in *Twin Peaks Productions, Inc. v. Publications Int., Ltd.*, the Court held that if a copyright holder has no interest in occupying a derivative market, a defendant's subsequent use is more likely to be fair.¹⁵⁹ The *Twin Peaks* case hinged on whether the defendant's derivative work constituted a market substitute or equivalent to the original and thereby deprived the copyright owner of profits.¹⁶⁰

d. Transformative Use:

As mentioned previously, Courts are free to consider any other factors they may find important.¹⁶¹ One additional factor that has emerged in many cases of infringement whose treatment has had a monumental impact on U.S. Copyright law is “transformative” use. The notion of transformative use as a component of a fair use defence first appeared in a Harvard Law Review article by Judge Leval.¹⁶² In this article, Leval examined the four factors of fair use and described how the concept of transformation should be applied to each factor.¹⁶³ He argued that a transformative use “must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”¹⁶⁴ Furthermore, “A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test” and, in quoting Justice

¹⁵⁶ 17 U.S.C. §107.

¹⁵⁷ *Harper & Row*, 471 U.S. at 566.

¹⁵⁸ *Campbell* Supra n.149 at 584.

¹⁵⁹ 996 F.2d 1366, 1377 (2d Cir. 1993).

¹⁶⁰ *Ibid.*

¹⁶¹ 17 U.S.C. §107

¹⁶² Leval (1990) Supra n.153

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.* at 1111

Story from *Folsom v. Marsh*, “it would merely ‘supersede the objects’ of the original.”¹⁶⁵ Finally, “[i]f, on the other hand, the secondary use adds value to the original -- if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings -- this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” Leval went further to provide a list of possible transformative uses including “criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it...parody, symbolism, aesthetic declarations, and innumerable other uses.”¹⁶⁶

The concept of transformative use found its way into law just years later in the monumental Supreme Court decision in *Campbell v. Acuff-Rose*.¹⁶⁷ In this case, the Court was dealing with an infringement action against rap group, 2 Live Crew, for its song, *Pretty Woman*, that allegedly infringed upon the copyright in Roy Orbison’s song, *Oh Pretty Woman*.¹⁶⁸ The version by 2 Live Crew was a sexually-explicit hip-hop parody of the original that borrowed the opening musical phrase and elements of the chorus to criticise the naivety of Orbison’s ode to a street-walker.¹⁶⁹ The Supreme Court held that the Sixth Circuit misapplied the first factor of the fair use analysis in ruling that the work’s commercial nature barred it from protection.¹⁷⁰ The Court, citing Leval’s article, held that “the more transformative the work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use.”¹⁷¹ *Campbell* has since served as legal precedent for a multitude of holdings regarding transformative use.

The concept of transformative use feels ideally suited to address and legitimise UGC. In fact, it feels as though the legal construct was designed around this very sort of creativity. However,

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ *Campbell* Supra n.149. at 579.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid. at 573.

¹⁷⁰ Ibid.

¹⁷¹ Ibid. at 579.

though philosophically that may be true, in application the law is often impotent due to other factors.

e. The Development of Legal Uncertainty in Fair Use Cases:

The open-ended and broad-reaching nature of the United States' fair use system has the benefit of empowering courts to adapt the law to changing circumstances without need for legislative reform. Fair use has been used to resolve many types of disputes that would have been unforeseeable in 1976 when Congress passed the legislation that created the doctrine. One example is the treatment of digital image thumbnails in search engine results.¹⁷² However, the doctrine is not without fault. The open-ended nature of the law that allows courts to adapt to changing circumstances also has led to significant doctrinal confusion and uncertainty which has created a sense of legal impotence in many areas.

When it considered adopting fair use in Australia, the Australian Law Reform Commission described this uncertainty.¹⁷³ Their concern was a legitimate one as, in the wake of *Campbell*, the United States has seen a murky and confusing evolution of the doctrine of transformative use marked by jurisdictional splits and a general lack of clarity as to what actually qualifies as a legitimate transformation.

For example, in one of the more recent and influential cases, the Second Circuit ruled that an artist, Richard Prince, was justified in using the copyrighted work of photographer Patrick Cariou for a series of collage-based artworks that garnered millions of dollars in sales.¹⁷⁴ Prince enlarged photographs he took from a copy of Cariou's book, *Yes, Rasta*, and obscured, tinted, altered, or collaged over the images.¹⁷⁵ In one work, Prince merely superimposed a guitar into the hands of one of Cariou's figures and painted three dots over the figure's face.¹⁷⁶ The Court

¹⁷² *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007)

¹⁷³ Australian Law Reform Commission, 'Copyright and the Digital Economy,' (2012) [4.70-80]

¹⁷⁴ *Cariou v. Prince*, 714 F.3d 694, 707 (2nd Cir. 2013)

¹⁷⁵ *Ibid.* At 700

¹⁷⁶ *Ibid.*

ultimately found that, of the 30 artworks in question, 25 constituted fair uses.¹⁷⁷ In these works, the Court reasoned that they “manifest an entirely different aesthetic from Cariou’s photographs” because “[w]here Cariou’s serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their environs, Prince’s crude and jarring works, on the other hand, are hectic and provocative.”¹⁷⁸ However, in his dissent, Judge Wallace noted that he was unable “to see how the majority in its appellate role can ‘confidently’ draw a distinction between the twenty-five works that it has identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination.”¹⁷⁹ This is the pinnacle of legal unpredictability.

In the world of music, however, transformative works are yet to be given the same leeway despite the fact that remixing or sampling music is essentially equivalent to Prince’s method of creating visual art. Musical remix involves the cutting, editing, and rearranging of sound files to create a new piece of music built on the foundation of another’s work- much the way Prince created his collage artworks from Cariou’s photographs. However, current case law in the United States is severely anti-remix.¹⁸⁰ The first court decision regarding sampled music was in *Grand Upright Music, Ltd. v. Warner Brothers Records, Inc.* In this case, the Supreme Court evoked the language of *Exodus* to equate the 8th Commandment, “thou shalt not steal,” with copyright law.¹⁸¹ Biz Markie, a rap artist, sampled a portion of the music from “Alone Again/ Naturally” by Gilbert O’Sullivan for the musical backing of his own song, “Alone Again.” The Court held that Markie had “stolen” from the earlier copyrighted work.¹⁸² Granted, some remixes are more or less “repackaged” versions of the original song and serve as takings more than original expression.

¹⁷⁷ Ibid. at 707

¹⁷⁸ Ibid.

¹⁷⁹ Ibid. At 714.

¹⁸⁰ see: *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (finding willful copyright infringement and granting an injunction against the defendant, Biz Markie). see also: *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799-800 (6th Cir. 2005) (Sixth Circuit held that two seconds of a sampled guitar solo, lowered it in pitch, and looped constituted a violation.)

¹⁸¹ 780 F. Supp. 182, 185 (S.D.N.Y. 1991)

¹⁸² *Grand Upright Supra* n. 180 at 185.

However, many remix artists would have a chance to succeed under a *Prince* analysis but for the fact that Sixth Circuit has given special protection to sound recordings not afforded to other creative media.¹⁸³ As it stands now, in this Circuit, any act of copying a sound recording, even if done so for the purpose of amateur experimentation, is considered a per se infringement under the law.¹⁸⁴ While many circuits have declined to follow¹⁸⁵ this bright-line rule, the law remains intact in the circuit where the *Prince* case was decided.

In the literary world, doctrinal confusion is just as ubiquitous. In *Suntrust Bank v. Houghton Mifflin Co.*, the Eleventh circuit found that Alice Randall's *The Wind Done Gone* (TWDG), a retelling of Margaret Mitchell's *Gone With the Wind* (GWTW) from the perspective of Randall's new character, Cynara, was transformative.¹⁸⁶ In writing *The Wind Done Gone*, "[Randall] appropriated the characters, plot and major scenes from GWTW into the first half of TWDG."¹⁸⁷ The Court, however, focused on the new insights that TWDG brought to light noting that "Randall's work flips GWTW's traditional race roles, portrays powerful whites as stupid or feckless, and generally sets out to demystify GWTW and strip the romanticism from Mitchell's specific account"¹⁸⁸ Citing *Campbell*, the Eleventh Circuit wrote that Randall's novel "reflects transformative value because it 'can provide social benefit by shedding light on an earlier work, and in the process, creating a new one.'"¹⁸⁹

However, this holding represents a notable departure from a similar case in the Ninth Circuit in 1997. In *Dr. Seuss Enterprises v. Penguin Books U.S.A Ltd.*, the plaintiff sued Penguin Books for publishing *The Cat Not in the Hat! A Parody by Dr. Juice*, which was a comedic retelling of the

¹⁸³ *Bridgeport Music*, Supra n. 180 at 799-800.

¹⁸⁴ Rothenberg R, 'Sampling: Musical Authorship Out Of Tune With The Purpose Of The Copyright Regime' (2008) 20 St. Thomas Law Review. Pg. 234.

¹⁸⁵ *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338,1341 (S.D. Fla. 2009) (Eleventh Circuit criticizing the policy decisions behind the Bridgeport ruling and declining to follow them). See Also: *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016)(Ninth Circuit rejecting the Bridgeport holding)

¹⁸⁶ 268 F.3d 1257 (11th Cir. 2001).

¹⁸⁷ Ibid. at 1259.

¹⁸⁸ Ibid. at 1270.

¹⁸⁹ Ibid. at 1271 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

O.J. Simpson trial in the style of Dr. Seuss.¹⁹⁰ The Ninth Circuit ruled that the work in question was not transformative despite the fact that, on its face, the work seemed to meet the accepted standard of presenting “new expression, meaning, or message.”¹⁹¹ Renowned copyright scholar, David Nimmer, criticised this holding in his copyright treatise by positing “[i]t is hard to imagine a message or meaning more disparate from Theodore Geisel's children's classic than making his Cat into a murderer who beats the system and gets off scot-free.”¹⁹² Where two works are both seemingly departures from their original sources and contain a message uniquely their own but only one is deemed a fair use, it appears, that what constitutes transformative value is subjective and unpredictable.

Thus, as the law stands, in the Sixth Circuit a sampled sound recording will be a per se infringement regardless of transformation but, in the Second Circuit a sampled photograph will likely be deemed fair use if it is sufficiently transformed. However, a sampled sound recording will be given fair use consideration in other circuits including the Ninth and Eleventh. A satirical or parodic work that transforms the message of a piece of fiction while incorporating some of its creative elements may or may not be considered transformative depending on the circuit hearing the case and a slew of other intangible factors. This is the pinnacle of both inter-circuit and inter-media unpredictability under the law.

In theory, the fair use system in the United States carries with it a pliability that allows the law to adapt to changes in technological innovation and public opinion. However, in practice, that pliability has lead to doctrinal confusion and ultimately legal unpredictability. The doctrine of transformative use is well-suited to the rapid change of the modern world but falls short in application because its open-ended nature makes it difficult to apply uniformly.

¹⁹⁰ 109 F.3d 1394 (9th Cir. 1997).

¹⁹¹ Ibid. At 1401.

¹⁹² Nimmer, M.B. & Nimmer, D., *Nimmer on Copyright* § 13.05 n. 85.2 (2013).

iii. Miscellaneous Jurisdictions: The E.U. and Others

Jurisdictions adopting fair use and fair dealing only account for 47 of over 190 recognised countries. However, nearly all of these remaining nations have adopted exclusions to infringement under different titles despite the fact that they generally function in the same way as fair dealing. The Berne Convention sets broad guidelines for signatory nations to establish their own exceptions to infringement. The treaty only requires that authorised reproductions do not “conflict with normal exploitation of the work” or “unreasonably prejudice the legitimate interests of the author.”¹⁹³

a. Exceptions to Infringements in Europe

Member states of the European Union are subject to the guidelines provided in the European Copyright Directive of 2001 when establishing exceptions to infringement in their national laws. The directive enumerates an exhaustive list of exceptions that should be allowed but only a few are related to user-generated content.¹⁹⁴ This includes the right to make incidental inclusions of a work within another work,¹⁹⁵ the right to make use of a work for educational or scientific purposes,¹⁹⁶ the right to private use of a work,¹⁹⁷ and the right to use a work for the purpose of parody, caricature, or pastiche.¹⁹⁸ These rights are echoed in the copyright laws of the United Kingdom as, at the time of this writing, it is still a member of the E.U. Therefore, in practice, while the various member states of the EU will have laws that differ from the UK, the resulting user rights will be similar. Moreover, recent caselaw of the CJEU indicates that the list of permitted exceptions to infringement in article 5 of the InfoSoc directive is meant to be exhaustive. In an analysis of the application of fundamental rights to copyright exceptions, the Court has ruled that the enumerated exceptions in

¹⁹³ Berne Convention Supra n.4 Article 9(2)

¹⁹⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167 , 22/06/2001. Article 5 (Herein after ‘European Copyright Directive’)

¹⁹⁵ European Copyright Directive article 5 3(i)

¹⁹⁶ Ibid. article 5 3(a)

¹⁹⁷ Ibid. article 5 2(b)

¹⁹⁸ Ibid. article 5 3(k)

article 5 are “specifically aimed at favouring fundamental rights such as the freedom of expression [...] [and] the freedom of the press [...] over the interest of the author” and thus no analysis on the interaction of fundamental rights and copyright infringement shall be permitted beyond the scope of those enumerated exceptions.¹⁹⁹ The inherent inflexibility in the exhaustive list format of exceptions to infringement is its key downfall. Yet the pitfalls of the United States’ system illustrates that too much flexibility in the law can create just as many problems.

G. Chapter Conclusions

Copyright law is a system of law that was designed to mimic the protections offered in real property for the purpose of incentivising new creations via the economic value created by the property protections. However, this model of law is antiquated and is now forced to reconcile issues created by a digital world that was completely unanticipated at its inception. Up to this point, this thesis has discussed the laws of copyright and two particular issues that plague them in the modern world- piracy and user generated content. Online piracy has been pervasive since the late 1990s and still befuddles both lawmakers and rights holders looking to enforce their copyrights. In many cases the law feels like a sword blunt on both edges as rights holders struggle to prevent pirated works online or sue for compensation when the infringements occur. Format and time shifting are users’ rights that have become unduly complicated by enforcement mechanisms designed to prevent piracy. User generated content is a new phenomenon guided by technological innovations and changing creative norms that have created a culture of collage and expression by appropriation. The resulting creations are often entirely new works with new meanings and value. However, much of the products of this creative movement either fall in grey areas within or expressly outside the protection of the law. As such, the rights of user-creators have likewise been curtailed by legal efforts aimed at piracy. Modern copyright policy should consider these three concepts and try to address them all appropriately. As the next chapters will illustrate, however, disproportionate

¹⁹⁹ Case C-469/17 *Funke Medien* [2019], para. 60; Case C-516/17 *Spiegel Online* [2019], para. 45;

Case C-516/17 *Spiegel Online* [2019], para. 47; Case C-467/17 *Pelham* [2019], para. 63; Case C-469/17 *Funke Medien* [2019], para. 62

preference is often given to (ineffective) measures to prevent piracy in ways that neglect the other rights of users. This is largely the result of the strict application of property rules to a system that no longer fits well into that mould. The following chapter will criticise the rigid use of a property system of protection for copyrighted works.

II. The Inefficacy of Property-Based Enforcement Mechanisms in Copyright Law

A. Introduction

The law, especially in common-law jurisdictions, is deeply rooted in tradition- evolving tradition but tradition nonetheless. The system is designed so that the law has enough freedom to grow, expand, or morph as the values of the people it governs likewise change over time. However, because of this system of slow adaptation, rarely do we find ourselves asking if the very foundations of a law or a legal principle remain ideally suited for its intended purpose. The notion of completely abandoning a system of law established over potentially hundreds of years for something new is radical in legal policy. However, simply because something has been done successfully for hundreds of years does not mean that it *remains* successful. Allowing the law to be constrained by tradition is dangerous in a world that is changing at a pace whereby it becomes nearly unrecognisable with each passing generation. At times, we must be willing to completely re-evaluate the efficacy of our laws from their very foundations upwards. For copyright law, that time is now.

Within the context of this thesis, the goal of this chapter is to analyse the efficacy of the property model for copyright protection. It comes to the conclusion that this very model of protection has grown ineffective in digital environments and lays the foundation for arguments in favor of a system of economic rights²⁰⁰ that follow in later chapters. It will do so by analysing the impotence of control-based copyright legal enforcement mechanisms and briefly introducing the idea that a system of economic rights is better able to address copyright dilemmas brought about by digital culture.

²⁰⁰ In the context of this thesis, economic rights are those that grant the owner of a creative work rights of statutory remuneration and monetary compensation for exploitations of their works as opposed to property rights which allow the owner to directly control where, when, how, and by whom their creative works are exploited.

B. The Property Model is No Longer Suitable

Copyright's current system of property rights has been allowed to evolve into a legal Hydra of seemingly boundless and perpetual protection for creative expressions. Meanwhile, the creative world has evolved from being composed of small niche groups of professionals to a much larger population where the lines between amateur and professional are far more blurred. The evolution of creative technologies and the internet have fostered a culture where anyone today can be a creator and copyright law touches the average citizen in ways that never could have been anticipated. At its inception, the property-based model was designed to be the most effective way to protect creators and likewise incentivise them to keep creating.²⁰¹ However, the overbearing protections found in its modern iteration have been relegated to simply propping up a code of honour amongst the professional creative communities and offer very little help to prevent or deter actual infringements from average users ranging from works of appropriation to outright piracy.²⁰² This is largely because a property-based system of protection is no longer appropriate in the digital world.

The property-based model of copyright protection made sense in a world where creative expressions shared many of the same qualities with actual property. Literature and poetry were printed in books, artwork was solidified in stone or on canvas, music was etched into vinyl, and films and photographs were recorded onto *actual* film. Despite the obvious inherent differences between a novel and a plot of land, the novel could still be protected as such because of the relative ease with which authors could control its reproduction and use. At the enactment of the Statute of Anne, access to the technology required to print a book was not afforded by the average British citizen. Therefore, it was relatively easy to control where, when, and how a book would be printed in the same way it would have been easy to control who had access to or could make use of a plot of land. Piracy is not a new concept. Even in the 1980s, it was relatively common for users to record their favourite songs from the radio onto cassette tapes. Furthermore, the sale of double tape

²⁰¹ Statute of Anne 1710 (England) 8 Anne, Ch. 19

²⁰² This statement is developed more thoroughly in section C of this chapter.

decks allowed the actual copying of entire albums onto blank cassettes. The practice, however, was tedious and resulted in degraded sound quality with each reproduction. Therefore, while some bootleg tapes were likely given to friends or even sold in flea markets, the opportunity to mass produce or widely distribute these reproductions was nonexistent. The music industry tolerated this pirate activity because it was relatively harmless and had no visible impact on revenue- which was high. However, digital technology reshaped the practice of piracy. Copies can now be made nearly instantaneously and without any noticeable quality degradation. Furthermore, the internet allows dissemination of those copies globally. Moreover, because of technological advancements, creative expressions have taken much different forms. Despite whether a creative work now takes an actual physical form or exists in a type of analog media, it will almost always exist in some digital capacity too. With digitisation, creators immediately lose the aspect of *control* found in the analogue world that allowed the property system to function so well. Once something is uploaded to the internet, the ability to protect it as if it were a piece of property is all but completely lost. Finally, technology has also given the average person the ability to convert or transpose most analog creations to digital ones- for example: the recording of vinyl music to digital audio files, digital photography, and three-dimensional scanning technology.

Copyright law is not only easier to infringe, it has become borderline impossible to enforce. Global connectivity through the internet means boundless legal jurisdictional hurdles for enforcement agencies countered by limitless potential for offenders to evade prosecution. Imagine a person in New Zealand having the ability to violate a person in England's right to quiet enjoyment of her home or to steal her television using only an internet connection. Moreover, imagine that same person in New Zealand being able to continue to do so from Australia, then Thailand, then Sweden, as soon as local authorities are able to shut her down. If such were the case, the legal academic community would surely be discussing property law reform. Yet thousands of infringements occur on a daily basis all over the world and the academic discussion about copyright reform is generally limited to the use of new technology to block infringements at the expense of

censoring legitimate creation despite being often circumvented by actual pirates when the problem clearly lies in a system of law that is no longer able to achieve its prescribed purpose. Copyright law is incapable of serving creators as a property right because *creations no longer resemble property*.

If one can accept that perhaps a property-based system is no longer ideally suited for protecting something that is intangible, potentially-infinite, and easily accessible, then the logical next step is determining a new model that can be successful.

Historically copyright law has represented an economic tool whereby creators are granted the right to *control* their creations in the form of temporary monopoly rights. However the law's critical failures in light of the modern world result largely from creators' inability to adequately exercise these rights of control. Therefore, a practical legal solution should look outside the concept of protection based on control and seek to accomplish the same goals through other means of economic incentives. An economic-rights based approach would eliminate the major hurdle the law currently faces of inability to exercise the rights granted while serving to incentivise creation via insured economic compensation for creative works. The following sections will criticise the existing paradigm of copyright as a right in property and the continuous legislative efforts to perpetuate this system despite being an upriver swim.

C. Modern Copyright as Grasping to this Antiquated Model - Solutions Seeking Control

With the invention of the internet and subsequent digital technologies came an onslaught of copyright legislation attempting to harmonise or modernise the law across various jurisdictions. However, these new laws typically took the form of attempts at reasserting property-like control over digital content. These modern legal methods of addressing copyright enforcement in the digital world can be broken down into two distinct strategies that are implemented in tandem across the globe. These are notice and takedown procedures and gatekeeping software. In the context of property law, these strategies are equivalent to digital eviction procedures and digital fences. However, as we will see, the fences rarely keep anyone out and the eviction of one digital squatter

often leads to the appearance of multiple new ones. This section will analyse these two methods of modern copyright enforcement within the context of their intent to maintain control despite inefficacy under the property model.

i. Notice and Takedown Procedures

The Digital Millennium Copyright Act (DMCA) of the United States was designed to bring copyright law into the age of the internet. It was passed in part to incorporate the World Intellectual Property Organisation's Copyright Treaty of 1996 into U.S. law.²⁰³ The act, among other things, had the goal of creating a more efficient system of copyright enforcement on the internet. The primary mechanism used to achieve this goal is the, now widely used, system of notice and takedown. This is a process whereby rights holders may work with online service providers- or those who host websites that allow their users to post material autonomously- to remove infringing material posted by their users. A similar system was also passed in the European Union's Electronic Commerce Directive of 2000.²⁰⁴

The notice and takedown process allows rights holders to request that infringing material be removed when posted to one of these sites and allows the online service providers immunity from claims of secondary infringement as long as they adhere to the rules of the process. Without this safe-harbour provision, sites like YouTube, Google, Facebook, and Reddit could never exist. The system attempts to balance users' rights against those of rights holders while simultaneously granting private entities the right to self-police in hopes that doing so would ease the burden of the courts. However, the system has its issues in practice.

The inefficacy of the notice and takedown system has been tracked through a multitude of empirical studies over the last two decades. In 2004, the Liberty Project compared reactions of a

203 Cobia, J., 'The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process' (2008) 10 Minn. J.L. Sci. & Tech. pg. 388

204 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') *OJ L 178, 17.7.2000*

U.S.-based ISP to those of a U.K. (E.U.) based ISP to takedown requests sent for obviously out-of-copyright content.²⁰⁵ The group found that the U.S. ISP refused to remove the allegedly infringing material without the complaint specifically adhering to requirements set out by the DMCA, compared to the European ISP who immediately removed the harmless material without any further vetting of its validity.²⁰⁶ In 2006, Urban and Quilter analysed 876 takedown notices, the vast majority of which were issued to Google (734).²⁰⁷ In analysing Urban and Quilter's findings, Mostert and Schwimmer claimed that 9 percent of the notices were defective, 30 percent presented questions that should have been determined by a court of law, and 57 percent of the notices were filed against competitors.²⁰⁸ In 2014, the Multatuli project conducted a similar investigation into 10 Dutch ISPs.²⁰⁹ The project again dealt with posting of obviously out-of-copyright material on websites hosted by these ISPs, calling for its removal and analysing their reactions.²¹⁰ Of the 10 tested, seven removed the harmless material without questioning the complaint's validity, one completely ignored the complaint, and two refused to remove the content because the complainant's identity could not be verified.²¹¹ The researchers concluded '[i]t only takes a Hotmail account to bring a website down, and freedom of speech stands no chance in front of the cowboy-style private ISP justice.'²¹² In 2017, Urban and Schofield published findings resulting from three empirical studies of the notice and takedown system.²¹³ The second study described in this paper quantitatively analysed a sample of 1800 takedown requests out of 108 million provided by Lumen

205 Ahlert, C., Marsden, C., and Yung, C., 'How 'Liberty' Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation' (2004) <<http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/liberty.pdf>>

206 Ibid.

207 Urban, J.M. and Quilter, L., 'Efficient Process or "Chilling Effects"? Takedown Notices under Section 512 of the Digital Millennium Copyright Act' (2006) 22 Santa Clara Computer & High Tech. L.J. 621 ('Urban-Quilter study')

208 Mostert, F. and Schwimmer, M.B., 'Notice and Takedown for Trademarks' (2011) 101 Trademark Rep. 249, 259-60

209 Sjoera, N., 'The Multatuli Project ISP Notice & Take Down' SANE (27 October 2004) <<https://www-old.bof.nl/docs/researchpaperSANE.pdf>> (accessed 26 August 2014) ('Multatuli project').

210 Ibid.

211 Ibid. 'The Results'

212 Ibid. 'Conclusion'

213 Urban, J. M., Karaganis, J., and Schofield, B., 'Notice and Takedown in Everyday Practice' (March 22, 2017) UC Berkeley Public Law Research Paper No. 2755628, Available at SSRN: <https://ssrn.com/abstract=2755628> or <http://dx.doi.org/10.2139/ssrn.2755628>

from a 6 month period in 2013.²¹⁴ Key findings were: 98.9% of the takedown requests were automated;²¹⁵ in one in twenty-five requests the allegedly infringing work described did not match the allegedly infringing material;²¹⁶ in 13.3% of requests it was difficult to locate the allegedly infringing material;²¹⁷ and 1 in 15 requests were flagged with characteristics that weighed favourably towards fair use;²¹⁸ and overall, nearly one third of the requests presented serious questions about their validity.²¹⁹

There are two key problems with the notice and takedown system that merit discussion. First, it is the first of many copyright enforcement mechanisms that have sought to delegate copyright adjudication to the private sector in hopes of an increase in legal efficiency. As with other areas of copyright law where we see the private sector allowed to self-regulate,²²⁰ the practice of copyright adjudication under the notice and takedown system has become an unbalanced system that favours rights holders at the expense of users' rights. Second, the system has become overwhelmed and is incapable of accurately and efficiently addressing online infringement.

b. Abuse of the Notice and Takedown System

The premier flaw of the notice and takedown system is its lack of functional legal oversight. While it is a legal mechanism of copyright law enforcement, the vast majority of its processes take place without supervision by any governmental body. The system was designed this way in order to alleviate the burden placed on the courts by allowing the private sector to self-police in a more efficient way. However, this lack of oversight has led to abuse of the system as there are virtually no repercussions for doing so. Moreover, the United States' requirement that service providers expeditiously remove infringing content once given notice has led to a tendency to err on the side

²¹⁴ Ibid. 77-79

²¹⁵ Ibid. at 82

²¹⁶ Ibid. at 90

²¹⁷ Ibid. at 94

²¹⁸ Ibid. at 95

²¹⁹ Ibid. at 96

²²⁰ See: Chapter 5 for a more detailed analysis on this topic

of removal instead of performing an in-depth analysis of the legitimacy of each claim received. The consequences for failure to remove an actual infringement are steep- the potential loss of safe harbour protections and assumption of secondary liability for the infringement. However, there is no functional penalty for removing legitimate content. Therefore, the very design of the system lends itself to be open for abuse by content owners and those posing as content owners.

There are three particular ways in which rights holders may abuse notice and take down procedures. First, takedown notices can be sent by those who are not actually the legal owner of the rights for the copyrighted material in question. Second, the process may be used for the purpose of intentionally censoring free speech. Third, takedown procedures ignore fundamental aspects of copyright law such as exceptions to infringement like fair use and are used to chill legitimate creativity.

Takedown Notices by Non-Owners

The first issue of note seen in the notice and takedown system is its lack of accountability with concern to those filing takedown requests. As a result, takedown notices have been fraudulently filed by those who are not the rightful owners of the allegedly infringed copyrighted material. This has been done for many reasons. It can be done for anticompetitive purposes as users have posed as content owners and filed takedown requests to Google to have their competitors' links removed from the search engine as a way of boosting their own traffic.²²¹ Thieves have also abused the notice and takedown system on YouTube to essentially hold other users' accounts hostage under the threat of copyright strikes (which can functionally ruin a YouTube artist's career) unless a ransom is paid.²²² This is possible simply because the accusation of copyright infringement

221 Binder, M., 'Fraudsters Are Abusing Google With Fake Copyright Complaints, And It's Getting Worse' (*Mashable*, 2020)

<<https://mashable.com/article/google-fake-dmca-takedown-requests/?europe=true>> accessed 21 May 2020

222 'Here's How A Scammer Abused Youtube's Copyright Infringement System In An Attempt To Extort Money From Users - Tubefilter' (*Tubefilter*, 2020) <<https://www.tubefilter.com/2019/02/07/youtube-content-id-copyright-infringement-scam/>> accessed 21 May 2020

on YouTube can carry as much weight as actual infringement. Finally there are examples of the system being abused in this way by internet trolls simply seeking to cause mayhem.²²³

Whatever the reason for filing a fraudulent takedown notice, the practice is not only possible- it's easy. Timothy Geigner, writing for Techdirt, aptly wrote that "good internet policy is not that which can be easily subverted by impersonating another person, because *that happens all the time* on the internet."²²⁴ Moreover, if theoretically anyone can assert rights of control over a copyrighted work then it is not actually being controlled. The simplicity of the notice and takedown system is supposed to be its strength. However, it must provide some way of verifying the legitimacy of those filing takedown requests and/or a system of recourse against those who file false claims. Otherwise, it will continue to be abused at the expense of legitimate users.

Takedown Notices as Tools of Censorship

The second way by which the notice and takedown suffers from abuse is that it has become an effective tool for copyright owners to censor unwanted but legitimate criticism or speech. Because service providers will err on the side of takedown and are likely to remove anything requested of them, and because there are essentially no consequences for filing false or fraudulent takedown notices, the DMCA is actually a powerful tool for temporary censorship. As such, it has been used by the producers of a nazi romance movie to silence critics,²²⁵ by a major American television network to silence a news article about leaked shows along with subsequent social media

223 'Soundcloud Troll Getting DMCA Takedowns Shows The Weakness Of Notice And Takedown Systems' (*Techdirt.*, 2020)
<<https://www.techdirt.com/articles/20181116/09175541064/soundcloud-troll-getting-dmca-takedowns-shows-weakness-notice-takedown-systems.shtml>> accessed 21 May 2020

224 Ibid.

225 'Producers Of Nazi Romance Movie Appear To Be Using DMCA Takedowns To Silence Critics' (*Gizmodo*, 2020)
<<https://kinja.com/api/profile/getsession?redirect=https%3A%2F%2Fgizmodo.com%2Fsession%3Fr%3Dhttps%253A%252F%252Fgizmodo.com%252Fproducers-of-nazi-romance-movie-appear-to-be-using-dmca-1831555053>> accessed 21 May 2020

posts referring to this censorship,²²⁶ and by a video game developer to block a bad review of his game.²²⁷ These are but a few examples that have happened within weeks of writing this section.

The problem here lies in the automatic handling of DMCA requests coupled with the little power the subjects of those requests possess to assert their legitimacy. The DMCA does have a counter notice system whereby the subject of a takedown request may dispute the claim. Following this, the entity who filed the original takedown notice has two weeks to file a lawsuit or the content will be reinstated.²²⁸ However, many average users are unaware of this process and in some online situations- particularly those involving the silencing of free speech- two weeks can be enough time to do a significant amount of damage. Therefore, the system has created essentially a built-in temporary censorship mechanism with no penalties for abuse. Controlling a copyrighted work cannot become so important that we are willing to sacrifice free speech rights to achieve it.

Takedown Notices and Exceptions to Infringement

The final, and perhaps largest, abuse or inadequacy of the notice and takedown system is its failure to address exceptions to infringement. Fair use in the United States, Fair Dealing in the United Kingdom, and various exceptions to infringement in Europe protect a variety of ways in which one may use the work of another without permission. However, this body of law is completely subverted by the notice and takedown system which makes no attempt to consider exceptions to infringement before takedowns are administered. In the United States, *Lenz v. Universal Music Corp.* established that fair use must be considered before a takedown request is sent.²²⁹ However, the once-believed pivotal holding has proven impotent as there is no standard by which to measure what constitutes sufficient consideration by rights holders and there has not been

226 'Another Week, Another Hollywood Company Files A Takedown Against Torrentfreak' (*Techdirt.*, 2020)

<<https://www.techdirt.com/articles/20190421/22512742056/another-week-another-hollywood-company-files-takedown-against-torrentfreak.shtml>> accessed 21 May 2020

227 'Video Game Developer Says He Won't Send A Takedown Of A Bad Review, Does So Anyway' (*Electronic Frontier Foundation*, 2020)

<<https://www.eff.org/takedowns/video-game-developer-says-he-wont-send-takedown-bad-review-does-so-anyway>> accessed 21 May 2020

228 Digital Millennium Copyright Act 1998 (U.S.A.)

229 801 F.3d 1126 (9th Cir. 2015)

a single case benefiting a user that cites this holding. In Europe, no such requirement even exists. Therefore, users are left to assert their rights through the notice and takedown system *after* their works have been removed. Moreover, in some online spaces, users are finding that content owners and/or service providers are not complying with requirements of the counter notice system. YouTube, in particular, has been known to simply reject a counter notice based on fair use despite being directly in violation of the DMCA.²³⁰

Counter-Notices as a Poor Safety Net

Any abuse of the notice and takedown system should theoretically be balanced out by the system of counter notices. Under the DMCA, counter notices allow users to formally contest the removal of allegedly infringing material. Once a counter notice has been filed, the original complainant has 14 days to seek a court order retraining the user from engaging in the infringing activity or the material will be automatically reinstated.²³¹ However, research suggests that this aspect of the system may also be subject to failures. For example, Urban, Karaganis, and Schofield write:

As a procedural matter, material that is targeted by a takedown request is often removed before the target is given the opportunity to respond; this was confirmed in interviews with OSPs and rightsholders. Yet all available evidence suggests that counter notices are simply not used. It is indicative of the problem that the most memorable uses of counter notices for our rightsholder respondents were a few bad-faith, bogus counter notices from overseas pirates. Given the high numbers of apparently unchallenged takedown mistakes that showed up in our quantitative studies, we would expect to see higher numbers of appropriate, good-faith counter notices if the process were working as intended.²³²

c. The system is Overwhelmed and Cannot Function Adequately

The issues I have described with the notice and takedown system exist but perhaps provide a distorted picture up to this point. Across the plethora of takedown notices filed daily, these abuses

230 'Youtube Appears To Be Breaking DMCA Law, Experts Say' (*Reclaim The Net*, 2020) <<https://reclaimthenet.org/youtube-dmca-take-down/>> accessed 21 May 2020

231 17 U.S.C. §512 (g)(2)

232 Urban, J.M. et al. (2017) *Supra* n. 213

represent the exceptions- not the rules.²³³ However, the ease with which the system may be abused is problematic and it is hardly functioning adequately outside of these abuses. In fact, the system is overwhelmed with automated requests and there is evidence that, while individual takedown requests will result in the swift takedown of the infringing material, they fail to functionally remove the infringing content as it will typically reappear instantly elsewhere online.

The system is overwhelmed. Automation coupled with overhanded enforcement strategies have lead to more takedown requests being sent than could ever be actually dealt with in a just way. For example, in just the first three months of 2016, Google alone received over 200 million requests to remove infringing material from its search engine.²³⁴ Entertainment lobbies have pointed to this humongous volume of requests as evidence to a need for a better system to combat online piracy.²³⁵ This argument has been refuted by evidence of a massive amount of redundant takedown requests as well as ones for nonexistent material.²³⁶ While this counterpoint may call into question a need for a new system based purely on the evidence of overwhelming numbers of requests sent, it hardly makes for evidence of a functional system.

While the massive volume of takedown requests may not be adequate to show a failing system, the system is, however, incapable of actually keeping up with the amount of infringements that occur online in a reasonable way. In 2017, the Recording Industry Association of America and 14 other relevant groups lobbied Congress for an overhaul to the DMCA.²³⁷ They argued that the process of removing infringing content online upon request by content owners has only created an “endless game of whack-a-mole” where the removed material reappears instantly somewhere else

233 Gross G, 'What's The Problem With DMCA Takedown Notices?' (*PCWorld*, 2020) <<https://www.pcworld.com/article/2110520/whats-the-problem-with-dmca-takedown-notices.html>> accessed 21 May 2020

234 Spangler, T., 'Google Copyright-Removal Requests Doubled In Q1 As Piracy Fight Balloons' (*Variety*, 2020) <<https://variety.com/2016/digital/news/google-dmca-copyright-removal-requests-piracy-1201740892/>> accessed 21 May 2020

235 'Millions Upon Millions Of 'Takedown' Notices To Google... For Links That Aren't Even In Google' (*Techdirt*, 2020) <<https://www.techdirt.com/articles/20181227/10311341298/millions-upon-millions-takedown-notices-to-google-links-that-arent-even-google.shtml>> accessed 21 May 2020

236 Ibid.

237 Kravets, D., 'Forget DMCA Takedowns—RIAA Wants Isps To Filter For Pirated Content' (*Ars Technica*, 2020) <<https://arstechnica.com/tech-policy/2017/02/forget-dmca-takedowns-riaa-wants-isps-to-filter-for-pirated-content/>> accessed 21 May 2020

online.²³⁸ This lobbying effort actually lead to a call for the implementation of anti-piracy filters in lieu of or to work in tandem with the notice and takedown system similar to the legislation recently passed by the European Union- a topic that will be discussed in much more depth later in this thesis.²³⁹

ii. Gatekeeping Software and Digital Locks

Just as digital technology has created boundless complications for the enforcement of copyright law, it has likewise granted new methods to increase protection for copyrighted works. It has therefore become both the sword that aids and the shield that defends against infringement. New technology has helped rights holders tighten their grasp on copyrighted works by allowing an increased sense of control. The implementation of this technology for the purposes of copyright enforcement has come in two main forms- Digital Rights Management (DRM) tools and gatekeeping software. The former is a type of digital lock that prevents unauthorised replication of copyrighted digital files. It is not a legislative enforcement mechanism but a tool of the private sector to enable control over pieces of property that are otherwise difficult to control. Gatekeeping software or filtering technology that tracks the uploading of copyrighted works via digital fingerprinting technology began as a private sector tool but has recently been incorporated into legislative efforts to prevent online infringements.²⁴⁰ It serves as the logical extension of the notice and takedown system with the incorporation of advanced technology as the system effectively serves to automate the process on both the OSP and copyright holders' ends. Both tools serve as attempts to replicate the antiquated sense of control over pieces of intellectual property felt in the pre-internet era with inarguable success in some respects. However, both also suffer from critical

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

points of failure that outweigh their respective successes and render them incompatible with fundamental purposes of copyright law.

a. DRM/TPM

Modern technology has given rise to digital tools that enable the controlled use of copyrighted works. These tools are commonly known as digital rights management (DRM). A subset of DRM are technological protection measures (TPM) or bits of code used to safeguard digital copyrighted works from infringement. These are industry tools and not legislative acts, though the technology often has legislative backing.²⁴¹ DRM technology represents content owners using the very technological advancements that made infringement so easy as a tool to help them reassert the necessary control over their digital assets for the current property system to continue functioning. However, the use of such technology as an enforcement mechanism for copyright law has presented two fatal issues. First, the technology ignores fundamental aspects of copyright law in order to serve its prescribed purpose. Second, despite sacrificing users' rights, the technology is not generally effective at preventing actual infringements.

Technological protection measures seek to serve one purpose- preventing unauthorised copying of copyrighted materials. In doing so, TPMs serve to undermine other important aspects of copyright law- namely users' rights in the forms of exceptions to infringement. For example, the phonographic industry uses DRM to "fight digital piracy" yet compliance with copyright exceptions to infringement is not one of their stated goals.²⁴² The use of technical protection measures to enable control over a digital copyrighted work typically ignore the rights of users in two ways. First, TPMs will block a legitimate user of a copyrighted work from format and/or time shifting that work. Second, TPMs will prevent the work from being copied not only in circumstances of

²⁴¹ It is illegal to bypass DRM technology in many jurisdictions.

²⁴² See e.g. the website of the International Federation of the Phonographic Industry at www.ifpi.org

infringement but also for legitimate reproductions where the use would qualify for an exception to infringement.

Format and time shifting are largely legitimised practices in modern copyright law. In the United States, the practice of time shifting, or recording a piece of lawfully accessed copyrighted material for the purpose of accessing it later in time, was ruled to be a legitimate fair use in the infamous “Betamax” case.²⁴³ While this case addressed time shifting, there is no legal holding with regards to format shifting and fair use in America. Moreover, the anti-circumvention laws in the DMCA make it illegal to bypass any DRM technology imbedded in a copyrighted work even for the legitimate purpose of time shifting.²⁴⁴ In Europe, most EU member states have implemented a private copying exception to their copyright laws following the Copyright Directive of 2001. This exception allows for both format and time shifting practices and uses levies on copying hardware to balance the potential economic harm faced by copyright owners. However, like the United States, it is also illegal to bypass any TPM even for the purpose of lawful format or time shifting.²⁴⁵ The United Kingdom provides a complaint system that users may use when a TPM prevents them from benefiting from an exception to infringement.²⁴⁶ However, the process is arduous and appears to be scarcely, if ever, used.²⁴⁷ Furthermore, the legislation backing DRM/TPM technology shifts the legal focus away from the actual goals of the software- to prevent piracy- to a more restrictive place. The question for courts dealing with infringement cases concerning DRM/TPM technology is not whether an actual infringement occurred, but rather simply was the technology circumvented in some way?²⁴⁸ The actual purpose of copyright law and the means by which digital locks may be

243 *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

244 Digital Millennium Copyright Act 1998 (U.S.A)

245 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society *OJ L 167, 22.6.2001* Article 6(1)

246 'Technological Protection Measures (Tpms) Complaints Process' (*GOV.UK*, 2020) <<https://www.gov.uk/government/publications/technological-protection-measures-tpms-complaints-process>> accessed 21 May 2020

247 'Private Copyies - Copyright' (*CopyrightUser*, 2020) <<https://www.copyrightuser.org/understand/exceptions/private-copying/>> accessed 21 May 2020

248 Matin, A., 'Digital Rights Management (DRM) in Online Music Stores: DRM-Encumbered Music Downloads' Inevitable Demise as a Result of the Negative Effects of Heavy-Handed Copyright Law,' (2007) 28 *Loy. L.A. Ent. L. Rev.* 265, 271-2

used to further that purpose is all but lost in this process. Instead, we are left with a legally-backed enforcement mechanism that encourages anti-competitive behaviour and ignores fundamental rights of users under the same law it seeks to enforce.

Ignoring users' rights is likely seen as the necessary cost of protecting works from large scale piracy. This *could* perhaps be a forgivable trade off *if* the technology actually worked. However, as it stands, it does not. While TPMs are typically sophisticated enough to prevent average users from accessing the digital information necessary to make unauthorised copies of the works in which they are imbedded, they fail to provide absolute protection. TPMs offer no protection against savvier users and professional infringers. "There is no DRM system, however sophisticated, that cannot be worked around if you have the right expertise."²⁴⁹ An article in 2002 stated plainly that "to this day, every DRM system with economic significance has been 'cracked.'"²⁵⁰ In the United States, Congress enacted the "anti-circumvention" provisions of the DMCA for this very reason.²⁵¹ It was responding to concerns voiced by content owners that their works would be pirated despite any digital protection measures they implemented.²⁵² Moreover, once the DRM is bypassed, the unlocked version can be uploaded to the internet to be accessed by anyone who wishes to do so- particularly the class of casual pirates that DRM is designed to obstruct. Once an unlocked version of a copyrighted work enters this space, it falls into the realm of notice and takedown protection and there is virtually nothing that can be done to completely remove it from the internet. Therefore, anything but absolute protection is functionally the same as no protection at all.

The use of code to safeguard digital works from unauthorised reproductions makes sense in theory in the modern world. Rapid technological growth over the last 30 years has caused the wave

249 Halderman, A. and Felten, E., 'Lessons from the Sony CD DRM Episode' (2006) Center for Information Technology Policy Department of Computer Science Princeton University, published on line <http://itpolicy.princeton.edu/pub/sonydrm-ext.pdf> accessed 25 March 2011, 23

250 Oksanen, V. and Välimäki, M., 'Transnational advocacy network opposing DRM - A technical and legal challenge to media companies,' (2007) *International Journal on Media Management*, 4:3, 156-164

251 17 U.S.C. (1201; see 144 Cong. Rec. H7093, H7094-95 (Aug. 4, 1998); S. REP. No. 105-90 at 29 (1998); H.R. REP. No. 105-551, pt. 1, at 18 (1998); H.R. REP. No. 105-551, pt. 2, at 38 (1998)

252 Litman J, *Digital Copyright: Protecting Intellectual Property On The Internet* [2000] Prometheus Books, pg. 89-150

of mass infringements that have plagued copyright owners. Using the very technological advancements that made copyright enforcement so difficult for content owners as a shield to reestablish the sense of inaccessibility that made pre-internet copyright law so easy to enforce feels elegant. However, the costs of such a solution must not be ignored. Copyright law is not designed as a one-sided protection for creators and content owners. It is a nuanced balancing act constantly seeking to resolve the rights of those who own content and those who engage with it. Any enforcement mechanism that ignores the rights of those represented by half of this equation is unacceptable- especially one that is otherwise ineffective. There is surely a means by which we can use code to aid in copyright enforcement. However, the system today is inadequate.

b. Gatekeeping Software

Gatekeeping software is the newest iteration of the content industry's attempts to assert control over copyrighted works online. It is the logical extension of the enforcement mechanisms discussed up to this point and essentially uses the technology behind DRM to automate the notice and takedown process. As such, it suffers from many of the same weaknesses. Chapters four and five of this thesis discuss the modern implementations of gatekeeping software and their failures in depth. However, this section will provide a general overview.

Gatekeeping software works via digital fingerprinting technology that seeks to match works posted online to copyrighted works compiled in a database. The software has the ability to detect reproductions of audio and visual digital files with a high but questionable degree of accuracy.²⁵³ YouTube has been the largest proponent of such software and its proprietary Content ID software is the most sophisticated of its kind. Therefore, YouTube also provides the most robust example of the use of gatekeeping software online for analysis. Content ID works as an enforcement tool for both infringements and for various licensing agreements that YouTube has negotiated with content

253 Longan M, 'Big Brother Is Watching But He Doesn't Understand: Why Forced Filtering Technology On The Internet Isn't The Solution To The Modern Copyright Dilemma' (*Script-ed.org*, 2019) <<https://script-ed.org/blog/big-brother-is-watching-but-he-doesnt-understand-why-forced-filtering-technology-on-the-internet-isnt-the-solution-to-the-modern-copyright-dilemma/>> accessed 23 July 2020

owners. It detects reproductions and, based on the licensing agreement for the work in question, will automatically allow, remove, or monetise the content in favour of the owner of the original material.²⁵⁴ The system, however, suffers from a slew of issues similar to DRM and notice and takedown including the inability to recognise fair, tolerated, or even licensed uses of a work.²⁵⁵ It also suffers from issues in accurately identifying works.²⁵⁶ Moreover, its licensing scheme functions in a way where there is no possibility for splitting revenue between content owners and user-creators and there is virtually no accountability within the system's review process.²⁵⁷

YouTube touts its Content ID program as a huge success, attributing it to billions worth of revenue paid to content owners since its inception.²⁵⁸ However, while gatekeeping software is arguably the most successful iteration of modern copyright enforcement mechanisms in terms of identifying and preventing piracy, it is by no means an ideal solution. First, Content ID operates in an isolated microcosm of the internet and is not realistically scalable to a degree that could encompass the entirety of the web. Therefore, while it is able to prevent infringements from appearing within its community with relative success, it has no means of effectively preventing them from appearing elsewhere online and is thereby subject to the same “whack-a-mole” effect described in the criticism of notice and takedown. Moreover, the system finds success by drawing hard line rules in an area of the law traditionally governed by grey areas and these hard lines are typically drawn to disproportionately favour content owners. Mechanisms enabling control are only successful if they enable the degree of control authorised by the law.

Digital fingerprinting technology that can recognise copyrighted works tied to databases do exist. However, copyright law is both complex and, at times, indefinite. While there are computer programs capable of recognising the existence of a copyrighted work, an analysis to determine infringement requires far more than simply recognition. Determining infringement often requires

254 Ibid.

255 Ibid.

256 Ibid.

257 Ibid.

258 Ibid.

subsequent analyses relating to statutory exceptions such as fair dealing. Moreover, copyrighted works are licensed to users everyday. This can occur through traditional channels involving contracts or, more often, through tolerated use initiatives by content owners in the form of no action policies. Current examples of filtering technology are not only incapable of determining if a publication would qualify for an exception to infringement, but are also unable to recognise if the work has been properly licensed or if the use is tolerated by the content owner. Furthermore, claims are even, at times, issued via filtering software by those who are not the rightful owners of a copyright. These failings to distinguish the intricacies of copyright law become especially unacceptable when considering that the current leading filtering software still fails to simply identify 20-40% of music recordings within its database.²⁵⁹ These three issues with copyright filtering technology online are discussed below.

False Positives and Exceptions to Infringement

While the technology that powers existing content identification software is undeniably complex and sophisticated, the resulting capabilities of that technology are actually simple. Content identification software systems rely on compiling massive databases of content and using fingerprinting technology to mark that content in order to determine whether a piece of uploaded content matches in whole or in part any piece of content in their database. This process is performed solely under a match or no-match condition. In other words, the sole objective, and only capability of the tech, is to determine whether or not the scanned content matches a piece of content from the database.

The first step of an infringement analysis will invariably involve a determination of similarity and access- regardless of jurisdiction. In theory, content identification software will correctly identify direct copying which would satisfy the required analysis for both of these factors.

²⁵⁹ Ingham T, 'YouTube's Content ID Fails to Spot 20%-40% of Music Recordings' (*Music Business Worldwide* July 13, 2016) <<https://www.musicbusinessworldwide.com/youtubes-content-id-fails-spot-20-40/>> accessed 25 July 2018

However, to reduce the process of analysing infringement solely to these two steps is, at best, unfair and, more likely, illegal because infringement analyses typically require far more considerations than simply access and similarity. All jurisdictions in Europe provide exceptions to infringement whereby users may legally make use of protected works without permission. The simple match/no-match process of content identification software fails completely to address this more complex aspect of copyright law and works that should be treated as a fair use are regularly flagged as infringements.²⁶⁰

Exceptions to infringement are not only foundational aspects of copyright law, but they represent uses of copyrighted works that are not illegal and therefore should not be blocked from publication or monetised for a third party by any entity- software or otherwise. Such a system should not be allowed to exist. Yet, legislative trends are now heading in the direction of *requiring* the adoption of such technology.

Licensed and Tolerated Uses

Complex analyses regarding exceptions to infringement aren't the only failures seen by content filtering software systems. Current filtering software will also not take into consideration whether a work has been licensed through legitimate channels or falls under a more broad category of tolerated use.

²⁶⁰ Cushing, T., 'YouTube Kills Livestream Of Convention When Audience Starts Singing 'Happy Birthday'' (*TechDirt*, Oct. 15, 2013) <<https://www.techdirt.com/articles/20131014/15323524876/youtube-kills-livestream-convention-when-audience-starts-singing-happy-birthdayshtml>> accessed July 25, 2018. *See Also*: Resnikoff P, 'Sony Music Says a Harvard Copyright Lecture Violates Its Copyrights...' (*Digital Music News* April 25, 2017) <<https://www.digitalmusicnews.com/2016/02/17/sony-music-takes-down-a-youtube-lecture-about-copyright-issues/>> accessed July 25, 2018. (Where a Harvard law school copyright lecture was taken down for including parts of Hendrix's "Little Wing" despite being a textbook example of fair use) *And*: Jackson G, 'Nintendo Flags YouTuber For Using Switch Sound' (*Kotaku Australia* March 8, 2017) <<https://www.kotaku.com.au/2017/03/nintendo-flags-youtuber-for-using-switch-sound/>> accessed July 25, 2018. (Where a Content ID claim was made for a "Ready...Fire!" sound effect from the Nintendo Switch)

With regards to licensed material, YouTube's Content ID software has blocked content containing legally obtained stock audio with such regularity that companies are offering specific advice for how their customers may dispute these claims.²⁶¹

Video game companies are at the forefront of tolerated use policies, with a particularly active and engaged fan base that bolsters the value of their copyrighted materials through various digital fan works such as LetsPlay videos. These videos are tolerated by most game development companies with specific policies listed on each company's website. Ubisoft, a game company that has supported user engagement in the form of fan videos and otherwise, spoke out in support of its fans who were issued Content ID claims for videos containing permitted footage from its games.²⁶²

Taking down or monetising these legitimate forms of creation establishes content filtering systems as indiscriminate tools of usurpers. Furthermore, this system achieves a goal of preventing unauthorised uses of copyrighted material by way of deterring legitimate uses. If a user knows that the content will be flagged regardless of legal status, there is no incentive to license content legally.

Illegitimate Third Party Claims

Not only do these systems have difficulty analysing what constitutes as material that should and should not be taken down. They also struggle to appropriately determine who has the right to make a claim on the copyrighted material. YouTube's Content ID system is rife with reports of automatic claims being issued by entities that should not have the power to issue a copyright claim.

Among these examples include a claim made for a song in the public domain,²⁶³ a magazine claiming ownership of a screenshot from a video game because it was published in one of their

261 McElwain J, 'Solving YouTube Content ID Claims for Stock Audio' (*Storyblocks Blog*, 2018) <<https://blog.storyblocks.com/storyblocks-features/youtube-content-id-claims-stock-audio/>> accessed 25 July 2018

262 Totilo S, 'YouTube Copyright Chaos Continues. Game Publishers To The Rescue?' (*Kotaku* December 12, 2013) <<https://kotaku.com/youtube-copyright-chaos-continues-game-publishers-to-t-1481517758>> accessed 25 July 2018

263 'YouTube's Content ID System Brings Humbug to the Holidays' (*Adam the Alien Productions* January 7, 2014) <http://adamthealien.com/2013/12/23/youtubes-content-id-system-brings-humbug-to-the-holidays/#.W1b2Vy_My1s> accessed 25 July 2018

editions,²⁶⁴ and Universal Music Group licensing a song from an indie artist to use as a backing track in an audiobook and then using that audiobook as a proxy to claim ownership for the original song.²⁶⁵

However, as the next few chapters will illustrate, the future of copyright enforcement online absolutely lies in gatekeeping software- and this is not necessarily a bad thing if done so properly. Using the software to imperfectly and unfairly attempt at emulating a judicial analysis of copyright infringement is not the answer. However, adapting the underlying system to both the tools of enforcement at our disposal as well as cultural creative norms is a viable option to finding harmony in the world of digital copyright enforcement. This will require rethinking the current structure of copyright law.

D. Using Economic Rights to Balance Infringements

The trend in copyright enforcement thus far can be characterised as various attempts to turn the very technological innovations that enabled the spread of piracy against itself and use new technology to either lock content or monitor and address its propagation online. This strategy is reliant on the notion that the current system of copyright will remain viable as long as works of intellectual property may be controlled by their owners. However, in order for this system to be successful it must achieve two goals. First, it must actually enable control over copyrighted works. Second, it must do so in a way that adheres to principles of copyright law. Modern copyright enforcement through DRM, gatekeeping software, and notice and takedown fails to achieve either of these goals. While some level of control is achieved, it is far from absolute. Moreover, even with only marginal success, the system does so by blatantly ignoring the rights of users.

264 Totilo, S., 'YouTube Copyright Chaos Continues. Game Publishers To The Rescue?' (Kotaku, December 12, 2013) <<https://kotaku.com/youtube-copyright-chaos-continues-game-publishers-to-t-1481517758>> accessed 25 July 2018

265 'UMG Licenses Indie Artist's Track, Then Uses Content ID To Claim Ownership Of It' (*Techdirt*.)

<<https://www.techdirt.com/articles/20150317/10513630347/umg-licenses-indie-artists-track-then-uses-content-id-to-claim-ownership-it.shtml>> accessed 25 July 2018

It is therefore time that we accept that absolute control of copyrighted works on the internet is likely impossible. We should seek new solutions to ensure that authors continue to profit from their works but abandon the concept that controlling them is paramount to doing so. The notion of control being the premier component necessary for copyright enforcement stems from the law's basis in property law. Abandoning this property system and replacing it with one of economic rights will allow us to likewise abandon the notion that we *must* control copyrighted works in order to protect their authors.

This is not a simple solution. For example, it creates immediate questions as to what, if not everything, should be governed by compulsory licenses.²⁶⁶ Should *all* aspects of copyright fall under this new regime of protection? Would, then, copies of Hollywood's latest releases shot in cinemas on camcorders be allowed assuming the makers followed some sort of legal procedure to obtain the compulsory license? Would other forms of obvious piracy be likewise allowed or should the law attempt to only target less harmful forms of fringe piracy like remix? Is it even possible to legislate one and exclude the other? Would such a law end up creating a scheme where it is necessary to obtain a compulsory license for something that would not have previously necessitated one under laws like fair use? These are all very important questions that will be addressed in the following chapters. However, this chapter is merely intended to offer the foundation- the notion that such a system has strengths where the current one has developed weaknesses. The online marketplace of culture is far better suited to liability rules than property ones.

Transitioning copyright law to a system of economic rights is not an entirely new concept and the notion of even incorporating economic rights into the existing system- for example compulsory licensing- has already been met with criticism. The following section will discuss this criticism of the inherent inadequacy of using liability rules to solve modern copyright dilemmas.

²⁶⁶ A compulsory license or system of compulsory licenses would be the main tool of protection for a system of economic rights in copyright law. A compulsory license is a statutorily mandated license that a rights holder is required to grant when requested. The terms of the license may be rigidly or vaguely defined by the governing statute.

E. The Myth of the Inferiority of Liability Rules in IP

Lawmakers' persistent perpetuation of the property system despite continued impotence in the modern world is likely attributed to the lack of a viable alternative. Abandoning copyright law altogether is hardly an option as entertainment lobbies would never allow it nor would such a move likely serve any public good. The most obvious alternative is a shift to an economic-rights based approach that uses compulsory licenses. However, while such a system has become a more popular topic of debate for legal academics, the notion remains heavily criticised and no such academic proposal has been welcomed by legislators. One key criticism of note is that compulsory licensing systems are inherently inferior to private collective licensing bodies operating within a property-rights system. This argument is, however, dated and has become less true as the state of digital technologies have evolved at speeds well beyond those of the laws that regulate them.

In the 1990s, Robert Merges wrote a paper urging American legislators against the use of compulsory licenses to solve intellectual property rights issues in new media.²⁶⁷ Merges premised his argument on the value of collective rights organisations and claimed that “society and industry will be better off if Congress exercises restraint, creating an environment in which private organisations can flourish.”²⁶⁸

Merges analysed the Calabresi-Melamed Framework,²⁶⁹ which subdivides all legal entitlements into either those governed by “property rules,” “liability rules,” or “inalienable entitlements.”²⁷⁰ These two types of rules govern the way entitlements are treated. Calabresi and Melamed define an entitlement as the legally prevailing interest when two or more opposing interests conflict.²⁷¹ Property rules are rooted in control and require permission from, and often

267 Merges, R., ‘Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations’ (Oct. 1996) *California Law Review*, Vol. 84, No. 5, 1293

268 *Ibid.* at 1300

269 *Ibid.* at 1302

270 *Ibid.* See also: Calabresi, G. and Melamed, D., ‘Property Rules, Liability Rules and Inalienability: One View of the Cathedral’ (1972) *Harvard Law Review*, vol 85, no 6, 1089, 1092

271 Calabresi. and Melamed (1972) *Ibid.* at 1090

payment to, the owner of the entitlement.²⁷² An example of this sort of entitlement in the intellectual property context is traditional licensing negotiation for use of a work. The owner of a copyright is granted power under the law to license it at her discretion and therefore permission is required up front for any potential licensor to make use of the work. However, liability rules, allow for the destruction of an original entitlement in cases where an objectively determined price is paid to do so.²⁷³ Merges claims these rules “are best described as ‘take now, pay later.’”²⁷⁴ These sets of rules allow the use of an entitlement by anyone who wishes to do so as long as adequate compensation is paid later.²⁷⁵ Merges describes the concept of eminent domain as the quintessential liability rule, but in the IP context, compulsory licenses fall distinctly into this category of rules. Finally, Calabresi and Melamed define inalienable entitlements as those whose transfer are “not permitted between a willing buyer and a willing seller.”²⁷⁶ In the context of copyright law, moral rights which continue to vest in the original author of a work regardless of copyright transfer and may not be sold or transferred themselves fall into this category of inalienable entitlements.

Merges criticises the use of liability rules to govern IP licensing for a number of reasons. First, compulsory licenses create standardised and inflexible valuations for a diverse body of goods.²⁷⁷ Second, standardised valuation creates a price ceiling that results in top-down bargaining outside the compulsory scheme.²⁷⁸ Third, compulsory license valuations are a legislated mechanism and are subject to pitfalls of the current legislative system including disproportionate influence from lobbyists and difficulty of revision leading to system obsolescence.²⁷⁹

One of the main difficulties in using liability rules for creative content is setting valuations. The value of certain pieces of content can fluctuate tremendously both across and within media. For

²⁷² Ibid. at 1092

²⁷³ Ibid.

²⁷⁴ Merges (1996) Supra n.267 at 1302

²⁷⁵ Ibid.

²⁷⁶ Calabresi and Melamed (1972) Supra n.270 at 1092

²⁷⁷ Merges (1996) Supra n.267 at 1311

²⁷⁸ Ibid. at 1305

²⁷⁹ Ibid. at 1313

example, how can a standardised rate for use of a film clip be set by a government body when the use of a clip from a Hollywood blockbuster like Star Wars would command a significantly higher license fee than a less-known independent film. Moreover, can the rates for films, music, and images be standardised across the board? These are difficult but not insurmountable problems. First, the historic use of compulsory licenses in the music industry provides some guidance for how to deal with intra-media price discrepancies (ignore them). Second, other academics discussed later in this thesis have begun to offer novel solutions to this problem.

The notion that compulsory licenses create a price ceiling is admittedly true. In his analysis of the mechanical license for musical compositions in the United States, Howard Abrams wrote that “even the most popular or potentially most popular songs normally cannot obtain more than statutory rate for their mechanical licenses in the current context of the music industry except in the rarest circumstances, if at all.”²⁸⁰ Moreover, the government scheme for mechanical licensing has become relegated to nothing more than a price ceiling as it is only rarely actually used. Abrams found that in 2008 only 274 notices of intent to invoke the compulsory license were filed with the U.S. Copyright Office.²⁸¹ Compared to the 2.44 million mechanical licenses issued by the Harry Fox Agency in 2008, Abrams made it clear that music publishers and those looking to license content preferred to negotiate licenses privately despite the existing government scheme.²⁸² Abrams attributed this largely to the stringent and atypical payment requirements of the scheme compared to industry standards.²⁸³ However, the notion that the legislated license rate remains the ceiling for bargaining in private settings holds true.

Merges also argues that the fixed or inflexible nature of royalty rates will, over time, inevitably become problematic. Merges claims that the disparity of difficulty in passing new legislation compared to preventing it or maintaining the status quo results in quickly outdated

280 Abrams, H.. ‘Copyright’s First Compulsory License.’ (2010) Vol. 26, Santa Clara Computer and High Tech L.J.. 215. at 235

281 Ibid. at 238

282 Ibid.

283 Ibid. at 240

license rates.²⁸⁴ For example, the original mechanical license rate of 2 cents per use that was established in 1908 went unchanged until 1978²⁸⁵ despite the fact that the retail price for a one-song phonorecord quadrupled over this time.²⁸⁶ This resulted in what was originally functionally an 8 percent royalty falling to 2 percent simply because of the legislative body's failure to adjust the rate according to inflation.

Merges uses this evidence to claim that the mechanical license and any future compulsory licenses are “not an effective solution to the problem of high transaction costs” and counsels against adoption of rigid legislative liability rules.²⁸⁷ Merges, however, pivots slightly and concedes that one “might function as an effective solution under different circumstances.”²⁸⁸ In the world of modern intellectual property, the circumstances are in fact far different. Merges's criticism of compulsory licensing as a solution is understandable, but it is also premised on factors that are no longer present. For Merges's argument that private sector licensing bodies are more efficient and effective than governmental ones to succeed, it relies on a clear and fair body of law within which the private sector may operate. Merges presupposes this point because in the 1990s copyright law felt much more defined than it does today. His article was published three years before the inception of Napster and in a time where copyright had not yet fallen prey to the wild west of the internet. While the law remains well defined, yet ill equipped to fight, with respect to piracy, in the 20+ years since Merges's paper, new media in the realm of user-generated content has rendered the law far more vague in its limits of protection.²⁸⁹ Therefore, there are not clear legal boundaries within which the private sector can collectively license. The result has been the inception of various collective licensing bodies that freely and openly operate in a predatory manner such as YouTube's

284 Merges (1996) *Supra* n.267 at 1312

285 *Ibid.* at 1310

286 Abrams (2010) *Supra* n.280 at 233.

287 Merges (1996) *Supra* n.267 at 1315-16

288 *Ibid.* at 1316

289 *See*: Chapter 1 E(ii)e

Content ID system. While the Content ID system is undoubtedly more *efficient* than any government-created licensing body could hope to be, it cannot be valued by its efficiency alone.

F. Conclusions

The internet has had an unforeseeable impact on the way in which copyrighted works are consumed and disseminated. It has lead to the absolute loss of control over creative works once they are published in any sort of digital form. Meanwhile, the current system of copyright protection first conceptualised in the 18th century is absolutely reliant on control over creative works for successful protection. Modern adaptations to copyright law and enforcement technologies such as the notice and takedown system, DRM, and gatekeeping software are all designed at using technology to re-assert the necessary control to maintain the functionality of the current copyright system. However, these legal and enforcement mechanisms not only fail in re-creating property-like control over copyrighted works but they simultaneously neglect other important aspects of the law such as exceptions to infringement and free speech. If the root of the problem with the modern copyright dilemma is lack of control, then a proper solution will not rely on it. Liability rules offer such an alternative. The implementation of liability rules in lieu of property ones in copyright law will allow us to stop fighting for control over copyrighted works online and focus on the purpose of copyright law- getting artists compensated for their creations so that they may continue to create. The following sections of this thesis will begin to offer the foundation for implementation of liability rules in copyright law.

III. A Theoretical Analysis of Users' Rights and How to Balance them Against those of Creators

A. Introduction

The previous chapter discussed the inefficacy of property-based mechanisms for copyright enforcement in the digital space. It represented the practical argument for the expansion of liability rules in copyright law. This chapter is designed to take a philosophical approach, furthering the same point from a different perspective.

Aside from the ineffectiveness of property-like enforcement mechanisms online, there is another reason why perhaps a shift away from this system would be ideal. With the internet and new technologies have come a generation full of creators. The internet is ideally suited for the propagation of amateur creativity and consumer technology has made it easy for the average user to have access to the necessary tools and skills to be a creator. Moreover, the lines between amateur and professional creativity are far more blurred than they were 30 years ago. The content industry is no longer composed solely of a few large corporations yet the rules are still built for such a system. Instead, there are millions of would-be creators, or “users,” online who lack the resources to take advantage of the current system in the same way that their corporate counterparts can. As it stands, copyright law creates a barrier to a lot of amateur creativity and a steep paywall to professional creativity. Copyright reform has led to a dilution, and sometimes disintegration, of both the public domain and the rights offered under exceptions to infringement coupled with the fact that licensing opportunities are often not realistically achievable for average creators.

Copyright law will be forever a delicate balance between the rights of content owners and the rights of users. Historically, this balance has been struck via absolute ownership tempered by various “safety valves” of exceptions to said control.²⁹⁰ Yet throughout the last few decades we

²⁹⁰ Trosow, S., 'The Illusive Search For Justificatory Theories: Copyright, Commodification And Capital' (2003) 16 Canadian Journal of Law & Jurisprudence, pg. 220. (Arguing that “these safety valves are the fair use/fair dealing doctrine, the idea/expression dichotomy, the originality requirement, the limitation on the duration of copyrights, and the concept of the public domain.”)

have seen gross expansion on the ownership side of the balancing scale²⁹¹ coupled with arguably synchronous diminution of safety valve provisions.²⁹² While proponents of these changes will argue that they have been necessary to incrementally update an out-of-date system and keep it aligned with the digital era, the result has been a tangible shift in the balance of power between owners and users. In 2003, Brian Fitzgerald wrote:

[t]he great divide, which has been exacerbated by the rise of the digital generation, is between content owners (Theories 1 and 2) and users (Theory 4). My sense is that the theory will fuel the rhetoric of this fiercely contested debate and that the prevailing economic, social, and cultural tradition will define its victor.²⁹³

This chapter has three goals. First, it will seek to analyse what exactly the rights of users *should* be. It will do so through analysis of four major theories of copyright law within the scope of users' rights. These theories are economic, labour, personality, and utilitarian. Second, in doing so, it will make the case that users have been disenfranchised by the current system. There is an imbalance of power characterised by extensions of term limits for copyrighted works, an increased protectionist philosophy for treatment of secondary uses, and a functional lack of access to proper licensing mechanisms for average users. Third, it will argue that a rebalancing must occur to not only restore users' legal standing but also that the historical property model of copyright law is unsuitable for such a rebalancing and should be restructured accordingly.

B. Philosophical Theories of Copyright Law

i. Introduction

Copyright law is justified and explained by various philosophical theories. This section will analyse three primary philosophical justifications for copyright law within the scope of users' rights. These three theories are: appropriation theories, economic theories, and utilitarian theories.

²⁹¹ Ibid. at 221.

²⁹² See: Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (For an example on how Europe is restricting users' rights that will be discussed in depth in a later chapter).

²⁹³ Fitzgerald B, 'Theoretical Underpinning Of Intellectual Property: "I Am A Pragmatist But Theory Is My Rhetoric"' (2003) 16 Canadian Journal of Law & Jurisprudence, pg. 189

Ultimately, it will aim to show that each theory supports a far more liberal interpretation of users' rights than is currently granted by the law today. This is true particularly with respect to the creation of derivatives. While each theory supports strong copyright protection for the right of reproduction, none of them support an absolute right to make derivatives as well.

ii. Appropriation Theories

Appropriation theories for copyright law are best described through a quote from Lysander Spooner: "he who does discover or first takes possession of, an idea, thereby becomes its lawful and rightful proprietor; on the same principle that he, who first takes possession of any material production of nature, thereby makes himself its rightful owner."²⁹⁴ This section will analyse two of the more prevalent appropriative theories of copyright law: Lockean and Hegelian philosophies. Both theories are creator-centric, using notions of labour or self-actualisation by or of the individual creator to justify protection of her creations. Finding the intersection of users' rights within these theories of legal justification relies on analysing the impact of secondary uses on concepts of original labour and self-actualisation. I find that, from the Lockean perspective, many secondary uses do not violate the justified exploitation of the fruits of the original creator's labour. Moreover, users are entitled to their own right to appropriate from works of intellectual creation that can be considered part of the commons- even when those works are not legally part of the public domain. From the Hegelian perspective, some but not all secondary uses *may* impact the creator's sense of self-actualisation through her work but only when those secondary uses are believed to originate from the first creator and, more importantly, when those uses are not paid for.

²⁹⁴ Palmer, T.G., 'Are Patents and Copyrights Morally Justified? The Philosophy of Copyrights and Ideal Objects' (1990) *Harvard Journal of Law and Public Policy*, 13, 816-65 at 823.

a. Labour Theory: Locke

Philosopher John Locke is likely the father of modern copyright law²⁹⁵ and is still regularly cited in modern court opinions.²⁹⁶ Application of his theories to copyright law often rely on transposition of his remarks on property rights found in Chapter V, "Of Property," from the *Second Treatise of Government*, to intellectual property concepts.²⁹⁷ However, his *Liberty of the Press*,²⁹⁸ which specifically addresses intellectual property issues, is of particular value as well. Lockean theory of property is also referred to as "labour theory" and is founded on the notion that men and women have a property right in the fruits of their own labour. Lior Zemer summarises this perspective as follows:²⁹⁹

By mixing his labor with a commonly owned object, the labourer becomes the owner of the object. He has annexed something to it 'more than Nature, the common Mother of all, had done.'³⁰⁰ Labor justifies the integration of a physical object into the laborer's realm, the *suum*,³⁰¹ and the result is ownership.³⁰²

Locke adamantly advocates that any violation of an individual's property right is an unacceptable and unlawful intrusion.³⁰³ However, while often seen as a creator-centric philosophy with respect to

295 Zemer L, 'The Making Of A New Copyright Lockean' (2006) Harvard Journal of Law and Public Policy. Pg. 904. (Where Zemer draws a comparison between Locke's recommendations for authorial rights to substitute the Licensing of the Press Act.)

296 See: *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-3 (1984) The Court held:

The "general perception of trade secrets as property is consistent with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labor and invention.'"

See also: *CCH Can. Ltd. v. Law Soc'y of Upper Can.*, [2004] S.C.R. 339, 15. The Court held:

There are competing views on the meaning of "original" in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright. This approach is consistent with the "sweat of the brow" or "industrious-ness" standard of originality which is premised on a natural rights or Lockean theory of "just desserts [sic]," namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be "original" and thus protected by copyright. This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that are the product of creativity will be rewarded with copyright protection.

297 Locke, J., *Two Treatises of Government*, Second treatise §24-50, McMaster University Archive of the History of Economic Thought. [1999] ProQuest Ebook Central, <http://ebookcentral.proquest.com/lib/suss/detail.action?docID=3117731> [hereinafter Locke, Second Treatise].

298 Locke, J., *Liberty of the Press* (1695), reprinted in *Locke: Political Essays* (Mark Goldie ed., 1997) 329 [hereinafter Locke, *Liberty of the Press*]

299 Zemer L, 'The Making Of A New Copyright Lockean' [2006] Harvard Journal of Law and Public Policy, pgs. 915-16.

300 Locke, Second Treatise § 45 pg. 123-4

301 Ibid. § 28, pg. 117

302 The *suum* means "what belongs to a person is what is one's own." See Olivecrona, K., Appropriation in the State of Nature: Locke on the Origin of Property, [1974] 35 Journal of History and Ideas. Pg. 225.; See also: Buckle, S., Natural Law and the Theory of Property: Grotius to Hume. [1999] Clarendon Press. Pgs. 169-74

303 Zemer (2006) Supra n. 299 at 917-18.

copyright law, Locke placed similar emphasis on protection for the collective.³⁰⁴ Therefore, “any violation of the collective right by virtue of disproportionate enclosures of cultural and social portions of the public domain violates the public’s property right in its labor.”³⁰⁵ In fact, Lockean justifications for copyright law carry a delicate balance between the rights of the creator and those of users- or what Locke describes as the “commons.” Moreover, analyses of Locke’s theories indicate that he placed higher interest on the community’s wellbeing than that of the individual.³⁰⁶

With respect to the balance between individual property rights and those of the common, Locke invoked his principle of “no harm.” Lockean philosophy dictates that when a property right is created, the unauthorised use or taking of that property by third parties harms the labourer and should be unlawful.³⁰⁷ The no-harm proviso tempers rights of a Lockean property owner based on how that ownership affects the collective. The “no harm” proviso also carries with it three conditions. First, the labourer may appropriate only the amount that he is able to use.³⁰⁸ This is known as the “no-spoilation proviso.”³⁰⁹ Second, one may appropriate from the common only where there is “enough, and as good left in common for others.”³¹⁰ Third, Locke indicates a charity proviso whereby, in extreme circumstances, commoners may take and consume the private resources of others.³¹¹ However, when applying these notions, particularly conditions one and two, to intellectual property instead of real property, problems occur. As Hughes observes:

Physical property can be used at any one time by only one person or one coordinated group of people. Ideas can be used simultaneously by everyone. Furthermore, people cannot be excluded from ideas in the way that they can be excluded from physical property. You may prevent someone from publicly using an idea, but preventing the private use of ideas may not be possible. These two basic differences between ideas and physical goods... suggest that ideas fit Locke’s notion of a ‘common’ better than does physical property.... With physical goods, the inexhaustibility condition requires a huge supply. With ideas, the inexhaustibility condition is easily satisfied; each idea can be used by an unlimited number of individuals.³¹²

304 “For this ‘labour’ being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to at least where there is enough, and as good left in common for others.” Locke, Second Treatise §26, P. 116

305 Zemer (2006) Supra n. 299 at 917-18

306 Favale, M., ‘Death And Resurrection Of Copyright Between Law And Technology’ (2014) 23 Information & Communications Technology Law, pg. 120

307 Zemer (2006) Supra n. 299 at 918

308 “Nothing was made by God or Man to spoil or destroy” Locke, Second Treatise supra n.297 at §30, 117-118

309 Zemer (2006) Supra n. 299 at Pg. 919

310 Locke, Second Treatise Supra n. 297 at §27, 305-06.

311 Zemer (2006) Supra n. 299 at 919

312 Hughes, Justin. ‘The Philosophy of Intellectual Property’ (1988) 77 Georgetown Law Review, pg. 315

When we look at users as not usurpers of property but rather secondary creators with valid appropriation rights of their own, the Lockean perspective becomes clear. That is to say, this perspective is best applied to users' rights in two points. First, copyrighted works are works of ownership, but that ownership shall be tempered where communal use is necessary. In a sense, aspects of copyright protection should be communally owned. Second, accepting that copyrighted works represent commonly owned goods within a Lockean understanding, then the addition of labour to copyrighted works is not only permissible but creates separate ownership in the secondary work to be vested in the secondary author. This argument is, in some senses, supported by modern legal frameworks as it underpins modern notions of fair use and fair dealing- especially those that address works of transformation.³¹³ However, these assertions must be parsed and boundaries articulated. Otherwise, the smallest changes to a copyrighted work could be interpreted to create new authorship. Yet the current law does not support enough freedoms for users to appropriate works protected by copyright by adding their own labour.

Copyrighted works, while valid pieces of property, remain at least partially in the commons. Some scholars have criticised Locke's philosophy for being too individualistic in nature. They claim that copyrighted works should actually be collectively owned. Zemer provides an excellent outline of these criticisms in his paper, *The Making of a New Copyright Lockean*:

For example, Tom Palmer once noted that if rights are to be recognized in works of art and authorship anywhere, "they should be in the audience, and not in the artist, for it is on the audience that the art work depends for its continued existence, and not on the artist."³¹⁴ Rosemary Coombe argues that the creation of cultural commodities is an essential process that involves the collective as much as it involves the individual author.³¹⁵ Margaret Chon claims that "the production of a 'work' that is subject to protection by copyright is an activity undertaken by both author and audience."³¹⁶ Carys Craig observes that because "the interdependent nature of human culture means that intellectual works are necessarily the products of collective labour" they "ought to be owned collectively."³¹⁷ Susan Scafidi remarks that as members of a

313 In the United States, works considered to be a fair use by transformation are permitted under fair use and given their own copyright protections.

314 Palmer, T.G., 'Are Patents and Copyright Morally Justified? The Philosophy of Property Rights and Ideal Objects,' (1990) 13 Harv. J.L. & Pub. Pol'y, pg. 848

315 Coombe, R.J., 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue,' (1991) 69 Tex. L. Rev., pg. 1863

316 Chon, M., 'New Wine Bursting From Old Bottles: Collaborative Internet, Art, Joint Works, and Entrepreneurship,' (1996) 75 Or. L. Rev., pg. 264

317 Craig, C.J., 'Locke, Labor and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law,' (2002) 28 Queen's L.J., pg. 36

cultural unit we “already share the same culture and jointly ‘own’ its cultural products.”³¹⁸ In other words, these scholars argue that the public’s contribution to the creative process amounts to labor.

Consumers, audiences, and users play a distinct role in the creation of value in creative works.

Without them, in fact, a work has no value to exploit. This role that cultural consumers play, however, may not amount to labour which would justify a property right under Lockean philosophy. Locke vigorously disapproved of the misappropriation of another’s labour³¹⁹ and it is hard to frame the act of appreciating the results of another’s labour as a laborious contribution that justifies a property right. Regardless, creative works that become particularly important to certain communities become pieces of their cultural heritage. William Fisher describes seven distinct categories of raw materials with which a Lockean labourer may add his labor:

- a. the universe of “facts”; b. languages-the vocabularies and grammars we use to communicate and from which we fashion novel intellectual products; c.our cultural heritage – the set of artifacts (novels, paintings, musical compositions, movies, etc.) that we “share” and that gives our culture meaning and coherence; d. the set of ideas currently apprehended by at least one person but not owned by anyone; e. the set of ideas currently apprehended by at least one person; f. the set of all “reachable” ideas-that is, all ideas that lie within the grasp of people today; [and] g. the set of all “possible ideas” – that is, all ideas that someone might think of.³²⁰

Cultural heritage is distinctly mentioned. The ability to use existing culture as a starting point for the creation of new works is necessary for a functioning social dialogue through creation. However, copyright law currently impedes this dialogue and interaction with culture by gatekeeping cultural heritage. Where ideas are a limitless resource, it cannot be said that copyright law fails to leave *enough*, in the Lockean sense, for the public to make use of. Yet, within the paradigm of cultural heritage, some ideas and expressions of those ideas are more important than others. Placing legal fences around a society’s most important pieces of cultural identity is a violation of the “as good” portion of the no harm proviso regardless of the labour involved in creating them. For example, while there is limitless potential for the creation of stories based in outer space, for the purposes of cultural interaction and dialogue, the ability to build on and use the Star Wars stories is of far more

318 Scafidi, S., ‘Intellectual Property and Cultural Products,’ (2001) 81 B.U. L. Rev., pg. 810

319 “...he desired the benefit of another’s pains, which he had no right to...” Locke, Second Treatise supra n.297 at §33, pg. 119

320 Fisher, W., ‘Theories of Intellectual Property,’ in *New Essays in the Legal and Political Theory of Property* [2001] Stephen R. Munzer ed. Pg. 186.

importance to a creator than the ability to create a new story. The Star Wars stories are socially relevant and distinct pieces of modern cultural heritage. Legally restricting derivative authors from building on these stories impedes their ability to add labour to a foundational raw material of creation- cultural heritage. However, this behaviour is easily confused with the notion of “free-riding” whereby an author creates a derivative with the sole purpose of profiting off of the established popularity and goodwill of the existing work. Lockean philosophy does not support free-riding and neither should the law. However, a balance can be struck between enabling access and preventing free-riding by using liability rules for derivative rights instead of property rules.

The monopolisation of cultural heritage is theoretically balanced in the law by the public domain- a realm of absolute commons that all creative works eventually fall into. However, cultural dialogue takes place in the present, not the past. Yet it would be an extreme rarity for anyone to live to see a work created during their lifetime enter the public domain. The lengthy time limits placed on copyright protection ensure this. Therefore, while the public domain does provide a commons of culture, it is not the culture *relevant* for a social dialogue because it is often generations old. It is therefore an inadequate substitute for a functioning commons of culture.

A Lockean creator has the right to claim a property right in the products of her creative labour. However, she may not do so at the expense of the commons. Creative works remain parts of the commons both by virtue of consumer contribution and their designations as cultural heritage. As a result, users should be able to add their own labour to existing creative works as they represent raw materials for the creative process. This philosophy in no way supports direct copying but should limit the power of copyright law to oppose unauthorised derivatives. Wendy Gordon argues that, in terms of Lockean philosophy, attributing an absolute property right to creators is conceptually wrong.³²¹ Such a right unfairly compresses the entitlement of the public.³²² I agree with both Gordon and Favale in their conclusion that a liability right, not enforceable by injunction,

321 Gordon, W., ‘A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property’ (1993) 201 Yale Law Journal pg. 1540

322 Favale (2014) Supra n. 306 at 121

is the most appropriate solution as it would protect the fruits of a creator's labour while allowing access for secondary creativity and thus safeguarding users' rights to the commons.³²³

b. Personality Theory: Hegel

The Hegelian perspective is founded on the idea that "property provides a unique and especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person."³²⁴ Once the ideas are appropriated, the creator's sense of self and well-being are intrinsically tied to the fate of the creation. Thereby comes the rationale for providing individual protection to those creations.³²⁵ While many common law countries such as the United States and the United Kingdom apply mixtures of economic and Lockean justifications for their copyright laws, much of continental Europe applies a more Hegelian, individual-centric, justification to their copyright laws. As such, Hegelian philosophy supports stronger protections for the integrity of a work and its author- known as moral rights that are found in European law but noticeably absent from that of the United States.³²⁶ Despite seeming like a philosophy focused on strongly protecting both authors and their works, Hegelian philosophy supports a liberal system of users rights under certain circumstances. These circumstances are namely where the integrity or reputation of an author is not harmed by virtue of secondary uses of her works and when those secondary uses are paid for, thereby recognising the property rights of the first author and, by extension, her personhood.

Hegelian philosophy supports secondary uses of creative works where the integrity or reputation of an author is not harmed. Because Hegelian philosophy is based on the intrinsic relationship between an author's personhood and her work, it is most often used to justify moral rights in copyright law. These rights are typically expressed as the right to paternity, or the right to claim authorship and be identified as the author of a work, and the right of integrity, or the right to

³²³ Ibid.

³²⁴ Hughes, J., 'The Philosophy of Intellectual Property.' (1988) 77 Georgetown Law Review, pg. 330

³²⁵ Becker, L. C., 'Deserving to Own Intellectual Property.' (1993) 68 Chicago-Kent Law Review, pgs. 610, 626-29.

³²⁶ The U.S. has very narrow moral rights protections which are limited only to some forms of visual art. See: 17 U.S.C. §106A

object to any distortion, modification, or derogatory treatment of one's work that would lead to harm of the author's reputation.³²⁷ However, the appropriation of another's work rarely results in reputation harm for the original author. In order for such harm to occur, two factors must be present. First, the secondary use must be distorted or modified in such a derogatory way that the author should feel an attack on her personhood by the use. Second, the secondary use must also present itself as or be reasonably confused to be the work of, or at least condoned by, the original author.

The first factor is subjective and difficult to measure. For instance, J.K. Rowling has stated publicly that she supports fan fiction based on her works except in cases where her characters are used in sexually explicit stories.³²⁸ However, S.L. Armstrong describes her feelings towards all types of fan fiction as such: "My knee-jerk reaction is I wouldn't like it and would want it to go away because those characters would never BE in those situations and I feel it detracts from what my purpose with them is."³²⁹ Moreover, some degrees of harm to one's reputation are already accepted today. For example, most jurisdictions allow for some uses of a work without permission for the purposes of criticism and review. Not all criticisms and reviews will be positive and it is reasonable to believe that the negative ones will negatively impact the reputation of the author under criticism. Defining what constitutes an attack on one's personhood is, at least, difficult and likely impossible. The standard of what an acceptable distortion may be will invariably differ from author to author and any legal standard outside of absolute rigidity will leave some authors craving more protection. Yet, such a rigid standard is unnecessary under Hegelian philosophy because, even if the standard were adequately defined, most secondary uses still cannot be said to violate an author's personhood.

327 Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, art. 6bis, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (1986)

328 'Rowling Backs Potter Fan Fiction' (*News.bbc.co.uk*, 2020) <<http://news.bbc.co.uk/1/hi/entertainment/3753001.stm>> accessed 21 May 2020

329 Armstrong, S. 'Fanfiction and Copyright' (2010) <<https://slarmstrong.wordpress.com/2010/05/08/fanfiction-and-copyright/>> accessed 27 August 2019

The second factor is most important to users' rights, however. Only secondary uses that are falsely presented as the work of the original author, or easily confused as such, may cause harm to that author's reputation and thus her Hegelian personhood. Secondary uses, like original works, represent a form of Hegelian self-actualisation for the secondary author with the same sense of personhood attached to them as original works hold for original authors. Hegel argues "everyone has the right to make his will a thing or to make the thing his will, or, in other words, to supersede the thing and transform it into his own..." indicating that the property right is created by personal attachment- an attachment that may be superseded by another.³³⁰ This line of reasoning appears to be disqualified by Hegel's own statement "a second party cannot take possession of what is already the property of someone else."³³¹ However, Hegel speaks apparently in reference exclusively to concrete objects ("taking possession of a thing makes its *matter* my property"³³²). Moreover, secondary creativity results in the creation of an entirely new work, one whose existence is the result of the secondary author's personality. Therefore, she does not seek to take possession of an otherwise owned work, but rather the newly-created work which may be viewed as ownerless. Just as one may take ownership in logs crafted from a day's work of felling trees and another may take ownership in a house they have built from the same logs, artistic creations may serve as building blocks for future creations. Moreover, when the secondary creator presents the secondary work as her own, there can be no harm to the reputation of the creator of the original work as she has no attachment to the new work outside of supplying creative raw materials. The crux of this process of transfer and re-appropriation is, however, payment.

Hegelian philosophy supports secondary uses of intellectual property when they are paid for because payment represents a recognition of artistic personhood. Payment to use a work serves as an acknowledgement of an individual's claim over the intellectual property and through such

330 Hegel, G.W.F., *Elements of the Philosophy of Right*, edited by Wood, A.W., Cambridge University Press, 2003 §44 pg. 76

331 Ibid. §50 pg. 81

332 Ibid. §52 pg. 82

acknowledgement, the content owner is recognised as a person.³³³ Hughes cites this notion of “recognition” as an important factor in the self-actualising nature of creative property and argues it must not be mere “lip service.”³³⁴ Recognition is manifested through actions, via the treatment of one’s property, not by any statement or verbal acknowledgement.³³⁵ To acknowledge the creator of a work as such but then go on to use her work without permission or payment is insufficient for Hegelian recognition. However, the act of payment can serve as such and “purchasers of a copyrighted work or licensees of a patent form a circle of people recognising the creator as a person.”³³⁶ Moreover, this income promotes further self-actualisation in that it may facilitate further expression.³³⁷ For an artist, the generation of revenue means the ability to fund more creative endeavours and likewise maximise personality. Thus, personality theory will support users’ rights to appropriate works when those uses are paid for.

c. Economic Theory

Copyright law is often justified not only by philosophical theories but economic ones as well. Theoretically, copyright law is used as a tool to correct market imperfections inherent to the economics of the creative industries. There are two characteristics of intellectual property, specifically copyrighted works, that create market imperfections not typically seen with tangible property. First copyrighted works are non-rivalrous.³³⁸ This means that a creative work may be enjoyed an infinite amount of times by an infinite number of people without depleting others of further enjoyment.³³⁹ This affects the competitive nature of intellectual creations as there is little direct competition between works, even in the same medium or genre, as the sales of one will not necessarily deplete the need for another similar work. Second, intellectual creations are non-

333 “Contract presupposes that the contracting parties recognize each other as persons and owners of property...” Ibid. §71 page 103. See also: Hughes (1988) Supra n. 324 at 349

334 Hughes (1988) Ibid at 349

335 Ibid.

336 Ibid.

337 Ibid.

338 Favale (2014) Supra n.306 at 125

339 Ibid.

excludable.³⁴⁰ This means that it is not always possible to prevent people who have not purchased or paid for the works from accessing and enjoying them.³⁴¹ This particular characteristic of expressive works has become exacerbated in the digital environment. This unique characteristic of expressive works not found in real property or goods facilitates free-riding behaviours- or the use and benefitting from the work without paying for its consumption.³⁴² This is considered a market failure as it will result in a decrease in the desire to create marketable expressive works due to the difficulty to recuperate investments and profit from those works. Copyright law is designed to correct these market failures by offering creators a bundle of exclusive rights intended to facilitate compensation and thereby promote creativity.³⁴³ This theory is derived from classical economics. However, the more prevailing neoclassical economic theory that governs copyright law today can be summarised as such: copyright protection corrects the public-good characteristics of expressive works, by turning them into vendible commodities.”³⁴⁴ Yet, while copyright law has been able to adequately correct these stated market failures inherent to expressive works for the last three centuries, the age of the internet and digital technologies has rendered the law less capable of doing so. Moreover, while economic theory undeniably supports a strong right of reproduction in copyright law, the evolution of strong derivative rights³⁴⁵ has come to undermine the notion of encouragement that underpins economic theory and copyright. From a user-centric perspective, this concept is paramount. When looking at the rights of users, the right to make derivative works serves as the greatest barrier to users’ rights of secondary creativity. While an economic theory of copyright justifies strong protections for the author’s rights of reproduction, it cannot be said to justify similar protections for derivative rights because derivatives are typically non-substituting,

340 Ibid.

341 Ibid.

342 Ibid.

343 Ibid.

344 Ibid.

345 In United States copyright law, the phrase “derivative right” is a legal term of art not present in other jurisdictions. Here the phrase is used generally to describe the bundle of rights offered in copyright laws all over the world that prevent the creation of unauthorised derivations not permitted by exceptions to infringement such as sequels, remixes, spin offs, and adaptations.

often have a net-zero or net-positive effect on revenue for the works on which they were based, and represent new additions to the creative economy which overall increase public welfare. Moreover a system of strong protection for derivative rights actually supports *underproduction* of creative works.

Economic theory supports expansion of users' rights to make derivatives because derivatives are non-substituting and typically have positive or no economic effect on their original counterparts. From an economic perspective, creative works are inherently non-substituting for one another. However, this is premised by the notion that any two creative works are at least different enough from each other to provide unique enjoyment to the same audience. As a result, pirated works and other facsimiles are obviously substitutive as they offer the same experience to the same audience. Derivatives, however, typically fall into the former category of works that, despite appealing to similar or the same audiences as the original works that they build upon, do so without siphoning revenue from them. In terms of economic effects on the originals they build upon, derivatives typically bolster sales of the works they adapt by raising or reawakening public awareness and interest in them.³⁴⁶ Much of the data on this comes from authorised derivatives. However, unauthorised derivatives would likely have similar effects.

The economic justification for copyright can also be described as an encouragement theory in that it is designed to encourage the production of creative works through economic incentives. The economic justification for copyright law is based on four premises. First, a growing body of creative works are necessary for social wealth. Second, without protection, the cost of creative works would diminish to a value marginally higher than the cost of making a copy of those works and in the digital world this value is often functionally zero. Third, without the ability to profit from

346 'Confirmed: Radiohead Landed On Charts Because Of Remix Tracks (Updated)' (*WIRED*, 2020) <<https://www.wired.com/2008/04/confirmed-radio/>> accessed 21 May 2020 (showing how Radiohead made the top 100 because of remixes); *See also*:

"'Old Town Road' Just Became Billboard's Longest-Running No. 1 Ever" (*Vox*, 2020) <<https://www.vox.com/culture/2019/7/29/8937934/lil-nas-x-old-town-road-billboard-charts-record-breaking-single>> accessed 21 May 2020 (explaining how remixes of old town road kept interest piqued)

See also: Knight, M., 'The World of Fan Fiction: Where Creative Expression and Copyright Collide' (*Articles.ibpa-online.org*, 2017)

<<https://articles.ibpa-online.org/article/the-world-of-fan-fiction-where-creative-expression-and-copyright-collide/>> accessed 21 May 2020 (IBPA article telling authors to encourage their fans to write and publish fan fiction based on their works because it can boost sales.)

their creative works, creators will stop creating altogether- or at least at a rate that would significantly diminish the output of creative works and likewise social wealth. Fourth, copyright protection counteracts this market failure by ensuring financial exploitation of creative works for a period of time and thereby incentivises production of new works. Premise one is easy enough to accept and a philosophical discussion about the value of art in society is outside the scope of this thesis. Premise two is also easy to accept as it is factually true. However, premises three and four are less certain. First, can we be certain that without copyright protections we would see such a significant decrease in creative output? Are financial motivations significant enough in the creative process for this to be true? The answer will vary depending on the creative sector. There are thousands of musicians in London alone playing gigs for tiny audiences and recording albums that may only be heard by a handful of people. It is hard to believe that these creators, who are more than likely losing money by making their music, would stop creating if there were no laws protecting the financial integrity of their creations. However, it is also equally hard to believe that Disney would have invested the 356 million dollars it took to make the most recent Avengers film without the ensured protections offered by copyright law. It is therefore likely that, without *any* sort of copyright protections, the creative industry would not die altogether but would look vastly different than it does currently. However, the fourth premise is most important for understanding economic theory and the rights of users. Does copyright law actually incentivise production of *new* works? A look at the creative landscape of popular culture today indicates that perhaps it does not. In fact, if anything, copyright law seems to incentivise the financial exploitation of *existing* works over the creation of new ones. Instead of seeing an incentive to create new works, we are seeing the creative industries using copyright powers to release the same creative content over and over until it is no longer economically viable. We are living in the age of the sequel and reboot. Under the current copyright system, we do not have a healthy economy of creative works. Instead we have an oligopoly of content owners selling us new or slightly different iterations of the same stories over

and over again. The potentially enormous value of a copyright coupled with its finite time period does not incentivise the creation of *new* works but rather the exploitation of existing popular ones.

This problem is reminiscent of the “chicken and egg” paradox.³⁴⁷ On one side, the power of a valuable copyright incentivises content owners to reinvest in existing works until they are no longer economically valuable- a deterrent to *new* creation. However, theoretically, this power likewise promotes the creation of new works by virtue of their potential economic value in the future and for years to come. The incentive theory, in this way, functions much like a lottery ticket. The potential for massive wealth encourages people to buy a ticket. However, it is hard to imagine someone continuing to purchase new lottery tickets after winning a life-changing jackpot- not even necessarily out of complacency but more so because there are plenty of more secure ways than buying lottery tickets to continue to accumulate wealth if you have a massive fortune at your disposal. This analogy admittedly does not accommodate for the idea that there are millions of creators who create out of passion- not the potential for wealth. However, the fact that popular culture is dominated by creative corporations is likewise inarguable. Disney built a creative empire on the back of a handful of great stories. Now, it seems more interested in milking those stories dry while their copyrights are still valid than investing in new ones.³⁴⁸

Limiting derivative rights in a way that opens access for third parties to easily make them would siphon the majority of the economic value of a copyright into the right of reproduction, or the actual work itself. This is not necessarily a bad thing. While derivatives are a viable market and revenue stream for a copyright, they are far from the *only* one and potentially outside the scope of copyright protection anyway. While copyright law explicitly does not protect ideas, derivative rights functionally do. They protect an infinite amount of yet-to-be-expressed ideas with respect to an existing expression. For example, the copyright for Harry Potter and the Sorcerer’s Stone, book

347 Which came first?

348 Economic data shows that Disney has made over \$7 billion by remaking their old animated films into live action movies since 2010. 'Disney Remakes Have Made Over \$7 Billion Since 2010' (*The Independent*, 2020) <<https://www.independent.co.uk/arts-entertainment/films/news/disney-remake-box-office-gross-total-lion-king-a9028641.html>> accessed 21 May 2020

one in the series, not only protected the author, J.K. Rowling, from unauthorised reproductions of the book, but also gave her the sole power to write or authorise the writing of the 6 ensuing sequels, the theatrical play, and the two Crimes of Grindlewald spin-off films. These creative works were protected by virtue of derivative rights before they were ever conceived.

Ultimately, economic theory supports strong rights of reproduction because they are necessary to correct the market failures inherent to creative works. However, such market failures are not nearly as present with derivatives. The derivative right may be tempered under economic theory as long as free-riding is prevented. This can easily be achieved in a multitude of ways. Using compulsory licenses to limit the derivative right protects against free-riding because uses, while no longer requiring permission, will still require payment. Moreover, the right to exclude others from making derivatives may be allowed only in cases lacking an established standard of additional creativity. Finally, the law could be tailored so narrowly as to allow the continued protection of sufficiently delineated characters as a reproductive right, ensuring the protection against unauthorised sequels/prequels/spinoffs involving those characters and thereby streamlining protection limited only to potential markets that the original author may yet exploit. Under such a regime, the story of the life of Obi-Wan Kenobi would be protected for Disney alone to exploit, but original stories taking place in the Star Wars universe even those potentially making use of obscure characters would be allowed.³⁴⁹ This section, and this chapter even, is not the place to discuss which of these options has the most merit or would be most effective, but the point is that there are options for altering the derivative rights inherent in copyright law- even from an economic theory perspective.

³⁴⁹ See *Paramount Pictures Corp. v. Axanar Productions Inc.* WL 83506 (C.D. Cal. Jan. 3, 2017) for a real-life example of this same concept, where Axanar raised money to produce an original story based on an obscure character from Star Trek that took place in the Star Trek universe. The United States case was settled with the public terms of the agreement reflecting CBS's fan films policy which drastically altered the course of the proposed film.

d. Utilitarian Theory

Founded by philosopher, Jeremy Bentham, utilitarian philosophy is a formulaic approach to ethical questions that analyses the perceived effect of an action in terms of the happiness or pleasure it will create for a given number of people compared against the suffering it would reciprocally create for a given number of people. Bentham defines utility as:

that principle which approves or disapproves of every action whatsoever, according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.³⁵⁰

Under Benthamian Utilitarianism, all are equal and happiness and pain are measured on quantitative not qualitative scales; the happiness or suffering of one individual bears the same weight as that of another.³⁵¹ The appropriate solution to any moral or ethical dilemma is, therefore, whichever one leads to the least amount of suffering for the least amount of individuals- or conversely, the greatest pleasure for the greatest number of individuals.³⁵² While early copyright laws were largely utilitarian constructs,³⁵³ centuries of legal evolution influenced by individualism has led to a system of laws that no longer reflect utilitarian values. Sara Stadler writes in reference to American copyright law:

As a nation, we began with Bentham; but we have ended up with John Locke, and as a result, we find ourselves strangled by the very monopolies about which the Framers repeatedly warned in their public writings.³⁵⁴

A truly utilitarian copyright law would likely serve to promote social welfare by advancement of arts, sciences, and thereby learning. However, it would also reject the strong monopoly protections that often benefit individuals over society that have come to define the modern legal framework. Utilitarian philosophy supports liberal users' rights that must be carefully balanced against the minimum individualist protections necessary to promote creation.

350 Bentham, J., *An Introduction to the Principals of Morals and Legislation*, [1907, reprint of 1823 edition] Oxford Clarendon Press, available at <https://www.econlib.org/library/Bentham/bnthPML.html?chapter_num=2#book-reader> Chapter 1, §II.

351 Ibid. Chapter 4 §V. *See also*: Gorecki, O., 'Utilitarianism: Doctrinal Analysis Evolution of Thought.' [2017] Vol. 20, No. 5, Special Issue, *Annales. Ethics in Economic Life*. 141–153, at 143. doi: <http://dx.doi.org/10.18778/1899-2226.20.5.11>

352 Bentham (1907) *Supra* n.350 at Chapter 4, §V.

353 Stadler, S.K., 'Forging a Truly Utilitarian Copyright.' (2006) 91 *Iowa Law Review*, pg. 611

354 Ibid.

Applying the utilitarian formula to the question of copyright law protection leads to, perhaps, an answer inappropriately skewed in favour of users. Here there are multiple forms of happiness that factor into the equation. First, there is the intrinsic happiness of creators- their right to create without restriction.³⁵⁵ A secondary aspect of this happiness is the right to preserve the integrity of their creations.³⁵⁶ Second, there is the happiness of users and consumers. This encompasses both their ability to access creative works³⁵⁷ and utilise them in the creation of secondary works.³⁵⁸ Though the lines between user-creators and consumers have become more blurred, there are still far more consumers of creative works than there are creators. Therefore, a purely utilitarian construct would favour the overall happiness of this larger group of individuals and would open access to works for creative consumption. This, at first glance, seems to indicate that the most utilitarian copyright law would be *no* copyright law. However, with *no* protections in place at all, the output and quality of creative works would surely decrease and thereby diminish the happiness of the larger body of creative consumers. Moreover, later utilitarian philosophers noted that rigid application of the formula can lead to a tyrannical majority which imposes its will despite violating the rights of the minority individuals.³⁵⁹ Thus, a balance must be struck where the minimum amount of protections are offered to ensure the maximum output and quality of creative works and protect intrinsic rights of first creators, but still allow easy access to both consume and adapt those works for users and consumers. The logical response to this statement is something along the lines of: “is that not what we have now?” I previously discussed my thoughts on how the current law supports underproduction of creative works and the continued pervasiveness of piracy and various forms of unauthorised remixes³⁶⁰ indicate that the larger body of users and consumers

355 “The pleasures of skill.” Bentham (1907) n. 350 Chapter 5, §V.3

356 “The pleasures of a good name.” Ibid. Chapter 5, §VII.5

357 “The pleasures dependent on association.” Ibid. Chapter 5, §XV.13

358 “The pleasures of skill.” Ibid. Chapter 5, §V.3

359 Gorecki, O., ‘Utilitarianism: Doctrinal Analysis Evolution of Thought.’ (2017) Vol. 20, No. 5, Special Issue, *Annales. Ethics in Economic Life*. 141–153, at 147. doi: <http://dx.doi.org/10.18778/1899-2226.20.5.11>

360 This refers to remix in its broadest sense, encompassing traditional remixes of musical compositions and sound recordings as well as fan fiction, memes, video and musical mash ups, modded video games, machinima, etc.

are both unhappy with their ability to access and re-use creative works. The law we have now is *not* the utilitarian answer to copyright protection.

A more appropriate utilitarian answer for what copyright should look like is absolute protection for the right of reproduction (defence against unauthorised copies, fakes, and forgeries) coupled with a system of derivative rights governed by liability rules. The strict right of reproduction ensures commercial viability and ethical preservation of a copyrighted work and thus promotes creation. It protects the rights of the creative minority to ensure their happiness and stimulate creation. As consumer access will remain the same, piracy will surely continue but may be economically offset in other ways such as levies. Using liability rules to govern derivative works appeases both the user's desire for access to creative raw materials in the form of existing works and the content owner's desire to profit from her works. Liability rules create revenue streams for the content owner without unduly burdening the derivative creator with upfront payments for access. While such action would serve to diminish the overall economic value of a copyright by virtue of standardising the value of a derivative right- which for some works may be valued in the billions in the current economic market-³⁶¹ this decrease in the individual value of some works is offset by both the economic and social value of new creations able to enter the market. Moreover, this solves the dilemma I discussed earlier of an overprotecting copyright system that encourages creative underproduction once a creator owns a popular copyright. In reducing the derivative value of copyrights, this system encourages the continued production of entirely new works as they would have the strongest protections and therefore the highest potential economic value. This system looks first to the wants and needs of the majority population, but not in a way that tramples the rights of the minority. It is the ideal utilitarian compromise that offers something to everyone.

361 In 2012, Disney announced its purchase of Lucasfilm for \$4.05 billion. While the sale included all aspects of the Lucasfilm business, a large portion of the valuation came from the derivative rights to the Star Wars and Indiana Jones stories and characters.

C. The Disenfranchisement of the Common Creator

Up to this point, this chapter has discussed the main theories underpinning modern copyright law. These justifications, however, upon close inspection, do not actually *justify* the imbalanced system of rights we have in place today. Philosophical ethics have been pushed to the wayside in favour of corporate lobbying and capitalist individualism. The balance of rights between users and creators under the current system inarguably favours creators by a gross margin. Yet each of the theories discussed up to this point that have been in some way used to justify the modern system we have support a liberal balance of rights between the two groups. We have, however, allowed the law's evolution to be dictated by corporate lobbyists and, as such, we are left with a legal regime that systematically favours the increasingly fewer corporations that control the vast majority of the most valuable copyrights. This thesis is neither an advocacy of creative anarchy nor a marxist manifesto of creative protection. There should be protections in place for creative works and, in some aspects, those protections should be strong. However, the fundamental purpose of copyright law should always be the *promotion* of creative works and, in its current state, it is no longer doing so. The paradigm of creators versus users versus consumers has shifted and the rules designed for this trichotomy in the 18th, 19th, and even 20th centuries can no longer be applied. The previous chapter demonstrated the futility of the law in the modern iteration of this trichotomy. This chapter is intended to show the callousness of it. The law has become something that neither functions adequately nor represents something we should not want even if it did. Overprotection in copyright is a symptom of the same individualist philosophies that have lead to huge wealth disparities in countries like the United States. It is a legal blind eye to the wants and needs of common people at the behest of corporate giants. The facilitation of a healthy creative economy relies on addressing the needs of all parties- not just those with the highest profits. There is an imbalance in the current standards of protection that grossly favours content owners. This imbalance is characterised by the extensions of copyright terms over the course of the last century coupled with increased protectionist treatment of secondary uses online and the functional lack of access to proper licensing mechanisms for average users.

i. Extension of copyright terms

There is a stark reason as to why the notion of the public domain is commonly associated primarily with very old works. This is because, since its inception, the terms granted by copyright law have undergone multiple extensions that, at some stages, were designed by corporate content owners to perpetuate protection of modern works. These extensions are the product largely of a miniature trade battle between the European Union and the United States coupled with the double edged sword of American legislative susceptibility to corporate influence and its global economic power to influence other nations to follow suit. This section will chart the evolution of copyright term extensions in European and American law as well as the ensuing international accommodations.

The first copyright law in the United States was passed by Congress in 1790 and provided a total of twenty-eight years (a once-renewable fourteen-year term) of protection for maps, charts, and books.³⁶² Since then, the American Congress extended the term of protection four times. In 1831, the initial fourteen-year term of protection was extended to twenty-eight years but Congress kept the renewal term at the original fourteen.³⁶³ In 1909, the renewal term was also extended to twenty-eight years.³⁶⁴ In 1976, Congress extended the term of protection to seventy-five years (an addition of 19 years).³⁶⁵ This act did not apply retroactively. Therefore, all works published in 1923 or later received the benefits of this extension but those published prior to 1923 remained in the public domain. The oldest of these works, those published in 1923, were slated to enter the public domain in 1998 under this new law. However, in 1998 Congress passed the Sonny Bono Copyright Term Extension Act (“CTEA”) which added an additional twenty years of copyright protection to all existing works under protection.³⁶⁶ The CTEA stated that works created between 1923 and 1978 would now receive protection for a total of ninety-five years and any work created after 1978 would

³⁶² Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831)

³⁶³ Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1870)

³⁶⁴ Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1976)

³⁶⁵ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541

³⁶⁶ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998)

receive a term of the life of its author plus seventy years.³⁶⁷ Anonymous, pseudonymous, and works for hire would also receive a ninety-five year term of protection.³⁶⁸

To give an example, H.P. Lovecraft's *The Lurking Fear* would have been slated to enter the public domain in 1989 as it was first published in 1923 and subject to the 1909 Act granting 56 total years of protection. However, its term was extended in 1976 and the new law meant that the novel would not enter the public domain until 1998. Its release to the public domain was then *again* blocked by the CTEA in 1998 which extended its term of protection to 2018- 39 years after it was originally intended to enter the public domain.

Among these amendments to the legal term of a copyright, the CTEA has received the most criticism from legal scholars for both its blatant pandering to corporate lobbyists and its lack of constitutional justification. It was, however, largely a response to the European Union's copyright directive designed to harmonise its copyright laws in 1993.³⁶⁹

The EU Directive achieved two goals. First, it harmonised the length of copyright terms among its member states, requiring each member state to adopt a term of life plus seventy years by 1995.³⁷⁰ Second, it set out to increase European economic leverage in global creative markets by requiring member states to adopt the "rule of the shorter term" when dealing with foreign works.³⁷¹ The "rule of the shorter term" is a provision set out in the Berne Convention³⁷² that dictates when there is a disparity in term of copyright protection between two nations, the nation with the longer term may choose to shorten the term of protection to match that of the other nation with regard to works originating from it.³⁷³ For example, if France offers a term of life plus seventy years and the United States offers a term of life plus fifty years, when applying protection to American works in France, France may choose to apply the shorter, life plus fifty, term instead of its own more

367 17 U.S.C. §§ 302-304 (2011).

368 Ibid.

369 Directive on Harmonizing the Term of Protection of Copyright and Certain Related Rights, Council Directive 93/98, 1993 O.J. L 290/19

370 Ibid. Article 7

371 Ibid. Article 7(1)

372 Berne Convention Supra n. 4

373 Ibid. Article. 7(8).

generous life plus seventy. This is because French works in the United States will only receive the life plus fifty protection and is designed to allow nations to match the economic imbalance. Under the Berne Convention, the rule of the shorter term is permissive. However, under the EU Directive, it became compulsory for EU member states. This was a calculated move to increase Europe's trade leverage against the United States with regard to creative works. In the debate over its response to the European Law, the United States estimated that the disparity in protection would cost its film industry alone as much as \$200 million a year by the year 2020.³⁷⁴ Thus, Europe's move sparked the debate in the United States Congress to extend its own terms so that it would be able to maintain its favourable trade imbalance in creative works with Europe.

However, regardless of the perceived necessity to maintain competitive viability of United States' copyright works abroad, the CTEA was also the product of intense lobbying from the creative industries.³⁷⁵ Disney, who was slated to lose protection for its iconic cash-cow, Mickey Mouse, was particularly involved in the legislative process for the CTEA. Eighteen of the twenty-five sponsors for the bill received campaign money from Disney, including Senate Majority leader, Trent Lott, on the very day he signed up as a co-sponsor.³⁷⁶ Congress's failure to address potential issues of the new law, such as the fact that term extensions were arguably a hidden tax on consumers or its conflict with the constitutional mandate that copyright laws should "promote the

374 Bryce, S.C., 'Life Plus Seventy: The Extension of Copyright Terms in the European Union and Proposed Legislation in the United States.' (1996) 37 Harv Int'l L J 525, 528. Citing: Hearings Before the House of Representatives Subcommn on Courts and Intellectual Property of the Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (statement of Ambassador Charlene Barshefsky, Deputy U.S. Trade Representative).

375 See: Pocaro, K. 'Private Ordering and Orphan Works: Our Least Worst Hope?' [2010] Duke Law and Technology Review. Pg. 15 ("The current state of copyright law, with wildly longer term limits and automatic protection, is a result of continuous content-industry lobbying to protect their valuable, ageing intellectual property.")

376 See: Buccafusco, C. and Heald, P., 'Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension,' Berkely Tech. Law Journal, Vol. 28:1, 1, 8. Citing: Landes, W.M. and Posner, R., *The Political Economy of Intellectual Property Law* [2004] AEI-Brookings Joing Center for Regulatory Studies, pg. 16 (noting that the Center for Responsive Politics showed that in 1996 media interests donated \$1.5 million to six of the sponsors of the Copyright Term Extension Act); See also: Solomon, J., 'Rhapsody in Green', BostonGlobe, Jan. 3, 1999, at E2. John Solomon wrote:

"Behind the scenes, however, [Disney] has been active. Congressional Quarterly reported that Disney chairman Michael Eisner personally lobbied Senate Majorit)' Leader Trent Lott, a Republican from Mississippi. That day, according to the Center for Responsive Politics, Disney gave Lott a \$1,000 contribution, following up two weeks later with a \$20,000 donation to the National Republican Senatorial Committee."

Progress of Science,”³⁷⁷ suggest that the CTEA’s swift passage through congress was a reflection of the power of corporate money in the American legislative process.

Ultimately, life plus 70 has become nearly a global standard with over 80 nations offering protection of at least this term and the vast majority of the rest offering at least life plus 50 years.³⁷⁸ However, just over 100 years ago when the United States was considering its second copyright term extension, Congress rejected the term of life plus fifty years because it believed that such a length was a radical departure from what was then the scope of copyright law.³⁷⁹ Yet many of the nations with lengthy copyright terms of protection, including Australia,³⁸⁰ Japan,³⁸¹ Jamaica,³⁸² South Africa,³⁸³ were directly influenced by the United States.

The extension of copyright terms across the globe has directly contributed to the imbalance of rights between users and content owners. Copyright law is designed to create temporary monopoly rights in order to incentivise creation. However, those monopoly rights are balanced by the public domain- a legal space of unrestricted use which every work eventually enters into. Yet the last century has been marked by so many extensions to copyright terms that one may wonder if legislators will *ever* allow modern works to enter into the public domain. Even if we truly have reached a place where lawmakers are content with the terms set, we have still gone too far

377 U.S. Const. art 1§8, cl. 8. (The CTEA was later challenged on the grounds that extending the terms of existing works failed to promote the creation of new ones as per this mandate in *Eldrid v. Ashcroft*.)

378 'List Of Countries' Copyright Lengths' (*En.wikipedia.org*, 2020) <https://en.wikipedia.org/wiki/List_of_countries%27_copyright_lengths> accessed 23 July 2020

379 Bryce, Shauna C, ‘Life Plus Seventy: The Extension of Copyright Terms in the European Union and Proposed Legislation in the United States.’ (1996) 37 *Harv Int'l L J* 525, 530. Citing: Hearings Before the House of Representatives Subcommn on Courts and Intellectual Property of the Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (statement of Marybeth Peters).

380 *See* Rimmer, M., ‘Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement’, (2006), 11 *First Monday*, No. 3 <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1316/1236> (“In the trade negotiations, [the U.S. Trade Representative] demanded that Australia ratify the World Intellectual Property Organization (WIPO) Copyright Treaty and Performances and Phonograms Treaty. He supported an extension of the copyright term, so that Australia adopted the standards set by the Sonny Bono Copyright Term Extension Act.”) (emphasis moved); *see also* Sainsbury, M., ‘Governance and the Process of Law Reform: The Copyright Term Extension in Australia,’ (2006) 9 *Canberra Law Review* 1. (detailing lobbying effort in Australia to ratify the Free Trade Agreement).

381 *See* Masnick M, ‘Copyright Extension Moves To Japan’ (*Techdirt.*, 2020) <<http://www.techdirt.com/articles/20091119/1840217016.shtml>> accessed 21 May 2020

382 *See* Masnick, M, ‘Jamaica Latest to Embrace Retroactive Copyright Term Extension,’ (*Techdirt.com*, 2020) <<http://www.techdirt.com/articles/20111014/00471816347/jamaica-latest-to-embrace-retroactive-copyright-term-extension-screw-public-domain.shtml>> accessed 21 May 2020

383 *See* Rens, A. & Lessig, L., ‘Forever Minus A Day: A Consideration of Copyright Term Extension in South Africa’ [2006] 7 *South African Journal of Information & Communication*, 22

considering the time extensions have not been met with equivalent expansions for users' rights. If anything, in the aftermath of term extensions, the last decade might be described as a period of legal attack on users' rights, constricting them even more and thus furthering the imbalance.

ii. Increased protectionist treatment of secondary uses

Alongside the seemingly perpetual extensions of copyright terms in the modern world, the enforcement issues associated with the internet have brought about new standards in copyright protection which serve to undermine users' rights. Technical protection measures ("TPMs"), filtering software, and the notice and takedown system are the primary means of enforcing copyrights in the digital environment and each serves to whittle away at users' rights for secondary creation. The previous chapter addressed the issues associated with these enforcement mechanisms and their effects on users' rights in detail. However, to recap the sentiments covered previously, TPMs, filtering software, and the notice and takedown system are all used online to prevent or remove infringing content at the expense of often removing legitimate secondary uses and even licensed uses with little recourse granted to the legitimate secondary authors.³⁸⁴ The nets designed to catch infringements are cast widely with little care for the rights of authors whose legitimate works are caught in them. These legal mechanisms are also subject to various abuses and used as tools of censorship³⁸⁵ and extortion³⁸⁶ with little repercussion for doing so. The use of technology and automation to enforce copyright in the digital space has resulted in an inadvertent shrinking of

384 Longan, M. (2018, August 17). Big Brother is Watching but He Doesn't Understand: Why Forced Filtering Technology isn't the Solution to the Modern Copyright Dilemma. *Script'ed Journal of Law Technology and Science*. Blog. <<https://script-ed.org/blog/big-brother-is-watching-but-he-doesnt-understand-why-forced-filtering-technology-on-the-internet-isnt-the-solution-to-the-modern-copyright-dilemma/>>

385 Ehrenkranz, M., 'Producers of Nazi Romance Movie Appear to Be Using DMCA Takedowns to Silence Critics' (*Gizmodo*, 2019) <<https://gizmodo.com/producers-of-nazi-romance-movie-appear-to-be-using-dmca-1831555053>> accessed 16 May 2021 (Where producers of a Nazi romance film used the notice and takedown system to silence critics). *See also*: 'Video Game Developer Says He Won't Send a Takedown of a Bad Review, Does So Anyway' (EFF, 2019 <<https://www.eff.org/takedowns/video-game-developer-says-he-wont-send-takedown-bad-review-does-so-anyway>> accessed 16 May 2021 (Where a video game developer uses notice and takedown to remove bad reviews.)

386 Hale, J., 'Here's How A Scammer Abused YouTube's Copyright Infringement System In An Attempt To Extort Money From Users' (*tubefilter*, 2019) <<https://www.tubefilter.com/2019/02/07/youtube-content-id-copyright-infringement-scam/>> accessed 16 May 2021

users' rights in a time where we should be looking to expand them to balance the expansions of owners' rights.

a. Lack of access to proper licensing mechanisms

While facing unnecessarily long terms of copyright protection as well as enforcement mechanisms that will often prevent secondary uses of works- even those that fall under exclusions to infringement- the process of actually obtaining a license to make a derivative is often nearly impossible for the average secondary creator. This is because licenses can be difficult to obtain in the first place and, when available, often come with exorbitant price tags making them functionally unavailable for the average person. The system of using property rules to govern licenses for derivatives has become prejudicial against average creators in favour of wealthier, more established professionals and organisations. The argument for the status quo is that access is and will always be available for all but must be negotiated privately and individually with the copyright holder in the spirit of a free market. These negotiations will inevitably be guided by relevant economic and non-economic factors alike— i.e. the perceived value of the work, the current demand for licenses, the perceived economic and intangible effects of granting the license on the commercial value of the work, etc. This free-market system functionally serves to deny access to the most socially relevant works for all but the wealthiest of secondary creators.³⁸⁷ Second, the non-economic factors associated with determining the price for a license often include unreasonable emotional attachments by authors to their works which can lead to outright denial of licenses or inflated prices beyond actual market value. Finally, the system of upfront payments coupled with the often high prices of obtaining a license discourage secondary creativity in general- not just for amateur or pseudo-professionals- because of the steep investment costs that must be paid before the secondary creator has any idea what the commercial success of her work may be.

³⁸⁷ Norek, J., Comment, 'You Can't Sing without the Bling: The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System.' (2004) 11 UCLA Entertainment Law Review 83, 90-91 (arguing that the high cost of licensing samples for remixes prevents new music from being developed and unfairly favours established, wealthy artists).

The cost of a license to make a derivative is often exorbitant and out of the range of access for most secondary creators.³⁸⁸ Economic theories claim this cost is justified. The use of a copyright, like that of any other good, is worth whatever price the seller is able to charge in a free market. However, copyrights are not governed by a free market. There is no competition because each individual work is unique and subject to temporary limited monopoly rights. While this is by design, as these monopoly rights are in place to ensure the commercial viability of creative works and thereby promote their creation, extending these monopoly rights to derivatives overshoots this purpose. Moreover, the use of free-market economics to govern a market that is not free allows for secondary and irrelevant factors to artificially inflate the price of a copyright. For example, authors often allow emotional attachments to their creations to affect their prices or even willingness to consider a licensing offer.³⁸⁹ This is especially true when the proposed license would have a perceived negative effect on the author's reputation.³⁹⁰ Studies done on libel claimants suggest that no amount of money will make ridicule worthwhile.³⁹¹ Allowing the market for copyright derivatives to operate freely has fostered an environment that chills secondary creativity for amateur and pseudo-professional creation.

However, the property rule system for derivatives also chills secondary creativity from professional sources. While it is true that inflated prices have created a paywall blocking entry for less established or financially-flush creators, the same system also serves to deter secondary creativity from even the wealthiest creators. While high price thresholds may be surmountable for the larger content companies, the high investment cost will limit their willingness to make secondary creations but for the most financially safe investments. As a result, the most popular

388 See Ashtar, R. 'Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime.' (2009) 19 Albany Law Journal of Science. & Technology 261, 273 ("Flat fees are generally made available, with prices set between one and five thousand dollars")

389 Yen, A.C., 'When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law.' (1991) 62 University of Colorado Law Review 79, 84

390 Ibid. at 103

391 Morrison, R.J., 'Derivers' Licenses: An Argument for Establishing a Statutory License for Derivative Works' (2006-2007) 6 Chi-Kent J Intell Prop 87, 103. *Citing*: Ibid. at 105.

creative franchises like Harry Potter, Star Wars, and Marvel will find investment money for derivatives despite the high price tags but less proven works will not.

We have allowed the law to develop in such a way that creativity, particularly secondary creativity, at best, has become a privilege unique to the wealthy and, at worst, is deterred for all but the original creator of a work. Copyright terms have been extended to such a degree that no person will likely live long enough to see a work created during her lifetime enter the public domain. Works made using exceptions to infringement and laws of fair use are being treated as infringements online without repercussions. Licensing is a tool of the law that finds utility in only a small percentage of the creative community and serves more often as a barrier to new creation. Changes must be made to the law in order to redirect some creative power into the hands of users and non-corporate creators.

D. How Liability Rules are Ideally Situated to Open Access and Rebalance the Rights of Users Against Owners

Liability rules would serve to immediately shift the balance of power in copyright derivative licensing in two ways. First, they would open access by dissolving the system that allows for the absolute refusal of licenses or functional refusal via overvaluing a work. Second, they remove the upfront barriers to secondary creation brought about by steep investment costs associated with derivative licenses by offering a take-now-pay-later system. The result will obviously diminish the value of derivative rights. However, a narrow focus when changing the law will limit this reduction in value for content owners while simultaneously spurring new creative production and thereby creating new revenue streams for both owners and secondary creators. The value will not dissipate but will be redistributed.

E. Conclusions

Copyright law is a philosophical and economics-based construct that sets out to protect perceived rights of creators- both moral and economic- as a means to incentivise production of new creative works for the benefit of society. This chapter has discussed the underlying philosophies

that serve as the basis for copyright law within the scope of users' rights and secondary creativity. While I have left the right of reproduction alone as there is much literature already on the subject and I have no desire to contest its utility in the modern world, I find that none of the theories analysed offer any justification for the strong derivative rights the law offers creators. Moreover, each theory seems to advocate for a strong balance of power between primary and secondary creators. Today the law offers no balance. The safety valves in place designed to promote secondary creativity and protect the rights of secondary creators such as the public domain, exceptions to infringement, and licensing mechanisms have become distorted over the course of time and legal evolution to the point that they no longer function as such. They have become impotent tools and empty promises to the average secondary creator. The solution to this problem of imbalance in the legal dichotomy is a shift in the nature of copyright law itself- in at least some facets- from that of a property right to a liability right. Such a move, if applied narrowly, would redistribute power to make secondary creations by removing the upfront financial and permissive barriers to do so while still ensuring a healthy pecuniary interest in derivatives for primary creators. How such a system may be implemented will be discussed more thoroughly in chapter seven of this thesis.

Section Two: Solutions Stemming from the Legislature and Private Sector

IV. Legislative Attempts to Address these Issues: A Comparison of the Copyright Modernisation Act in Canada and Article 17 of the New European Copyright Directive

A. Introduction

Thus far, this thesis has sought to establish copyright law's increasingly weak position in the digital age. This notion is, on its own, not an entirely new concept. In fact, academics and legislators have been wrestling with this dilemma for years- to little or no success. Chapter two addressed how the private sector has tried, in the absence of up-to-date legislation, to adapt copyright to the digital era via modernised control-based mechanisms. This chapter will provide an analysis of actual and proposed legislative measures that are designed at adapting copyright law to the digital world. It will do so by comparing two particular legislative measures from separate jurisdictions. The first is Canada's Copyright Modernization Act and the second is the E.U.'s Directive for Copyright in the Digital Single Market. These two pieces of legislation are attempting to solve some of the same problems but in very different ways. The European approach represents the status quo- a system that requires either extensive licensing efforts on the part of online content service providers or de facto adoption of filtering technology designed to increase rights holders' ability to control the uses of their works online. The Canadian approach marks the first step away from this model and serves to legitimise much of the content the European approach will end up censoring- either by design or inadvertently. Ultimately, I find that both proposals fall short and this chapter will serve as a critique of both systems- the European directive for its massive censorship potential and the Canadian approach for balking at absolute reform. The conclusions drawn from the comparisons in this chapter will be used to inform my recommendations in chapter six.

i. Introduction

The Canadian approach to adjusting its copyright law to the modern world has been two faceted. The first prong is the common-law hybridisation of its fair dealing provisions with that of American fair use. The second is the Copyright Modernization Act of 2012- a piece of legislation designed to accommodate certain forms of user-generated content that make use of copyrighted works online. Both examples represent legal transitions towards a more liberal and open-ended type of copyright law enforcement regime while remaining squarely within the established property-model system. The Canadian approach has nuanced strengths, though. It represents the first piece of legislation to address non-commercial³⁹³ remix head-on and legitimise the practice. However, it ultimately fails to offer new solutions to piracy and has lead to an increase in the value gap for creators. Moreover, within the context of issues described in this thesis, it only addresses non-commercial remixes and fails to offer an easier path to legal monetisation for would-be creators.

ii. Hybridizing the Two Systems

While Canada's fair dealing statute originally appeared in the Canadian Copyright Act in 1921 as an exact duplication of the fair dealing clause in section 2(1)(i) of the U.K. Copyright Act of 1911,³⁹⁴ it has subsequently evolved into something entirely distinct from its predecessor.

In 2004, in the landmark case of *CCH Canadian Ltd. V. Law Society of Upper Canada*, Canada made its first distinct divergence from traditional fair dealing in the U.K. In this case, the Canadian Supreme Court ruled by unanimous decision that the Law Society of Upper Canada's

392 Portions of this section have been subsequently published in: Longan, M.E., "The inadequacy of U.K. law to address user-generated content: a comparative analysis with the United States and Canada". (2017) *Queen Mary Law Journal*, special conferences issue, p. 109-122.

393 The term non-commercial is used throughout this chapter. Legally speaking, a non-commercial work is one that is created by individuals for personal enjoyment or consumption and is done outside of the market sphere. It excludes works created for profit, within the context of a business activity, or directed at a commercial advantage or monetary compensation. See: Hugenholtz, P.B., *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, 2018 Wolters Kluwer. p.264-65.

394 *Copyright Act*, S.C. 1921, c. 24, s. 16(1)(i)

request-based reproduction libraries constituted a fair dealing under copyright law.³⁹⁵ The Law Society of Upper Canada runs a law library in Toronto that provides copies of requested materials to its patrons as well as on-site photocopy machines.³⁹⁶ CCH Canadian Ltd. is a publishing company that claimed the Law Society infringed its copyrights in several publications, including treatises and other legal commentaries, by providing copies to patrons and allowing them to make their own copies.³⁹⁷ The Court determined that providing photocopies of selections from copyrighted works to its patrons for the purpose of research- be it commercial or non-commercial research- was quintessential fair dealing. However, it was *how* the Court came to this decision that is important.

The Court made a momentous shift from a narrow construction of the fair dealings exceptions by holding that such exceptions “must not be interpreted restrictively.”³⁹⁸ The Court noted that, in order to prove a dealing was fair, the defendant must prove that the dealing was (1) within an enumerated exception and (2) fair.³⁹⁹ Such an interpretation of the law is very much in line with the modern fair dealing analysis in the U.K. However, the Court added certain factors that it deemed to be relevant in determining fairness in the future.⁴⁰⁰ These factors were: the purpose (and commercial nature) of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.⁴⁰¹ These factors, by no coincidence, come straight from United States copyright law- specifically the law of fair use.⁴⁰²

In this one decision, the Canadian Supreme Court essentially merged the antiquated fair dealings doctrine of the United Kingdom with the current fair use analysis practiced in the United

395 *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004 SCC 13, [2004] 1 S.C.R. 339, 236 D.L.R. (4th) 395 [*CCH*])

396 *Ibid.*

397 *Ibid.*

398 *Ibid.* at 4 para 48

399 *Ibid.*

400 *Ibid.*

401 D’Augustino, G. ‘Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use.’

53 McGill L.J. 309, 320

402 17 U.S.C. §107.

States to create a hybrid of the two doctrines. However, the Canadian Supreme Court sought to draw a line distancing its newly created doctrine from that of American Fair Use. In *SOCAN*, the Court stated that “[u]nlike the American approach of proceeding straight to the fairness assessment, we do not engage in the fairness analysis in Canada until we are satisfied that the dealing is for one of the allowable purposes enumerated in the Copyright Act.”⁴⁰³ In doing so, the Court gave the fair dealings doctrine a sense of pliability that it desperately needed while maintaining its narrow foundation to avoid the “notorious ambiguity”⁴⁰⁴ seen in the United States.

However, in requiring that a use fall into one of the enumerated purposes before conducting the fairness analysis, Canadian law would continue to operate much in the same way that U.K. Law does today. Because of the importance of users’ rights to the furtherance of creative expression in the modern world, Canada passed separate legislation to deal with UGC.

iii. The Copyright Modernization Act:

In 2012, Canada passed the Copyright Modernization Act into law. This act, while having many purposes, legitimised two important acts that previously constituted infringement. These are format shifting and non-commercial user-generated content.

First, the act granted consumers the right to reproduce legitimately acquired materials for private purposes.⁴⁰⁵ This provision allows consumers to shift the format of content that they purchase legally to make it more accessible. The provision contains an exception for reproductions onto an “audio recording medium,” meaning that consumers may copy songs purchased on iTunes onto their phones or an mp3 player, but not onto a compact-disc.⁴⁰⁶ This provision legitimised an already widespread behaviour.

403 *Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 at para. 26

404 Tehranian, J. *Infringement Nation: Copyright 2.0 and You*. [2011] Oxford Scholarship Online. pg. 4

405 Copyright Modernisation Act, Canada, 2012, 29.22.

406 Ibid.

The second, and more important to this thesis, function of the act was to legalise all forms of non-commercial user-generated content.⁴⁰⁷ The amendment states that it is not an infringement for an individual to use an existing copyrighted work in the creation of a new work if the use is non-commercial, proper acknowledgement to the source author is given, the individual had reasonable grounds to believe that his act was not an infringement, and the new work does not have a substantial adverse effect on the existing work, financial or otherwise.⁴⁰⁸ The text of the exception in the act is concerned largely with striking a balance between two opposing forces in copyright law- users' rights and creators' rights. While it sets a groundbreaking precedent in terms of permissive treatment of copyrighted works, it does so with a clear purpose in continuing to guarantee certain authors' rights- namely the moral interest in receiving proper recognition for secondary uses as well as the economic interest of continued opportunity to exploit a work for financial gain expected from copyright law.

The Canadian government's website lists common examples that would fit this exception. Such examples are: "making a home video of a friend or a family member dancing to a popular song and posting it online, or creating a 'mash-up' of video clips."⁴⁰⁹ The first example is an homage to the controversial United States case of *Lenz v. Universal Music Corp.* that arose when Universal Music issued a takedown notice to Lenz under the DMCA for her YouTube video of her young children dancing while Prince's "Let's Go Crazy" played from a quiet and distorted radio in the background. Lenz sued Universal claiming fair use and the case ultimately lead to a holding that fair use must be considered before issuing a DMCA takedown notice.⁴¹⁰ The second example is an acknowledgement of remix culture and its rightful place as an accepted practice within the law.

The modern Canadian approach is two-fold. First, it hybridises the restrictive fair dealings doctrine and the free-for-all fair use doctrine into an approach that is neither too rigid to adapt as

407 Ibid. at 29.21(1)

408 Ibid.

409 'What the Copyright Modernization Act Means for Consumers', online: Government of Canada <<http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01186.html>>

410 *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008)

technology changes but not so open-ended that the law becomes muddled and unpredictable.

Second, it uses statutory provisions to remove what it views as harmless activity from the modern notion of piracy by legalising format-shifting and non-commercial UGC. Canada uses its hybridised fair dealings approach in conjunction with specific statutory provisions to cast the boundaries of copyright law in a manner that achieves nearly every goal of the transformative/fair use doctrine in the United States without suffering legal unpredictability. This law, however, fails to legitimise transformative works that have a commercial purpose- theoretically one key asset of American law.

iv. Legislative Suggestions Borrowing the Canadian Model

There have been three notable discussions about copyright reform based on the Canadian model. The first is the Irish Copyright Review Committee's report of 2013 which suggested reforms echoing the Canadian model.⁴¹¹ The second is a proposal by Peter Yu for the implementation of the Canadian system in Hong Kong.⁴¹² The third is a paper by Lambrecht and Cabay that served as a proposal for European copyright reform inspired by the Canadian adjustments discussed thus far.⁴¹³

In 2013, the Irish Copyright Review Committee issued a report outlining weaknesses in Irish copyright law and concluded with suggestions for reform. Among those suggestions were both an amendment to fair dealing deeming the list of exceptions non-exhaustive and allowing the possibility to accept other acts not included as well as the introduction of an exception for non-commercial UGC.⁴¹⁴

In 2014, Peter Yu proposed a new piece of legislation in Hong Kong regarding UGC and copyright law.⁴¹⁵ The proposed act was modelled after the provision on non-commercial UGC in Canada's CMA and reads nearly word-for-word as such. However, Yu argued that that the act was

411 Irish Copyright Review Committee, 'Modernizing Copyright', 2013

412 Yu, P. 'The Quest for a User-Friendly Copyright Regime in Hong Kong'. [2016] *American University International Law Review*. Pgs. 283-362

413 Lambrecht, M. and Cabay, J. (2016). 'Remix allowed: avenues for copyright reform inspired by Canada.' 11(1) *Journal of Intellectual Property Law & Practice*. Pgs.21-36

414 'Modernizing Copyright' (2013) *Supra* n. 411 at 175

415 Yu (2016) *Supra* n. 412 at 283-362.

supported both by Canadian law and the doctrine of transformative use in the U.S. He noted that “Canadian and U.S. models are so closely related that policymakers and commentators, including those in the Australian Law Reform Commission, have considered the Canadian UGC exception a form of the transformative use exception.”⁴¹⁶ Accepting this line of analysis, the Canadian approach, while accomplishing the same goals as the transformative use doctrine, does so without fear of unpredictability. The precise language of the law does not force the role of art critic or philosopher upon judges that seems to have created confusion in the U.S. However, his proposal remained open to using United States case law as a foundation for Hong Kong as its courts apply the law.⁴¹⁷

Yu made one significant change to the wording of the Canadian provision for his proposal. In the phrase “solely for non-commercial purposes” seen in the CMA, he changed “solely” to “predominantly.”⁴¹⁸ Yu aptly argues that such a change allows for a broader range of works that may be denied protection under the Canadian approach for harmless monetisation to succeed.⁴¹⁹ Harmless monetisation can be characterised by inconsequential ad revenue through social media sites. It is an elegant harmonisation of the strengths of both the Canadian and U.S. Systems coupled with a tactful understanding of the way creative works are typically disseminated online whereby the key strength of the transformative use doctrine is its allowance of monetised works under certain circumstances. Furthermore, there is precedent for such a provision in private regulations within certain markets. For instance, in its Game Content Usage Rules,⁴²⁰ Microsoft addresses its policy on machinima, or the usage of a video game’s source code to make films. The Rules state that such usage is permitted if done for non-commercial purposes only.⁴²¹ However, Microsoft explicitly notes that ad-generated revenue from sites like YouTube will not constitute a work as

416 Ibid. At III(b)

417 Ibid.

418 Ibid.

419 Ibid.

420 Xbox, ‘Game Content Usage Rules,’ <<http://www.xbox.com/en-us/developers/rules>> accessed 31 March 2016

421 Ibid.

commercial.⁴²² Another video game development company, Blizzard, states in a similar provision that “as long as the website that hosts your Production provides a free method to allow viewers to see the Production, Blizzard Entertainment will not object to your Production being hosted on that site.”⁴²³ Such a provision likewise allows for ad-driven revenue from YouTube and other social media sites as long as those who access the content are not paying for the privilege.

In 2016, Lambrecht and Cabay published a paper considering two potential proposals for European copyright law reform based on the Canadian model.⁴²⁴ These proposals were the introduction of a specific exception for user generated content and a transition to a semi-open fair dealing exception aimed at providing needed flexibility to European copyright interpretation.⁴²⁵ Ultimately, they found that a model based on the decision by the Canadian Supreme Court in *SOCAN* and able to be implemented by the CJEU would be most appropriate for Europe.⁴²⁶

The Canadian approach seen in the CMA has been, in some ways successful- as characterised by its inspiring of multiple copycat legislative proposals. However, to date, no jurisdiction has actually adopted a system based on the CMA.

v. Criticising the Canadian Model

While it has inspired legislative proposals elsewhere, the Copyright Modernisation Act has also been the subject of much criticism- particularly by Canadian content creators citing huge reductions in royalty revenues as a direct result of the act.⁴²⁷ However, these criticisms are isolated to a section of the law that included educational purposes as a fair dealing and essentially opened the door to large sections of copyrighted works being legally copied and used by educational

422 Ibid.

423 Blizzard, ‘Video Policy’ <<http://eu.blizzard.com/en-gb/company/legal/videopolicy.html>> accessed 31 March 2016

424 Lambrecht and Cabay (2016) *Supra* n.413 at 21-36

425 Ibid.

426 Ibid.

427 ‘On Canada’s Copyright Modernization Act: ‘Where Does Balance Fit?’ (*Publishing Perspectives*, 2020)

<<https://publishingperspectives.com/2017/11/canada-copyright-modernization-act-conference/>> accessed 21 May 2020

institutions without permission or payment.⁴²⁸ As that section of the law is largely outside the scope of this thesis, so are the criticisms associated with it. However, in 2017, the Standing Committee on Industry, Science and Technology released a report as part of a statutorily mandated 5-year review process of the Copyright Modernisation Act.⁴²⁹ The Industry Committee also requested a separate advisory report from the Canadian Heritage Committee (the other federal department in charge of copyright policy in Canada). This Heritage report was released a few weeks before the final Industry Report.⁴³⁰ With these reports came countless testimonies from witnesses representing the creative communities affected by the CMA. Much of it focused on the problem-ridden educational fair dealing provision. However, many addressed the non-commercial user-generated content provision as well.

With respect to the section authorising all forms of non-commercial user generated content, the Canadian government received mixed feedback from stakeholders. Laurent Dubois, the general manager for the Union des écrivaines et des écrivains québécois (UNEQ), spoke out against the provision.⁴³¹ He argued that the new law unduly ignores moral rights of authors stating:

It is important to remember that the concept of copyright is not merely an economic one. There is copyright and the economic right to royalties, but there is also the idea of moral rights that we would like to put on the table today. This concept seems to be missing from the current act. We would like to discuss it.⁴³²

However, his argument lost traction as he immediately began to cite the economic harm supposedly created by the act. He went on to say:

Moral rights refer to the idea that an artist has the right to grant or withhold permission for their work to be used, disseminated or even altered. With its many exceptions, the 2012 act has stripped many artists and writers of their income. I do not want to be more dramatic than necessary, but I will just give you some figures. In Canada, the average annual income of a professional writer is \$12,879. In Quebec, the median income was \$2,450 in 2008, and about the same right now. As a result, professional writers in Canada could be an endangered species.⁴³³

428 Ibid.

429 'Committee Report No. 16 - INDU (42-1) - House Of Commons Of Canada' (*Ourcommons.ca*, 2020)
<<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/page-42>> accessed 21 May 2020

430 'Committee Report No. 19 - CHPC (42-1) - House Of Commons Of Canada' (*Ourcommons.ca*, 2020)
<<https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/report-19/>> accessed 21 May 2020

431 'Evidence - INDU (42-1) - No. 102 - House Of Commons Of Canada' (*Ourcommons.ca*, 2020)
<<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-102/evidence>> accessed 21 May 2020

432 Ibid.

433 Ibid.

Neither I nor the Canadian parliament found Dubois's argument about the distinction between moral and economic rights that was, ironically, substantiated by claims of economic harm convincing.

Ken Thompson, Chair for non-profit group, Artists and Lawyers for the Advancement of Creativity (ALAC) offered a slightly different perspective on the user-generated content exemption.⁴³⁴ He asked parliament to limit its scope and allow creators to issue their own policies on both commercial and non-commercial UGC and, in the case of the former, allow collective management bodies to control the licensing arrangements.⁴³⁵ He claimed that "a song mash-up or an unauthorised sequel to a novel or film by someone else could scoop the value of the author's or performer's original."⁴³⁶ However, his proposal can be simply described as a calling for the new law to be abolished and the old system reinstated. Moreover, his basis for this claim is poorly founded. Mash-ups typically serve to boost revenue for the songs they make use of.⁴³⁷ Unauthorised sequels likely have similar effects on their predecessors as they are intended to appeal to the fanbase of the original work that they build upon- thus reigniting interest in the base work. Finally, he ignores the most relevant issue which is that these works of UGC represent new creativity despite their derivative nature and the legal system should foster their creation without bias. Copyright is and has always been about protecting expression, not ideas. Legally mandating the stifling of new creative expression because it makes use of the ideas of another author is not the purpose of copyright law. Moreover, it can be argued that expression is, in some ways, always derivative to a degree.⁴³⁸ Creatives are constantly building on the works of those who came before them. Drawing hard lines that criminalise derivative creativity when it represents new expression goes against the very purposes of copyright law.

434 'Evidence - INDU (42-1) - No. 110 - House Of Commons Of Canada' (*Ourcommons.ca*, 2020)

<<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-110/evidence>> accessed 21 May 2020

435 Ibid.

436 Ibid.

437 See: Supra n.346

438 "it is not possible to conceive of a cultural creation without that creation building upon the previous work of other authors" Case C-467/17 *Pelham* [2019], para. 56

Finally, multiple parties testified that a key problem with the user-generated content exception lies in the fact that most of the content created under this exception is posted online and thereby generates revenue solely for the sites that host it, with the primary authors and secondary creators receiving no compensation.⁴³⁹ Such a system represents an exploitation of the exception by online service providers and an unfair diversion of revenue.⁴⁴⁰ This point is perhaps the most insightful. However, it is the necessary result of only authorising *non-commercial* UGC as the rule will automatically exclude revenue for both the original and derivative authors. The derivative author may not profit from her work as the exception requires it to be non-commercial. The primary author may also not profit from the derivation because it is created under an exception to infringement and no license is required. While it does not necessitate that a content-hosting third-party shall receive revenue for these works, such is the nature of content dissemination today. One solution would be to require the establishment of a fund for creators paid into by these OSPs that are unduly profiting from the uses of their works. However, simply expanding the provision to allow for commercial works as well and establishing either a baseline for license negotiation or a simple and efficient body of collective licensing would open the doors for revenue streams for both the primary and secondary authors and rebalance the division of revenue.

vi. The Copyright Modernization Act of Canada: Conclusions

The CMA is a multifaceted piece of legislation with each prong having distinct strengths and weaknesses. The educational fair dealing section has received the most criticism but is least relevant to the scope of this thesis. The section that establishes non-commercial works of UGC as non-infringing works is the most relevant and, in many ways, is lightyears ahead of copyright modernisation efforts of other nations. However, it is not without its downfalls. While being

439 INDU, *Evidence*, 1st Session, 42nd Parliament, 8 May 2018, 1735 (Patrick Curley, Third Side Music Inc. [TSM]); INDU (2018), *Evidence*, 1635 (Payette, PMPA); INDU, *Evidence*, 1st Session, 42nd Parliament, 1 October 2018, 1550 (Marie-Josée Dupré, Société professionnelle des auteurs et des compositeurs du Québec [SPACQ]); ALAC, *Brief Submitted to INDU*, 14 December 2018.

440 Ibid.

progressive, it is a short-sighted half-measure. Limiting its scope to only non-commercial works of UGC helps the creative community by providing a tangible legal support for the right of expression and effectively says that new creativity and expression should not be stopped by the law. However, in failing to address the commercial side of this puzzle, parliament has allowed the law to be exploited economically by online service providers who host content as they are the only ones legally allowed to profit from this newly allowed creativity. If copyright law is treated as a tool to inspire creation through economic incentives, it should not be inadvertently diverting all of the revenue from creations to the only party involved in the transaction with no creative input. Expanding the provision to include commercial works and finding ways to make licensing transactions efficient and fairly-priced for average creators would serve to maintain this new notion that all creativity should be fostered by the law *and* facilitate economic exploitation of the new works for all creative parties involved.

C. The E.U.: The Directive for Copyright in the Digital Single Market

i. Introduction

The European Parliament has recently passed a directive designed, among other things, to address problems of piracy and other forms of copyright infringement associated with the digital world.⁴⁴¹ The relevant provision of the copyright directive, originally article 13 but now article 17, sets out new legal requirements to be imposed upon online content-sharing service providers.⁴⁴² The directive originally called for these content-sharing service providers to adopt digital filtering technology to prevent infringements uploaded by their users.⁴⁴³ However, the proposed law faced fierce backlash from the public. It became colloquially known as the “meme killer” as it was perceived as a threat to appropriative creative expression online because of the well-documented

441 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

442 Ibid.

443 See: Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD)

inability of filtering technology to adequately deal with works that qualify as fair dealings or other exceptions to infringement.⁴⁴⁴ While the public opposition failed to prevent the passing of the directive, it likely contributed to its subsequent alteration.⁴⁴⁵

At its present and adopted state, the directive no longer requires implementation of filtering technology by content-sharing service providers but will now impose a liability on these companies for infringements by their users.⁴⁴⁶ The directive requires that content-sharing service providers cooperate with rightsholders to obtain licenses for the right to communicate and share to the public their works.⁴⁴⁷ This represents a stark departure from what has become the modern standard in internet-age copyright law whereby online service providers may not be held liable for the infringements of their users as long as they comply with notice and takedown procedures.⁴⁴⁸ The new directive also requires that this cooperation shall not lead to the prevention of the availability of non-infringing works including those covered by exceptions to infringement.⁴⁴⁹ This is the European legislators' response to criticism that the previous iterations of the directive would result in the chilling of free expression. However, it is unclear what the EU expects to result from the implementation of this directive. Despite its new wording, the directive likely will lead to the adoption of filtering technology by content-sharing providers in order to avoid liability for infringement themselves.⁴⁵⁰

444 See eg: Kelly, J., 'Potential 'meme killer' law moves forward with EU lawmakers' (*Globalnews.ca*, 2018)

<<https://globalnews.ca/news/4446228/meme-killer-copyright-eu-article-13/>> accessed 16 May 2021; See also Longan (2019) Supra n.253

445 Goosens, S., 'Article 13 (now Article 17) of the new Copyright Directive: what you need to know' (*Reedsmith*, 2019)

<<https://www.reedsmith.com/en/perspectives/2019/04/article-13-now-article-17-of-the-new-eu-copyright-directive>> accessed 16 May 2021

446 Directive (2019) EU Supra n. 441

447 Ibid.

448 See: Chapter 1 E(ii); Chapter 2 C(i)

449 Directive (2019) Supra n. 441

450 EU Commissioner admits that upload filters may be necessary despite rewording of article 13: 'EU Commissioner Gunther Oettinger Admits: Sites Need Filters To Comply With Article 13' (*Techdirt.*, 2020) <<https://www.techdirt.com/articles/20190329/15501341902/eu-commissioner-gunther-oettinger-admits-sites-need-filters-to-comply-with-article-13.shtml>> accessed 21 May 2020; See also:

France's Minister of Culture announces a "mission to promote and supervise content recognition technologies" 'After Insisting That EU Copyright Directive Didn't Require Filters, France Immediately Starts Promoting Filters' (*Techdirt.*, 2020)

<<https://www.techdirt.com/articles/20190327/17141241885/after-insisting-that-eu-copyright-directive-didnt-require-filters-france-immediately-starts-promoting-filters.shtml>> accessed 21 May 2020

While the European Parliament has correctly identified a problem- a failure in the law to adequately address online infringements, the new solution would represent a regression in legal evolution. The digital world has revolutionised the way creative works are created and disseminated. That revolution has likewise extended to perceptions as to how copyright law should function. As copyright law in the European Union has gone largely unchanged since 2001, the content industries have set in place sophisticated pseudo-legal systems designed to combat these issues of unauthorised uses.⁴⁵¹ However, these systems are generally focused on allowing low-value uses while establishing mechanisms to monetise them- both for the users that publish them and the copyright holders themselves.⁴⁵² Article 17 undermines these programs that are functioning successfully on the internet. Moreover, Article 17 stands to create more problems than it solves if it implicitly forces the adoption of filtering technology that is currently incapable of addressing many fundamental aspects of copyright law such as exceptions to infringement and legitimately-licensed materials.⁴⁵³ Forcing internet portals to adopt copyright filtering software is the wrong solution not only because the available technology is incapable of adequately determining copyright violations⁴⁵⁴ but also because current industry developments illustrate that monetisation, not take-downs or blocking, should be the focus of legislators.⁴⁵⁵ While it is counter-intuitive, this means inevitably that filtering technology is likely the future of copyright enforcement online. However, in its current state it is unacceptable. Rather than requiring the adoption of subpar technology with little oversight, legislative measures should be aimed at facilitating the growth and fair use of filtering technology as a tool to empower online creators and content owners by monetising works for both parties in the form of automated licensing mechanisms. Instead, this new directive simply shifts liability to the party with the most to lose in hopes that the created risk will result in stronger policing online. This should not be the burden of content-sharing service providers and, in reality,

451 See: Chapter 5 and its discussion on tolerated use and controlled monetization schemes

452 See: Chapter 5E

453 See: Chapter 2 C(ii) "Gatekeeping Software"

454 Longan (2019) *supra* n.253

455 See also: The conclusions drawn from Chapter 5

will likely force them to adopt the simplest solution to avoid their newly created liabilities- upload filters.

This new iteration of the law raises two important questions- one practical and one philosophical. First, how can online service providers comply with this new law in real world situations? Regardless of whether it claims to do so, the new directive continues to functionally require that content-sharing services adopt copyright filtering technology as doing so is the most practical way to comply. Second, who should we hold accountable for infringements online? Article 17 is a paradigm-shifting piece of legislation that will potentially hold large corporations accountable for infringements that they did not commit, did not intend to commit, had no knowledge of, and did not facilitate outside of providing a digital venue that has a multitude of legitimate purposes and cultural value. Is this a legal principal we are prepared to accept?

ii. The Inevitable Result is Filtering Technology

The rewording of Article 17 no longer explicitly requires the adoption of filtering technology by content-sharing service providers. However, there is a consensus among academics that the law leaves no option but adoption of filtering technology.⁴⁵⁶ Upon analysis of the reality of complying with the law, this becomes even more apparent.

The requirements set out by Article 17 read as such:

1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.

⁴⁵⁶“There is scientific consensus that Article 13 changes the obligation on service providers to act upon obtaining constructive knowledge (established under the e-Commerce Directive) to what will become a filtering obligation that benefits big players.” (*Create.ac.uk*, 2020) <https://www.create.ac.uk/wp-content/uploads/2018/06/Academic_Statement_Copyright_Directive_29_06_2018.pdf> accessed 21 May 2020 see also: “It is hard to see how these obligations will not lead to the adoption of “upload filters” and, ultimately, result in general monitoring. (That the provision will lead to filters has in fact been conceded by some EU officials and national governments)” Quintais J and others, ‘The New Copyright Directive: A Tour D’horizon – Part II (Of Press Publishers, Upload Filters And The Real Value Gap)’ - *Kluwer Copyright Blog* (*Kluwer Copyright Blog*, 2020) <<http://copyrightblog.kluweriplaw.com/2019/06/17/the-new-copyright-directive-a-tour-dhorizon-part-ii-of-press-publishers-upload-filters-and-the-real-value-gap/>> accessed 21 May 2020

2. Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues.

3. When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.

The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes falling outside the scope of this Directive.

4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:

- (a) made best efforts to obtain an authorisation, and
- (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event
- (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).⁴⁵⁷

The act goes on to expressly forbid OCSSPs from preventing their users from sharing works made legally under exceptions to infringement:

7. The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

- (a) quotation, criticism, review
- (b) use for the purpose of caricature, parody or pastiche.

8. The application of this Article shall not lead to any general monitoring obligation.⁴⁵⁸

The language of article 17 is plain. OCSSPs have two available options to comply. The first is to obtain authorisation to communicate content uploaded by the public to their users.⁴⁵⁹ This will require the negotiation of a license scheme on a massive scale in order to include the millions of potential works that may be incorporated in uploads by users. While the music industry has a sophisticated system of collective rights management already in place, other creative industries have not had the necessity to do so. The task of negotiating permissions for an already huge and ever-growing body of creative works across all media is likely impossible for *any* OCSSP to do.

⁴⁵⁷ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid. Article 17(1)

This, coupled with the potential incurred liability for any communicated piece of content that slips through the cracks in licensing efforts, results in little incentive for OCSSPs to comply via this method. The second means by which OCSSPs may comply with article 17 is via adherence to three cumulative conditions. They must demonstrate that they have:

"(a) made best efforts to obtain an authorisation; (b) made best efforts to ensure the unavailability of specific works for which the right holders have provided them with the relevant and necessary information; and (c) acted expeditiously, subsequent to notice from right holders, to take down infringing content and made best efforts to prevent its future upload."⁴⁶⁰

Despite the fact that section 8 of article 17 states that this article shall not lead to any general monitoring obligation, the best way to adhere to these three cumulative conditions is, in fact, by employing upload filters. Both EU officials⁴⁶¹ and national governments⁴⁶² have conceded that this is the reality of the situation.

With Article 17's newly created burden of liability for communications to the public, OCSSPs now face tremendous liability potential for each piece of content uploaded by their users. Moreover, the removal of safe-harbour status for this type of infringement compounds that liability potential. From a business perspective, absolute compliance will be crucial- copyright infringement lawsuits are not cheap, whether you win or lose. Minimising exposure to the risk of lawsuit will become the number one priority for OCSSPs. Even if it were feasible to negotiate licenses for 99% of the available content, the easiest and most economically sensible way to comply still appears to be the adoption of the industry standard upload filtering technology. In doing so, coupled with an efficient system for the removal of requested content (which would be typically in place already as it carries over from the notice and takedown system), OCSSPs would easily satisfy all three conditions of compliance and effectively shield themselves from liability for any upload to their

460 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Article 17(4)).

461 EU Commissioner Gunther Oettinger Admits: Sites Need Filters To Comply With Article 13' (*Techdirt.*, 2020)

<<https://www.techdirt.com/articles/20190329/15501341902/eu-commissioner-gunther-oettinger-admits-sites-need-filters-to-comply-with-article-13.shtml>> accessed 21 May 2020

462 'After Insisting That EU Copyright Directive Didn't Require Filters, France Immediately Starts Promoting Filters' (*Techdirt.*, 2020)

<<https://www.techdirt.com/articles/20190327/17141241885/after-insisting-that-eu-copyright-directive-didnt-require-filters-france-immediately-starts-promoting-filters.shtml>> accessed 21 May 2020

site- not just any upload that falls within the catalogue of works they have sought licenses for. Thus, the reality of article 17 is that it will result in the incorporation of upload filters by OCSSPs to prevent the communication of infringing material.

iii. Who to Hold Accountable for Online Infringement

The new European directive turns the notion of who we hold accountable for online infringements on its head. Up to this point, online enforcement of copyright infringement has had two primary purposes. First, limit and remove the publication of low value infringements by users through the notice and takedown system. Second, dismantle and try to recover damages from high-value piracy organisations via litigation. The late 1990s was a valuable learning experiment for content owners as suing individual users in court, even for outright piracy, created such backlash that the process no longer made economic sense.⁴⁶³ Moreover, safe harbour provisions in modern copyright law have limited the liability of wealthier, less personal (i.e. easier to sue without a publicity nightmare), internet corporations for online infringements provided they follow the notice and takedown procedures.⁴⁶⁴ Online hubs whose purpose were solely for the dissemination of illicit copyrighted materials were therefore the only safe option for litigation- legally, financially, and reputationally speaking. However, after decades of struggling to find someone to safely sue, the new European directive provides content owners with just that. Article 17 will effectively shift the burden of copyright enforcement online to online portals- many of which host primarily legitimate uses of content- and leave these deep-pocketed corporations open to litigation should they fail to do so. Holding internet companies that provide a legitimate service liable for infringements that they neither encourage nor know of is more of a legislated cash-grab for content owners than an actual solution to the problem of online infringement. The new law places those with the least involvement in online piracy yet the most to lose financially in the proverbial hot seat and will

⁴⁶³ See: the analysis conducted in Chapter 1 E(iii) and the conclusions drawn from it.

⁴⁶⁴ See: Chapter 1 E(ii)

likely lead to over-protective behaviours where concerns of censorship become an afterthought in a constant battle to remain shielded from liability.

As modern copyright enforcement has become a game of who-to-sue, one of the biggest questions the new European directive raises, though, is who can/should we hold liable for infringements online? The process of keeping individual users accountable is both inefficient and unpopular. Content owners in the United States have tried holding ISP's liable for the actions of their users to no avail.⁴⁶⁵ Large online companies that host content submitted by users like YouTube, Facebook, and Reddit were the next obvious target. However, is it legally just to hold these companies accountable for infringements made by their users that they do not encourage or condone and are unaware of? Strictly speaking, I believe the answer is no. Moreover, the solution to copyright problems created by the internet has been proven over and over again to *not* be simply finding the right person or entity to sue.⁴⁶⁶ At some point this game of whack-a-mole must come to an end and we must humbly accept our inability to adequately police a property-right system of copyright on the internet and look for solutions outside of that box.

iv. An Erosion of Intermediary Liability Protection Regimes

Article 17 of the new European Copyright Directive is built upon the right of communication to the public. The right of communication to the public was first mentioned in international law in article 11 *bis* of the revised Berne Convention for the Protection of Literary and Artistic Works.⁴⁶⁷ It was later a requirement by signatories the WIPO Copyright Treaty in 1996.⁴⁶⁸ The right was subsequently harmonised in the EU by the Infosoc directive in 2001. Absent adequate definition in the directive, the boundaries of the right have been subsequently defined by the CJEU over the course of a few important cases. Article 17 of the new copyright directive uses the right of communication as a basis for the imposition of liability on OCSSPs. Therefore, in asking whether

⁴⁶⁵ See: *Grande Communications* Supra n.76

⁴⁶⁶ See: the analysis in Chapter 1 E

⁴⁶⁷ Berlin Act (1908).

⁴⁶⁸ WIPO Copyright Treaty, Art. 8

the directive justly places liability on OCSSPs for actions of their users, it is important to analyse the history and purpose of the right of communication in E.U. law.

When determining whether a copyrighted work has been communicated to the public, the CJEU follows a three-step formula. First the Court must find that there has been an “act of communication.”⁴⁶⁹ The act of communicating relies on the defendant having played and “indispensable role” through a “deliberate intervention.”⁴⁷⁰ Second, upon finding that a communication has occurred, the Court seeks to determine whether that communication has been made to “a public.”⁴⁷¹ This refers to a group of people of an indeterminate number that is of a certain, not insignificant, size. The relevant public may be reached either simultaneously- in the case of a screening, display, or live stream- or cumulatively over the course of a period of time- in the case of content that remains accessible like a torrent, download, hyperlink or social media post.

In *Stichting Brein v. Ziggo*,⁴⁷² the CJEU was called to make a determination as to whether online portal, The Pirate Bay, made communications to the public of copyrighted material in order to determine whether anti-piracy group, Stichting Brein, was eligible to receive injunctive relief from ISP, Ziggo, in the form of blocked access to the p2p portal.⁴⁷³ In determining whether The Pirate Bay committed a communication to the public, the Court acknowledged that the infringing material was not directly communicated by the platform itself, but rather its users.⁴⁷⁴ The Pirate Bay served as an indexing service for infringing material on the bittorrent network that ultimately could be downloaded through peer-2-peer services. However, the Court noted that, nevertheless, the efficiency of the system is so reliant on the indexing services provided by sites like The Pirate Bay that “their role may be regarded as necessary.”⁴⁷⁵ The Court ultimately found that “the decisive role

469 Rosati, E., *The Construction of Economic Rights in the InfoSoc Directive*. In *Copyright and the Court of Justice of the European Union*. [(2019) Oxford University Press. Retrieved 27 Jul. 2020, from <https://www-oxfordscholarship-com.ezproxy.sussex.ac.uk/view/10.1093/oso/9780198837176.001.0001/oso-9780198837176-chapter-5>. Pg. 96

470 Ibid. at 97

471 Ibid. at 96

472 Case C-610/15, ECLI:EU:C:2017:456

473 Ibid.

474 Ibid.

475 Ibid. at 50

in the communication to the public of a given work cannot be attributed to it if it is unaware that the work has been made available illegally or if, once it has been made aware of the illegality, it acts in good faith to rectify the matter.”⁴⁷⁶ Moreover, once the operator has knowledge that it is making available works that have been illegally reproduced, if it does not take action to remove access to the work/s in question then “its conduct may be regarded as being intended to allow, expressly, the continuation of the illegal making available of that work and, hence, as an intentional action.”⁴⁷⁷ Plainly, the Court in *Stichting* saw the role of a hosting service in the act of communicating to the public as requiring either actual or functional intent. In the absence of actual intent, functional intent may be found in cases where there is knowledge that an infringement is being communicated and no action to stop such communication is taken.

The definition of what constitutes a communication to the public provided in *Stichting* is therefore contradictory to the new use of the law in article 17 of the copyright directive. In fact, article 17 now imposes liability on legitimate online portals where the vast majority of content posted by their users is non-infringing and, in the cases of infringing content, the portals are typically “unaware that the work has been made available illegally.”⁴⁷⁸ Ultimately, what article 17 does is remove the requirement of intent for hosting platforms described in *Stichting* from the communication to the public analysis, making it now a matter of strict liability.

v. Failure to Address Current Industry Demands

While article 17 arguably looks to trends in digital copyright enforcement, as it is built around the notion of using copyright filtering technology as a gatekeeping tool, it fails to see the bigger picture with respect to this technology. As legislative reform concerning copyright in the digital era has been stagnant, content industries have been left to find their own solutions to infringements online. An analysis of the evolution of tolerated use and similar adopted programs

⁴⁷⁶ Ibid. at 51

⁴⁷⁷ Ibid. at 51

⁴⁷⁸ Ibid.

illustrates a growing favour for pecuniary rights over exclusivity among content owners.⁴⁷⁹ Whether this emerging trend is a result of the impracticality of preventing users from publishing unauthorised uses of copyrighted works online or simply content owners preferring to establish new revenue streams from copyrights is difficult to tell. Yet, legislators have a responsibility to acknowledge this change in perception regarding copyright law. While legislation is needed to address the issues associated with unauthorised uses online, any legislation passed should expand on the industry norms rather than invalidate them. Here, that means finding ways to help content owners monetise low-value infringements efficiently- not preventing users from sharing the content.

There is an argument to be made that this is precisely the goal of Article 17. It is designed to force licensing arrangements which would both create revenue streams for content owners and facilitate use of their content by secondary creators online. However, the system, as it stands, is predatory and unfairly compensates both content owners and the hubs to which UGC is posted while leaving out secondary creators. Permission to use is an inadequate form of compensation when, in most cases, permission would not be required under the law. Moreover, for the cases where permission would be required, granting permission in exchange for 100% of the revenue resulting from the use is an unfair standard to set. The facilitation of licensing mechanisms is meaningless when the benefits of the license are one-sided.

The following chapter will discuss at length the evolution of tolerated use online and how it has morphed into a system where content owners take advantage of the vaguely defined borders of exceptions to infringement and their own financial power to force users into accepting unfair terms with respect to secondary uses. Article 17 is an extension of this practice whereby the law ignores the rights of amateur and small-time professional creativity to appease the wants of larger, more economically influential content owning corporations. Chapter seven will then illustrate the ideal way in which we can step away from this behaviour towards a system that acknowledges and

⁴⁷⁹ This is discussed at length in Chapter 5

rewards all parties involved.

vi. Conclusion

Article 17 fails on many fronts. The European Parliament quieted public outrage by removing the express requirement of upload filters and incorporating a provision designed to protect existing rights. However, the law still functionally requires upload filters as they are the most efficient way to comply and it is unclear whether the provision designed to protect users rights will have any actual effect. The current available software is not only inadequate at addressing intricate aspects of copyright law but it regularly fails to simply identify copyrighted material in its database. As a result, the technology is far from sufficient to merit a compulsory adoption regulation. Furthermore, such a regulation would demonstrate absolute ignorance to the changing tides of perception towards copyright law and its function from both users and content owners alike. Both the online creative community⁴⁸⁰ and national governments⁴⁸¹ have expressed concerns with the new European Directive and its implications. It is not a modernising piece of copyright legislation. It is, instead, a cash-grab by the content industry disguised by fear mongering. It is the newest iteration of the constantly failing “who can we sue?” status-quo.

D. Comparison and Conclusions

i. Focusing on Users’ Rights

These two pieces of legislation, while having the overarching goal of updating copyright law to function more efficiently in the digital world, have separate means of achieving this broad aspiration. Article 17 of the European Directive redefines the European right of communication to the public to force online content-sharing service providers to either negotiate licenses with

480 Survey shows that 46% of streamers in UK concerned about article 13. See: ‘46% Of UK Streamers Are Worried About Broadcasting Content In Light Of Article 13’ (*influencerupdate.biz*, 2020) <<https://www.influencerupdate.biz/news/68115/46-of-uk-streamers-are-worried-about-broadcasting-content-in-light-of-article-13/>> accessed 21 May 2020

481 See: ‘Poland challenges article 13’ (*Theinquirer.net*, 2020) <<https://www.theinquirer.net/inquirer/news/3076379/poland-vs-article-13>> accessed 21 May 2020

rightsholders or implement stronger policies to prevent infringements from being posted on their platforms. These policies must be, however, implemented and enforced with existing users' rights in mind. Though, no expansion of those rights has been made. By comparison, the Copyright Modernisation Act in Canada expands and redefines users' rights by granting *carte blanche* for secondary creativity as long as those expressions remain non-commercial.⁴⁸² Key problems in the CMA arise from its inability to close the value gap for primary creators and diverting revenue from creators to online content hosting service providers.⁴⁸³ For the European Directive, the crucial issue is a fear of its implications for the diminution of users' rights in practice as a side effect of its efforts to close the value gap for creators.⁴⁸⁴

In many respects, these two laws take opposing stances on the appropriate solution to the same problem. The Canadian approach envisions the expansion of users' rights as a key component to aligning copyright law with the digital world while the European approach arguably constricts them. Ironically, the key criticisms of each opposing approach are rooted in their lack of ability to address the issues that the other seemingly tackles. More clearly, the European approach is touted for its predicted diminution of the value gap but has faced much criticism for its implied constriction of users' rights. Likewise, the Canadian approach has been criticised for its part in increasing the value gap but praised for its expansion of users' rights in the digital environment. Is it, therefore, simply impossible to solve both problems simultaneously?

a. The Value Gap

The phrase "value gap" has become a buzzword in copyright discussion of late. It refers to the disparity in value generated by creative industries compared to compensation received by those same industries and their members. The increasing value gap is a two-fold problem. First, the dissemination of creative works requires an increasing number of intermediaries in the digital

⁴⁸² See: Copyright Modernisation Act *Supra* n. 405

⁴⁸³ See: Chapter 5 B(v)

⁴⁸⁴ See: Chapter 5 C(ii-vi)

space- each of whom claim a piece of the value pie. To give an example, in the music industry, the value of a single song's stream will be split amongst multiple parties including the record label, the publisher, the performer, the songwriter and the streaming company. Second, and more important to the increasing value gap, the largest revenues from creative works are paid to the newest addition to these intermediaries- online service providers who host the digital spaces where creative content may be accessed. In some instances, like with music streaming services like Spotify and Apple Music, these intermediaries are forced to negotiate licenses with rightsholders in exchange for the use of their material. However, in the case of OCSSP's like YouTube, who are protected by safe harbour provisions, the negotiation of licenses for rights is not a necessary element of their business models. Yet, in many ways YouTube functions much like a streaming service, except one supported by ad revenue instead of subscription fees and the negotiating power it receives from safe harbour provisions has lead to an overall decreased amount of revenue paid to content owners when their content is accessed on its platform. For content owners dealing with companies like YouTube, their options are to either negotiate on YouTube's terms or fight the inevitable uploads of their content on the platform through the notice and takedown system. Thus content owners are forced between choosing the "rock" of spending money and time trying to (impotently) prevent that content from being uploaded and accessed or the "hard place" of foregoing the hardship and expense of online copyright enforcement at the price of being underpaid for access to their content. Both the European Directive and the Copyright Modernisation Act (more so in the suggestions from its five-year reviews) are concerned with narrowing the value gap. The value gap, like piracy, is a real problem for copyright law created largely by the internet. The European approach, heavily influenced by lobbying from the entertainment industry,⁴⁸⁵ is directly concerned with solving this problem while the Canadians are currently looking at how the Copyright Modernisation act has increased the value gap and, in many ways, looking to Europe for solutions.

485 Dusollier, S., 'The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition' (2020) *Common Market Law Review* 57, 979-1030, pg.979

The European approach to narrowing the value gap is simple. Forcing online content-sharing service providers, like YouTube, to negotiate licenses with rights holders directly will result in both higher and more (in the cases where there are no mechanisms in place for rights holders to receive remuneration for communications of their works) revenue streams for primary creators. The directive is, in many ways, a tax on these online companies with the revenue directly diverted to rightsholders and will likely lead to increased revenue for them.

However, the European approach is decidedly one-sided and seeks to reform the law with only one party's needs in mind- content owners. While users' rights are acknowledged in the new law, they are treated as necessary obstacles in the protection of the rights of content owners. There is, however, a second value gap that goes largely undiscussed in copyright reform conversations. While the value paid versus value generated for creative content online has inarguably diminished, with respect to secondary creativity there is an even larger disparity. Secondary works of creativity nearly always result in no revenue streams for their authors when published online- even when those works are legitimately made under exceptions to infringement. This is because venues for posting this sort of content online either offer no means of revenue or divert the entirety of any revenue to the owner of the base copyrighted work. In rare cases where venues are created specifically for secondary authors to sell and profit from their works, like in the case of Kindle Worlds for fan fiction, the terms of the license offered are often predatory.⁴⁸⁶ New laws that seek to help authors get paid for uses of their works in the digital space cannot ignore the new generation of secondary creators in doing so.

ii. Neither Solution is Ideal

Chapter Four of this thesis addressed the philosophical justifications for a system that more strongly promotes and protects users' rights. Those points will not be remade here. The Canadian approach expands users rights infinitely within one sphere of creation- non-commercial works. The

⁴⁸⁶ This will be discussed in depth in chapter 5.

European approach undermines users' rights by making them a secondary priority compared to those of first authors. As stated before, copyright law should be a delicate balance between the rights of creators and the rights of users. Each law differs by focusing on opposing parts of this scale. However, a balance must be struck. Both parties' rights should be accounted for. The CMA fails both users and creators in that its structure has not only failed to facilitate further financial exploitation for either party, but it has also diverted any potential revenue from the new works it promotes solely to non-creative third parties. The law can be seen as a win for the right of expression but a loss when viewed within the scope of the purpose of copyright law- the promotion of new works through economic incentives. The European Directive, though still in the theoretical stages as it has yet to be fully adopted and implemented by member states, is a win for primary creators as it will undoubtedly serve to diminish the value gap they have suffered. However, it is likely a loss for users as it will undoubtedly have censoring effects despite its provisions intended to prevent them. Moreover, it is a loss for online content distribution companies who play a pivotal role in the dissemination of largely legitimate content. They have become the unfortunate targets for compensation simply by virtue of their financial success and the industry's inability to hold anyone else financially accountable for piracy in recent history. Neither solution is in fact a solution. They are both bandages strategically applied to separate wounds which, in turn, allow the neglected ones to continue to fester.

A true solution is needed- one that addresses each of the ailments copyright law faces caused by the digital world. A system designed to promote and facilitate licensing efforts by (often) low-value users who are typically ignored or priced out of traditional access would be an ideal way to ensure financial exploitation of works for primary creators (value gap issues) and create a healthy system of users' rights that more appropriately reflects the creative norms of the digital era. Such a system, however, is likely incompatible with many aspects of the dogmatic property-based system of copyright. Transitioning away from this model will be the key to successful copyright law in the age of the internet. The following chapter will discuss how, in the absence of meaningful

legislation, the private sector has begun to address these problems on its own and how these methods may be transposed into a new system of law that benefits all parties involved.

V. Private Sector Solutions as Copyright's Crutch: Creative Commons, Tolerated Use, and Content ID

A. Introduction

As the scope and boundaries of copyright law become less and less vivid in the wake of rapidly advancing technology, globalisation, and a shift in user expectations, solutions have not always come from legislation or court opinions. In fact, over the last decade, the private sector has had an enormous impact on the definitions of copyright law in practice through implementation and adoption of pseudo-law systems without the backing of legislation.

This chapter will discuss three modern alternatives to copyright law that have come about as proposed solutions to its problems. Each alternative sets out to solve a different set of problems imposed by the law. However, they are similar in that each solution is one that both operates outside the bounds of the law and is implemented at the discretion of content owners. The first force seeking to harmonise modern practices with the law is a movement known as the Creative Commons which was designed to counterbalance what its founders saw as a growingly intrusive copyright law system. Second, content owners sought to fill copyright law's gaps with respect to user-generated content by creating pseudo-laws in the form of tolerated uses that arguably expand and restrict users' rights under the law. Third, YouTube's content ID system and related programs serve as a private enforcement mechanism for copyright-related disputes within the YouTube universe and other online communities. All of these solutions take advantage of the current ambiguity of the law in an attempt to satiate users, provide clarity, and redistribute control in a way that echoes the evolving paradigm in copyright law. When analysed together, these systems present three clear ideas. First, there is a disparity between copyright law as it is written and how those whom it regulates believe it should function which can be best described as a failure in the law. Second, where corporate entities have been given the freedom to reshape the law, they have done so in a way that favours themselves. Third, the main theme tying these three separate solutions

together is a trend of rights-holders favouring rights of remuneration and efficient means of enforcing those rights over exclusive control. These concepts, coupled with the issues in the law that have brought about the need for such private-sector solutions, demonstrate that perhaps the most equitable solution for all parties is a drastic redefinition of copyright law itself. This chapter will discuss the influence of these three systems on the law, how they benefit and degrade users' rights, their immediate successes and failures, their long-term prospects as solutions and their implications for actual changes in copyright legislation.

B. Creative Commons

i. Introduction and the System

The Creative Commons is an American non-profit organisation founded in 2001 by a group of legal scholars, technologists, philanthropists, and entrepreneurs.⁴⁸⁷ The organisation is said to have a twofold objective.⁴⁸⁸ Its first aim is to “counteract the increasing protection of creative content by copyright.”⁴⁸⁹ The sense of “increasing protection” stems from the modern expansion of copyright rights granted in both duration and scope of protection. The Creative Commons views such expansions as “overreaching and detrimental both for future creators and for the users of copyrighted works.”⁴⁹⁰ There is a growing paradigm among creators of online works that embraces sharing and remix. However, Copyright law serves largely as a barrier to this process. To share or remix a work, under copyright law a license must first be obtained. The process of obtaining such a license is neither simple nor cheap. Susan Corbett noted that “the copyright or copyrights in many creative works is owned by large media corporations who require substantial royalty payments if indeed they will grant one at all.”⁴⁹¹ Furthermore, before breaking through the barriers to obtain a

487 ‘History, Creative Commons’ (2020) <<https://creativecommons.org/about/history>> accessed 21 May 2020

488 Dusollier, S., ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright.’ [2005-06] 29 Columbia Journal of Law & the Arts 271, 271-2

489 Ibid. at 272

490 Ibid.

491 Corbett, S., ‘Creative Commons Licenses, the Copyright Regime and the Online Community: Is There a Fatal Disconnect,’ (2011) Vol. 74, no. 4 Modern Law Review, Pgs. 503-531. at 509

license from a content owner, one must determine who that owner is- a process that has become much more difficult in the age of internet publishing.⁴⁹² Niva Elkin-Koren noted that:

The barriers to access are thus effectuated by two separate aspects of copyright law: first the legal right to restrict access and to apply for injunction in case of unauthorised use, and, second, the information costs associated with securing a license. Creative Commons' strategy accepts the first and focuses on the latter.⁴⁹³

Therefore, the first goal of Creative Commons is to create a vessel whereby authors can easily bypass the modern restrictions of copyright law and make their works more readily available for the public to use. The second aim of the Creative Commons is to cure what it sees as copyright law's tragic flaw- that it has become "an impediment to the creative process or the enjoyment of cultural resources, rather than as a necessary element of the creative process and access to artistic culture."⁴⁹⁴

In its attempt to respond to these acknowledged problems in the law, the Creative Commons uses a licensing model that "instead of prohibiting the use of copyrighted works (the 'all-rights-reserved' approach), purports to authorise the reproduction and dissemination of works, while also allowing the licensor to prohibit unwanted uses of her works (the 'some-rights-reserved' approach).⁴⁹⁵ In plainer terms, the Creative Commons is a system whereby authors may choose to forego some or all of the rights granted to them by copyright law for the sake of the greater good of the artistic community.

This process is manifested in the form of six legally-binding licenses that any author may choose to tag her work with. Each component of the license is represented by a symbol. When a work is given a Creative Commons license it will be symbolically tagged according to that license in the way that copyrighted works are tagged with the © symbol. Each license is worldwide, royalty-free, non-exclusive, perpetual (for the life of the copyright) and irrevocable (except under conditions of breach of contract). All rights not expressly granted by the licensor are considered

492 Ibid.

493 Elkin-Koren, N., 'Exploring Creative Commons' in Guibault, L. and Hugenholtz, P.B. (eds.) *The Future of the Public Domain: Identifying the Commons in Information Law* [2006] Hague: Kluwer, pg. 327

494 Ibid.

495 Ibid.

reserved. The licensee must include a copy of the license with every copy of the work she distributes.

ii. Flaws in the System

The Creative Commons represents a manifestation of a growing paradigm in copyright law- that somehow the law must be attenuated for the benefit of the growing creative community. However, as an actual solution to the problem of copyright's intrusion, the Creative Commons is a partial failure for two reasons. First, the creative commons has failed to reach mainstream adoption. Second, and more importantly, the Creative Commons operates within the confines of the law it criticises and uses its very tools.

To claim that the Creative Commons has failed to reach mainstream adoption is perhaps unfair. In fact, based on a survey of Google's cache, it was estimated in 2014 that over 882 million works were published online using Creative Commons licenses.⁴⁹⁶ These numbers imply widespread adoption. However, the overwhelming majority of these works were published to amateur sites like Wikipedia, YouTube, Flickr, and DeviantART.⁴⁹⁷ While it appears that the values underpinning the Creative Commons system represent those of the majority, it is a powerless majority. These numbers, in fact, help to paint a clear picture of the structure of the content industry today. As most popular content is controlled by a few global corporations who have lead the way in lobbying for stricter copyright laws with longer terms, nearly a billion amateur works made in a span of 13 years represent the wants of the people- laws that support creative freedom. So, in one facet, the Creative Commons is a success in terms of adoption. However, as an optional system that is the antithesis of the laws corporate content owners have fought so hard to create, it will never reach full adoption. This notion brings us to the second, and most important, flaw of the Creative Commons system- the law within which it operates.

⁴⁹⁶ 'Cc-Archive/Stateofthe' (*GitHub*, 2020) <<https://github.com/creativecommons/stateofthe/blob/master/data/notes.md>> accessed 21 May 2020

⁴⁹⁷ Ibid.

The Creative Commons works within the confines of copyright law- the very system it argues is tragically flawed. Severine Dusollier aptly analogised the Creative Commons solution to Audre Lorde's statement that "the master's tools will never dismantle the master's house."⁴⁹⁸ Niva Elkin-Koren also wrote that an alternative to the current copyright system can only come from a complete restructuring of the actual law- and that attempts to adapt it via the same tools that turned it into an unbalanced body of law are doomed from the start.⁴⁹⁹ However, Dusollier offers another viewpoint whereby the "master's tools" might be able to bring down the "master's house." She posits that by using the very tools that have created this unbalanced law in an attempt to undermine it could have a parodic effect that alters the dialogue in such a way that changes the "social practices related to the spread of creative works" and could break the "constructive habit" of the "control/remuneration discourse that dominate[s] copyright discourse."⁵⁰⁰ However, twelve years later, within the confines of a social movement with the power to effect real change, the Creative Commons has arguably failed. No meaningful legislation has been passed as a result of the revolution it sought to create and, despite its numbers, the movement has been relegated to that of an internet subculture of amateurs and academics. Meanwhile, the corporate content owners distributing the films, television shows, and music that people pay for continue to benefit from the archaic laws this movement arguably sought to dismantle.

Dusollier concluded by arguing that the Creative Commons "only addresses one side of the dialogue: that of the public opportunely transformed into consumers."⁵⁰¹ If the Creative Commons represents the public's response to failings of Copyright, then Tolerated Use represents the opposing side- that of "(corporate) content owners."⁵⁰²

498 Dusollier (2005) *Supra* n.488 at 272

499 Elkin-Koren, N., 'A Public-Regarding Approach to Contracting over Copyrights,' in *Expanding the Boundaries of Intellectual Property*. [2001] R.C. Dreyfuss, D. L. Zimmerman & H. First. Pg. 192

500 Dusollier (2005) *Supra* n.488 at 285

501 *Ibid.* at 293

502 *Ibid.*

C. Tolerated Use: Then and Now

Derivative works, licensed and unlicensed, are common on the internet. As evidenced by the best seller and box office sensation, *Fifty Shades of Grey*, which began as *Twilight* fan fiction⁵⁰³, fan fiction is growing in popularity. Fan art, ranging from gallery-quality paintings to small t-shirt companies, are ubiquitous. Remixes and sampled music are more popular than ever, especially in hip-hop, rap, and electronic dance music.

Many of these are technically infringing works, regardless of commercialisation. Although, some are either arguably a fair use or done through the arduous process of licensing. The law on fair use in America and its relative counterparts elsewhere are generally ambiguous with respect to user-generated content at best and, at worst, criminalise these expressions. Tim Wu described this body of works ten years ago as “a giant grey zone in copyright, consisting of millions of usages that do not fall into a clear category but are often infringing.”⁵⁰⁴ Wu went on to note that “the critical aspect of this phenomenon are uses of works that are of a mass quantity and low value per transaction.”⁵⁰⁵

With the exorbitant costs associated with defending against a copyright infringement action, especially in America, coupled with the low economic value of each individual work, there is little incentive for litigation. Therefore, there are very few recent judicial opinions on this body of works.

Despite legal ambiguity and a perception of the law that favours content owners, these works remain ubiquitous. In an attempt to bolster relationships with fans and users while retaining firm control over copyright works, corporate content owners have taken advantage of the current legal climate and sought to establish pseudo-laws in the form of user-generated content policies. These “no-action policies,”⁵⁰⁶ a term coined by Wu as he suggested their inception over 10 years ago, serve as public statements by content owners outlining to users boundaries within which they

503 Bertrand, N. 'Fifty Shades of Grey' started out as 'Twilight' fan fiction before becoming an international phenomenon' (*Business Insider*, 2015) <<http://www.businessinsider.com/fifty-shades-of-grey-started-out-as-twilight-fan-fiction-2015-2>> accessed 17 May 2021

504 Wu, T., 'Tolerated Use,' (2007-2008) 31 Colum. J.L. & Arts. pg. 617

505 Ibid.

506 Ibid. at 633

may use copyrighted material to make new works. Whether these policies reflect the law as it would be interpreted by a judge is dubious at best, but they generally remain unchallenged.

This section will show how tolerated use has evolved since Wu first wrote about it over ten years ago by examining a few of the more prevalent examples of these policies, how they affect users' rights, and their potential conflicts with the law.

i. Tolerated Use in 2007

Wu first coined the term “tolerated use” in his 2007 paper of the same title. He defined it as “the contemporary spread of technically infringing, but nonetheless tolerated, use of copyrighted works.”⁵⁰⁷ Wu was writing in a time where our technological capabilities had just begun to surpass what was foreseen by the authors of copyright law. He noted that “as recently as the 1960s, it was very difficult to infringe the copyright law...[t]oday every man, woman, corporation and child has the technological ability to copy and distribute, and therefore to potentially infringe copyright...”⁵⁰⁸ Wu noted that this newfound technological power given to users spawned a wave of infringements, and, from that, new ways of addressing those infringements outside of the scope of traditional categories of usage.⁵⁰⁹ Wu concluded, however, that there was a more perfect way to deal with these potential infringements given their ambiguity under the law.⁵¹⁰ He suggested instead a system of “no-action” policies whereby content owners would describe to users those uses of the works that the owner will not enforce.”⁵¹¹ Wu envisioned a no-action policy as “a simple posting on the web or elsewhere that details the secondary uses of a work that a secondary author can make without gaining further permission of the owner.”⁵¹²

⁵⁰⁷ Ibid. at 617

⁵⁰⁸ Ibid. at 618

⁵⁰⁹ Ibid. at 619

⁵¹⁰ Ibid. at 633

⁵¹¹ Ibid.

⁵¹² Ibid.

Ten years later, content owners have taken Wu's suggestion to heart and no-action policies are commonplace in the content world. In some jurisdictions where exceptions to infringement are limited, no-action policies represent the only saving grace for amateur creators seeking to make derivative works. However, in jurisdictions like the U.S. where fair use provides a much more broad set of rights to users, no-action policies are arguably at odds with the law. Wu addressed this point but dismissed the notion because "thanks to the inherent vagueness in the concept of fair use and the costs of litigation, the contours of fair use for casual infringement have not been- and may never be- well mapped out."⁵¹³

The following sections will illustrate not only how no-action policies have come to life in the content industry but also how certain industries have gone steps further to fill gaps in copyright law. It will analyse the differing effects these no-action policies have on users' rights based on jurisdiction and discuss the implications of the evolution of tolerated use for future copyright policy.

ii. No-Action Policies

This section will outline how no-action policies are used in the real world, the forms they take, and their implications.

a. Fan Fiction/Films

With fan-fiction being the quintessential body of work that has spawned the need for tolerated use programs, the worlds of books, film, and television are rife with such policies. Typically, they will vary from author to author (or studio to studio), though they come, generally, in one of three forms.

The first form is a *Non-Commercial All Access* approval. This is where authors have stated publicly that they will not enforce their copyright against fan-fiction authors who publish works

⁵¹³ Ibid. at 620

non-commercially. Neil Gaimon⁵¹⁴, Jim Butcher⁵¹⁵, and Stephanie Meyer⁵¹⁶ are included in the large list of authors who support fan fiction in this context.

The second category is the *Noncommercial with Exclusions* approval. This includes authors who are willing to allow non-commercial publications of fan-fiction using their work with certain exceptions- most often pornographic interpretations. These authors include J.K. Rowling⁵¹⁷ and Anne McCaffrey⁵¹⁸.

The final category is one of *No Tolerance for Any Publications*. This category represents authors and publishers who view fan fiction as, categorically, a non-fair use infringement and will take legal action against any publication. Typically, authors in this category take this stance based on a belief that non-enforcement subjects their copyrights to risk of abandonment.⁵¹⁹ However, some authors simply view fan fiction as morally wrong and upsetting.⁵²⁰ Whatever their reasons, some authors and publishing companies publicly disallow any publications of fan works based on their copyrighted works. A more prominent example of this in the United Kingdom is the Dr. Who franchise owned by the BBC.⁵²¹

b. Video Games

Tolerated use policies are not exclusive to the literary and film worlds. As user-generated content and fan works concerning all forms of media have become ubiquitous, nearly every industry

514 Fanlore.org (2018) 'Professional Author Fanfic Policies – Fanlore' <https://fanlore.org/wiki/Professional_Author_Fanfic_Policies#cite_ref-42> accessed 24 February 2018

515 Ibid.

516 Fanlore.org (2018) 'Stephenie Meyer – Fanlore' <https://fanlore.org/wiki/Stephenie_Meyer> accessed 24 February 2018

517 Waters, D., 'Rowling backs Potter fan fiction' (*BBC News*, 2018) <<http://news.bbc.co.uk/1/hi/entertainment/3753001.stm>> accessed 24 February 2018

518 McCaffrey, A., 'Fan Fiction Rules – The Worlds of Anne McCaffrey' (*Pernhome*, 2018) <<http://pernhome.com/aim/anne-mccaffrey/fans/fan-fiction-rules/>> Accessed 24 Feb. 2018

519 Laurel, K., Hamilton and George R. R. Martin. See: Fanlore.org. (2018). 'Professional Author Fanfic Policies – Fanlore' <https://fanlore.org/wiki/Professional_Author_Fanfic_Policies#cite_ref-42> accessed 24 Feb. 2018; R.R. Martin, G., 'Someone Is Angry On the Internet' (*Livejournal*, 2018) <<https://grm.livejournal.com/151914.html>> accessed 24 February 2018

520 Lynn Flewelling, S.L. Armstrong. See: Armstrong, S., 'Fanfiction and Copyright' (2010) <<https://slarmstrong.wordpress.com/2010/05/08/fanfiction-and-copyright/>> accessed 24 Feb. 2018]. and Fanlore.org. (2018). 'Lynn Flewelling – Fanlore' <https://fanlore.org/wiki/Lynn_Flewelling#cite_note-nightrunner-1> accessed 24 February 2018

521 BBC (2018) 'Doctor Who - Frequently Asked Questions - BBC One' <<http://www.bbc.co.uk/programmes/articles/1mv1sSDySZXtn3Y3bsS4fPv/frequently-asked-questions>> accessed 24 February 2018

has created policies of tolerated use in one form or another. The video game industry is a noteworthy example because video games have become a source of a multitude of legal issues with regards to user-generated content. As a result, tolerated use policies from the video game industry have become sophisticated and thorough.

Activision, the world's first independent developer and distributor of video games for console systems has outlined its user-generated content policy in its terms of service. It states that users creating their own content from its games grant Activision a perpetual, worldwide, royalty free, non exclusive license to use, reproduce, or create derivative works from the UGC.⁵²² Activision takes the license a step farther and grants a similar license to all other users of the game once a player publicly posts her UGC.⁵²³ Thus, Activision acknowledges that copyright of UGC derived from its video games vests in the user-creator. This is a key difference from other policies that require no copyright registration be made for fan creations.⁵²⁴ Activision finishes by outlining types of UGC which it retains the right to terminate including harassing, abusive, sexually explicit or generally vulgar material.⁵²⁵ Insomniac games has similar provisions in its terms of service, but provides a clause that explicitly deems that the copyright for the UGC is owned by its creator.

c. Video Games- Machinima

Another copyright issue associated with video games is the rising popularity of machinima- or using the engine of video game to create a film. Machinima film-makers play the video game in a way that brings life to their characters, all the while capturing the gameplay in a digital recording, edit that recording like film, and dub in dialogue and music. The final result is an animation-esque film made almost entirely from content within the video game.

Microsoft addresses machinima in its Game Content Usage Rules. In these rules, Microsoft states that it supports use of machinima for non-commercial purposes only.⁵²⁶ It does, however,

⁵²² 'Terms of Use,' Activision, <<https://www.activision.com/legal/terms-of-use>> accessed 31 March 2016

⁵²³ Ibid.

⁵²⁴ 'Fan Production Guidelines' (2017) <<https://intl.startrek.com/fan-films>> accessed 31 May 2018

⁵²⁵ Activision Supra n.522

⁵²⁶ 'Game Content Usage Rules,' Xbox, <<http://www.xbox.com/en-us/developers/rules>> accessed 31 March 2016

have an explicit exception for ad-driven revenue from sites like YouTube.⁵²⁷ Blizzard, conversely, omits this exclusion for ad-driven revenue from the videos it allows.⁵²⁸ However, Blizzard states that “as long as the website that hosts your Production provides a free method to allow viewers to see the Production, Blizzard Entertainment will not object to your Production being hosted on that site.”⁵²⁹ Blizzard appears to be prohibiting machinima videos made from its games to be shown on subscription based or pay-to-view based websites or channels. It is possible, then, that machinima filmmakers would be within their rights to post their videos to youtube and receive ad-revenue from it.

D. Tolerated Use and Users’ Rights- The Issues

Because copyright laws vary from nation to nation, understanding the effects of tolerated use policies on users’ rights requires a jurisdictional analysis. However, this analysis can be generalised into two categories: jurisdictions with fair use and jurisdictions without. This section will argue that, in jurisdictions without fair use, no action policies typically expand users’ rights whereas, in jurisdictions with fair use, no action policies arguably limit users’ rights.

i. Jurisdictions Without Fair Use

The vast majority of the world live in jurisdictions that do not have “fair use” laws. Many countries, including the United Kingdom and most of its former colonies use a system of fair dealing while the rest of the world uses a system of enumerated exceptions to infringement that function similarly to fair dealing. These exceptions will vary from country to country. However, with respect to UGC, there are but a few exceptions that become applicable.

These relevant exceptions are for works made for private use, works that incidentally include material from other works, and works of parody, caricature, or pastiche. While each of these exceptions *may* have relevance to some forms of UGC, none of them nor their aggregation provides

⁵²⁷ Ibid.

⁵²⁸ ‘Video Policy,’ Blizzard, <<http://eu.blizzard.com/en-gb/company/legal/videopolicy.html>> accessed 31 March 2016

⁵²⁹ Ibid.

any sense of comprehensive protection to user-creators. The private use exception offers no help to those who wish to share their works with others. Most works of user-generated content will rarely fall within the narrow threshold for incidental inclusion. Finally, parody, caricature and pastiche represent only a small fraction of the genres within which users are creating content. Therefore, generally, users who live in a jurisdiction without fair use often have little to no legal protections under the law for the creation of transformative derivatives.

In these jurisdictions, tolerated use policies become a saving grace. They expand the confines of the law and give users the opportunity to create in ways that they otherwise may not be entitled to.

ii. Fair Use Jurisdictions

Fair use is an American legal concept, though it has been adopted in other jurisdictions like Israel and South Korea, and has been developed mostly through American case law. Therefore, this section will likewise focus primarily on tolerated use and the United States.

In the United States, tolerated use relies on legal ambiguity by filling in the gaps in ways that are seemingly compromises between creators and users rights. However, in many ways these policies arguably weaken users' rights under the law and represent unnecessary compromises made by users. The policies, nevertheless, remain unchallenged because of the generally weak position users would face in litigation based on expenses.

There is little legal precedent to rely upon with regards to fair use and fan works/ user-generated content. Moreover, the various holdings available are, in many ways, in conflict with each other.⁵³⁰ Cases like *Prince v. Cariou*, *Campbell v. Acuff Rose*, and *Suntrust Bank* set precedents for apparently strong user's rights.⁵³¹ However, they are undermined by others like *Penguin Books*,⁵³² *Bridgeport Music*,⁵³³ and *Axanar Productions*.⁵³⁴ The law of fair use in the U.S.

⁵³⁰ See: Chapter 1 F(ii)e

⁵³¹ See: Chapter 1F(ii)e

⁵³² See: Supra n. 190

⁵³³ See: Supra n.**Error! Bookmark not defined.**180

⁵³⁴ See: Supra n.349 See also: Chapter 1 F(ii)e

is, unquestionably, vaguely defined. However, the vaguely drawn borders of this legal construct and its partner, transformative use, result in leaving an argument to be made that most forms of user-generated content could constitute a fair use and do not require the blessing of a no action policy.

iii. Implications

Tolerated use policies, therefore, have very different meanings and implications depending on the jurisdiction in question. However, regardless of jurisdiction, tolerated use policies are the result of a critical failure in the law. There is an indisputable growing paradigm in the creative amateur communities that calls for the right to interact with copyrighted works- to transform them, remix them, and create derivatives as a means of new expression. Tolerated use programs address this paradigm in all jurisdictions. In those without fair use, where the law has almost no protections for users, tolerated use supplants the law. It represents the inability of legislators to adapt the law to a modern community- one type of failure in the law. In jurisdictions with fair use, where there are some provisions for a user's right to make transformative derivatives but those provisions are poorly defined, tolerated use policies seek to clarify the law but do so in arguably predatory ways- another type of failure in the law. However, across all jurisdictions, the reality is that the law no longer governs this aspect of copyright but rather corporate policies. Nations of the free world do not allow private entities to govern in any other aspect and copyright law should not be the exception. It is the responsibility of lawmakers to take a stance. However, tolerated use is no longer simply a manipulation of inadequate or undefined legislation by content owners to control expression. It has evolved into a means to also monetise and profit from the expressions of others.

E. Controlled Monetisation- The Future of Tolerated Use and Copyright Law

As the ubiquity of user-generated content has brought about policies of tolerated use in nearly every sector of the content industries, some industries have sought to take these policies a step further. Despite the fact that tolerated use policies were designed to target works that, by definition, are of low individual economic value, content owners have begun to adapt policies in

attempts to find ways to monetise aggregate bodies of these works for themselves. For example, where the damages from one fan fiction author for her infringements are minuscule, the aggregate value of, say, *all* fan fiction is substantial. Therefore, content owners have now begun to look for ways to, under controlled settings, monetise these works for themselves and the authors they represent by creating hubs within which user-authors may publish and sometimes sell their fan-works legally. These regimes display a user-friendly facade when in reality they are often contracts of adhesion that require users to pay exorbitant licenses for works that, as discussed earlier, may not actually require one. However, these programs are in the early stages of development and may, in fact, represent the next step in the evolution of copyright law. This section will describe examples of the early-stage evolution of the future of tolerated use, how it degrades the rights of users, and its implications for changes in copyright law itself.

i. Amazon Kindle Worlds- A Licensing Scheme for Fan Fiction in the U.S.

With its creation of the Kindle Worlds section of its massive online distribution network, Amazon has enabled fan fiction authors to easily monetise their works. Moreover, they've done so in a way that also makes it legal and simple. Amazon has done this by licensing content from various owners that are relevant to fan fiction authors.⁵³⁵ Amazon then allows fan fiction writers to write whatever they would like (within its guidelines) concerning the "worlds" it has licensed.⁵³⁶ Amazon reviews the submitted fan fiction to ensure that it complies with its licensing agreements before publishing it.⁵³⁷

535 See: 'Kindle Worlds,' Amazon, <<http://www.amazon.com/gp/feature.html?docId=1001197421>> accessed 31 March 2016 (Amazon Publishing has secured licenses from Warner Bros. Television Group's Alloy Entertainment for *Gossip Girl*, *Pretty Little Liars*, and *The Vampire Diaries*; Valiant Entertainment for *Archer & Armstrong*, *Bloodshot*, *Harbinger*, *Shadowman*, and *X-O Manowar*; Hugh Howey's *Silo Saga*; Barry Eisler's *John Rain* novels; Blake Crouch's *Wayward Pines* series; and *The Foreworld Saga* by Neal Stephenson, Greg Bear, Mark Teppo, Eric Bear, Joseph Brassey, Nicole Galland, and Cooper Moo)

536 'Content Guidelines and Review Process,' Kindle Worlds, <<https://kindleworlds.amazon.com/faqs?topicId=A2W2IF5J2WZDKT>> accessed 31 March 2016

537 Ibid.

While this program marks a giant leap in advancing fan fiction, it has its downfalls. First, the “worlds” Amazon has licensed are extremely limited.⁵³⁸ Second, even amongst the “worlds” Amazon has secured licenses for fans to write about, crossover and hybrid stories are not permitted across “worlds.” It is likely that fan fiction authors will find limitations like this too constraining as the very point of fan fiction seems to be unfettered exploration. However, there is no other company offering a legitimate way to publish monetised fan fiction as of now and Amazon’s program is in its early stages of development.

Legally, the Kindle Worlds program represents a potentially unnecessary bargain for fan fiction authors- and a costly one at that. The licensing scheme relies on the claim that using another’s work for commercial purposes is an illegal infringement. However, under U.S. law this is not necessarily so. Works that are sufficiently transformative will be deemed fair uses despite monetisation.⁵³⁹ However, the policy relies on the ambiguity created by conflicting case law such as *Axanar* and *Cariou* to substantiate this claim.⁵⁴⁰ Furthermore, the cost of the license represents the metaphorical “arm and a leg” that an author must pay to have her work posted. First, by posting a work to Kindle Worlds, an author grants an exclusive license to all original elements of that work to Amazon.⁵⁴¹ Therefore, all future publications of any sort that make use of such original elements will be an infringement unless done so through Amazon’s channels- including publications by its author. Furthermore, Amazon will retain the right to other derivations of the author’s work such as film and television licenses.⁵⁴² Moreover, the actual cost of the license is expensive. Fan authors in the Kindle Worlds scheme will be paid 20-35% of net revenue from their works as royalties.⁵⁴³ While ebook royalties vary, the authors guild recently wrote that a 50/50 split between author and

538 See: *Campbell* Supra n.149; *Cariou* Supra n.174

539 Ibid.

540 See: Chapter 1 F

541 Kindle Worlds (2020) <<https://kindleworlds.amazon.com/faqs?topicId=A31DTV3VSRP82B>> accessed 21 May 2020

542 Ibid.

543 Kindleworlds.amazon.com. (2018) ‘Kindle Worlds – FAQs’ <<https://kindleworlds.amazon.com/faqs?topicId=A3T3UQCG5AG03W>> accessed 31 May 2018

publisher are the fair terms for e-publications.⁵⁴⁴ With a rightful share of 50% of sales in mind for a digital author, and at only 20-35% actually paid, the fan author is essentially paying 30-60% of her own share to license the work she builds upon. Comparatively, when using the established mechanical license programs under United States copyright law for a cover song, musicians pay far less for their license. An artist will make between \$.57 and \$.74 per digital download of a song.⁵⁴⁵ Of that, \$.091 will need to be paid for the license.⁵⁴⁶ Therefore, the artist will be paying between 12% and 16% of her share for the right to license the musical composition. Thus, in this budding and unregulated market of fan fiction, we see prices set at 2-5 times higher than the closest government-established parallel.

The Kindle Worlds program was cast from the same mould as traditional tolerated use. It relies on ambiguity in the relevant statutory and case law to craft a predatory policy that will go unchallenged based on the poor position any potential challenger would face coupled with the uncertainty of legal outcome. The only difference is that Kindle Worlds creates actual revenue for content owners- both direct and indirect. Kindle Worlds, however, is not the only program of its kind.

ii. Video Games- Modding

In a world where games are easily modified by enthusiastic players from their own laptop computers and then may be quickly disseminated across the globe, gaming companies have had to adapt their strategies. In the gaming industry, there is an across-the-board acknowledgement that UGC represents (typically) an original creation that merits individual copyright protection vesting in its author. However, development companies protect themselves by granting themselves non-exclusive rights in the content. Furthermore, many companies are finding ways to monetise these

544 The Authors Guild (2015). 'Half of Net Proceeds Is the Fair Royalty Rate for E-Books' <<https://www.authorsguild.org/industry-advocacy/half-of-net-proceeds-is-the-fair-royalty-rate-for-e-books/>> accessed 31 May 2018

545 'How much do music artists earn online' (2020) <<https://informationisbeautiful.net/2010/how-much-do-music-artists-earn-online/>> accessed 21 May 2020

546 Assuming the song is less than 5 minutes in length. (Copyright.gov, 2020) <<https://copyright.gov/licensing/m200a.pdf>> accessed 21 May 2020

consumer-created contributions both for themselves and users in ways analogous to the Kindle Worlds scheme. This process likewise represents a compromise that appeases both sides as the users are free to continue creating mods and profit from them, but the development companies retain their pecuniary rights in the copyrighted elements of the games that inspire these mods.

Daybreak Games, the developer for the wildly popular massive multiplayer online role playing game, Everquest, has recently launched its Player Studio.⁵⁴⁷ The Player Studio is essentially a marketplace for gamers to create and sell items to be used in the game.⁵⁴⁸ Players are able to create their own items, upload them to the marketplace (after Daybreak approves them) and sell them. Daybreak then pays the players 40% of the sale price.⁵⁴⁹

Valve Games owns Steam, an online distribution platform that represents how the majority of computer gamers purchase their games.⁵⁵⁰ After embracing modding as a policy, the company sought to use Steam as a way for fans to monetise their creations. Valve announced in 2015 that it was releasing a platform for modders to sell their mods on Steam.⁵⁵¹ Valve had experimented with a program similar to Daybreak's Player Studio that allowed users to sell their cosmetic item mods for the games Team Fortress 2 and Dota 2 in 2011.⁵⁵² The program was considered a huge success as it paid out \$57 million to content creators in the community over four years from 2011 to 2015.⁵⁵³ However, Valve's experiment with a mod marketplace was less successful and shortly after its trial phase began it was shut down. Yet, two years later, Valve is continuing to pursue ways to compensate modders. In a recent interview, Valve president, Gabe Newell, described the positive

547 'Player Studio,' Daybreak, <<https://player-studio.daybreakgames.com>> accessed 31 March 2016

548 Ibid.

549 Ibid.

550 Maibergh, E., 'Whoa, Valve Just Monetized Mods' (*Vice*, 2015) <<https://www.vice.com/en/article/jp5n4p/whoa-valve-just-monetized-mods>> accessed 16 May 2021

551 Ibid.

552 Ibid.

553 Ibid.

effect modding has on the game development industry by illuminating the aspects of games that fans appreciate and want to be further explored and those they find uninteresting.⁵⁵⁴

In the Summer of 2017, Bethesda games launched its solution- the Creation Club- an online marketplace for professionally-built in-game content. Noting Valve's failure with monetising modded content but wanting to solve the issue of a high demand for in-game add ons and modifications, Bethesda created this unique program. Amateur developers can apply to become part of the scheme whereby they will work as Bethesda contractors to create high quality add-on content. On its website, Bethesda states the Creation Club is *not* a system for paid mods, noting that "Mods will remain a free and open system where anyone can create and share what they'd like" but that CC content will be developed in the same professional manner that all other Bethesda content is- albeit with the help of some outside contractors under the supervision of internal developers.⁵⁵⁵

By creating distribution and monetisation methods for mods and other forms of user-generated content, gaming companies have conceded that content editors and creators within the games own at least a share of the rights to their creations. In the video game world, there is no way to distribute in-game items or modded versions of a video game without directly interacting with the game's source code. However in the literary world such barriers do not exist. Therefore, the arguable difference between video game monetisation platforms and the Kindle Worlds program is that video game companies have *created* this market whereas Kindle Worlds has attempted to monopolise an already existing one. Furthermore, the general consensus in the game-development community is an appreciation of amateur mods on a non-commercial basis while monetisation attempts have been pursued only to supply users with higher-quality content- not to try and squeeze a profit from an amateur community comprised entirely of its fans. However, despite being a more user-friendly system of controlled monetisation, the system echoes the desire to monetise the, previously thought to be, unmonetisable and represents an extension of tolerated use.

554 Lahti, E., 'Valve: Modders 'absolutely' need to be paid' (*PC Gamer*, 2016) <<http://www.pcgamer.com/valve-modders-absolutely-need-to-be-paid/>> accessed 31 May 2018

555 'Creation Club,' (*Bethesda*, 2017) <<https://creationclub.bethesda.net/en>> accessed 31 May 2018

iii. The BBC's Mission Dalek and Crowdsourcing Content from Fans

As mentioned earlier, the BBC has taken a harsh stance when it comes to fan fiction for one of its proudest franchises, Dr. Who. On its website, the BBC tells fans “you are welcome to write Doctor Who fiction for your own enjoyment, we should remind you that it is not permitted for you to publish this work either in print or online.” This policy echoes current U.K. law by acknowledging that private use is allowed but refuses to condone even non-commercial amateur publications. As it stands, this is less of a no-action policy and more of a reiteration of copyright law in general. However, the BBC has begun to pivot from this position in two ways. First, in 2015, the BBC created a competition for fans to create stories with Peter Capaldi’s twelfth Doctor using provided materials and/or original content.⁵⁵⁶ Second, in 2017, the BBC launched a space where fans can legally post Dr. Who fan fiction- with some key conditions.⁵⁵⁷

The competition known as “Mission Dalek” was part of BBC’s “Make it Digital” campaign which was designed at encouraging amateurs to experiment with coding and digital technologies.⁵⁵⁸ Fans were provided materials in the form of video clips and images that they could use to create a story but were also encouraged to create their own content as well.⁵⁵⁹ While the competition was likely designed as a way to promote digital technology education and fan relationships, it set the tone for the BBC’s new Dr. Who fan site that appears to be nothing more than a way to crowdsource content ideas from fans for free.

In 2017, the BBC launched its official Fan Fiction Site.⁵⁶⁰ The site represents the only legal outlet that fans have to publish their Dr. Who fan fiction and, like other examples of controlled

556 Kamen, M., ‘BBC wants your Doctor Who fanfic and fan films’ (*Wired*, 2015) <<http://www.wired.co.uk/article/doctor-who-digital-content-competition>> accessed 31 May 2018

557 Doctor Who (2017) ‘Doctor Who Fan Fiction: Your Chance to get Involved!’ <<http://www.bbc.co.uk/blogs/doctorwho/entries/108b4bf0-ffe8-4bab-ab25-a3f2438999ab>> accessed 31 May 2018

558 Kamen, M., ‘BBC wants your Doctor Who fanfic and fan films’ (*Wired*, 2015) <<http://www.wired.co.uk/article/doctor-who-digital-content-competition>> accessed 31 May 2018

559 Ibid.

560 Doctor Who Supra n.557

monetisation, uses a facade of user-friendliness to exploit amateur creations. The site is designed to promote fan engagement by stating that it will feature advice from the show's lead writer and offers basic advice on how to structure a well-written Dr. Who story.⁵⁶¹ However, a close look at the terms of participation reveal what is perhaps the true motive behind the program- crowdsourcing ideas for new content. Based on the Copyright policies, authors retain the rights to their original creation, but grant the BBC the right to "use it at any time and for any purpose."⁵⁶² The policy offers the reassurance that the BBC will not use user's creations in the show without written permission.⁵⁶³ Regardless, the BBC has essentially created a portal whereby it can collect fresh ideas for its content created by its own fans without having to suffer from the traditional legal implications of hearing story ideas from outsiders and, more importantly, without having to pay for it.

This program, like the others discussed before it, notes a shift in viewing the economic value of fan works from that of individually low value pieces to an aggregate body of works that has economic value to be exploited. In the Kindle Worlds and various video games examples, the monetisation was direct. Content owners were providing essentially marketplaces for fans to sell their derivatives and taking a portion of the revenue. Here, the monetisation is indirect. There is no exchange of money, but value is extracted nonetheless.

iv. Implications

Copyright law across the globe is founded on systems of exclusive rights. Authors extract value from their creations by exploiting these exclusive rights granted to them under the law. Traditionally, being the only person able to sell, copy, and adapt a work has been a successful way to ensure that authors are justly compensated for their works and thereby motivated to create new ones. However, the internet has fostered a community where exclusive rights have begun to mean very little because of the inability of authors to adequately police unauthorised uses. In the 1700s or

⁵⁶¹ Ibid.

⁵⁶² 'Mixital Terms,' (*Mixital.co.uk.*, 2017)<<https://www.mixital.co.uk/terms>> accessed 31 May 2018

⁵⁶³ Ibid.

even the 1980s, if someone was publishing your novel without permission, the legal process of suing, barring the publication, and recovering damages was comparatively simple. However, in today's world, where infringing works on the internet are taken down and subsequently reposted elsewhere within seconds, an author that wishes to enforce her exclusive rights to the full extent of the law will likely find herself playing an endless game of whack-a-mole that costs more money than she could ever hope to recover. Thus we see an evolution in authors' values that has manifested itself in these tolerated use policies. Accepting that fighting mild or potential infringements is time-consuming, expensive, and futile, content owners have begun to abandon fighting unauthorised uses of their works in favour of simply trying to extract some sort of value from those uses.

Early tolerated use was largely about the idea of indirect value. Allowing infringements of low economic value saved money from expensive litigation, bought goodwill from one's fanbase, and allowed communities to advertise and market one's content for free. While no royalties were being collected, value was gained. However, as technology has become more efficient and "micro-transactions" has become a buzzword in the content industry, content owners are less satisfied with indirect value and are testing programs to create direct value as well- controlled monetisation schemes. Furthermore, content owners are expanding the notion of indirect value from free advertising to essentially free labour. While the evolution is noteworthy, the core concept remains the same. Authors in the post-internet world are more concerned with extracting value from unauthorised uses than excluding them. In legal terms, they prefer their pecuniary rights over their rights of exclusivity. This notion and the way in which it has manifested itself, however, is completely at odds with the current copyright system that is based on creating value for authors by granting them exclusive rights that are enforceable in courts of law. Furthermore, in practice, current licensing rates in these unregulated markets are far higher than those seen in comparable compulsory licenses. Such practice indicates predatory behaviour. Perhaps, then, it is time the law was changed to not only reflect those values but also to protect users' rights.

A close look at how copyright law with concern to user-generated content is actually functioning in the world today indicates that authors are more concerned with finding efficient means of compensation for uses of their works than they are with the power to prevent those uses. As technology and the internet have created a threat to authors well-being by providing a venue for infringements to be published with little options for recourse, it also provides a solution in the form of efficient means to track and monetise those very unauthorised publications. If the evolution of tolerated use illuminates problems with copyright law's place in the modern world, YouTube's Content ID offers the solution.

F. YouTube's Content ID and Copyright Match Tool

YouTube is the undisputed mega-hub for user-generated content on the internet. The website has over one billion active users with approximately one billion hours of footage watched daily.⁵⁶⁴ This content is a healthy mix of original amateur content, professional content, remixed amateur content, and pirated material. As an American company, YouTube falls within the safe harbour provisions of the DMCA as long as complies with provisions under the act for notice and take down procedures.⁵⁶⁵ However, YouTube has gone beyond its responsibility under the law by implementing a system of software based copyright tools to enable content owners to deal with infringements in a more efficient way. These tools are its proprietary Content ID software and its newly released Copyright Match Tool. These pieces of software use digital fingerprinting technology to notify content owners of infringing uses of their material that have been uploaded to YouTube. The Content ID system is automated via a series of if-then hypotheticals that determine how to deal with an infringing upload. The options include removal, monetisation, and tolerance. The Copyright Match tool works in a similar fashion but instead of relying on an outside database provided by professional organisations to find matches, it searches within YouTube's own database of content. Therefore, this tool is aimed at allowing creators on YouTube to know when, where, by

⁵⁶⁴ 'Press – YouTube,' (*Youtube.com.*, 2018). <<https://www.youtube.com/intl/en-GB/yt/about/press/>> accessed 31 May 2018

⁵⁶⁵ Digital Millennium Copyright Act 1998

whom, and in what portions, their content is being re-used or re-posted.⁵⁶⁶ As opposed to the automated nature of Content ID, users are only notified of potentially infringing uses and must then take some sort of affirmative action against them. The options under the Copyright Match tool are to message the infringer, report the infringement, or allow it.⁵⁶⁷ The Content ID system is a tool for massive professional organisations such as record labels and film and television studios whereas the Copyright Match tool is designed to provide similar protections to the large amateur and pseudo-professional community of YouTube creatives. While the Copyright Match Tool is still in its early stages and is yet to be released to all creators, the Content ID system has been around for years and has faced both applause and criticism from the academic and professional communities. This section will explore those praises and criticisms, look at academic suggestions for changes in the software, and analyse the implications of both these software systems for potential changes to copyright law.

i. Flaws

These systems were designed to police copyright infringements on YouTube in a way that better satisfies content owners than requirements under the DMCA and other similar legislation elsewhere in the world. As a result, YouTube has paid out over two billion U.S. dollars to partners in the music industry alone through its Content ID program since its inception.⁵⁶⁸ However, these programs serve to enforce copyright law without any sort of government or legal backing. Moreover, they do so through computer analysis with little to no human element involved. Non-legal bodies enforcing the law creates issues but those issues are multiplied when it is, in fact, a computer doing the enforcement. The largest among these problems created by non-human analysis are false positives and the failure to adequately address fair use, other exceptions to infringement,

⁵⁶⁶ 'Copyright Match Tool - Youtube Help' (*Support.google.com*) <<https://support.google.com/youtube/answer/7648743?hl=en-GB>> accessed 20 August 2020

⁵⁶⁷ Ibid.

⁵⁶⁸ Resnikoff, P., 'YouTube: 99.5% of All Infringing Music Videos Resolved by Content ID.' (*Digital Music News*, 2016) <<https://www.digitalmusicnews.com/2016/08/08/copyright-problems-resolved-content-id/>> accessed 31 May 2018

and tolerated uses. Moreover, the system compounds on its faults by lacking a legitimate appeal process with third-party review and unjustly enriches content owners who choose to monetise the videos through its royalty scheme.

a. False Positives and Exceptions to Infringement

As an automated system controlled by computers, false positives and the failure to address exceptions to infringement are the obvious downside to the Content ID system. The software has not only issued reports for music in the public domain,⁵⁶⁹ but also fails to address uses that are legally fair⁵⁷⁰ or would otherwise be tolerated.⁵⁷¹ In the United States, following a ruling in *Lenz v. Universal Music*, a content owner must consider fair use before issuing a take-down notice under the DMCA.⁵⁷² The Ninth Circuit stated that while the analysis need not be prohibitively extensive to satisfy this burden, mere “lip service” to fair use would not suffice.⁵⁷³ Fair use requires a four factor balancing test that the Content ID software is incapable of replicating even on a superficial level. Yet, the Content ID software is given the authority to block videos published to YouTube in the same way as a DMCA take-down notice. While fair use is not the global norm, similar systems of exceptions to infringement require equally complicated analyses that the Content ID software does not accommodate.

569 Morran, C., ‘YouTube’s Content ID System Will Take Away Your Money If You Dare Sing “Silent Night,”’ (*Consumerist*, 2013) <https://consumerist.com/2013/12/26/youtubes-content-id-system-will-take-away-your-money-if-you-dare-sing-silent-night/> accessed 31 May 2018

570 Cushing, T., ‘YouTube Kills Livestream of Convention When Audience Starts Singing ‘Happy Birthday’ (*TechDirt*, 2013) <https://www.techdirt.com/articles/20131014/15323524876/youtube-kills-%20livestream-convention-when-audience-starts-singing-happy-birthdayshtml> accessed 16 May 2021

571 See: Higgins, P., ‘Mars Landing Videos, and Other Casualties of the Robot Wars,’ (*EFF*, 2012) <https://www.eff.org/deeplinks/2012/08/mars-landing-videos-and-other-casualties-robot-wars> (Where Content ID prevented thousands from seeing NASA’s mission to Mars). *See also:* Fitzgerald, B., ‘YouTube Pulls Michelle Obama’s Democratic National Convention Speech In ‘Error,’ (*Huffington Post*, 2012) <http://www.huffingtonpost.com/2012/09/05/youtube-pulls-michelle-obama-speechn1857708.html> (Where Michelle Obama’s Democratic National Convention Speech was blocked).

572 ‘Dispute a Content ID Claim,’ YouTube, <https://support.google.com/youtube/answer/2797454>

573 *Lenz* Supra n. 229

b. Higher Transaction Costs and Lack of Tolerated Use Provisions

Not only is Content ID incapable of addressing complicated fair use analyses, it also fails to efficiently deal with content that has been previously licensed or is publicly tolerated. As described earlier, content owners will often make public statements about types of uses that they consider tolerable and will not pursue litigation against. Users are generally free to use unlicensed content within the scope of these guidelines without fear of legal repercussions. However, because Content ID was designed to be automatic, it “took the owner’s choice of how to use their rights away from them.”⁵⁷⁴ Therefore, when Content ID flags a video, not only is there no consideration as to whether that video may fall under a stated policy of tolerated use, but there is also no consideration as to whether the video was licensed through formal channels.⁵⁷⁵ This system, while in theory was designed to be more efficient, has created many problems for content owners whose fans barrage them with complaints that their videos which fall under tolerated use guidelines have been removed or monetised.⁵⁷⁶

c. Unfair Royalties Splits and Unjust Enrichment

Regardless of fair or tolerated use considerations, Content ID nearly always unjustly enriches the content owners.⁵⁷⁷ Under U.S. copyright law, claimants are only able to recover profits from an infringer that are attributable to the infringing work.⁵⁷⁸ The law seeks to strike a “balance between deterring infringing content and promoting creative uses of content.”⁵⁷⁹ However, under the current system in place via Content ID, content holders are not limited to profits that are attributable to their own content but rather receive *all* profits (minus a share paid to YouTube).

⁵⁷⁴ Boroughf, B., 'The Next Great Youtube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation' (2015) 25 Alb LJ Sci and Tech 95, pg. 110

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

⁵⁷⁷ Ibid. at 112

⁵⁷⁸ 17 U.S.C. § 504(b) (2012); *see also* Walker v. Forbes, Inc., 28 F.3d 409, 415 (4th Cir. 1994) (sating that profits a plaintiff "receives under the Copyright Act are those attributable to the use of the infringed work").

⁵⁷⁹ Boroughf (2015) Supra n. 574 at 112. *citing* Galavis, A., 'Reconciling the Second and Ninth Circuit Approaches to Copyright Preemption: A Universal System Is Paramount to the Protection of Idea Purveyors' Rights,' (2013) 19 Boston University Journal of Science & Technology Law 157, 184-85

This system thereby deprives users of the right to profit from their own contributions. Boroughs aptly analogised this system to the equivalent of a poet being able to claim all the revenue from an unlicensed book of poetry that only included one of her poems.⁵⁸⁰

d. Lack of a Fair System of Review

As a software system designed to enforce copyright law, Content ID lacks the most important aspect of traditional copyright law enforcement- judicial or, at least, third party review. While Content ID is not entirely automatic and does offer an appeal process,⁵⁸¹ that process is judged entirely by the content owner. Therefore, while the poster of a flagged video will have the right to appeal the flag based on fair use or permission, the one hearing and judging that appeal will be the very party who, theoretically, filed the complaint. Unlike a court of law where an unbiased judge will make a decision on infringement, in the world of Content ID "the claimant and the claimant alone reviews and either accepts or rejects the dispute."⁵⁸² If the appeals process fails, users do have the right to file a Counter Notification which constitutes a legal action to have YouTube reinstate a video that has been improperly removed.⁵⁸³ However, it appears this action is only available for videos that have been removed and may be unavailable for those videos that have been simply monetised for the content owner.⁵⁸⁴ The only other check on the power granted to content holders is YouTube's ability to disable Content ID access or terminate partnerships with those who "repeatedly make erroneous claims."⁵⁸⁵

⁵⁸⁰ Ibid.

⁵⁸¹ Support.google.com. (2018) 'Dispute a Content ID claim - YouTube Help.' <https://support.google.com/youtube/answer/2797454?hl=en-GB&ref_topic=2778545> accessed 31 May 2018

⁵⁸² Boroughf (2015) n. 812 at 109. *Citing* : Wilke, N., 'Copyright Kings Are Judge, Jury and Executioner on *YouTube*', (Wired, 2012) <<http://www.wired.com/business/201202/opinion-baiodmcayoutube>> (describing an instance in which a claimant was given full authority alone to review a copyright claim)

⁵⁸³ 'Counter Notification Basics - YouTube Help' (*Support.google.com*, 2018) <https://support.google.com/youtube/answer/2807684?hl=en-GB&ref_topic=2778545> accessed 31 May 2018

⁵⁸⁴ Ibid.

⁵⁸⁵ 'How Content ID Works,' YouTube, <<https://support.google.com/youtube/answer/2797370?hl=en-GB>> accessed 16 May 2021

While Content ID is a software system designed to mimic the functions of the copyright legal system more efficiently in a digital environment. However, it does so at the expense of users' rights.

ii. Implications

Despite its criticisms, Content ID has remained intact. While some, like Boroughs, have offered suggestions to restructure the system⁵⁸⁶ to reflect a more balanced and fair approach to automating copyright law, that is beyond the scope of this paper. I am more interested in the implications this system has for the future of copyright law itself. YouTube's Content ID software establishes a semi-successful model for using computer software to police the web for infringements. Nicholas DeLisa, in fact, argued that this software has paved the way for a compulsory synchronisation license for user-generated content on other platforms.⁵⁸⁷ However, an important aspect of Content ID to note is that, like modern tolerated use schemes, the Content ID system represents a trend of content owners to favour their pecuniary rights over their rights to exclusivity. This is evidenced largely by the fact that over 90% of all claims handled by the Content ID software result in monetisation, not takedown.⁵⁸⁸ This significant figure indicates that, in a space where the process of licensing is efficient, rights-holders vastly prefer new revenue streams over exclusivity. Furthermore, Content ID serves to demonstrate that there is a viable alternative to the rights-based approach for Copyright law in the digital world. Monetisation is possible, even for works that were originally perceived to be of too low economic value to bother with.

However, the current flaws of the system are glaring. The lack of provisions to protect users' rights are unacceptable from accommodating fair uses to offering a share of royalties for

⁵⁸⁶ Boroughs (2015) n. 812 at 114-122

⁵⁸⁷ DeLisa, N.T., 'You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms,' (2016) 81 Brook. L. Rev. 1275

⁵⁸⁸ 'Creator Academy,' (YouTube, 2018). <<https://creatoracademy.youtube.com/page/lesson/cid-optimize?hl=en-GB#strategies-zippy-link-1>> accessed 31 May 2018

partial or transformative uses. The model, as it stands, is imperfect. Yet, when it is viewed as a prototype, or a blueprint for something much larger, it is more acceptable.

G. Conclusions

The existence of the programs discussed in this article, Creative Commons, tolerated use and its progeny of controlled monetisation schemes, and Content ID, demonstrate that copyright law is no longer an efficient facilitator for creatives. It is an inhibitor. The law, as it stands, appears to get in the way more often than it solves problems. In jurisdictions without fair use, the law is overly constrictive. Conversely, in fair use jurisdictions, the law is overly broad and ambiguous to a point that it is unpredictable. Each legal system, therefore, has created a climate whereby the private sector has been given the ability to step forward and restructure the law in a way that suits it. As a result, the policies that spawned from this movement unabashedly favour content owners to a borderline predatory extent. While the last 10 years have seen a surge in no action policies in the wake of Wu's influential paper, I predict that the coming decade will represent a shift where content owners opt out of these policies in favour of creating discreet hubs encouraging UGC that use terms and conditions to exploit the works for financial gain. The new tolerated use is not one of freedom of expression or even free advertising. It is one of micro-transactions and unpaid labour. Nicholas Carr first referred to this technique of monetising "free labor" as "digital sharecropping" in 2006: "Web 2.0 provides an incredibly efficient mechanism to harvest the economic value of the free labor provided by the very, very many and concentrate it into the hands of the very, very few."⁵⁸⁹ However, in rejecting this current budding system, I argue that copyright law itself can use it as a model for a new system that is equitable for all.

Ultimately, most tolerated use policies represent corporate vigilantism and exist only because of weaknesses in the law. While, at face value, many policies are tolerant and even supportive of users rights, just as many take advantage of the poor position users face under the law

⁵⁸⁹ Carr N., 'Digital sharecropping' (*Roughtype*, 2006). <<http://www.roughtype.com/?p=634>> accessed 17 May 2021

and exploit it. The best solution is to absolve the need for such provisions by clarifying and or fixing the law at the legislative level. The inherent problem with Content ID, tolerated use, and the Creative Commons lies at their core- the law within which they operate. It is clear that an appropriate solution cannot come from a pseudo-legal crutch that props the law up into the modern era. The law, itself, must be changed. But how?

The world we live in today is drastically different from the world in which copyright laws were imagined. Likewise, perhaps an equally drastic change to copyright law is needed to modernise it. The previous analysis of the evolution of tolerated use demonstrates a movement that values economic rights over exclusivity. Content owners are more concerned with extracting extra economic value from their works than exercising their exclusive rights. Moreover, users appear happy to sign over pecuniary rights in exchange for freedom to create derivatives. These are not the values reflected in the Statute of Anne or its modern evolutions. These are values that would be most appropriately reflected in a system of copyright law that was based on rights of economic remuneration- or compulsory licenses- not property rights. Moreover, YouTube with its Content ID software represents a functioning microcosm where such a system exists and flourishes- in some ways. A legislated program that parallels these current industry examples would both serve to clarify the law's stance on user generated content and ensure the protection of user's rights by addressing the systems current failings. The following chapter will propose and analyse the viability of such a system.

Section Three: A New Solution and **Conclusions**

VI. Rebalancing the Scales of Copyright Rights: A New Philosophy for Copyright Policy and a Compulsory License for Derivative Authors

A. Introduction

Up to this point, this thesis has discussed various problems copyright law faces in the modern, particularly digital, environment. The internet has made piracy a commonplace and unassailable force despite a multitude of legislative measures and technological developments designed to combat it.⁵⁹⁰ In turn, many of these would-be solutions carry side effects of chilling legitimate secondary creativity.⁵⁹¹ Much of this thesis has hinted at the notion that a solution lies in a paradigm shift away from the use of property rules and towards the use of liability rules. This chapter will focus on those solutions. However, transitioning copyright law from a property system to a system of economic rights in its entirety is implausible (for the time being), would not be a panacea, and is not even necessary. There is likely no one-size-fits all solution to the problems associated with copyright law that this thesis has described. In many ways, attempts to solve one problem have created new ones.⁵⁹² That is largely because, up to this point, derivative creativity and outright piracy have been treated as one and the same by the law. Legal mechanisms designed at targeting piracy have also been used to address unauthorised derivative infringement online. This failure to offer a distinction between the two and a separate solution for each has led to many of the problems I have outlined.

The major problems copyright law faces in the digital environment that this thesis has observed up to this point can be summarised into five distinct issues. First, digital technology has created a new generation of creators looking to incorporate previous works into new ones and, while the law often chills this behaviour, this sort of creation is culturally relevant and valuable. Its development should be fostered by the law. Second, the disintegration of control over creative

⁵⁹⁰ See: the analyses offered in Chapter 1 E and 2 C

⁵⁹¹ See, e.g.: The analysis of how content filtering technology filters out works that are fair uses in Chapters 2 C and 4 D,E

⁵⁹² See: Chapter 5 D

works caused by the internet and digital technology has spawned legal solutions that steadily stamp out users' rights.⁵⁹³ Third, this same technological advancement have created a value gap for *both* primary creators and derivative creators who legitimately use existing creative works in the creation of new ones.⁵⁹⁴ Fourth, the lack of a clearly defined legal framework in some jurisdictions and areas of the law have created a digital wild west where content owners effectively govern themselves- leaving users with little power to assert their rights or to fairly bargain.⁵⁹⁵ Fifth, digital technology has altered the world in such a way that some aspects of copyright law are no longer reasonably enforceable.⁵⁹⁶

These problems cannot be solved by one change alone. Moreover, an acceptable solution cannot solve one of these while exacerbating others.

This chapter will offer two distinct suggestions in which we may re-conceptualise copyright law in the digital environment. The first is the idea of abandoning the notion that gatekeeping is the ideal solution in copyright enforcement. With respect to unauthorised secondary uses of creative works online, we should steer the purpose of our solutions away from takedowns and filters.⁵⁹⁷ Over the last two decades this philosophy has lead to legal mechanisms that not only often fail to prevent actual infringement but have a side effect of deterring new creativity and legitimate secondary uses.⁵⁹⁸ We should instead use policy to target the facilitation of both secondary creativity and new revenue streams for primary creators. The second suggestion this chapter offers is that the ideal way to do this is to use liability rules to govern derivative rights in copyright. Within the scope of this proposal, I will also suggest a way that we may reframe the passage of time in copyright protection. As a result of miniature trade wars, copyright term limits have been extended well beyond a necessary time frame to promote creativity and instead largely serve at the

⁵⁹³ See: Chapter 2 C, Chapter 3 C

⁵⁹⁴ See: Chapter 4 D II

⁵⁹⁵ See: Chapter 5 C,D,E

⁵⁹⁶ See: Chapter 2 B,C

⁵⁹⁷ See: Chapter 2 C,D

⁵⁹⁸ See: Chapter 2 C

behest of corporate content owners far more often than individual authors.⁵⁹⁹ Without adjusting the actual length of the terms of copyright, this section will reject the binary system of absolute or no protection and suggest a diminished amount of protections early in the relative life of a work to rebalance users' rights against content owners. When employed as a tandem, these policies would effectively reduce unauthorised derivatives online, appropriately rebalance the rights of users with those of content owners, provide new revenue streams for both spheres of creation, and carve out incentives for new creativity that has previously been chilled by the law- all while ensuring the continuation of strong protections for authors' rights of reproduction and financial exploitation of their works in other areas.

B. Abandoning the Role of Gatekeeping in Copyright Enforcement

My first suggestion is a theoretical one rather than a legislative one. The notion of gatekeeping content as a copyright enforcement philosophy is deeply rooted in the property system of copyright law itself. 'This story, character, image, melody, or film is *mine* because *I* made it.' The property law roots of copyright law justify this mentality. However, as described in previous chapters, the property aspects of copyright law have not only become difficult to enforce but have also lead to behaviours that impede the creation and dissemination of new and culturally valuable works.⁶⁰⁰ This is largely because the lines between outright piracy and derivative creativity are blurred under the law. The law generally treats both acts as the same, an infringement, despite the fact that derivative creativity is culturally valuable. Moreover, the attempts to modernise copyright law that this thesis has analysed have been designed to target piracy and unauthorised reproductions online but seep into the realm of user-generated content as well because of this lack of legal distinction.⁶⁰¹ One reason this occurs is because computer programs aimed at preventing the

⁵⁹⁹ See: Chapter 3 C

⁶⁰⁰ See: Chapter 2, Chapter 3 C

⁶⁰¹ See e.g.: Article 17 of Directive (2019) E.U. Supra n. 441

dissemination of facsimile are ill-equipped to appropriately address unauthorised derivative creativity.⁶⁰²

The first step in accepting a shift away from the property law aspects of copyright will be acknowledging that gatekeeping derivative content online is an unproductive goal. Instead of investing time and money looking for ways to more effectively and efficiently stamp out low-value infringements, legislators should be looking to legally reinforce and regulate existing systems online aimed at monetising secondary works established by the private sector.

i. The Gatekeeping Philosophy in Action

Online copyright enforcement bodies and mechanisms assume largely the role of gatekeeper. As gatekeepers, their decisions are almost always binary- to allow or not allow a piece of content. In the notice and takedown system, a content owner sends notice to a service provider or host that a piece of content is an infringement and should be taken down. Theoretically, in this system the gatekeeper would be the ISP or the host as it would be their job to determine if the complaint is valid and take action accordingly. However, the system places such a high burden of expeditiously addressing all claims received coupled with the fact that recipients have absolutely nothing to lose by blindly complying with takedown requests and everything to lose should they inappropriately deny one, the role of gatekeeper is functionally shifted to the sender of the takedown notice as compliance is automatic.⁶⁰³ Filtering technology is beginning to replace the notice and takedown system online as software is able to detect copies of visual, auditory, and audiovisual works posted to the internet through digital fingerprinting. In online communities where filtering technology is in place, the act of gatekeeping is an *ex ante* process, where the software will make a determination of each piece of posted content's compliance with copyright law before it is ever allowed to be posted. Non-compliant content will typically be blocked but in some systems,

⁶⁰² Longan (2019) Supra n.253

⁶⁰³ See: Chapter 2 C

such as YouTube's Content ID, it may be monetised in favour of the owner of the copyrighted work being used. Previous chapters have addressed the technical failures related to both these systems.⁶⁰⁴ Both the notice and takedown system and filtering technologies are aimed at stamping out reproductions. This thesis is in no way an advocacy for the dissemination of facsimiles online. However, problems occur when these systems aimed at stamping out piracy are also applied to derivative infringements. First, piracy and derivative infringement are not the same problem. They have different repercussions and cultural implications. When gatekeeping programs aimed at combating piracy are applied to derivative content, they have the effect of chilling both infringing and legal creativity.⁶⁰⁵ Moreover, the infringing derivative creations that these programs prevent are better suited to be dealt with in other legal ways. When applied to derivative creativity, infringing or not, gatekeeping mechanisms are a poor solution both economically and morally.

ii. Gatekeeping is a Poor Philosophy: The Economic Perspective

Gatekeeping certain types of potential infringements, specifically non-replacing secondary works, is a poor philosophy from an economic perspective because it eliminates potential revenue streams for creatives simply because it is more efficient to take down than license. Gatekeeping facsimiles and simple reproductions is necessary for content owners because they represent perfect competitors. However, secondary works with added creativity do not have the same effect on the value of the original work. Moreover, available evidence suggests that, when given the choice, content owners prefer licensing content over gatekeeping.⁶⁰⁶ It is therefore most likely that a lack of efficient licensing mechanisms elsewhere are why we do not see similar behaviour in other areas. Even if one is unwilling to accept that content owners would *always* prefer monetisation over takedown from this limited data, it undoubtedly indicates a willingness to transition away from the traditional takedown philosophy of online copyright enforcement where the infringements in

⁶⁰⁴ See: Chapter 2 C, Chapter 5 F

⁶⁰⁵ Longan (2019) Supra n.253

⁶⁰⁶ "well over 90% of all Content ID claims result in monetisation across the platform." 'Continuing To Create Value While Fighting Piracy: An Update' (Google, 2020) <<https://blog.google/topics/public-policy/continuing-to-create-value-while/>> accessed 21 May 2020

question are non-substitutive. Acknowledging this interest is an important job for legislators. In an age where technology has transformed the way we perceive copyright law, or at least the notions of what should constitute a taking under it, content owners have likewise adapted what they want from the law. Takedown policies are a somewhat efficient means of maintaining control over copyrighted works on the internet.⁶⁰⁷ However, especially considering their overall inefficacy, it is no surprise that, given the option, content owners would simply prefer to allow some infringing content to exist if it meant new revenue streams. The gatekeeping philosophy is one of control. It provides no economic benefit to content owners but for the intangible benefits of monopolisation. It represents opportunity ignored- especially when viewed in light of the fact that, when given the opportunity to choose, gatekeeping is the severely minority choice.

Thus, gatekeeping, with respect to non-replacing secondary works, is a poor philosophy of enforcement from an economic standpoint as it provides no direct economic benefits while simultaneously robbing a content owner of the potential for new ones through licensing. It has simply been the only available solution up to this point.

iii. Gatekeeping is a Poor Philosophy: The Moral Perspective

Gatekeeping is not only a poor philosophy for the enforcement of copyrights online from an economic standpoint. It is also a poor philosophy from a moral perspective as well. Ignoring the loss of revenue streams and direct monetary benefits offered by abandoning the gatekeeping philosophy, it is still one that chills creativity, silences expression, and thereby negatively affects society by robbing it of cultural dialogue and new creative works.

iv. Interim Conclusions

The notion that we should be taking down secondary works online and preventing their distribution elsewhere is a poor choice of philosophy that is rooted in property elements of the law

⁶⁰⁷ See: Chapter 1 E, Chapter 2 C

that would likely never have existed had the law been conceived in the world we live in today. The solution is simple. A change in the way we perceive how copyrighted works should be treated is the first step to improving the function of copyright law in the digital world. We must prioritise access and balance it with economic rights instead of property ones. Refocusing the law on fostering new creativity through liability rules that open access for secondary creativity while ensuring economic viability and new revenue for content owners is the most utilitarian solution. Abandoning control as a priority in copyright enforcement and instead using the the law to prop up monetisation schemes and ensure their fairness for all parties is the modern answer to the many of the problems created by the digitisation of culture. Shifting our philosophical perspective is the first step. Acknowledging that copyrighted works, in many ways, can no longer be treated as pieces of property and nor *should* they be is how we move forward to a law that functions efficiently online and serves *all* parties involved in the creative process.

C. Protecting Derivative Rights with Liability Rules, Not Property Rules

Much of this thesis has been spent dancing around the notion that property rules are no longer suitable methods of enforcing copyright law in the digital environment. This is a matter of both practicality and philosophy. First, the digital environment has removed all of the barriers to infringement that made copyrighted works feel as though they could be protected like property. Access to works, the ability to replicate them without quality loss, and the ability to distribute copies on massive scales are all just as available to the average British teenager as they would be to an industry professional. Controlling a creative work as if it were a piece of property is no longer possible. Moreover, attempts to use technological innovation to reestablish control over digital works such as DRM technology, filtering software, and notice and takedown automation, fail to prevent piracy. Professionals and even slightly savvy average users are easily able to bypass DRM mechanisms and enable anyone else to access the DRM-free material by posting it online.⁶⁰⁸ Once a

⁶⁰⁸ See: Chapter 2 C

pirated piece of content is posted online, it is subject to the notice and takedown system which, while efficient at helping content owners to remove a specific infringement from a specific place on the internet, struggles to prevent the same infringement from instantly re-appearing elsewhere online.⁶⁰⁹ While modern attempts to re-establish control over creative works in the digital environment have been largely unsuccessful, the technological innovations that have brought us here have also lead to a new creative norms. With respect to appropriation, the lines between theft and legitimate forms of cultural dialogue and expression are blurry. The law, while offering safety valves of protection for users' rights that vary in strength and breadth depending on jurisdiction, generally fails to offer a sturdy support framework for this kind of creativity.⁶¹⁰ This is in part because some of it falls squarely within the realm of actual infringement. However, where appropriative creativity falls in the grey areas of the law or even, in some cases obviously in the realm of fair usage, the enforcement and redress systems in place grossly favour content owners.⁶¹¹

Chapter 3 of this thesis described the ineffectiveness of property law system when governing creative works. Chapter 4 analysed how that system has likewise disenfranchised average creators and served to chill a world of untapped, valuable creativity. I will not reiterate the points made in those chapters here. Instead, this section will focus on the practical solution. The derivative rights to copyrighted works should not be treated as property rights. Instead, they should be governed by economic rights with certain property aspects maintained to ensure future exploitation for creators. However, the notion of using liability rules to govern derivative rights and other aspects of copyright law is not new. I am far from the first academic to suggest such a measure. In 1990, Jane Ginsburg suggested the adoption of statutory licenses for derivative works low in creative nature, such as databases.⁶¹² Naomi Voegtli proposed that an extensive compulsory license model

609 See: Notice and takedown functions as an endless game of "Whack-a-mole" according to RIAA *supra* n.65

610 See: Chapter 1 F

611 See: Chapter 1 E, Chapter 2 C

612 Ginsburg, J.C., 'Creation and Commercial Value: Copyright Protection of Works of Information,' (1990) 90 Columbia Law Review, 1865, 1924–

for derivative works could be a solution to the difficulties they pose in 1997.⁶¹³ In 2006, Robert Morrison argued that a full statutory license model for derivatives is justified under some normative grounds.⁶¹⁴ Kembrew McLeod and Peter DiCola advocated for a compulsory license model for musically sampled works in 2011.⁶¹⁵ Peter Menell suggested a similar model solely for the making of Mash-Up works in 2016.⁶¹⁶ Also in 2016, Nicholas Thomas DeLisa argued for a compulsory synchronisation license specifically limited to user-generated content online.⁶¹⁷ In 2018, Hugenholtz and Quintais proposed a system that allowed individuals to reproduce and make available to the public copyrighted works as long as it was for a non-commercial purpose.⁶¹⁸ They argued that their proposed model could be supported by a variety of legal mechanisms, one of which being statutory licensing.⁶¹⁹ Finally, Omri Rachum-Twaig published a book in 2019 that advocated for a liability rule system of rights for derivatives with disputed rates set on a case by case basis by the court system.⁶²⁰

This chapter will not provide a more in-depth summary of all of these previously proposed models. However, DeLisa and Rachum-Twaig's proposals are of particular importance and will be discussed at greater lengths for the purpose of acknowledging their strengths and weaknesses and differentiating my suggestions from theirs. Ultimately, DeLisa's solution represents not enough proposed reform while Rachum-Twaig perhaps too much and in the wrong way. My proposed solution likely falls somewhere in between each of theirs and is therefore ideally outlined amidst an analysis of theirs.

613 Voegtli, N.A., 'Rethinking Derivative Rights,' (1997) 63 Brooklyn Law Review, 1213, 1264–5.

614 Morrison, R., 'Derivers' Licenses: An Argument for Establishing a Statutory License for Derivative Works,' (2006) 6 Chicago Kent Journal of Intellectual Property 87.

615 McLeod, K. & DiCola, P., *Creative License: The Law and Culture of Digital Sampling* [2011] 226–29

616 Menell, P., 'Adapting Copyright for the Mashup Generation,' [2016] 164 University of Pennsylvania Law Review 441

617 DeLisa N. T., "You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms" (2016) 81 Brooklyn Law Review 1275

618 Hugenholtz, P.B. and Quintais, J.P., 'Towards a Universal Right of Remuneration: Legalizing the Non-Commercial Online Use of Works,' from: Hugenholtz, P.B., *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, 2018 Wolters Kluwer.

619 Ibid. at 260

620 Rachum-Twaig, O., *Copyright Law and Derivative Works: Regulating Creativity*, Routledge, Milton. Available from: ProQuest Ebook Central. [19 February 2020]. Pages 168-172

i. DeLisa's Compulsory Synchronisation License for UGC

Nicholas Thomas DeLisa wrote an article for the Brooklyn Law Review in 2016 that compared the existing scheme of Content ID on Youtube to a de-facto compulsory synchronisation license scheme.⁶²¹ While his argument was similar in many ways to the point I made in chapter six of this thesis, his solution took the form of a compulsory synchronisation license for user-generated content on the internet. His point was that, in legislating the practice seen on YouTube, it would be possible to not only extend the program to other areas of the internet where UGC is commonplace, but also to cure some of the inherent problems of the Content ID system.⁶²² Among those noted problems were the minority shareholder veto power, or the power of any rights-owner to trigger a “block” in Content ID regardless of her share percentage or the wishes of the majority owners.⁶²³ DeLisa uses the example of a songwriter owning 1% of the rights to a song being able to veto the wishes of all six other contributing writers to monetise the content because YouTube must always abide by the most conservative policy set for a video.⁶²⁴ DeLisa argued that this problem would easily be solved by a compulsory license regime as the veto power would be stripped from all parties.⁶²⁵ While DeLisa's proposed compulsory synchronisation license would address and likely cure *some* of the problems he noted with the current Content ID system, his proposal fails to go far enough which, I believe, creates more problems than it solves.

First, by limiting the scope of the license to synchronisation of “sound recordings and musical compositions with an original visual representations for use on UGC platforms,” DeLisa fails to offer much more than a government-endorsed version of the existing Content ID system. When it comes to UGC video content, YouTube is not the only place on the internet where such content can be found, but its market share is 5x that of its next competitor, Vimeo, with the rest of

⁶²¹ DeLisa (2016) *Supra* n. 617

⁶²² *Ibid.* at

⁶²³ *Ibid.* at

⁶²⁴ *Ibid.* at 1310

⁶²⁵ *Ibid.* at 1311

its direct competitors holding less than 2% of the market share.⁶²⁶ Moreover, Vimeo hosts largely professional content and offers its own system of copyright filtering similar to Content ID. This effectively means that YouTube is the only meaningful source of this type of amateur content.⁶²⁷ Thus, there is little to be gained by arguing that the license extends the Content ID-like system to other platforms because there are no other platforms that meaningfully compete with YouTube. This means that the license would serve, in practice, only to fix the existing issues with the Content ID system. Theoretically the license would extend to social media platforms like Facebook, TikTok, Instagram, and Snapchat who are not direct competitors with YouTube but allow for the posting of user-created videos. These platforms, however, have been able to privately negotiate blanket licenses for their users with the major record companies when necessary.⁶²⁸ Limiting the license to synchronisation of sound recordings and musical compositions with original video content addresses one form of user-generated content that is popular at the moment. However, this type of expression is the least needing of legislative protection as it is easily negotiated in the private sector. Yes, a compulsory license for this expression would remove some predatory aspects of the agreements set up by these platforms on behalf of their users and it would allow users to profit from their creations. However, this solution also leaves out a wealth of other valuable and popular expression.

While I acknowledged a multitude of issues with Content ID and other programs designed to facilitate UGC instituted by the private sector in Chapter Six, building the foundation for an effective and efficient compulsory license regime will be far too much work to justify such a small scope. Ultimately, DeLisa is on the right track, but balks at the notion of complete reform.

626 'Youtube Market Share And Competitor Report | Compare To Youtube, Vimeo, Wistia' (*Datanyze*, 2020) <<https://www.datanyze.com/market-share/online-video--12/youtube-market-share>> accessed 21 May 2020

627 'U.S. Reach Of Leading Video Platforms 2018 | Statista' (*Statista*, 2020) <<https://www.statista.com/statistics/266201/us-market-share-of-leading-internet-video-portals/>> accessed 21 May 2020

628 'Tiktok Now Has Short-Term Licensing Deals With The Major Labels' (*Billboard*, 2020)

<<https://www.billboard.com/articles/business/9347970/tiktok-now-has-short-term-licensing-deals-with-the-major-labels>> accessed 21 May 2020

ii. Rachum-Twaig's Compulsory License System

In her book, *Law and Derivative Works: Regulating Creativity*, Omri Rachum-Twaig set out to address and tackle many of the same problems as this thesis. Her ultimate conclusion, that the derivative right should be governed by liability rules, is likewise in line with my own. However, we have differing opinions on important nuances in the application of such a new law.

Rachum-Twaig defined derivative rights into five non-excluding categories of works.⁶²⁹ She argued that the derivative right should be wholly separate from the right of reproduction in treatment and remedies and, as such, even works that make use of certain aspects of the right of reproduction should not be treated as reproductions if they fall into one of the categories of derivative rights. This is best illustrated by a work of fan fiction that is a wholly new story but uses characters holding individual copyright protection. In Rachum-Twaig's system, if the taken expression constitutes an inseparable part of the second work and could not be substituted with a different non-protected expression without undermining the purpose of the second work, then the second work should be treated as a derivative despite its reproductive elements.⁶³⁰

With a comprehensive definition of what should be legally considered a derivative work, she defined how those works should be protected. She discussed three alternative remedies models for derivative works before ultimately outlining her preferred solution.⁶³¹ She described a distribution of profits in lieu of injunctive relief model,⁶³² a blocking copyright model⁶³³ based on patent law, and a system of taxes and levies⁶³⁴ as possible solutions previously proposed in academic literature.

Abandoning injunctive relief in favour of distribution of profits benefits from having the effect of a compulsory license system without need for actual legislation. In American law,

629 Rachum-Twaig (2018) *Supra* n. 620 at 163-167

630 *Ibid.* at 153

631 *Ibid.* at 163-167

632 *Ibid.* at 163-64

633 *Ibid.* at 165-66

634 *Ibid.* at 166

injunctive relief is a remedy that may be sought by plaintiffs but its award is at the discretion of the courts. Therefore, judges may simply choose to abandon this remedy altogether without the need for changes to the legal code. However, without legislative action and, in light of the mountain of precedents supporting injunctive relief,⁶³⁵ it is highly unlikely that judges will collectively choose to deny injunctive relief in future cases. Moreover, even if such a practice were to occur, it would be the absolute least efficient way to replace property law remedies for derivative rights with liability rules as the rule would only be enforced *after* litigation. While it would be simple in implementation (theoretically), the cost of maintaining the system would be paid dearly by creatives who would be forced to either litigate to establish their license rates or negotiate at a disadvantage because of weaker financial positions in the face of potential litigation.

Transposing the law of blocking patents, where a patent may be granted to an improvement on a currently protected invention which would have the effect of preventing the first inventor from making use of the published improvement, into copyright law is likewise an impractical solution. Applying such a rule to copyright law would allow secondary authors to at least prevent first authors from using the derivatives they create. However, it would not actually allow the new derivative creation to be brought to market. The law is and would be intended as a tool to foster a dialogue between authors that should result in a license. However, there are important differences between copyright and patent law that would likely render the transposition of this law ineffective. The first of these differences is term limits. Patent law typically offers a term of 20 years while copyright offers a less defined but, even at a minimum, *much* longer term. License negotiations are possible with patents because there is a reasonable expectation that, at the least, the blocking patent will be economically viable (even if it is only for a short period of time) at the end of the first patent's term. In other words, the improving inventor has far more bargaining power at the created negotiating table because she knows that, even if no deal is reached, she can exploit her patent

635 Rachum Twaig cites one case where distribution of profits was chosen over injunctive relief but this is by far the exception with injunctions being the rule.

(even if only for a short time) once the primary patent expires. If John Smith, a 19-year old college student attempts to negotiate with Disney over a blocking copyright to a new story about Elsa and Anna from Frozen, Disney's refusal would require him to wait 83 years before he could legally publish his story. Nineteen years is a lot less time to wait than the potential century or more offered by copyright law. Moreover, there are important differences between the nature of an improvement for an invention and a derivative of a copyrighted work that make potential negotiations less likely to happen on the copyright side. Particularly, with an invention, the financial implications of an improvement can often be far more tangibly seen. It may make the invention more efficient or effective at doing its prescribed job- something that immediately translates to money saved and/or value created. However, with copyrights, where each creative work lends itself to an infinite number of "improvements" or derivations, and the economic value of those derivations is tied directly to the public's subjective response, there is simply no way of knowing with the certainty equivalent to a patent improvement if the derivation would lead to the financial success necessary to justify a license. With these differences in mind, it seems highly unlikely that any system based on blocking patents applied to copyright law would lead to meaningful negotiations or more bargaining power for secondary creatives. It would, at best, provide a way for secondary creators to safely market their derivative works to content owners. However, it would not have the effect of strong-arming them into a license negotiation in the way that blocking patents often do. Such a system offers no assurances that new, culturally valuable, works will actually be made and brought to the public.

Twaig also described a model copyright protection that utilises taxation and levies to compensate artists while allowing free access to their works.⁶³⁶ Such a model was originally proposed⁶³⁷ by William (Terry) Fisher and would theoretically use digital fingerprinting technology to track the uses of registered works online for the purposes of establishing remuneration rates for

⁶³⁶ Ibid. at 166-67

⁶³⁷ Fischer III, W., *Promises to Keep* [2004] 202-3, 234-6

their authors from the pool of collected taxes.⁶³⁸ Fisher claimed that such a model has particular relevance in light of new creative practices- particularly remix and mash up.⁶³⁹ However, while such a model would be quite successful at identifying derivatives that make use of pieces of an original work like mash ups or sampled music, it would likely be wholly unable to identify and appropriately compensate for derivatives that do not include digitally fingerprinted material. Such works like fan fiction, fan films, sequels, prequels, and fan art make up a huge portion of the body of derivative works. Even if one is willing to accept the legislative and economic hurdles necessary for a tax and levy based system⁶⁴⁰ of copyright law, its limited scope of application to the right of reproduction and a niche set of derivatives makes it an unappealing solution.

After discussing these three alternative proposals for copyright reform, Rachum Twaig offered her solution- the use of compulsory licenses to govern the derivative right. Her solution is elegant in that it beautifully counters one of the key critiques of the current compulsory license systems in copyright law- price ceilings set by fixed rates. In the music business, the fixed rate for cover songs serves more as a starting place for negotiations than the actual rate. In fact, the vast majority of licenses to make cover songs are privately negotiated and end up at a rate significantly lower than the statutorily mandated one.⁶⁴¹ Moreover, establishing either a single rate or a system of rates that fairly applied to *all* types of derivative works would be a near impossible task. Disney paid four billion dollars each for both the Star Wars and Marvel franchises but it would be difficult to name another franchise that would command anywhere close to that kind of price in today's market. The majority of creative works are *significantly* less valuable. How, then, can any statutorily set rate appropriately compensate authors when their works are used? Rachum-Twaig argued that it cannot, but offered a different solution.

638 Ibid.

639 Ibid.

640 Which Rachum-Twaig outlines elegantly

641 See: Abrams (2010) Supra n.280 at 238

Her proposal required that a license be granted but left it to individuals to negotiate the rates of the license privately.⁶⁴² If no agreement could be made, a judicial tribunal specialising in such matters would set an appropriate rate for them.⁶⁴³ She compared this to the practice of establishing damages. The judiciary would be allowed to rely on expert witnesses and testimony. This, combined with the judges' experience, should make for a reliably fair process of determining the rate. Rachum-Twaig specified that the rates should always be set as a matter of percentage of royalties in lieu of a fixed price on a per-use basis. This, she argues, will simplify the process because it will clarify the court's goals in establishing a rate by requiring that they determine the contributions by both negotiating authors as a percentage of the final work and it won't unduly burden secondary authors with upfront license costs.⁶⁴⁴

While Rachum-Twaig's solution is elegant in many ways, it has flaws. First, as she acknowledged, the costs of utilising the tribunal system to determine the royalty rate would be no different from the current costs of litigation.⁶⁴⁵ Her solution to this problem is two fold. First, she would have a portion of the royalty paid be used to fund future adjudication to the extent that it related to the royalties.⁶⁴⁶ She argued that forcing the derivative author to internalise the costs of the model would create an effective entry fee for the making of derivatives which would prevent misuse of the model.⁶⁴⁷ Moreover, she is relying heavily on the incentives for both parties created by the model to come to an agreement without the aid of the courts. However, I feel that Rachum-Twaig has neglected to acknowledge an important factor here, bargaining power. Theoretically, the traditionally strong bargaining power held by the primary author is balanced by the fact that a license cannot be refused. Rachum-Twaig seems to imply that the cost of litigating the royalty rate is an equally powerful incentive for each party to reach an agreement. The reality, however, is that

642 Rachum-Twaig (2018) *Supra* n. 620 at 169

643 *Ibid.* at 169

644 *Ibid.*

645 *Ibid.* at 170

646 *Ibid.*

647 *Ibid.*

it likely is not. In fact, the costs of potential litigation are much more easily weathered by large entertainment corporations (the holders of the majority of the most valuable and popular copyrights) than they would be for an average derivative creator. Regardless, in any situation where one of the parties is significantly wealthier than the other, that party will have much more leverage in the pre-litigation royalty negotiations. Any party unprepared to see negotiations through a potentially multi-million dollar litigation process will be forced to accept a potentially predatory license rate or no deal at all. While there will be situations involving every possible combination of wealthy and poor parties on each side of the negotiating table, the most common will likely be an average individual or small company negotiating for derivative rights with a large, wealthy corporation. Moreover, one of the main reasons both Rachum-Twaig and I have called for a liability rules system for derivatives is to open access to average creators who have been disenfranchised by the current system. While Rachum-Twaig's proposed system of negotiate first, litigate second would likely work quite well when both parties to the negotiation are large corporate entities, so does the current system of copyright law. It is the rights of average, less economically significant, parties that we should focus on when changing the way copyright law works because they are the ones who are most often left out by the current system.

iii. An Alternative Model

Differentiating my model from Rachum-Twaig's is not difficult. First, I respectfully reject her solution to the problems posed by fixed-rate royalties and likewise the implication that they create an inherently unjust system and should be avoided. Second, I would look to temper the system by maintaining certain strong reproduction rights that Rachum-Twaig incorporates into derivative ones in her system.

a. Setting an Appropriate Rate

The problems created by fixed rates in compulsory license schemes have been widely discussed both in this thesis and other academic literature. The most oft discussed issue is

that fixed rates typically create a price ceiling instead of a standard and efficient rate. In other words, parties continue to privately negotiate instead of using the license scheme but use the rate set by the scheme as the maximum possible rate to be paid. This nature of the practice can be harmful to content owners, particularly those of especially valuable content who could, in a free market, command royalty rates much higher than the legislated rate. I feel, however, that this imbalance does not render the notion of a fixed rate as unequivocally unjust. Instead, the legislator must take this expected behaviour into account when setting the rate. The first way to do so would be in changing the way royalty rates are defined.

Currently, there are but a few compulsory licenses used in copyright law available for analysis. However, with respect to the mechanical license for musical compositions in the United States, there is much legislative history that provides insight as to how the rates were established. The fight to establish a mechanical license for musical compositions in the United States began in 1905 over concerns of potential monopolisation of the player piano roll industry.⁶⁴⁸ There was a tremendous degree of uncertainty as to whether copyright law actually covered the right to control the manufacture of and sale of piano rolls and other mechanical devices that had the effect of reproducing the sound of the musical composition.⁶⁴⁹ The battle began in the courts with publishers, composers, and one manufacturer of player piano rolls (The Aeolian Company) fighting for the right to fall under the umbrella of copyright protection with the rest of the player piano companies and some newly emerging phonograph record companies fighting against them.⁶⁵⁰ The fight was less about copyright law than it was antitrust as it became apparent that the Aeolian Company had secured exclusive licenses for production of player piano rolls with virtually all of the major music publishers and was looking to monopolise the industry.⁶⁵¹ However, from this, the United States

648 Greenman, F., and Deutsch, A., 'The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect' (1982) 1 Cardozo Arts & Ent LJ 1, 5

649 Ibid. at 5

650 Ibid. at 6

651 Ibid. at 7

passed its first mechanical license for musical compositions in 1909.⁶⁵² The license has been adjusted, and even suggested to be abolished, multiple times over the course of the last 111 years. However, a standardised rate of \$X per manufacture has been a constant since its inception. In the legislative debates preceding the passage of the first license bill, Congress debated using a royalty of 10% of the retail price, \$.02 per recording, or 10% of the retail price with a minimum of \$.02.⁶⁵³ However, it ultimately settled on the flat fee of \$.02 per recording with no explanation as to why the percentage royalty was eliminated.⁶⁵⁴ From here onward, the notion of using a percentage was not given serious consideration again until the 1970s. Instead, rate adjustments were made typically to combat inflation with the intention of maintaining the original relative percentage of royalty paid. In the late 1970s, however, Congress created the Copyright Royalty Tribunal (CRT) with the goal of delegating the work of setting royalty rates to it. Congress set forth four criteria designed to guide the CRT in setting its adjustments. The criteria were:

- (A) To maximize the availability of creative works to the public;
- (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.⁶⁵⁵

The CRT heard arguments for and against changing the flat monetary rate to a percentage in 1980. Songwriters argued that the rate should be set at 8% the retail price of each phonorecord, Music publishers were advocating for 6%, and record companies argued that the rate should stay at its current price of \$.0275 and not be represented as a percentage of price.⁶⁵⁶ Ultimately, the tribunal elected to fix the rate as a flat fee without explanation but Greenman and Deutsch provide an excellent analysis of the costs and benefits of a percentage based system in their history of these

⁶⁵² Ibid.

⁶⁵³ Ibid. at 10

⁶⁵⁴ Ibid.

⁶⁵⁵ 17 U.S.C. §801(b) (Supp. IV 1980).

⁶⁵⁶ Greenman and Deutsch (1982) Supra n. 648 at 60

proceedings.⁶⁵⁷ Ultimately, they set out that the great advantage of the percentage royalty is that “it perseveres a ratio between mechanical royalties and recording company revenues, and to that extent adjusts for inflation automatically, without requiring any further legislative adjustment.”⁶⁵⁸ They also characterised three main issues with a percentage based royalty. The first is determining the price to which the percentage would be applied.⁶⁵⁹ Retail prices, the preference of songwriters and publishers, while typically uniform in record sales, can often be skewed by deep discounts.⁶⁶⁰ Wholesale prices also represented a difficulty because of the differences by which small and large record companies distributed their records and the transactions that governed those distribution agreements.⁶⁶¹ The second problem with a percentage royalty was the increased difficulty associated with administering it.⁶⁶² Finally, a percentage based royalty may have an impact on the value generated for individual authors and composers in situations where licensed works were sold at discounted prices- thus perhaps increasing their average royalty rate but reducing the actual royalties paid.⁶⁶³

Despite the difficulties they pose, I agree with Rachum-Twaig that rates should be defined as percentages of royalties paid instead of a fixed price per use utilised by the mechanical license for musical compositions. This not only has the benefit of automatically adjusting to inflation discussed by Congress in the establishment of the compulsory mechanical license for musical compositions, but it also has the added benefit of reducing entry fees and opening access for average creators. Moreover, it is more applicable to a compulsory license that will affect more than one type of media as it can account for the inherent price differences across those media. For example, the fixed rate of \$.09 per sale may be perhaps fair for the mechanical license for musical compositions that typically are sold for \$.99 but would be wholly unjust for films that are sold for

⁶⁵⁷ Ibid. at 60-62

⁶⁵⁸ Ibid. at 60

⁶⁵⁹ Ibid. 61

⁶⁶⁰ Ibid.

⁶⁶¹ Ibid.

⁶⁶² Ibid.

⁶⁶³ Ibid.

10 times or more that price. Because derivative works can take the form of musical compositions, films, literary works, and much more, a single flat rate would be unfeasible. However, referring back to the previous example, setting a rate at 10% of the retail price would accommodate all equally. Although ten percent, when considering it represents the maximum possible value paid (and often much more than the actual value)⁶⁶⁴, is likely not a fair rate and the most difficult part will be establishing a universally fair one. I find, when looking to the legislative history of the United States' mechanical license for musical compositions for guidance, the most helpful piece is the four guidelines⁶⁶⁵ for establishing rates set forth by congress to the CRT.

With these guidelines in mind, a fifty percent revenue fee is likely much closer to appropriate. Such a rate is hefty enough to incorporate the more valuable works on the market fairly while still serves as an adequate starting place for private negotiations that would be far more commonly adopted.⁶⁶⁶ It would maximise the availability of creative works by immediately opening access to make them- even if the starting place for license negotiate is higher than it needs to be. It offers the potential for a fair return on licensed works for both parties. Moreover a maximum of 50% royalty for the primary author implies that the creative contributions of the derivative author should be, in theory, at least equal to those of the primary. This reflects the CRT's third criterion stating that the license reflect the relative roles of each party.⁶⁶⁷ It is also an important philosophical distinction to make as the system should not be used to grant licenses to free-riders. It should promote legitimate derivative creation only. Finally, when applied strategically, such a rate can be minimally disruptive to current industry practices. This will be discussed in-depth in the following two sections.

664 See: Abrams (2010) Supra n. 280

665 Supra n. 655

666 Abrams (2010) Supra n. 280

667 Supra n. 655

b. A Percentage Based Royalty and Underpriced or Noncommercial Works

One of the main applicable arguments against a percentage based rate is that it will serve to underpay creatives for licensed works that fail to generate revenue or are marketed for free or heavily discounted prices. The latter may have the effect of giving secondary authors unnecessary leverage in competing with the authors whose work they license. First, when licensed works simply fail to generate revenue, such failure can be attributed to a lack of public interest. Therefore, the work likewise does not serve as relevant competition to the base work from which it derives. One of the main strengths of a compulsory license for derivatives is that it will facilitate the creation of many new works. Some of these works will inevitably be of poor quality or simply unpopular and will generate no meaningful revenue for the authors who license them. This is seen as a necessary trade off with little harm to the economy of creative works. However, popular derivatives that are sold at a deep discount or even made available for free arguably represent a fear for primary authors. After all, what good is a 50% royalty if the licensed product is made available for free? The first perspective is that non-commercial works will not represent viable economic substitutes for professional ones. Canada has successfully adopted this perspective with its exception to infringement for non-commercial user-generated content. The notion that content made with the intention to be distributed for free will grow to supplant paid-access content altogether is irrational. While some amateurs will be happy to create some types of work as a hobby and give them away for free, low budget films and hobbyist fan fiction will never replace Hollywood movies and best-selling literature. I believe that the nature of the inherent economics associated with creating and marketing a creative work will serve to create a healthy balance between free amateur content that may appeal to some small audiences and professionally-made for-profit works that generate revenue for both parties to the license. However, in order to combat potential misuse of the system, the license rate should apply both to traditional revenue streams as well as any ad-based revenues for free-to-access content.

c. How to Apply the Percentage Royalty

One of the key difficulties posed by a percentage-based fee is determining to which price should it be affixed. In setting its compulsory license rate, the music industry was concerned solely with whether retail or wholesale prices should be the standard and that was enough of a complication for it to avoid a percentage-based royalty altogether. Here, setting a royalty designed to function efficiently across all types of media is an especially difficult challenge. This challenge is exacerbated by modern content delivery mechanisms such as streaming and ad-based revenue models. However, I believe that there is a simple solution.

Instead of establishing the rate as a “50% revenue” or “50% profits” or “50% wholesale/retail/stream price” the simplest way of ensuring that the licensing author receives her fair share for all revenue generated is by adding them as a co-author of the licensed work whose statutorily granted share of royalties is 50%. Doing this would guarantee the licensing author a fair share of all forms of revenue generated by the licensed work without the need for tedious detailing in the legislation. Moreover, it serves the final criterion of the CRT’s directive requiring license rates to be minimally disruptive to current industry practices. Division of author’s royalties according to their contribution is a common practice in most entertainment industries as many works, especially those in the music, film, and television industries, have multiple authors. Funnelling the license into this established system would be minimally disruptive.

The specifics of this system would be as follows:

In cases where the licensing work is co-authored. Each author’s contribution will be reflected relatively in their share of the derivative work by halving it. For example, Authors A,B,C collectively wrote a novel for which each author is attributed 33.33% of the publishing rights. Author D writes a prequel under the derivative license. Author D will collect 50% of royalties for

the derivative with authors A,B, and C collecting the other 50% in shares equivalent to their contribution in the primary work. In this case, that would be 16.66% each.

In cases where multiple works are licensed for use in one new work, each licensed work shall represent an equal percentage of the overall 50% share, with co-authored works then dividing their portion amongst co-authors as determined by their own pre-existing agreements. For example where a licensed derivative is a mash-up of Songs A, B, C, D, and E, the rights for the sound recordings and musical compositions of each song will represent an equivalent share of the 50% royalty. In this case composers A, B, C, D, and E will receive a 5% royalty for the new work and owners of the sound recordings A, B, C, D, and E will also receive a 5% royalty. If the musical composition for song C has two composers, each will receive a share of the 5% allotted to them according to their preexisting ownership rights. If the owner of the rights to the musical composition for Song D is the same person as the owner of the rights to the sound recording for Song D, that person will effectively receive a 10% royalty, so on and etc.

In cases where a new author seeks a license to make a derivative of a previously licensed derivative, the 50% fee will be apportioned to the first derivative author and the content owner/s in relative to their original arrangement. For example, author A writes a sequel to author B's novel X under the scheme. Authors A and B split the revenue at 50% each. Author C wishes to write a spin off of the derivative sequel that uses both original elements from novel X and author A's newly added elements from the derivative. Author C licenses the spin-off under the scheme and collects 50% of the revenue from it while authors A and B each collect 25%.

While this does not necessarily simplify the process of calculating and collecting royalties, it appropriately transfers the burden from the legislator to the parties involved. Moreover, if disputes occur, treating the licensing author as if she were a 50% co-author of the derivative provides a clear way for courts to appropriate royalties after litigation.

However, there should be restrictions placed on typical powers of co-authorship and it should be limited to only an economic right. The licensing author should not have the power to

market or license the derivative work or to assert moral rights as a traditional co-author would- only the right to collect royalties as one and transfer or assign her rights. However, in the event that the licensed derivative were infringed, in order to protect her own financial stake, the licensing author should be allowed to bring about an infringement action on behalf of the derivative author. The derivative author should be given the opportunity to join the litigation or collect a portion of the compensation received according to her ownership percentage of the derivative work. This would be necessary to prevent derivative authors who “sleep” on their own rights from causing economic harm to the authors they license works from. These rights would need to be statutorily defined, likely with a distinct term for the newly created compulsory authorship rights.

This is admittedly an imperfect system. Notably, problems arise in cases where multiple works are licensed in the use of one new work. The system treats all licensing authors as equivalent despite the fact that their contributions to the new work may not be. However, the system is designed to set a baseline with the expectation that it will be, like the compulsory license for musical compositions, rarely used in its statutory form. There is the expectation that private negotiations will determine licensing rates far more often than the statute, and as such, will sort out nuanced issues of fair appropriation that a statute could not efficiently determine anyways. It is designed more as a tool to provide bargaining power to secondary authors while still representing an acceptable- though not ideal- economic tool-of-last-resort in the absence of meaningful negotiation.

d. Tempering the Compulsory License for Derivatives

While I believe that opening access to new creativity is paramount in importance, I also acknowledge how disruptive a compulsory license to make derivatives could be. Therefore, I believe it is necessary for the newly created derivative right to be tempered in a multitude of ways. The abolishing of a creator’s right to refuse a derivative license represents a stark change to modern copyright law. It would be an uncomfortable intrusion for many artists. Moreover, such a change in

the law will inevitably interfere with an artist's ability to exploit her own works. I believe some measures should be in place to insure that creatives would maintain some rights in light of such changes. The ideal way to do this would be two-fold. First, certain reproduction rights must be strengthened and excluded from the derivative license. Second, the license should not be immediately accessible once a work is published. Tempering the open access offered by the license with a short period of time in which authors may exploit their own works without worrying about competing with other derivative authors will allow them to maintain some level of control over the creative direction of their works. Rachum-Twaig and I agree on this second premise.

e. The Balance of Rights of Reproduction with Derivative Rights

Creating a compulsory license for derivative works will almost certain incite a free-for-all whereby the market is flooded with derivative works. For the first time, authors will be able to rework their favourite works and present them to the public no matter their personal economic standing. This is surely a worrisome idea to owners of existing popular works. Strengthening certain rights of reproduction and clearly defining the boundaries between the derivative and reproductive rights is one way in which the legislature could temper the freedoms offered by a compulsory license to make derivatives. In order to do so, we must have a clear idea of the types of works that the compulsory license would be intended to foster and likewise the kinds of works that it should not be enabling.

It is perhaps easier to start with the kinds of works a compulsory license should not allow. The license should not easily be exploited by free-riders or any others looking to siphon profits from a popular expression with little added creativity. The purpose of the license is to expand our creative catalogue and promote creativity. However, it should not become a tool for facsimile or even pseudo-facsimile. Moreover, it should not provide derivative authors with an unfair competitive advantage against original authors. Ideally, the license would promote the creation of

works that never would have been made without it without placing too hefty of a burden on the economic viability of original works of authorship.

The first, and easiest, way to achieve this goal is to not apply the license to the less creative categories of derivative works. Pamela Samuelson argued there are essentially three categories of derivative works: short versions of the first works, faithful renditions (i.e. translations), and transformation of works from one genre to another.⁶⁶⁸ She also added that sequels, prequels, and works of criticism should also be considered derivatives.⁶⁶⁹ Omri Rachum-Twaig, building on Samuelson's research, parses derivative works into five categories: short versions of the first work, translations and communications to new audiences, improvements and developments of first works, disassembly and reconstruction of first works, and taking parts from the first work to make a new, entirely separate and different work.⁶⁷⁰ Short versions, faithful renditions, and translations or presentations to new audiences are all categories of work that require limited new creative input. While they represent derivations of the first work, they are not the sort of new creativity that our current cultural breadth is lacking or that a compulsory license should foster. Moreover, these categories of works represent the greatest potential for harm to first authors under a percentage based license scheme. After all, the ability to translate Harry Potter to any language and release it for substantially lower prices (or even free) would be indescribably harmful to J.K. Rowling in each of the markets where the translated language was spoken. The same is true, while not equally so, with abridgements and other shortened versions as they are not wholly substitutive but inarguably attempt to be such for some audiences. Establishing that the compulsory license shall only apply to derivations that improve, develop, disassemble and/or reconstruct, and/or take parts from the first work to make a new separate work is a simple way to limit the scope of the license to the types of works with the most cultural value and least potential for economic harm.

668 Samuelson, P., 'The Quest for a Sound Conception of Copyright's Derivative Work Right' (2013) *Geo. L.J.* 1505, 1518-27

669 *Ibid.*

670 Rachum-Twaig (2018) *Supra* n. 620 at 154-56

f. Employing a Waiting Period Before the License Takes Effect

The purpose of this proposed legislation is to rebalance the rights of users against those of creators. However, it is important not to take that rebalancing too far and tilt the scales in the opposite direction. The goal here is a *balance*, not an anarchist upheaval of the current system. Thus, it is important to note the effect a compulsory derivative right would have on an author's ability to exploit her own works through derivatives. Allowing the right to take effect immediately upon publication would likely have one of two reactions. First, authors would find themselves scrambling to compete with derivative authors licensing their works or, second, authors would delay publication of works until they had time to also produce a series of derivatives and would release them as bundles. Neither outcome is ideal. This thesis has spent much time discussing how the extensions of copyright terms have had the the effect of chilling secondary creativity and often blocking secondary creators from accessing valuable and relevant creative raw materials. This should be balanced against the author's right to exploit her own work. Therefore, a waiting period before the license takes effect should be employed in order to allow authors a short monopoly period on derivatives before the public has the right to join in. Rachum-Twaig also advocates for such a blocking period in her proposal.⁶⁷¹ However, she fails to define what it should be outside of the notion that it would "most likely, have to vary with respect to different types of works."⁶⁷² Her suggestion ends with "the intention is for short time periods measured in months or several years depending on each type of work."⁶⁷³ Again I agree with Rachum-Twaig in principle but disagree in her application. I believe that a cooling off period is absolutely necessary but also believe that a uniform period of time for it can easily be established and needs to be established.

Copyright law applies to a plethora of different types of creative works and, for the most part, grants the same term to them all. While Rachum-Twaig is correct in her assertion that "making

⁶⁷¹ Ibid. at 171

⁶⁷² Ibid.

⁶⁷³ Ibid.

a motion picture version of a book requires greater time than a sequel book,”⁶⁷⁴ the economically impactful life of a film is often far different to that of a novel or a photograph. However, the law applies the same monopoly term limits to all of them. Moreover, one of the key pitfalls of copyright law that this thesis has discussed which has brought us to needing this reform is legal ambiguity. Vague aspects of copyright law have lead to its exploitation by larger content owning corporations at the expense of users. I believe clarity and definition are more valuable than an attempt nuanced inclusivity. Therefore, a fixed term for the blocking period is most appropriate.

Thus comes the inevitable question of for how long should the period be? I believe the simplest solution is to look to existing law and practice in a similar field- patents.

The law of patents typically grants a term of 20 years for which an inventor may monopolise and exploit her invention before it is made free for the public to use and exploit as their own. This term applies to medical technology, car parts, and virtual reality gaming alike. It is, therefore, not based on the expected economic life of the product but on the notion of a reasonable time of exploitation. In England, the first uniform patent term was 14 years.⁶⁷⁵ While there is no clear explanation for the 14 year term by the legislator, academic speculation indicates that it was based on the typical term of an apprenticeship at the time.⁶⁷⁶ At the time, the typical term of an apprenticeship was 7 years. Doubling that term for the length of a patent allowed master craftsmen the ability to train multiple generations of apprentices without worry that they would be able to use the knowledge imparted to them to compete against her too quickly.⁶⁷⁷ In the United States, the first

⁶⁷⁴ Ibid.

⁶⁷⁵ Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.) (“[A]ny declaration before mentioned shall not extend to any Letters Patents and Grants of Privilege for the term of fourteen years or under, hereafter to be made of, the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such Letters Patents and Grants shall not use, so as also they be not contrary to the law, nor mischievous to the state . . . [t]he said fourteen years to be accounted from the date of the first Letters Patents, or Grant of such Privilege hereafter to be made, but that the same shall be of such force as they should be, if this Act had never been made, and of none other.”).

⁶⁷⁶ Lester, S. & Zhu, H. 2019, ‘Rethinking the Length of Patent Terms’, American University International Law Review, vol. 34, no. 4, pp. 787-806, at 789

⁶⁷⁷ Ibid. at 790

uniform patent term was also 14 years.⁶⁷⁸ Today the term has been extended to a minimum of 20 years by the TRIPS agreement and is now the uniform standard.

That term is not without criticism however. Since the 1960s, many economists and legal academics have criticised patent law's long term and uniform application as inefficient and unnecessary.⁶⁷⁹ However, since much of the criticism is centred around the idea that patent terms are too long, it is reasonable to note that, with respect to innovation, 20 years is plenty of time to economically exploit an invention.

The types of works covered by patent law are vastly different to the types of works covered by copyright law. However, the underlying purposes of both laws are to promote new creations- both aesthetic and useful ones- through economic incentives. The economic incentives for a valuable copyright now extend far beyond those of a valuable patent. However, the comparison of why that may be is outside the scope of this thesis. Regardless of whether the current patent term is the ideal length for its own purpose does not invalidate it as a useful starting point for a blocking period in a compulsory derivative license. Applying a twenty year blocking period before the license takes effect achieves two goals. First, it provides a sense of legislative precedence to the term. Second, the actual time period satisfies the needs of the blocking period itself. It allows ample time for creators to exploit their own works in whichever ways they may choose. Twenty years is plenty of time to make sequels, prequels, remixes, spin offs, adaptations, and any sort of derivation a creator may want to explore. It is reasonable to assume that any derivation not made within twenty years most likely never will be made. There are obvious exceptions to this. The first of the Star Wars prequels was released 22 years after the original film debut and films are still being made now over 40 years later. However, creators will adapt to the new law and learn to work within its

⁶⁷⁸ Ibid. at 791

⁶⁷⁹ See: Nordhaus, W.D., 'The Optimum Life of a Patent: Reply,' (1972) 63 American Economics Review 428, 428; Scherer, F.M., 'Nordhaus ' Theory of Optimal Patent Life: A Geometric Reinterpretation,' (1972) 62 American Economics Review 422, 422-23.; Mandeville, T., *Understanding Novelty: Information, Technological Change, and the Patent System*, [1996] 35; Thurrow, L., 'Needed: A New System of Intellectual Property Rights,' (1997) 75 Harvard Business Review 95, 103; Carroll, M.W., 'One for All: The Problem of Uniformity Cost in Intellectual Property Law,' (2006) 55 American University Law Review 845, 847; Tabarrok, A., *Launching the Innovation Resistance: A New Way to Bring Smart Ideas to Market Fast* [2011]

new time constraints. Moreover, in reference to the previous example, the recent resurgence of Star Wars content can be attributed to its acquisition by Disney- an example of how licensing enables creation that otherwise would have likely never been made. From the perspective of derivative creators looking to acquire licenses, a 20 year period is less than ideal but also workable. Most importantly, it is not so long as to cut off derivative artists from adapting works made by their contemporaries. It provides access to relevant and modern cultural raw materials. A twenty year waiting period strikes a delicate balance between the wants and needs of both parties. Moreover, if we look at the time period from a perspective similar to the license rate and assume that the period represents the *maximum* time a creator will exclusively exploit her own creations it begins to feel even more fair. It is reasonable to expect that a much shorter time period of derivative exclusivity will, in some cases, prompt creators to be more proactive about licensing their works before they lose the ability to refuse a license. The knowledge that a license will become compulsory in X amount of years gives extra bargaining power to those wishing to negotiate for licenses before the waiting period expires.

D. An Example of What the Statutory License May Look Like

This section will give an example of what such a license may look like when implemented.

It could read as such:

The right to make a derivative work shall be governed by a compulsory license granted by this statute.

The right to license a work to make a derivation shall become compulsory on the first day of the **21st** calendar year of the work's copyright term.

Types of derivations excluded from the compulsory license scheme:

- Annotations or shortened versions of an original work
- Translations of an original work

Under the compulsory license scheme, two new types of authors shall be recognized, each with their own rights.

The author/s of the original work for which a license is being sought shall be referred to as the Compulsory Primary Author/s (“CPA”).

The author/s of the newly created licensed work shall be referred to as “Secondary Author/s” (“SA”).

A Compulsory Primary Author (“CPA”) shall have the right to:

- Collect royalties from the licensed author up to the amount of 50% for all exploitations of the work for which she is listed as the CPA
- Claim ownership of the work on behalf of the licensed Secondary Author for the purposes of bringing about an infringement action or issuing a takedown notice against a third party.
- In the event that a CPA brings about an infringement action against a third party on behalf of the licensed SA, the licensed SA shall have the right to be listed as a co-claimant and/or must be attributed any proceeds of the litigation (minus costs) proportional to her share of royalties as dictated by the license.
- Be identified as the CPA in all relevant circumstances subject to traditional rules of assertion of moral rights

-Assign or transfer all rights granted under this provision excluding the moral right of attribution

A Compulsory Primary Author shall **not** have the right to:

- Grant or deny a license to use any work for which she is a CPA
- Reproduce, display, perform, communicate to the public, or make an adaptation or derivation of any work for which she is a CPA without license by the SA.
- Object to uses of the licensed derivative by the licensed derivative author on the grounds that they represent a derogatory treatment of the original work

The rights of a CPA are limited, in part, to situations in which the CPA is not also the author of the licensed derivative. In cases where a CPA is also an author of the licensed derivative, the restrictions placed on her rights as a CPA shall not interfere with her rights as a traditional author in the new work.

The duration of the rights granted to a CPA will be, at most, limited to the term of her own work for which she has granted a license.

The rights of a Secondary Author who has obtained a license to make a work under this scheme shall be the same as those of any other bona-fide author under copyright law.

E. Exceptions for Non-Commercial Works

The compulsory license has been designed in many ways as a means to address weaknesses seen in the Canadian Copyright Modernisation Act. It addresses the Act's inability to deal appropriately with commercial content as well as its inadvertent shifting of revenue away from creative parties and into the hands of content hosting sites. However, on its own, the license does a

poor job of addressing non-commercial UGC and is best applied in tandem with an exception for these types of works.

Alone, the license would still require non-commercial works like memes or free fan fiction to undergo the 20 year waiting period and still be subject to licensing procedures. However, there is no need to impose those restrictions on non-commercial works. The 20 year waiting period is designed as a counter-balance to following loss of derivative exclusivity, and the competitive edge that goes along with it. Non-commercial works do not represent true competitors because they are, economically speaking, not allowed to compete. Non-commercial remixes may, at times, divert attention from their original counterparts, but more often they will serve to complement them. Moreover, the lack of economic incentives for non-commercial derivative authors is sufficient to to balance their power to use creative raw materials without permission or payment. However, in order to ensure that the non-commercial exception is not abused in a way to subvert the requirements of the compulsory license for derivatives, three important considerations must be well defined.

First, the definition of “non-commercial” must be narrowly construed in this situation. Any works made under this exception must not be allowed to garner *any* revenue for their authors, including ad based revenue on free-to-view platforms. Otherwise, it would serve to subvert the established safety valves present in the compulsory licence that do not apply to non-commercial works, such as the waiting period or the requirement of sharing revenue. Moreover, indirect revenues such as donations through sites like Patreon may require special rules. This could be as simple as not allowing links to donate to be posted alongside works looking to qualify for the non-commercial UGC exception. It may, however, be best to leave the definition of when indirect revenues serve as a backdoor to avoiding the license fees and/or waiting period to the discretion of courts.

Second, there would also need to be strictly defined rules that either limit or prohibit the crowdsourcing of funding to make non-commercial remixes. This issue was tackled by the private

sector in the *Axanar* case discussed previously.⁶⁸⁰ Owners of the Star Trek copyrights, CBS/Paramount, sought injunction against a fan film when it was found to have raised \$1,000,000 in funding from a crowd-sourcing website. The resulting settlement outlined a policy for the amount of money that may be raised to create a Star Trek fan film without concern of infringement. Governments may consult this and similar policies from the private sector to find a range of funding that content holders find tolerable and non-competitive.⁶⁸¹

Third, there should be a legislated program to prevent third party content hosting services from unjustly profiting from this kind of content where all other parties are legally unable to do so. The simplest solution without creating another licensing mechanism would be a levy imposed on all services of this nature with the revenue apportioned amongst content owners. Here, the same digital fingerprinting technology I have criticised throughout this thesis finds a valuable use. It may be used to identify works used and posted online for the purpose of appropriating royalties paid by the levy. Though I have spent much time criticising the efficacy of these softwares, their flaws are more tolerable when they are not being used to silence creative expression.

F. Retroactive Application

One important question concerning the implementation of such a license is whether it should apply retroactively. I believe the simplest answer is a yes with a caveat. Retroactive application of new copyright laws is commonplace, especially when the new laws benefit the financial earning potential of major content holders.⁶⁸² There is no reason why a law looking to temper their rights should be eased into effect. However, with the notion of causing as little disruption to the structure of the industries involved in mind, its retroactive application should be tempered.

The license should apply retroactively to all works currently covered by copyright. However, for existing works, the 20 year waiting period would begin to toll at the time of the

⁶⁸⁰ See: *Axanar* (2017) Supra n.349

⁶⁸¹ Ibid.

⁶⁸² The United States has passed retroactive term extensions multiple times. See: Chapter 3 C

license's implementation- not from the point of the works' creation. In other words, while the license would apply to works already covered under copyright law, the waiting period should not be retroactively applied. This, coupled with the tedious amount of time it would take to pass such a law, would provide content holders ample time to prepare for its consequences while still having an immediate impact on the rebalancing of users' rights.

G. Conclusion

The internet and technology have revolutionised the way media is created, stored and disseminated. From that revolution we have seen a massive increase in both piracy and derivative infringements or potential infringements. This chapter and this thesis do not claim to offer a solution for piracy. However, it serves as a criticism of the history of legal solutions that treat piracy and derivative infringement as one and the same. The historical method of combating online infringement has been facilitating the assertion of property rights for creators in the online environment. Expediting the process of removing infringing content from the web has been the key tactic for lawmakers. This began in the early 2000s with the invention of notice and takedown procedures. It has since evolved into providing additional legal insulation for digital rights management tools and technical protection measures developed by the private sector to build digital fences around its cultural property.⁶⁸³ Most recently, the trend has moved towards looking at how digital fingerprinting technology and online filters may be incorporated into the law to prevent the need for takedown requests by blocking infringing content before it is ever posted. From this evolution of legal practice we have doubled-down again and again on the philosophy that gatekeeping content online is the ideal way to protect content owners. However, this philosophy, though it makes sense when applied to facsimile reproductions aimed solely at enabling online users to access content for free that they would otherwise be required to pay for, is far less ideal when applied to new creative works that simply make use of existing ones. It robs the public of new

⁶⁸³ See: Chapter 1 and 2

creative works and it robs creators of new revenue streams. Moreover, when trying to apply enforcement mechanisms designed to prevent piracy to derivative works as well, we end up chilling a wealth of legitimate creativity made under exceptions to infringement in the process. This thesis, again, regrettably does not have a solution for online piracy. However, it is a plea that we stop treating derivative creativity as such. It has offered a path to do that.

A compulsory license to make derivatives will enable users access to content that they crave. It will promote a new body of creative works and foster a new generation of creators. It will create the potential for new revenue streams both for content owners and new derivative creators alike. It will likely incite the creation of organised collective licensing bodies in the film, television, and publishing industries similar to those seen in the music industry. It will end the chilling of legitimate derivative creativity online. It will reign in the predatory licensing policies that have evolved for user-generated content as a result of vague and outdated laws. It will rebalance the rights of users against those of content owners after decades of legislation that have shifted power more and more to the side of corporate interests. It will promote the creation of millions of absolutely terrible works that most people will never see. It will also promote the creation of millions of creative works that never would have been made otherwise, some of which will undoubtedly be quite popular. It will legitimise a behaviour that is commonplace online and transform it from an illicit nuisance to an economic opportunity. Finally, it will refocus copyright law on its purpose- the promotion of creative works and allow it to work for *everyone* not just a handful of huge corporations.

VII. Conclusions of this Thesis

The overarching research question this thesis sought to answer was how we may appropriately balance author's rights with the dissemination of information in a digital world in a way that leads to a system of copyright law that is practical, fair, and enforceable. It hypothesised that the fundamental aspect of copyright law, its basis in property and the application of rules within that paradigm, has hindered its ability to competently address issues of balancing the rights and interests of content owners and those of users who wish to make secondary works online.

Each individual chapter has set out to test this hypothesis and answer this research question. Chapter one set forth the issues relevant to this thesis, namely that piracy is a near unassailable force online, that user-generated content has risen in popularity, and the derivative creativity associated with it represents a new and culturally valuable phenomenon. These two forces must be balanced against one another. It also described the systems in place that currently address both piracy and UGC and how they are inadequate as a means of both preventing piracy and simultaneously promoting new creativity from users. Chapter two introduced the notion that perhaps the property law system that influences copyright law protection exacerbates problems with this delicate balancing act. It argues that control is paramount in a property system and is all but lost for digital creative works online. It introduces the concepts of property and liability rules in legal entitlements and argues that liability rules are far more effective tools for copyright enforcement in the online environment based on this notion of lack of control. Chapter three argues that regardless of the efficacy of online enforcement strategies or the legal constructs that inform them, copyright law has developed into an overprotective scheme that leaves users behind. New legislation and policy should be informed by its conclusion that the law is fundamentally out of balance. Chapter four introduces legislative measures from separate jurisdictions that aim to solve this issue raised of how to balance creators' rights against the dissemination of information in a digital world. It compares the two, analyses their strengths and weaknesses and concludes that neither solution is adequate largely because of their reliance on property law mechanisms in the digital space. Chapter

5 analyses how the the private sector has addressed copyright's failure to adequately map out treatment of user-generated content in a world that demands space for this sort of derivative creativity described in chapter one. It analyses how tolerated use and controlled monetisation policies represent not only a failure in the law but a shift in private sector policy that demonstrates a propensity for monetisation of derivative creativity. However, the analysis also demonstrates how, in the absence of clear legislative backing or oversight, these private sector systems of pseudo-laws can be predatory and are insufficient as a solution on their own.

The final chapter, my own conclusion and solution, is informed by each of the preceding five. It addresses the problems outlined in chapters one and three. It builds off of the failures and successes of the legislative measures analysed in chapter four but from a perspective informed by the arguments about property rules set forth in chapter two. The solution I propose is also finally a reflection on the private sector initiatives analysed in chapter five and how they may be applied in a legislated system that is fair and just for all parties involved. It serves to answer the question of how may balance these two adversarial parties and their rights against one another in the digital world. It also answers the key hypothesis of this thesis by advocating for a solution based on liability rules, not property rules.

This thesis has served as a criticism of modern copyright law, or at least its ability to function efficiently and adequately amidst a digital world. It is an argument first that the system established 300 years ago is no longer the most appropriate way to address the goals of the law. Second, it is a calling for a rebalancing, a suggestion that the law has grown to disproportionately favour creators- largely represented by a few multinational corporations. A generation ago there were only creators and consumers. However, innovation has bred a third party in the 21st century, users, and the law has failed to accommodate their role in this trichotomy. There are legal constructs in place that have developed to establish a place for user creativity. The laws of transformative and fair use in the United States, fair dealings in the United Kingdom, and various niche carve-outs amidst exceptions to infringement elsewhere all provide some protection for user

creativity. However, these laws are either too narrowly applied or too vague to offer true security and are often undermined by non-legislated policies issued by content owners themselves. Moreover, attempts to modernise copyright law typically take the form of anti-piracy measures which ignore users' rights and likewise undermine existing legal carveouts for them. These measures chill creativity, silence free speech, rob the world of valuable creative contributions, and block the potential for legitimate transactions that would create revenue for content owners and users alike.

There are four conclusions I have drawn from writing this thesis. First, copyright law is antiquated and must be changed to function in the digital space. Second, the law must come to distinguish between piracy and derivative creativity and offer separate frameworks for each. Third, the law has grown to be overprotective and must be rebalanced to adequately reflect the needs of creators, consumers, and users alike. Fourth, a compulsory license for derivative creativity is the most appropriate solution to both legally distinguish this sort of expression from piracy and rebalance the power structure of users, consumers and creators.

A. Copyright Law is Antiquated and Must be Changed to Function in the Digital Space

First, copyright law, despite its many changes over the years, remains in many ways an 18th century legal construct used to address 21st century issues. While some laws do not face obsolescence with time, copyright law has struggled to keep pace with the technological innovation that has resulted from society's development. While the simplified premise that creative works deserve protection to ensure the financial security of creators and thereby incentivise more creation rings just as loudly as it did in 1710, the appropriate means to achieve this end feels different. The notion of treating creative works like pieces of property made sense in a time where the ability to create and disseminate them was so limited that they could be controlled as such. However, one has to wonder if someone were to propose copyright law's modern iteration for the first time now, a

system so easily subverted, that so often chills creativity and expression, and is readily used as a tool to silence free speech, would they not be mocked for such a proposal?

The use of property rules to govern creative works has grown obsolete in many respects. Piracy has developed into a relatively small, yet completely unstoppable, subculture and there is ample room for more research on how the law might be adjusted to address this phenomenon. While this thesis addressed the issues posed by piracy, it did so with the purpose of highlighting a different failure of the law. User-generated content, or works of derivative creativity, remix, appropriation, collage, and re-imagination, have become ubiquitous in online culture yet the blurred legal line between these types of works and piracy creates problems. UGC's rise in popularity has seemed to largely correlate with the invention of technology to make and distribute these types of works. Despite the obvious cultural value of these works, copyright law, constrained by its property law mechanics, has struggled to foster the development of this type of creativity. This is not entirely for lack of effort. Various jurisdictions have created carveouts and exceptions to infringement designed to protect many types of user-generated content. However, these exceptions, in practice, are often impotent lip service paid to derivative creators. Legal ambiguity has created a climate where content owners have been able to make their own rules with respect to this sort of creativity. That has, in turn, fostered a system of predatory and exploitative treatment towards derivative creators. However, the recent focus on legal reform aimed at stamping out piracy at any cost has been the largest prohibitor to derivative creativity.

B. The Law Must Distinguish Between Piracy and Derivative Creativity

The main indicator of the law's growing obsolescence in the digital age is its growing inability to address and enforce against unauthorised uses of creative works. Content owners lack the ability to control their creations that was available in an analog world. Piracy constitutes an ever-present threat to the function of a legitimate creative marketplace and must be addressed by the law. However, as it has become more and more difficult to prevent piracy, legislators have sought

to stop it at nearly any cost. Unfortunately, these associated costs have typically been valuable derivative creativity. The law, in its vain attempt to stamp out piracy online, subverts users' rights and prevents the development of a valuable secondary markets for creative works. Legal policies that seek to "modernise" copyright law typically do so with piracy as the focus and take a sweeping and indiscriminate approach. As a result, derivative creativity is lumped into the same box as piracy and receives the same treatment. However, there is ample evidence that, given conditions where they were able to do so, content owners would not treat this kind of creativity in the same way as they would piracy. Moreover, UGC is often creative and culturally valuable. It deserves to be fostered by the law.

The law must distinguish piracy from valuable derivative creativity and offer solutions to the problems each practice imposes separately. Solutions geared towards piracy that infringe upon the rights of users are unacceptable just as policies designed to foster UGC that likewise promote piracy should also be unacceptable. However, in recent history there have been relatively few policy changes designed at promoting user-generated creative works while every few years seems to mark the implementation of new anti-piracy strategy. The implementation of legislation that recognises works of UGC as culturally valuable and seeks to protect them in a tangible and accessible way would be a healthy start.

C. The Law is Overprotective and Must be Rebalanced

Despite the issues that arise from legal failures to adapt to modern technology as well as those associated with the grouping of piracy and derivative creativity into the same category, the law has failed users in a third way. It has grown overprotective as a result of the steady expansion of owners' rights coupled with the parallel constriction of safety valves on these rights (user protections) over the last century. In the United States, the term of a copyright has been extended from 14 years to potentially 10x that figure or more over the last 100 years. The public domain, the greatest safety valve of all to protectionist copyright measures, feels more and more like a myth as

term extensions continue to be passed. Moreover, this strengthening of protection for creators has not been met with equivalent balancing for users and consumers. Laws allow content owners to digitally prevent consumers from privately copying or transferring content they have paid for from one format or medium to another. The same laws prevent users from accessing content for the purposes of legal remix or transformation. Moreover, the safety valves that have arisen such as fair use, fair dealing, and other exceptions to infringement are largely ineffective either because they are too vague to offer confidence in the legitimacy of a created work or too narrowly applied to protect it. The majority of the most valuable copyrights today are controlled by but a few large multinational corporations. These corporations have been able to wield tremendous power to influence legislators and, as a result of their lobbying efforts, we have a system of law that tremendously favours the economic interests of these few corporations.

An analysis of the philosophical foundations for copyright law demonstrated an across-the-board preference for a strong set of users rights. The Lockean commons call for it, Beckham's utilitarianism calls for it, economic theory supports it, and even Hegel's creator-centric personality theory allows for strong carveouts for secondary uses. The law we have today is not the result of philosophical ethics or even the promotion of new creativity. It is the result of corporate lobbying and international trade wars. I have tried to explain in this thesis what users' rights are, what they *should* be, and how we can change them to become that. My final conclusion is that, in order to both distinguish derivative creativity from piracy and expand users' rights to better align them with the expansion to owners' rights, a compulsory license for derivative works is the ideal solution.

D. The Appropriate Solution is a Compulsory License for Derivative Creativity

A compulsory license for derivative creativity solves three problems. First, it helps to adapt the law to the difficult digital environment that it currently governs. It does so first by legitimising an already ubiquitous behaviour. However, in doing so, it turns this behaviour into a new revenue stream for content owners and users alike. It also will shift the notion of how we should be using modern technology to enforce copyright online from a gatekeeping and takedown philosophy to one

of creative promotion and monetisation- a philosophy that resonates more harmoniously with the underlying goals of copyright as a whole. Second, it distinguishes secondary creativity from piracy and establishes the former as a socially valuable contribution that shall be fostered by the law. Third, it props up users' rights in a way that appropriately rebalances them against the historically strong rights of creators. However, it does so in a way that is not unduly disruptive to the existing creative economy. The nuances of the license I have proposed are all aimed at either addressing problems caused by similar legislation, such as the value gap created by Canada's non-commercial exception for UGC, or to ensure that the new system would be minimally disruptive and feasible to implement.

E. Final Words

This thesis is a criticism of a system that typically functions and develops with little scrutiny outside of the private-sector interests that influence it. It is, in many ways, an overly-optimistic assertion of how the law can change for the better. However, if it is unrealistic in any way, it is only because the suggestions I propose *will not* be introduced- not because they *can not* or *should not*. If there is one singular point I would like to drive home to any unfortunate soul who has been required to read this thesis in its entirety, it is that copyright law has lost its focus and should reset its sights on ways in which it may promote new creativity. This includes *all* forms of creativity, not just corporate creativity.

Bibliography

17 U.S.C.A. § 101

17 U.S.C. §106(a)

17 U.S.C. §203

17 USC §107

17 U.S.C. §§ 302-304 (2011)

17 U.S.C. § 504(b) (2012)

17 U.S.C. §512(c)

17 U.S.C. §801(b) (Supp. IV 1980)

17 USC §1201

3D Virtual Fitting Dressing Room / Mirror. '3D Virtual Fitting Dressing Room / Mirror'
<www.fitnect.hu/>

'46% Of UK Streamers Are Worried About Broadcasting Content In Light Of Article 13' (*influencerupdate.biz*, 2020) <<https://www.influencerupdate.biz/news/68115/46-of-uk-streamers-are-worried-about-broadcasting-content-in-light-of-article-13/>>

A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001)

'About The Licenses' - Creative Commons' (*Creativecommons.org*, 2020) <<https://creativecommons.org/licenses/>>

Abrams, H., 'Copyright's First Compulsory License.' [2010] Vol. 26, Santa Clara Computer and High Tech L.J.. 215

Act of May 31,1790, ch. 15,1 Stat. 124 (repealed 1831)

Act of Feb. 3,1831, ch. 16, 4 Stat. 436 (repealed 1870)

Act of Mar. 4,1909, ch. 320, 35 Stat. 1075 (repealed 1976)

'After Insisting That EU Copyright Directive Didn't Require Filters, France Immediately Starts Promoting Filters' (*Techdirt.*, 2020) <<https://www.techdirt.com/articles/20190327/17141241885/after-insisting-that-eu-copyright-directive-didnt-require-filters-france-immediately-starts-promoting-filters.shtml>>

- Ahlert, C., Marsden, C., and Yung, C., 'How "Liberty" Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation' (2004)
<<http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/liberty.pdf>>
- Angelopoulos, C., 'Communication to the Public and Accessory Copyright Infringement' [2017] 76 The Cambridge Law Journal 496
- 'Another Week, Another Hollywood Company Files A Takedown Against Torrentfreak' (*Techdirt*, 2020) <<https://www.techdirt.com/articles/20190421/22512742056/another-week-another-hollywood-company-files-takedown-against-torrentfreak.shtml>>
- Armstrong, S. (2010). 'Fanfiction and Copyright.' <<https://slarmstrong.wordpress.com/2010/05/08/fanfiction-and-copyright/>>
- Ashdown v. Telegraph Group Ltd.* [2002] Reports of Patent, Design and Trade Mark Cases 119(6) 235-256 (Court of Appeals).
- Ashtar, R., 'Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime.' [2009] 19 Albany Law Journal of Science & Technology 261
- Australian Law Reform Commission, 'Copyright and the Digital Economy,' (2012)
- Banks, A., 'Augmented Reality Examples: How Fashion & Retail Are Using It.' (*Highsnobiety*, 2016) <www.highsnobiety.com/2016/07/25/augmented-reality-examples/>
- BBC, 'Doctor Who - Frequently Asked Questions - BBC One'. (*BBC*, 2018)
<<http://www.bbc.co.uk/programmes/articles/1mv1sSDySZXtn3Y3bsS4fPv/frequently-asked-questions>>
- 'BBC NEWS, Rowling Backs Potter Fan Fiction' (*News.bbc.co.uk*, 2020) <<http://news.bbc.co.uk/1/hi/entertainment/3753001.stm>>
- Becker, L. C., 'Deserving to Own Intellectual Property.' [1993] 68 Chicago-Kent Law Review
- Bell, T. W., 'Copyright as Intellectual Property Privilege,' [2008] vol. 58 no. 3 Syracuse Law Review
- Bentham, J., *An Introduction to the Principals of Morals and Legislation* [1907] Oxford Clarendon Press reprint of 1823 edition, available at
<https://www.econlib.org/library/Bentham/bnthPML.html?chapter_num=2#book-reader>
- Berlin Act (1908)
- Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886
- Bertrand, N. 'Fifty Shades of Grey' started out as 'Twilight' fan fiction before becoming an international phenomenon,' (*Business Insider*, 2015) <<http://www.businessinsider.com/fifty-shades-of-grey-started-out-as-twilight-fan-fiction-2015-2>>
- Bethesda, 'Creation Club' (*Bethesda*, 2017) <<https://creationclub.bethesda.net/en>>

Binder M, 'Fraudsters Are Abusing Google With Fake Copyright Complaints, And It's Getting Worse' (*Mashable*, 2020) <<https://mashable.com/article/google-fake-dmca-takedown-requests/?europa=true>>

Blacks law dictionary

Bode, K., 'Study Again Shows 'Pirates' Tend To Be The Biggest Buyers Of Legal Content' (*Vice*, 2020) <https://motherboard.vice.com/en_us/article/evkmz7/study-again-shows-pirates-tend-to-be-the-biggest-buyers-of-legal-content>

Boroughf, B., 'The Next Great Youtube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation' (2015) 25 Albany Law Journal of Science & Technology 95

Buccafusco, C. and Heald, P., 'Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension,' Vol. 28:1 Berkely Technology Law Journal

Buckle, S., *Natural Law and the Theory of Property: Grotius to Hume*. [1999] Clarendon Press

Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 799-800 (6th Cir. 2005)

Bruno, A., 'A New Battle Plan,' (*Billboard*, 2008) vol. 120, no. 42

Bryce, S.C., 'Life Plus Seventy: The Extension of Copyright Terms in the European Union and Proposed Legislation in the United States.' (1996) 37 Harv International Law Journal 525

Calabresi, G and Melamed, D., 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) Harvard Law Review, vol 85, no 6, 1089

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)

Cariou v. Prince, 714 F.3d 694, 707 (2nd Cir. 2013)

Carr N., 'Digital sharecropping' (RoughType, 2006) <<http://www.roughType.com/?p=634>>

Carroll, M.W., 'One for All: The Problem of Uniformity Cost in Intellectual Property Law,' (2006) 55 American University Law Review 845

Case C-467/17 *Pelham* [2019]

Case C-469/17 *Funke Medien* [2019]

Case C-516/17 *Spiegel Online* [2019]

CCH Can. Ltd. v. Law Soc'y of Upper Can., [2004] S.C.R. 339

ChannelMeter, 'PewDiePie,' (Statistics) <https://channelmeter.com/channels/-IHJZR3Gqxm24_Vd_AJ5Yw>

- Chon, M., 'New Wine Bursting From Old Bottles: Collaborative Internet, Art, Joint Works, and Entrepreneurship, ' (1996) 75 Oregon Law Review
- Chynoweth, P., 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* [2008] Wiley-Blackwell
- Cobia, J., 'The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process' (2008) 10 Minnesota Journal of Law, Science, & Technology
- Collier, K., 'Getty Claims Copyright on Socially Awkward Penguin, Forces Site to Pay \$868' <<https://www.dailydot.com/layer8/socially-awkward-penguin-meme-getty-lawsuit/>>
- Commission of the European Communities, 'Green Paper: Copyright in the Knowledge Economy' (COM(2008) 466/3)
- Committee Report No. 16 - INDU (42-1) - House Of Commons Of Canada' (*Ourcommons.ca*, 2020) <<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/page-42>>
- Committee Report No. 19 - CHPC (42-1) - House Of Commons Of Canada' (*Ourcommons.ca*, 2020) <<https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/report-19/>>
- 'Content Guidelines and Review Process', Kindle Worlds, <<https://kindleworlds.amazon.com/faqs?topicId=A2W2IF5J2WZDKT>>
- 'Continuing To Create Value While Fighting Piracy: An Update' (*Google*, 2020) <<https://blog.google/topics/public-policy/continuing-to-create-value-while/>>
- Coombe, R.J., 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue' (1991) 69 Texas Law Review
- Copyright Act 1911.
- Copyright Act 1956 (UK)
- Copyright Act of 1976
- Copyright Designs and Patents Act 1988
- 'Copyright Match Tool - Youtube Help' (*Support.google.com*) <<https://support.google.com/youtube/answer/7648743?hl=en-GB>>
- Copyright Modernisation Act 2012 (CA)
- Corbett, S., 'Creative Commons Licenses, the Copyright Regime and the Online Community: Is There a Fatal Disconnect' (2011) Vol. 74, no. 4 Modern Law Review 503-531
- Craig, C.J., 'Locke, Labor and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law' (2002) 28 Queen's Law Journal

- Cushing, T., 'YouTube Kills Livestream Of Convention When Audience Starts Singing "Happy Birthday"' (*TechDirt*, 2013) <<https://www.techdirt.com/articles/20131014/15323524876/youtube-kills-livestream-convention-when-audience-starts-singing-happy-birthdayshtml>>
- D'Agostino, G., 'Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use,' 53 *McGill Law Journal*
- DeLisa, N.T., 'You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms' (2016) 81 *Brooklyn Law Review*
- Delzo, J., 'Men Fall from Cliff Playing Pokemon Go.' (*CNN*, 2016) <edition.cnn.com/2016/07/15/health/pokemon-go-players-fall-down-cliff/index.html>
- Dewey, C., 'How Bernie Sanders Became the Lord of "Dank Memes,"' (*The Washington Post Online*, 2016) <<https://www.washingtonpost.com/news/the-intersect/wp/2016/02/23/how-bernie-sanders-became-the-lord-of-dank-memes/>>
- Dhir, A., *The Digital Consumer Technology Handbook: A Comprehensive Guide to Devices* [2004] Newness
- Digital Millennium Copyright Act 1998 (USA)
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178
- Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
- Directive on Harmonizing the Term of Protection of Copyright and Certain Related Rights, Council Directive 93/98, 1993 OJ L 29019
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167
- Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111
- 'Dispute a Content ID Claim,' Youtube, <<https://support.google.com/youtube/answer/2797454>>
- Dovey, D., 'A New, Creepy Porn App Allows You to Impose Anyone's Face on an Adult Film Actress's Body.' (*Newsweek*, 2018) <www.newsweek.com/deepfakes-fake-app-reddit-pornography-792053>
- Drehs, W., 'How PewDiePie became king of YouTube' <http://www.espn.com/espn/story/_/id/13013936/pewdiepie-how-became-king-youtube>

‘Doctor Who Fan Fiction: Your Chance to get Involved!,’ (BBC, 2017). <<http://www.bbc.co.uk/blogs/doctorwho/entries/108b4bf0-ffe8-4bab-ab25-a3f2438999ab>>

‘Dr. Who Fan in Knitted Puppet Row,’ (BBC) <<http://news.bbc.co.uk/1/hi/entertainment/7400268.stm>>

Dusollier, S., ‘The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition’ (2020) 57 Common Market Law Review 979-1030

Dusollier, S., ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright.’ (2005-06) 29 Columbia Journal of Law & the Arts 271

Ehrenkranz, M., ‘Producers of Nazi Romance Movie Appear to Be Using DMCA Takedowns to Silence Critics’(gizmodo, 2019) <<https://kinja.com/api/profile/getsession?redirect=https://gizmodo.com/setsession?r=https%3A%2F%2Fgizmodo.com%2Fproducers-of-nazi-romance-movie-appear-to-be-using-dmca-1831555053>>

Elkin-Koren, N., ‘A Public-Regarding Approach to Contracting over Copyrights,’ in Dreyfuss, R.C., Zimmerman, D.L., & First, H. *Expanding the Boundaries of Intellectual Property* [2001]

Elkin-Koren, N., ‘Exploring Creative Commons’ in L. Guibault and P. Bernt Hugenholtz (eds.) *The Future of the Public Domain: Identifying the Commons in Information Law* [2006] Hague: Kluwer

‘EU Commissioner Gunther Oettinger Admits: Sites Need Filters To Comply With Article 13’ (*Techdirt.*, 2020) <<https://www.techdirt.com/articles/20190329/15501341902/eu-commissioner-gunther-oettinger-admits-sites-need-filters-to-comply-with-article-13.shtml>>

European Charter of Fundamental Rights Article 17(2)

European Copyright Directive of 2001

‘Evidence - INDU (42-1) - No. 102 - House Of Commons Of Canada’ (*Ourcommons.ca*, 2020) <<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-102/evidence>>

Evidence - INDU (42-1) - No. 110 - House Of Commons Of Canada’ (*Ourcommons.ca*, 2020) <<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-110/evidence>>

‘Fanfiction’ (Fanlore.org Digital Encyclopedia Entry) <<http://fanlore.org/wiki/Fanfiction>>

Fanlore.org., ‘Professional Author Fanfic Policies - Fanlore.’ (2018) <https://fanlore.org/wiki/Professional_Author_Fanfic_Policies#cite_ref-42>

Fanlore.org. (2018). ‘Stephenie Meyer - Fanlore,’ <https://fanlore.org/wiki/Stephenie_Meyer>

- Favale, M., 'Death And Resurrection Of Copyright Between Law And Technology' (2014) 23 Information & Communications Technology Law
- Fischer, W., *Promises to Keep*, [2004]
- Fisher, W., 'Theories of Intellectual Property,' in *New Essays in the Legal and Political Theory of Property* [2001] Stephen R. Munzer ed.
- Fitzgerald, B., 'YouTube Pulls Michelle Obama's Democratic National Convention Speech In 'Error,' (*Huffington Post*, 2012) <<http://www.huffingtonpost.com/2012/09/05/youtube-pulls-michelle-obama-speechn1857708.html>>
- Fitzgerald B, 'Theoretical Underpinning Of Intellectual Property: 'I Am A Pragmatist But Theory Is My Rhetoric,' (2003) 16 Canadian Journal of Law & Jurisprudence
- Folsom v. Marsh* 9. F.Cas. 342 (C.C.D. Mass. 1841)
- Foong, C 'Making Copyright Content Available in the Cloud vs the Making of Copies: Revisiting Optus TV and Aereo,' (2015) 41 Monash U. Law Review 583
- 'French Pokemon Go Player Arrested on Indonesian Military Base.' (*The Guardian*, 2016) <www.theguardian.com/technology/2016/jul/19/french-pokemon-go-player-arrested-on-indonesian-military-base>
- Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006)
- Galavis, A., 'Reconciling the Second and Ninth Circuit Approaches to Copyright Preemption: A Universal System Is Paramount to the Protection of Idea Purveyors' Rights,' (2013) 19 Boston University Journal of Science & Technology Law
- 'Game Content Usage Rules', (*Xbox*) <<http://www.xbox.com/en-us/developers/rules>>
- Geller, 'German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations,' (2010) 57 Journal of the Copyright Society of the USA 553
- German Act on Copyright and Neighbouring Rights, 1965 (Urheberrechtsgesetz) s 24 – (1)
- Ginsburg, J.C., 'Creation and Commercial Value: Copyright Protection of Works of Information,' [1990] 90 Columbia Law Review, 1865
- Glenn, P.H., 'The Aims of Comparative Law', in: J.M.Smits (ed.), [2006] *Elgar Encyclopedia of Comparative Law*, Cheltenham: Edward Elgar
- Goldstein, P. *International Copyright* [2001]
- Gomez-Arostegui H.T., 'The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710,' 25 Berkley Technology Law Journal 1247
- Goold, P., 'Why the U.K. Adaptation Right is Superior to the U.S. Derivative Work Right.' (2013-14) 92 Neb. L. Rev. 875

- Gordon, W. 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 201 Yale Law Journal
- Gorecki, O., 'Utilitarianism: Doctrinal Analysis Evolution of Thought.' (2017) Vol. 20, No. 5, Special Issue, *Annales. Ethics in Economic Life*. doi: <http://dx.doi.org/10.18778/1899-2226.20.5.11>
- Gowers Report, 2006
- Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991)
- Greenman F., and Deutsch, A., 'The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect' (1982) 1 *Cardozo Arts & Entertainment Law Journal* 1
- Goosens, S., 'Article 13 (now Article 17) of the new Copyright Directive: what you need to know' (*ReedSmith*, 2019) <<https://www.reedsmith.com/en/perspectives/2019/04/article-13-now-article-17-of-the-new-eu-copyright-directive>>
- Grosheide F.W., *Auteursrecht Op Maat: Beschouwingen over De Grondslagen Van Het Auteursrecht in Een Rechtspolit.* Context = Tailored Copyrights [1986] Kluwer
- Gross G, 'What's The Problem With DMCA Takedown Notices?' (*PCWorld*, 2020) <<https://www.pcworld.com/article/2110520/whats-the-problem-with-dmca-takedown-notices.html>>
- Halderman, A. and Felten, E., 'Lessons from the Sony CD DRM Episode' (2006) Center for Information Technology Policy Department of Computer Science Princeton University, <<http://itpolicy.princeton.edu/pub/sonydrm-ext.pdf>>
- Hale, J., 'Here's How A Scammer Abused YouTube's Copyright Infringement System In An Attempt To Extort Money From Users.' (*Tubefilter*, 2019) <<https://www.tubefilter.com/2019/02/07/youtube-content-id-copyright-infringement-scam/>>
- Hanna, P., 'The next Napster? Copyright Questions as 3D Printing Comes of Age.' (*Ars Technica*, 2011) <arstechnica.com/tech-policy/2011/04/the-next-napster-copyright-questions-as-3d-printing-comes-of-age/>
- Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985)
- 'Have Spotify and Apple Music Just Won the Streaming Wars?' (*Music Industry Blog*) <<https://musicindustryblog.wordpress.com/2016/09/16/have-spotify-and-apple-music-just-won-the-streaming-wars/>>
- Hegel, G.W.F., *Elements of the Philosophy of Right*, edited by Wood, A.W., [2003] Cambridge University Press
- 'Here's How A Scammer Abused Youtube's Copyright Infringement System In An Attempt To Extort Money From Users' (*Tubefilter*, 2020) <<https://www.tubefilter.com/2019/02/07/youtube-content-id-copyright-infringement-scam/>>

- Hugenholtz, P.B., *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* [2018] Wolters Kluwer
- Higgins, P., 'Mars Landing Videos, and Other Casualties of the Robot Wars' Electronic Frontier Foundation (*EFF*, 2012), <<https://www.eff.org/deeplinks/2012/08/mars-landing-videos-and-other-casualties-robot-wars>>
- Hill, Michael P. 'NBC Augments Super Bowl with Body Scans, Virtual Elements.' (*Newscast Studio*) <www.newscaststudio.com/2018/02/05/super-bowl-augmented-reality/>
- Holmes, R., 'How Bernie Sanders Beats Donald Trump at Social Media,' (*Fortune Magazine*, 2016) <<http://fortune.com/2016/04/18/bernie-sanders-donald-trump-social-media/>>
- Horton, S., 'Game Of Thrones Season 7 Pirated Over 1 Billion Times,' (*Muso*, 2017) <<https://www.muso.com/magazine/game-of-thrones-season-7-pirated-over-1-billion-times/>>
- How Content ID Works*, YouTube, <http://support.google.com/youtubeanswer/2797370>
- Hughes, J., 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Review*
- Hubbard v Vosper* [1972] 2 Q.B. 84
- Hyde Park Residence Ltd. v. Yelland and Others* [2001] Ch. 143 (Court of Appeal)
- I Hargreaves Commission, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011)
- 'Independent,' (2020) <<https://www.independent.co.uk/arts-entertainment/films/news/disney-remake-box-office-gross-total-lion-king-a9028641.html>>
- 'Fair Use Handbook,' (*Infojustice.org*, 2020) <<http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf>>
- Ingham T, "YouTube's Content ID Fails to Spot 20%-40% of Music Recordings" (*Music Business Worldwide*, 2016) <<https://www.musicbusinessworldwide.com/youtubes-content-id-fails-spot-20-40/>>
- Intellectual Property Office, 'Online Copyright Infringement Tracker Latest Wave Of Research Mar 16 - May 16 Overview And Key Findings' (2016)
- Irish Copyright Review Committee, 'Modernizing Copyright', 2013
- Jackson G, 'Nintendo Flags YouTuber For Using Switch Sound' (*Kotaku Australia*, 2017) <<https://www.kotaku.com.au/2017/03/nintendo-flags-youtuber-for-using-switch-sound/>>
- Jacques S, 'Mash-Ups And Mixes: What Impact Have The Recent Copyright Reforms Had On The Legality Of Sampling?' (2016) *Entertainment Law Review*

- Jurusz, J. and Warner Bros, 'Through the WBshop.com Red2Blu Program You Can Upgrade Your Warner Bros. HD-DVD Titles for New Industry-Leading Blu-Ray Discs' (*Red2Blu*) <<https://web.archive.org/web/20120303211110/http://red2blu.com/>>
- Kamen, M., 'BBC wants your Doctor Who fanfic and fan films' (*Wired*, 2015) <<http://www.wired.co.uk/article/doctor-who-digital-content-competition>>
- Kelly, J., 'Potential 'meme killer' law moves forward with EU lawmakers' (*Globalnews.ca*, 2018) <<https://globalnews.ca/news/4446228/meme-killer-copyright-eu-article-13/>>
- Kelly, J.M., *A Short History of Western Legal Theory* [1992] Clarendon Press
- Khawaja, J., 'The Great SoundCloud Purge of 2015 Has Begun,' (Thump, 14 August 2015) <https://thump.vice.com/en_au/article/the-great-soundcloud-purge-of-2015-has-begun>
- 'Kindle Worlds' Amazon, <<http://www.amazon.com/gp/feature.html?docId=1001197421>>
- Kipper, G., & Rampolla, J., *Augmented Reality: An Emerging Technologies Guide to AR* [2012]
- Kohler, K., 'Why Does Nintendo Want this Superfan's YouTube Money?' (*Wired*) <<https://www.wired.com/2015/03/nintendo-youtube-creators/>>
- Kravets D, 'Forget DMCA Takedowns—RIAA Wants Isps To Filter For Pirated Content' (*Ars Technica*, 2020) <<https://arstechnica.com/tech-policy/2017/02/forget-dmca-takedowns-riaa-wants-isps-to-filter-for-pirated-content/>>
- Kretschmer M, 'Private Copying - Copyright' (*CopyrightUser*, 2020) <<https://www.copyrightuser.org/understand/exceptions/private-copying/>>
- Lahti, E., 'Valve: Modders 'absolutely' need to be paid' (*PCgamer*, 2017). <<http://www.pcgamer.com/valve-modders-absolutely-need-to-be-paid/>>
- Lambrecht, M. and Cabay, J., 'Remix allowed: avenues for copyright reform inspired by Canada.' (2016) 11(1) *Journal of Intellectual Property Law & Practice*
- Lane, J., 'An interview with Axanar attorney Erin Ranahan' (*Fan Film Factor*, 2017) <<https://fanfilmfactor.com/2017/02/13/an-interview-with-axanar-attorney-erin-ranahan/>>
- Lenz v. Universal Music Corp*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008)
- Lester, S. & Zhu, H. 2019, 'Rethinking the Length of Patent Terms', vol. 34, no. 4 *American University International Law Review*
- Leval, 'Commentary: Toward a Fair Use Standard', 103 *Harvard Law Review* 1105
- Lewis, G., 'We Asked an Expert if Memes Could Determine the Outcome of the Presidential Election,' (*Vice Magazine Online*, 2016) <<http://www.vice.com/read/we-asked-an-expert-if-memes-could-determine-the-outcome-of-the-presidential-election>>
- Licensing of the Press Act 1662 (UK)

- 'LimeWire Pays \$105m Illegal Filesharing Settlement' (*FACT Magazine*, 2011)
<www.factmag.com/2011/05/13/limewire-pays-105m-settlement-over-illegal-filesharing/>
- 'List Of Countries' Copyright Lengths' (*En.wikipedia.org*, 2020)
<https://en.wikipedia.org/wiki/List_of_countries%27_copyright_lengths>
- Litman J, *Digital Copyright: Protecting Intellectual Property On The Internet* [2000] Prometheus Books
- Locke, J., *Liberty of the Press* (1695), reprinted in *Locke: Political Essays* (Mark Goldie ed., 1997)
- Locke, J., *Two Treatises of Government*, Second treatise, McMaster University Archive of the History of Economic Thought., [1999] ProQuest Ebook Central,
<<http://ebookcentral.proquest.com/lib/suss/detail.action?docID=3117731>>
- Longan M., 'Big Brother Is Watching But He Doesn't Understand: Why Forced Filtering Technology On The Internet Isn't The Solution To The Modern Copyright Dilemma' (*Script-ed.org*, 2019) <<https://script-ed.org/blog/big-brother-is-watching-but-he-doesnt-understand-why-forced-filtering-technology-on-the-internet-isnt-the-solution-to-the-modern-copyright-dilemma/>>
- Longan, M., "The inadequacy of U.K. law to address user-generated content: a comparative analysis with the United States and Canada". (2017) *Queen Mary Law Journal*, special conferences issue, p. 109-122.
- Maibergh, E., 'Whoa, Valve Just Monetized Mods,' (Apr. 23, 2015), <<http://motherboard.vice.com/read/whoa-valve-just-monetized-mods>>
- Mandeville, T., *Understanding Novelty: Information, Technological Change, and the Patent System* [1996]
- Marwick, A., 'Memes,' Contexts' (2013) <<http://www.jstor.org/stable/24710851>>
- Masnick, M., 'Copyright Extension Moves To Japan' (*Techdirt.*, 2020) <<http://www.techdirt.com/articles/20091119/1840217016.shtml>>
- Masnick, M., 'Techdirt.' (*Techdirt.com*, 2020) <<http://www.techdirt.com/articles/20111014/00471816347/jamaica-latest-to-embrace-retroactive-copyright-term-extension-screw-public-domain.shtml>>
- Matin, A., 'Digital Rights Management (DRM) in Online Music Stores: DRM-Encumbered Music Downloads' Inevitable Demise as a Result of the Negative Effects of Heavy-Handed Copyright Law,' (2007) 28 *Loy. L.A. Ent. L. Rev.* 265
- Minow, M., 'Archetypal Legal Scholarship: A Field Guide' (2013) 63 *J. Legal Educ.* 65
- McCaffrey, A., 'Fan Fiction Rules – The Worlds of Anne McCaffrey' (*Pernhome.com*, 2018)
<<http://pernhome.com/aim/anne-mccaffrey/fans/fan-fiction-rules/>>

- McElwain, J., 'Solving YouTube Content ID Claims for Stock Audio' (*Storyblocks Blog*, 2018) <<https://blog.storyblocks.com/storyblocks-features/youtube-content-id-claims-stock-audio/>>
- McLeod, K. & DiCola, P., *Creative License: The Law and Culture of Digital Sampling* [2011]
- Menell, P., 'Adapting Copyright for the Mashup Generation,' (2016) 164 University of Pennsylvania Law Review 441
- Merges, R., 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations' (1996) Vol. 84. No. 5 California Law Review
- 'Millions Upon Millions Of 'Takedown' Notices To Google... For Links That Aren't Even In Google' (*Techdirt.*, 2020) <<https://www.techdirt.com/articles/20181227/10311341298/millions-upon-millions-takedown-notices-to-google-links-that-arent-even-google.shtml>>
- 'Mixital Terms' (*Mixital.co.uk*, 2017) <<https://www.mixital.co.uk/terms>>
- Moazed, A., 'Why SoundCloud Will Be Worth More Than Spotify,' <<https://techcrunch.com/2016/01/24/why-soundcloud-will-be-worth-more-than-spotify/>>
- Morrison, R.J., 'Derivers' Licenses: An Argument for Establishing a Statutory License for Derivative Works' (2006-2007) 6 Chi-Kent J Intell Prop 87
- Mostert, F. and Schwimmer, M.B., 'Notice and Takedown for Trademarks' (2011) 101 Trademark Rep. 249
- Nas, S., 'The Multatuli Project ISP Notice & Take Down' (*SANE*, 2004) <<https://www-old.bof.nl/docs/researchpaperSANE.pdf>>
- National Heritage Act 1983 (UK)
- Nimmer, M.B. & Nimmer, D., *Nimmer on Copyright* [2013]
- Nollan v. California Coastal Commission*. 483 U.S. 825, 837 (1987)
- Nordhaus, W.D., 'The Optimum Life of a Patent: Reply' (1972) 63 Am. Econ. Rev. 428
- Norek, J., Comment, 'You Can't Sing without the Bling: The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System.' (2004) 11 UCLA Entertainment Law Review 83
- Oksanen, V. & Välimäki, M., 'Transnational advocacy network opposing DRM - A technical and legal challenge to media companies,' (2007) 4:3 International Journal on Media Management

- “'Old Town Road' Just Became Billboard'S Longest-Running No. 1 Ever' (*Vox*, 2020) <<https://www.vox.com/culture/2019/7/29/8937934/lil-nas-x-old-town-road-billboard-charts-record-breaking-single>>
- Olivecrona, K., 'Appropriation in the State of Nature: Locke on the Origin of Property' (1974) 35 *Journal of History and Ideas*
- 'On Canada's Copyright Modernization Act: 'Where Does Balance Fit?' (*Publishing Perspectives*, 2020) <<https://publishingperspectives.com/2017/11/canada-copyright-modernization-act-conference/>>
- Palmer, T.G., 'Are Patents and Copyrights Morally Justified? The Philosophy of Copyrights and Ideal Objects' (1990) 13 *Harvard Journal of Law & Public Policy*
- Paramount Pictures Corp. v. Axanar* (C.D. Cal. Jan. 3, 2017)
- Patry, W., *How to Fix Copyright* [2011] Oxford Univ. Press, U.S.A
- Patterson, L.R., 'Copyright and the Exclusive Right of Authors.' Vol. 1 No. 1. *The Journal of Intellectual Property Law*
- Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007)
- 'Player Studio,' (*Daybreak*) <<https://player-studio.daybreakgames.com>>
- Ploman E.W. and Hamilton L.C., *Copyright: Intellectual Property in the Information Age* [1980] Routledge & Kegan Paul
- Pocaro, K. 'Private Ordering and Orphan Works: Our Least Worst Hope?' (2010) *Duke Law and Technology Review*
- 'Pokemon Go: Armed Robbers Use Mobile Game' (*The Guardian*) <www.theguardian.com/technology/2016/jul/10/pokemon-go-armed-robbers-dead-body>
- 'Pokemon Go Has Revealed a New Battleground for Virtual Privacy.' (*Information Law & Policy Centre*, 2018) <infolawcentre.blogs.sas.ac.uk/2016/08/01/pokemon-go-has-revealed-a-new-battleground-for-virtual-privacy/>
- 'Pokemon Go Players on the Hunt Illegally Cross Canada-US Border' (*The Guardian*, 2016) <www.theguardian.com/technology/2016/jul/23/pokemon-go-players-illegally-cross-canada-us-border>
- Prince v. Cariou* 714 F.3d 694 (2d Cir. 2013)
- 'Producers Of Nazi Romance Movie Appear To Be Using DMCA Takedowns To Silence Critics' (*Gizmodo*, 2020) <<https://gizmodo.com/producers-of-nazi-romance-movie-appear-to-be-using-dmca-1831555053>>
- 'Professional Author Fanfic Policies' (*Fanlore.org*, 2018) <https://fanlore.org/wiki/Professional_Author_Fanfic_Policies#cite_ref-42>

Proposal for a Directive of the European Parliament and of the council on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD)

Quintais J and others, 'The New Copyright Directive: A Tour D'horizon – Part II (Of Press Publishers, Upload Filters And The Real Value Gap) - Kluwer Copyright Blog' (*Kluwer Copyright Blog*, 2020) <<http://copyrightblog.kluweriplaw.com/2019/06/17/the-new-copyright-directive-a-tour-dhorizon-part-ii-of-press-publishers-upload-filters-and-the-real-value-gap/>>

Rachum-Twaig, O., *Copyright Law and Derivative Works : Regulating Creativity* [2018] Routledge, Milton

Recording Industry v. Diamond Multimedia Systems, 180 F. 3d 1072 (Court of Appeals, 9th Circ)

Reda report, <<https://juliareda.eu/copyright-evaluation-report-explained/#transformative>>

Reichert, C., 'Piracy 'Significantly' Declining Due To Availability Of Streaming Services' (*ZDNet*) <<https://www.zdnet.com/article/piracy-significantly-declining-due-to-availability-of-streaming-services/>>

Regina (British Academy of Songwriters, Composers and Authors) v. Secretary of State for Business, Innovation and Skills (The Inc. Society of Musicians Ltd. Intervening) [2015] EWHC 2041 (Admin)

Rens, A. & Lessig, L., 'Forever Minus A Day: A Consideration of Copyright Term Extension in South Africa' (2006) 7 South African Journal of Information & Communication

Resnikoff P, 'Sony Music Says a Harvard Copyright Lecture Violates Its Copyrights...' (*Digital Music News*, 2017) <<https://www.digitalmusicnews.com/2016/02/17/sony-music-takes-down-a-youtube-lecture-about-copyright-issues/>>

Resnikoff, P., 'YouTube: 99.5% of All Infringing Music Videos Resolved by Content ID' (*Digital Music News*, 2016) <<https://www.digitalmusicnews.com/2016/08/08/copyright-problems-resolved-content-id/>>

Rideout, B., 'Printing the impossible triangle: the copyright implications of three-dimensional printing,' (2011) 5 Journal of Business, Entrepreneurship & Law

Rimmer, M., 'Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement,' (2006) 11 First Monday, No. 3 <<https://firstmonday.org/ojs/index.php/fm/article/view/1316/1236>>

Rosati, E., *The Constructuion of Economic Rights in the InfoSoc Directive in Copyright and the Court of Justice of the European Union* [2019] Oxford University Press

Rothenberg R, 'Sampling: Musical Authorship Out Of Tune With The Purpose Of The Copyright Regime' (2008) 20 St. Thomas Law Review

- R.R. Martin, G., 'Someone Is Angry On the Internet' (2018) <<https://grrm.livejournal.com/151914.html>>
- Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)
- Sacco, R., 'Legal Formants. A Dynamic Approach to Comparative Law', (1991) *American Journal of Comparative Law*
- Samuelson, P., 'The Quest for a Sound Conception of Copyright's Derivative Work Right' (2013) *Georgetown Law Journal* 1505
- Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325 (S.D. Fla. 2009)
- Scafidi, S., 'Intellectual Property and Cultural Products,' (2001) 81 *Boston University Law Review*
- Scherer, F.M., 'Nordhaus 'Theory of Optimal Patent Life: A Geometric Reinterpretation' (1972) 62 *American Economics Review* 422
- Scott, R., 'Game Of Thrones Sets Worldwide Ratings Record As It Climbs To 30M Viewers' (*TVweb*, 2017) <<https://tvweb.com/game-of-thrones-season-7-worldwide-ratings-records/>>
- Silverman D, 'Why The Recording Industry Really Stopped Suing Its Customers' (*Harvard Business Review*, 2008) <<https://hbr.org/2008/12/why-the-riaa-stopped-suing>>
- Sing., (2004) 78 *Hansard Parliamentary Debates* 10 (Jayakumar) [Debate 2004]
- Smith, C., 'Emerging Social Networks: 7 Amazing Soundcloud Statistics,' (News Article) <<http://expandedramblings.com/index.php/soundcloud-statistics/>> accessed 12 December 2016.
- Snyder, B., 'Everything TV networks feared about Netflix is coming true.' (2015) <<http://fortune.com/2015/03/11/cable-tv-ratings-netflix/>> Accessed November 16, 2016
- Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427
- Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998)
- Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)
- 'Soundcloud Troll Getting DMCA Takedowns Shows The Weakness Of Notice And Takedown Systems' (*Techdirt.*, 2020) <<https://www.techdirt.com/articles/20181116/09175541064/soundcloud-troll-getting-dmca-takedowns-shows-weakness-notice-takedown-systems.shtml>>
- Spangler T, 'Google Copyright-Removal Requests Doubled In Q1 As Piracy Fight Balloons' (*Variety*, 2020) <<https://variety.com/2016/digital/news/google-dmca-copyright-removal-requests-piracy-1201740892/>>

Stadler, S.K., 'Forging a Truly Utilitarian Copyright.' (2006) 91 Iowa Law Review

Statute of Anne 1710 (England) 8 Anne, Ch. 19

Steuer, E., 'The Remix Masters,' (*Wired Magazine*, 2014)
<<http://www.wired.com/wired/archive/12.11/beastie.html>>

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

Taekema, S. and Van Der Burg, W., 'Legal Philosophy as an Enrichment of Doctrinal Research Part I: Introducing Three Philosophical Methods', (2020) Law and Method, DOI: 10.5553/REM/000046

'Technological Protection Measures (Tpms) Complaints Process' (*GOV.UK*, 2020) <<https://www.gov.uk/government/publications/technological-protection-measures-tpms-complaints-process>>

Tehrani, J. *Infringement Nation: Copyright 2.0 and You*. [2011] Oxford Scholarship Online

'Terms of Use,' (*Activision*) <<https://www.activision.com/legal/terms-of-use>>

The Authors Guild. 'Half of Net Proceeds Is the Fair Royalty Rate for E-Books - The Authors Guild.' (2015) <<https://www.authorsguild.org/industry-advocacy/half-of-net-proceeds-is-the-fair-royalty-rate-for-e-books/>>

Theregister.co.uk, 'Texas ISP Slams Music Biz For Trying To Turn It Into A 'Copyright Cop' (*The Register*, 2020) <https://www.theregister.co.uk/2018/08/21/texas_isp_copyright_police/>

Thurrow, L., 'Needed: A New System of Intellectual Property Rights,' (1997) 75 Harvard Business Review 95

'TikTok Now Has Short-Term Licensing Deals With The Major Labels' (*Billboard*, 2020) <<https://www.billboard.com/articles/business/9347970/tiktok-now-has-short-term-licensing-deals-with-the-major-labels>>

Titcomb J, 'Internet Piracy Falls To Record Lows Amid Rise Of Spotify And Netflix' (*The Telegraph*, 2020) <<https://www.telegraph.co.uk/technology/2016/07/04/internet-piracy-falls-to-record-lows-amid-rise-of-spotify-and-netflix/>>

Totilo S, 'YouTube Copyright Chaos Continues. Game Publishers To The Rescue?' (*Kotaku*, 2013) <<https://kotaku.com/youtube-copyright-chaos-continues-game-publishers-to-t-1481517758>>

Trosow S, 'The Illusive Search For Justificatory Theories: Copyright, Commodification And Capital' (2003) 16 Canadian Journal of Law & Jurisprudence.

Urban, J.M., Karaganis, J., and Schofield, B., 'Notice and Takedown in Everyday Practice' (March 22, 2017) UC Berkeley Public Law Research Paper No. 2755628, Available at SSRN: <<https://ssrn.com/abstract=2755628>> or <<http://dx.doi.org/10.2139/ssrn.2755628>>

Urban, J.M. and Quilter, L., 'Efficient Process or "Chilling Effects"? Takedown Notices under Section 512 of the Digital Millennium Copyright Act' (2006) 22 Santa Clara Computer & High Tech. L.J. 621

'UMG Licenses Indie Artist's Track, Then Uses Content ID To Claim Ownership Of It' (*Techdirt*) <<https://www.techdirt.com/articles/20150317/10513630347/umg-licenses-indie-artists-track-then-uses-content-id-to-claim-ownership-it.shtml>>

US Const. Article 1 Section 8.

'U.S. Reach Of Leading Video Platforms 2018' (*Statista*, 2020) <<https://www.statista.com/statistics/266201/us-market-share-of-leading-internet-video-portals/>>

Van der Sar, E., 'Disney Says Piracy is a Business Model' (*TorrentFreak*, 2006) <<https://torrentfreak.com/disney-says-piracy-is-a-business-model/>>

Van Gestel, R. and Micklitz, H., 'Revitalizing Doctrinal Legal Research in Europe: What about Methodology?' (2011) EUI Law, <<http://hdl.handle.net/1814/16825>>

'Video Game Developer Says He Won't Send A Takedown Of A Bad Review, Does So Anyway' (*Electronic Frontier Foundation*, 2020) <<https://www.eff.org/takedowns/video-game-developer-says-he-wont-send-takedown-bad-review-does-so-anyway>>

'Video Policy,' Blizzard, <<http://eu.blizzard.com/en-gb/company/legal/videopolicy.html>>

VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016)

Voegtli, N.A., 'Rethinking Derivative Rights,' (1997) 63 Brooklyn Law Review, 1213

Von Lohmann, F., 'Google on what is driving creativity and innovation in the digital economy,' (*WIPO Magazine*, 2016) <http://www.wipo.int/wipo_magazine/en/2016/02/article_0006.html>

Walker v. Forbes, Inc., 28 F.3d 409 (4th Cir. 1994)

Wang S, 'The Cloud, Online Piracy and Global Copyright Governance' (2016) 20 International Journal of Cultural Studies.

Waters, D., 'Rowling backs Potter fan fiction,' (*BBC News*, 2008) <<http://news.bbc.co.uk/1/hi/entertainment/3753001.stm>>

Watkins, D., & Burton, M. (Eds.). *Research Methods in Law* [2017] Routledge

What the Copyright Modernization Act Means for Consumers, online: Government of Canada <<http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01186.html>>

WIPO Copyright Treaty

WIPO Performances and Phonograms Treaty

Wired, 'Confirmed: Radiohead Landed On Charts Because Of Remix Tracks (Updated)' (*WIRED*, 2020) <<https://www.wired.com/2008/04/confirmed-radio/>>

Wu, T., 'Tolerated Use,' (2007-2008) 31 Columbia Journal of Law & Arts

Yen, A.C., 'When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law' (1991) 62 University of Colorado Law Review, 79

Yougov.co.uk, 'Number Of Britons Illegally Downloading Music Falls' (*Yougov*) <<https://yougov.co.uk/topics/arts/articles-reports/2018/08/02/number-britons-illegally-downloading-music-falls>>

Youtube Appears To Be Breaking DMCA Law, Experts Say' (*Reclaim The Net*, 2020) <<https://reclaimthenet.org/youtube-dmca-take-down/>>

"YouTube's Content ID System Brings Humbug to the Holidays" (*Adam the Alien Productions*, 2014) <http://adamthealien.com/2013/12/23/youtubes-content-id-system-brings-humbug-to-the-holidays/#.W1b2Vy_My1s>

Youtube. 'Creator Academy' (2018). [online] <<https://creatoracademy.youtube.com/page/lesson/cid-optimize?hl=en-GB#strategies-zippy-link-1>>

'Youtube Market Share And Competitor Report | Compare To Youtube, Vimeo, Wistia' (*Datanyze*, 2020) <<https://www.datanyze.com/market-share/online-video--12/youtube-market-share>>

Youtube, 'Statistics' <<http://www.youtube.com/yt/press/statistics.html>>

Yu, P. 'The Quest for a User-Friendly Copyright Regime in Hong Kong' (2016) American University International Law Review

Zemer L, 'The Making Of A New Copyright Lockean' (2006) Harvard Journal of Law and Public Policy