

RECONSTRUCTING COPYRIGHT SYSTEM: CRITICAL THINKING BASED ON INTEREST BALANCE THEORY AND INCENTIVE THEORY

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Abstract:

This paper gives a policy-based interpretation of the copyright law and makes critical reflections on the current copyright regime from the perspectives of interest balance theory and incentive theory. It argues that current copyright system does not give full play to the guiding role of interest balance theory and incentive theory, and several problems are discovered through analysis: neglecting the interests of users, prolonged copyright term, abusing of rights, low remunerations for creators, and inappropriate authorization mechanism for derivative works. Accordingly, the author suggests to reconstruct a more balanced copyright regime from the following perspectives: to implant the role of the users and the social value of their behaviours into the decision-making system; to set the copyright term based on evidence; to re-impose the copyright application and renewal system; to increase the government funding as one of the incentives for creators; to improve the statutory license system and copyright collective management system; and to promote the application of creative commons license to derivative works.

Key Words: copyright protection; interest balance theory; incentive theory; reconstruction

I. Introduction

“Law is a social and cultural creation”.¹ Theoretically law must keep pace with current markets and technologies for the latter’s important role in creating consumer demand, and while the former meets it. This theory is particularly vital in copyright law - there is no point in possessing copyright for intellectual works if there is no consumer demand; Although

copyright law itself is not directly related to the creation of consumer demand, it can greatly interfere with the possibility of market actors' behavior.ⁱⁱ Therefore, this may explain why the foothold of copyright law has shifted from "stimulating creation" to stimulating business development and technological innovation.ⁱⁱⁱ However, in today's society where with rapid development of business and technological transformation, whether the copyright law has kept up with the pace of The Times and realized its original intention is a question worthy of reflection. Based on the above consideration and the purpose of "inspiring creativity so as to strengthen the progress and prosperity of science and culture"^{iv}, this paper interprets and makes a critical analyze on the current copyright law from the perspective of policy out of the interest balance theory and incentive theory.

II. Political Interpretation of the balance of Interest and incentive theory

All legal relationships eventually boil down to interest which being considered a key factor to the depths of the law.^v However, compared with other laws, copyright law seems to put more emphasis on the concept of the balancing doctrine of interests, which has become one of the goals we consciously strive to achieve. To some extent, copyright law actually represents the distribution of the benefits and profits generated in the process of creation, dissemination and use. The basic spirit of copyright law is the balance of interests, which is essentially a "harmonious state of pursuing the mutual coordination of various conflict factors, including the balance of rights and obligations of copyright owners, the balance between creators, disseminators and users, and the balance between public interest and private interest"^{vi}.

In addition, in order to realize the purpose of copyright law, another theory also plays an important role, that is, incentive theory. According to incentive theory, copyright law can promote the progress of science and practical art by rewarding the "unique creative labor" of copyright owners.^{vii} Under this theory, the copyright owner works can be regarded as a kind of "the benefit of the public spread knowledge and information", as a bonus, he has the original work of a series of proprietary rights, proprietary rights and those who can bring certain economic benefits to him, these include not only the money income, economic benefits include improve the reputation and market share, etc. However, it should be noted that the ultimate purpose of copyright law to provide incentives for "creative labor" is to promote social utility, that is, to enhance culture and knowledge by increasing the supply of existing intellectual

products.^{viii} As the Supreme Court of the United States noted, the constitution provides for an economic philosophy of copyright protection -- that "the best way to advance the public good is to stimulate the talents of authors and inventors in the fields of science and applied art by encouraging individual effort through self-interest".^{ix} Therefore, copyright protection itself is not an incentive, but on behalf of public welfare, is a means to promote social development.

From the above analysis, it can be seen that the balance interest theory and incentive theory provide a legitimate basis for the existence of copyright law, and the ultimate policy goal of the existence of the law is to promote national cultural innovation and improve social welfare. Article 1 of the PRC Copyright law clearly indicates that, "to protect the literary, artistic and scientific works, the author's copyright and copyright-related rights and interests, encourage are beneficial to the construction of socialist spiritual civilization and material civilization of the works of creation and dissemination, to promote the development of socialist culture and science and prosperity".^x In order to maximize the overall welfare of the society, the copyright law on the one hand by giving creators to enjoy certain exclusive rights to their works as incentives; On the one hand, the author's rights are restricted through such institutional arrangements as the term limit of works' rights, the dichotomy of ideas/expressions, rational use and exhaustion of rights, so as to prevent excessive protection from interfering with the creation and dissemination of future works.^{xi} It can be seen that this purpose of copyright law has its own contradictions: "without legal monopoly, there will not be enough information; while legal monopoly will lead to too little information to be used"^{xii}, and this contradiction also reflects the game between copyright law and information resource sharing in the public domain -- "if there is no copyright protection, there will be no information resource sharing; Intellectual achievements protected by copyright cannot advance society better without the sharing of information resources."^{xiii} Therefore, the purpose of copyright law is to achieve a balance between personal interests and social interests, to make copyright protection and information sharing work towards "pare to optimality", so as to maximize the overall social benefits.^{xiv}

III. Rethinking Copyright System based on the Balance Interest Theory

Based on the theory of balance of interests, an effective copyright protection system should strike a balance between protection and restriction that can not only realize practical utility but

also reflect practical efficiency, so as to promote the development and progress of national culture. In this regard, there should be a "degree" between granting exclusive rights to authors and imposing restrictions on such rights, that is, the protection should not be so strict that it excessively hinders the reasonable use of new works that may eventually lead to new works. Nor should restrictions be so broad that creators lose interest in creating new works. If copyright protection and restrictions can be controlled, then the goal of copyright law can be achieved. However, based on the author's observation, the current copyright system fails to give full play to the guiding role of balance interest theory, and its function of promoting social creativity needs to be improved, which can be analyzed from the following aspects.

(1) The Neglected Copyright Users

Users have an important legal position in the copyright system. If there are no users in a copyright system, the necessity and legitimacy of the system are questionable. According to the foregoing introduction, the legislative purpose of copyright law is to balance incentives to stimulate the creation of creators and provide opportunities for users of works to use their works, so as to achieve the ultimate goal of promoting the development of national culture. It can be seen that the purpose of granting exclusive rights to copyright owners by copyright law is actually to realize the public interests combined by the rights and interests of users.^{xv} Lyman Ray Patterson, a famous American scholar, also stressed that "copyright law should be a law about the rights of the user of a work, not the rights of the copyright owner".^{xvi} However, throughout the history of copyright law for more than three hundred years, the academic circle has always focused on the interests of copyright owners, while the research on the users of works is rare. Professor Jessica Litman also said, "although the public interest has always been the focus of copyright law, the academic research on the users represented by the public interest and the use of behavior is obviously insufficient".^{xvii} Hong Kong professor Li Zhian also pointed out this problem in 2016, but it seems that the legal circle in mainland China is still in a chaotic state.^{xviii} When the users of works representing public interests are neglected and their legal status cannot be correctly recognized, it goes without saying whether the balance of interests theory is truly balanced.

(2) Unreasonable Copyright Protection Term

Of course, the theory of interest balance in the context of copyright is not perfect, and it is also questioned because of its limited utility, that is, "it can hardly tell us how to carry out in practice"^{xxix}. In this regard, some scholars point out that unless the balance theory is continuously analyzed and improved, it can only provide limited utility.^{xx} In fact, this is not only the defect of the theory, but the reality of the whole copyright system. Professor James Boyle once used an iconic term to describe copyright legislation: "no evidence zone"^{xxi}. So, to borrow from professor Nimmer, "wherever one goes on the question of equilibrium theory, the conclusion must be based on explicit premises, not implicit assumptions"^{xxii}. However, there is one aspect of copyright legislation that deliberately refuses to base the decision on the available evidence, that is, to determine the term of copyright. However, there is one aspect of copyright legislation that deliberately refuses to base the decision on the available evidence, that is, to determine the term of copyright. For example, Andrew Gowers, in his report to the chancellor of the exchequer in November 2006, conducted a study that looked at whether extending copyright for recordings for 20 years would increase the production and income of performers. "The evidence shows that over the course of 50 years, most tapes are sold within a decade of their release, and very few record companies continue to make money from sales and commissions..." Although longer copyright term for most performing artists without any help, and the higher prices and less contact with the opportunity to bring harm to the public, the British minister of culture, media and sport Bumham Sir Still rely on has not previously been to clarify and define the so-called core moral case "copyright law" to make a decision.^{xxiii} Another example, in 2009, Singapore Fang Boliang professor and professor Wang Qihong reviewed the organisation for economic co-operation and development countries in 1991 and 2005 extended copyright term of movies, books and music, even though they found no evidence that the longer the copyright term than before the short term to create more books, yet books copyright term extended.^{xxiv} So the empirical studies that have been done to show what the effective duration of copyright protection should be, unfortunately, have become routine, replaced by vague moral claims.

(3) Lack of Copyright Application Procedures

In the early days of copyright law, the government imposed certain legal procedures on the creation and exercise of copyright. At that time, the copyright acquired must go through certain application procedures, and the exercise of copyright must follow certain procedures,

otherwise the copyright already possessed may be lost. The United States is one of the countries with a rich history of copyright formalities. From the date of the first act of 1790, it stipulated the procedures of registering, renewing and attaching copyright notices to all published works.^{xxv} Later, due to the copyright protection period is short, the application procedures for red tape and paper in the world with all kinds of limitations such as production and distribution of the disadvantages such as the huge costs in limiting the public disclosure or prosecution for copyright infringement question, in view of balancing of interests, in order to improve the economic efficiency, reduce cost of copyright protection and to improve the overall social welfare, the copyright protection of various application procedure was repealed, instead of the Berne convention copyright protection principle automatically.^{xxvi} Different from the paper era, the popularization of digital technology has greatly changed people's way of life, including the way of creation and learning. On the one hand, a new work can be distributed globally in a few seconds with a mouse, and production and distribution no longer require much cost, which greatly expands the number of people who create and distribute works globally. On the other hand, due to the huge expansion of the types of works covered by copyright and the popularization and even flood of works, the number of people who face the risk of innocent infringement by accessing and copying these works also increases sharply. As professor Ian Hargreaves concludes in his report to the British government, "Copyright cannot be considered appropriate for the digital age when millions of citizens violate copyright every day by simply switching a piece of music or video from one device to another"^{xxvii}. Therefore, when the public are facing the risk of infringement, we have to reflect on the rationality of the system. As a matter of fact, when the consumer market and technology are developing continuously, the theory of interest balance with economic benefits and social welfare as the theme should also develop dynamically. Otherwise, the existing system will not only fail to promote the development of science and culture, but also become a stumbling block to the progress of society.

IV. Rethinking Copyright System based on the Incentive Theory

As a form of private right, copyright is a monopoly right, which is supported by some costs imposed on the society.^{xxviii} Specifically, copyright protection can be seen as a society's reward to authors and creators in the form of a limited monopoly, which aims to recognize and

encourage creation so that the public can obtain more intellectual creation. But to be clear, although it is an incentive, there is no direct causal relationship between copyright and the promotion of author creativity. This is because, throughout history, for most people, the creative instinct comes from our human nature, and we want to create something meaningful for ourselves and others.^{xxix} As James Rosenquist, an artist in the contemporary world, puts it, "art is just a way for an artist to express himself."^{xxx} It can be seen that the practical role of copyright law is limited. It is not the motivation for people to create, nor can it promote economic prosperity. However, the value of copyright law should be affirmed and supported, which ensures that once a work is created, it can be protected from free riding and the creator can get economic benefits. From this perspective, "the copyright system provides a mechanism for those authors who have spent time and labor to recover their investment and ensure their normal income."^{xxxi} With such an incentive theory to review the current copyright system, the author found that there are still unsatisfactory places.

(1) The "Winner-Takes-All" Phenomenon

Some people, especially in Europe, see copyright as a form of respect for the author, a recognition of his romantic genius. While this view has spawned non-economic rights to protect authors' reputations and reputations, in practice it supports the winner-takes-all model.^{xxxii} In contrast to copyright law, which guarantees authors the right to a return on investment, many works, especially books, receive little in return for their economic returns, this gives a small number of publishers with little creative labor almost all the economic benefits of a book, while a large number of authors with little creative labor get almost nothing. Although without copyright protection and incentive to create, creators may not stop creating, but their initiative to create will certainly be indirectly affected, copying and copying will also make the human mind stagnant, scarcity may still occur by reducing the number of socially available works. But the same is true of the national economy, where wealth and power are concentrated among a small number of top media executives, so it is worth considering how these funds are distributed and how those funds are put more into the pockets of authors.

(2) The Inadequacy of Compulsory Licensing System

One of the purposes of copyright law is to promote the dissemination of knowledge and to give authors rights in their reasonable markets as a price. The concept of a reasonable market changes over time, just as economic conditions change. Regrettably, the current copyright law does not fulfill its due obligations to authors and the public. The author does not get corresponding remuneration for the use of many works that can be legally remunerated, while the use of many works that should not be compensated becomes the author's claim for compensation. An obvious example is the compulsory licensing system in China. First of all, the introduction of compulsory license is to deal with the problem of large-scale replication beyond the original reasonable use caused by the difficulty in controlling reproduction and transmission technology in the network era. In fact, the goal setting of this system is influenced by the transaction cost in economics, that is, from the anti-monopoly decision to save the market failure to reduce the transaction cost in pursuit of economic benefits.^{xxxiii} As judge Posner said, "copyright protection first needs to weigh the cost of restricting access to works to stimulate creation. How to properly balance access to works and incentives is the core issue of copyright law."^{xxxiv} However, as one of the requirements of compulsory license, the obligation to "pay remuneration" has not been implemented by the users of the works, which undoubtedly seriously damages the legitimate rights and interests of the copyright owners. For example, in March 2012, the national copyright administration pointed out in the first draft of the copyright law (revised draft), "From the practice of the copyright compulsory licensing system for 20 years, there is basically no user to fulfill the obligation of payment, and very few users assume legal responsibility for failing to fulfill the obligation of payment, and the rights of the right holder have not been effectively protected, and the legal provisions are meaningless"^{xxxv}. The main reason is that "the legal permission is generally short works, and most of them are used in other places. The litigation cost is far greater than the profit from litigation, and the users of the works enjoying the legal permission are generally not fulfilling the legal obligation to pay remuneration because they have recognized the weakness of copyright owners who cannot protect their rights under this condition"^{xxxvi}. Therefore, how to improve the compulsory licensing system to protect the right of remuneration is also an urgent problem to be solved.

(3) The Unreasonable Authorization Mechanism of Derivative Creation

Derivative right is a relatively new right in copyright law. Section 101 of U.S. Copyright Law provides a broad definition of derivative works^{xxxvii}, while its legislative report on congress interprets the criteria for infringing derivative works as "must in some form contain a portion of a copyright work"^{xxxviii}. Different from the United States, most countries, including China, rely on the Berne convention to specifically decompose the derivative works right into the right of fame according to the type of works. For example, the rights of derivative works in China's copyright law include the rights of translation, adaptation, annotation, arrangement, filming and compilation. Since then, the copyright law has treated derivative works differently from the original works, and set different judgment standards for derivative works and copies to some extent. The reality shows that the rationality of this distinction is difficult to prove. Professor Nimmer once wrote, "derivative rights are redundant, because the creation of derivative works almost always involves copying the original works, and human creation is based on copying and borrowing."^{xxxix} Judge Posner and professor Landes also point out that "giving authors copyright control over derivative works is a subtle example that does not, as we might imagine, require the creator to recoup the cost of expression. Because, by definition, a derivative is an imperfect substitute, often it's not a substitute at all because by definition a derivative is an imperfect substitute, and often it's not a substitute at all"^{xl}. This claim has also been confirmed by academic Omri rachum-twaig, who argues that "The distinction that copyright law makes between derivative works (based on protected expression) and original works (based on thought and unprotected expression) is a normative distinction within the law, not based on any justification inherent in creativity. The creation of derivative works is, in essence, a creative activity under the creative cognitive approach, no different in quality from the original works"^{xli}. Thus, the proliferation of derivative works represents the expansion of rights in the last century, but it is the most harmful because it inhibits the most creative and culturally significant works. In addition, the current various licensing mechanisms are cumbersome and trading rules are not smooth, adding to this contradiction. This not only greatly damages the legitimate rights and interests of the original authors, but also reduces the creative enthusiasm of derivative creators, which is not conducive to the healthy development of the copyright industry.

V. The Reconstruction of Copyright System

The development and wide application of digital network technology has given birth to the emerging copyright industry, profoundly changing the traditional way of creation, dissemination and authorization of works, and also bringing great impact and challenge to the traditional copyright protection system. In view of the above from the perspective of balancing doctrine of interests and incentive theory reflection of the current copyright system, the author tries to reconstruct it from the following points.

(1) Incorporating the Role of the User and the Social Value of the Consumers' Behavior into the Copyright Policy Consideration

The behavior of using works relates to the shaping of social culture and human memory, and is closely related to the policy goal of copyright law to promote national cultural development. A balanced copyright policy should take into account the inducement and security to the owners and the interests of the users. In fact, the users of works are usually divided into two categories: passive users and active users.^{xlii} The former is the user of the traditional economic hypothesis, that is, the work is regarded as a kind of commodity, the user (consumer) will look for commodities in the market according to his preference, and the producer generates commodities according to the fixed passive use mode of the user.^{xliii} The latter is a "second creator", a person who creates by using the work of others and thus becomes an author.^{xliiv} For passive users, given that their main function in the copyright system is to provide a market for copyright and related products, what the copyright law should ensure is that creators have sufficient incentives to produce products that satisfy the preferences of consumers (passive users). For active users, the existing copyright system considers many of their ACTS as infringements, so the adjustment of copyright policy should pay more attention to the positive benefits to the society as a whole, and consider to grant or expand the space from infringement. In general, the copyright legislation and judicial practice in measuring social people close to the possibility of using works, deal with the different levels of use of the social value, such as promoting imagination, learning, independent decisions and self-expression and meticulous consideration, these social value actually with the copyright law is closely related to the policy aims to promote the development of national culture.^{xliv}

(2) Setting the Copyright Protection Term on the Basis of Evidence

Copyright law has long been criticized for being based on rhetoric and belief rather than on solid empirical evidence. Therefore, there is a growing call for effective legislation based on the actual business practices and evidence of relevant industries.^{xlvi} As Breyer observes, "the need for copyright protection varies with the type of work, and one should understand the realities of each particular industry before weighing the costs and benefits associated with copyright protection."^{xlvii} This is especially true when copyright time limits are set. Too long a period of protection and too broad a range of rights have proved costly to the public, since most authors have no interest in redeveloping their works while others have no access to them. And the economic value of most works is ephemeral: the return on investment is either recoup soon after publication or not at all, and granting longer Copyrights does not change the market value at all. Research by the congressional research service found that even the short copyright period was too long for most works. When we look at the copyright term with the method of empirical research, we will find that different works should apply different term.^{xlviii} Therefore, the copyright term should be greatly reduced and different protection periods should be set for different types of works according to the empirical data. Otherwise, the creation of new works will be threatened and the development of original works will be not conducive.

(3) Restoration of Copyright Application Renewal System

Today, with the expansion and even flood of copyright rights, it is necessary for us to adhere to the concept of "public domain is the principle, copyright protection is the exception" and resume the application procedure of copyright protection. In fact, in October 2010 Cary Sherman, President of the recording labels association of America, said: "Today the copyright application process makes more sense. We need a better way to distinguish when copyright is a useful property right and when it is a meaningless and unnecessary right. Perhaps it is time for creators to assert copyright for themselves rather than for them to automatically acquire it"^{xlix}. The EU group on the digitization of cultural heritage also proposed that, "certain forms of registration should be regarded as a prerequisite for the full exercise of rights, although this would require amendments to the Berne convention". According to existing provisions, the principle of automatic copyright protection mainly exists in Article 5(2) of the Berne convention, "the enjoyment of these rights shall not be subject to any form of restriction", while Article 5(3) stipulates that "protection in the country of origin shall be governed by the laws of the country of origin". Taken together, these two articles show that states are free to impose

any procedures on works of their own authors or works of which the state of origin is the state, and that if all states do so, they can do so without violating any treaty obligation.^l Therefore, in order to effectively exercise copyright, countries can reconsider the application of some simple and convenient copyright application system.^{li} The aim of the system is to ensure that creators can declare their rights to the public and give full attention to their claims so that copyright law can work effectively. At the same time, it can effectively reduce the risk of innocent copyright infringement for the public. In addition, we can also consider restoring the copyright term renewal system, which gives authors autonomy and further protects works of commercial value, while works of little value re-flow into the public domain to reduce the cost of protection.

(4) Increasing Government Funding to Stimulate Creativity

It is true that copyright law is not the motivation of authors' creation, so strengthening copyright protection cannot stimulate authors' enthusiasm. In fact, the most important thing for writers and artists is not the copyright of their works, but the economic benefits coming with. So if we want to inspire more writers and artists, we need to provide them with more financial support, rather than allow them to compete for market share in a winner-takes-all environment. If copyright cannot provide a steady income for most writers and artists, we must find other sources of income for them. In this regard, the government plays an important role in financing cultural and artistic creation. It can provide more financial support to writers and artists through academic or artistic funds, which should be regarded as the key to creating diverse cultures and supporting writers and artists: copyright law cannot do this.

(5) Promoting the Compulsory Licensing and Collective Management System

As one of the countries with the largest number of legal licenses, China's imperfect legal licensing system is difficult to protect the right of remuneration of copyright owners, which not only greatly damages the legitimate rights and interests of copyright owners, but also damages the reputation of users of works. Therefore, the author suggests that in the specific areas of legal permission, relevant payment standards should be formulated to make the use of works to follow rules. In December 2013, China passed The legal method of remuneration for the use of licensed works in textbooks, and The legal method of payment by means of written works came into effect on November 1, 2014, which is an important step to improve the system^{lii}.

However, regulations on the use of works in other fields need to be issued as soon as possible. It is necessary to further improve the copyright collective management system to transfer the authorization and management of works to copyright collective management organizations, and establish the pricing mechanism on the basis of free consultation with right holders^{liii}.

(6) Promoting the Creative Commons License to Derivative Works

As stated above, derivative works are not intrinsically different from the original works and are creative, and the right of reproduction shall only apply to copies that are not creative in themselves. Therefore, in order to ease the tension between legal norms and creative cognitive methods, copyright law should first distinguish the right of reproduction from the right of derivative works. In the United States and Britain, general derivative rights existed only in 1909 and 1911, respectively. Previously, courts have generally used case-by-case analysis to determine whether derivative works offer new ideas or insights, or, conversely, simply replace the original works, which may be the way to go.^{liv} Second, in order to create a perfect match between legal norms and cognitive methods, it is necessary to change the compensation system. Copyright holders currently have derivative works, which are mainly paid through licensing. Perhaps by encouraging them to use Creative Commons more often, they would voluntarily forgo the financial benefits of derivative rights and give them more government funding to sustain their creative passion, which can better adapt to human creative behavior.

VI. Conclusion

The development of science and technology has brought great impact to the copyright system. China is not the only one in the world being involved in this real dilemma. As professor Pamela Samuelson said, "Technological progress plays a significant role in legal reform. The formulation and design of copyright system should adapt to the changes brought by technological progress."^{lv} Therefore, we should not only adjust the legislation, but also set guidance on judicial practice and policy. Only by keeping pace with The Times and constantly reforming, can we make the copyright law realize its goal of promoting the development of social science and culture, otherwise it will become the resistance to the progress of society.

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^{xxxvii} 美国版权法第101条的“衍生作品”定义为：“基于一个以上已有作品的作品，比如翻译、音乐编曲、改编为戏剧、改编为小说、改编为电影剧本、录音制品、艺术复制品、节略本、缩写本，或者重作、转换或者改变一部作品的其他任何形态。含有编辑性修订、注释、详细解释或者其他修改的作品，如果作为整体是作者的独创作品，是衍生作品。”

^{xxxviii} 参见国家版权局：擅自创作续集会侵犯原作者著作权吗？

<http://www.ncac.gov.cn/chinacopyright/contents/4509/293330.html>，最后访问日期2018年11月13日。

^{xxxix} Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (Mattew Bender Elite Products 2015), p s.8.09[A][1].

^{xl} William Landes and Richard Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003), p 109.

^{xli} Omri Rachum-Twaig, 'Recreating Copyright: The Cognitive Process of Creation and Copyright Law' (2017) 27 *Forham Intellectual Property, Media and Entertainment Law Journal*, p 346.

^{xlii} See Erez Reuveni, 'Authorship in the Age of the Conducer' (2007) 57 *Journal of the Copyright Society of the U.S.A.*, pp 286-287.

^{xliii} See Niva Elkin-Koren, 'Making Roon for Consumers under the DMCA' (2017) 22 *Berkeley Technology Law Journal*, p 1138.

^{xliv} See Rebecca Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17 *Loyola of Los Angeles Entertainment Law Journal*, p 652.

^{xlv} 参见李治安(脚注18), 第61页。

^{xlvi} See William Patry (n 2), p 74.

^{xlvii} Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84 *Harvard Law Review* 281, p 351.

^{xlviii} Michael Yuan, 'Should Different Information Economies Have the Same Duration of Copyright' (2009) 6 *Review of Economic Research* 13.

^{xlix} See William Patry (n 2), p 204.

¹ *The New Renaissance: Report of the Committee of Sages, Reflection Group on Bringing Europe's Cultural Heritage Online*, January 10, 2011, p 9.

^{li} Stef van Gompel, 'Formalities in the Digital Era: An Obstacle or Opportunity?' in Lionel Bently et al. (eds.) *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*

(Edward Elgar Publisher 2010). See also Christopher Sprigman, 'Re(form)alizing Copyrihgt' (2004) 57 Standard Law Review 484.

^{lii} 参见管育鹰（脚注33），第23页。

^{liii} 参见熊琦：《著作权法定许可的正当性结构与制度替代》，载《知识产权》2011年第6期。

^{liv} See William Patry, *Patry on Fair Use* (2011 edition, West Publishing Company), p 19.

^{lv} Pamela Samuelson, 'The Digital Content Symposium' (1997) 12 Berkeley Technology Law Journal 1.

