Reflections on copyright jurisprudence and information policy in light of Internet, Data economy and Artificial Intelligence □

I. Introduction

Today, the current copyright regime, which allows private hands to capture important valuable information,[1] seems to demise in digital world. Although our contemporary defenders of intellectual property (IP) like to speak of it as though it is broadly analogous to other kinds of property and therefore use the later to justify it, it is actually based on a quite different principle. So, there is a necessity to clarify these two terminologies, "property" and "copyright" (IP) foremost.

First, property is a legal concept that deals with the legal relations between individuals, instead of referencing to physical and mental facts.[2] It refers to entitlements to resources protected by formal legal institutions, which enable its owner to exclude others from those resources.[3] So, exclusion and the right to exclude is crucial in property. It performs an important enabling function, which relates to the domain of positive use privileges that property confers upon the owner, for the scarce and rivalrous conditions in resources.[4]

In a word, traditional property, like real property, through a legal exclusiveness, focuses on enabling the positive use of resource, which in turn aims at guiding the use of scarce means to their most important usages. But in the case of copyright, things are different. Since the immaterial resource or so called "information" subject matter, [5] once they have come into existence, it is obviously non-rival. When an individual uses a piece of information, it does not reduce the quantity or quality available to the rest, everyone can use it simultaneously without interfering or competing

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1 Drahos Peter, *A Philosophy of Intellectual Property*, Australian: ANU e-Text, 2019, p.1.

2 See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 The Yale Law Journal 16, 20-21 (1917).

3 See Thomas W. Merrill, Henry E. Smith, *Property,* New York: Oxford University Press, 2010, pp. 3-5.

4 See Shyamkrishna Balganesh, *THE OBLIGATORY STRUCTURE OF COPYRIGHT LAW: UNBUNDLING THE WRONG OF COPYING*, 125 Harvard Law Review, 1664, 1669 (2012).

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It is common to say that intellectual property law protects information. See Efroni Zohar, *Access-Right: The Future of Digital Copyright Law*, New York: Oxford University Press, 2011, pp.1-2; Also see Thomas Hoeren, *Access Right as a Postmodern Symbol of Copyright Deconstruction?*, in Adjuncts and Aliternatives to Copyright, Jane C. Ginsburg & June M.Besek eds., 2002, pp.348-363; Also see William M. Landes, Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 The Journal of Legal Studies, 325 (1989).

with one another. So, copyright holders actually don't need protection through legal exclusion to enable their uses upon information. Instead, copyright focuses on disabling the uses of information by others in order to retain the ability to appropriate a stream of rents.

In sum, in traditional property law, property right actively enables the exclusive use of the res and operates within the domain of positive liberty, whereas copyright law gives the right to disable others from using the immaterial resource, information Thus, it operates as a form of negative liberty.[1] It restricts more human freedom than the former. That's why IP system is different and even goes beyond the conception of property, since it represents legal interventions by restricting the freedom of some people to do what they want with their own real and personal property in order to improve the lives of other people.[2] In other words, the conception of IP is not a right to a concrete thing, but to a pattern, it offers a power to its owners to control and tell others how to make use of the valuable information they have owned.[3] Unlike traditional property, which guarantees the ownership of an apple you have picked, IP law in nature aims at giving control on both "how to pick an apple" and "how to eat it".

So the legislation which gives the above form of property control upon information, along with the legal doctrines that analogous copyright to property, is not only unsuitable, but a long and dangerous jump. In digital world, our daily life is based on information, getting information is part of our educational system, having more information than others is regarded as a competitive advantage in the economy. In 21st century, the term "information society" relates to our postmodern feeling that information is the fundament of our living conditions, or in other words, information have become a primary good in our modern society. [4]Furthermore, information are also the essence of our nowadays foremost infrastructure, Internet which is nothing more than one way to disseminate information. So, since copyright law at its core regulates copies of information, and internet at its core, makes digital copies of information, which together with contemporary lifeworld (*Lebenswelt*) transformed from physical to digital, has caused our everyday life being subjected to current copyright regime. Now every single act on the internet triggers the law of copyright.[5]

As can be seen above, thanks to the ideology and technological advance, our current copyright regime has become over hypertrophied in digital world, both in superstructure and economic foundation, which has caused not only a gigantic crisis in itself, but further posed a great threat

[1] See Id, p. 1670.

[2] See Mark A. Lemley, *Faith-based Intellectual Property*, 62 UCLA L. Rew. 1328, 1339 (2015)

[3] See Michele Boldrin, David K. Levine, *Against intellectual monopoly*, New York: Cambridge University Press, 2008, pp123-124.

[4] See Drahos Peter, supra note, p.202.

[5] See Lawrence Lessig, *Code version 2.0*, New York: Basic Books, 2006, pp. 192-193.

on our common lives. First, the imbalance of copyright has already created a monopoly in information itself, and thus leads to access, communication, comment and criticism of content becoming more difficult. So it seems we are going to experience a violent collision between freedom of speech and the copyright holders' monopoly interest, and if governments continue favoring the later as they always did, that would definitely result in an erosion of a robust public sphere (*Öffentlichkeit*) in coming future. Besides, since the current copyright system constantly turns everybody into an infringer, even though just technically, this calls for a more draconian enforcement system, together with more effective technologies to monitor and guard netizens' acts. This would pose a serious threat to privacy and personal information safety, and thus harms the individual authority and autonomy. As a result, it may further accelerate the process of instrumentality system's (*System*) invasion and colonization of the private sphere (*Intimsphäre*) in modern society.

It is time to reconsider this ancient copyright regime together with its old fashion jurisprudence, and thus reflect on a new philosophy of information regulation in light of new technology. This is what the article endeavors to explore.

II. Copyright's philosophical conceptions and dilemmas

Let's turn back to the original question, why our legislation and jurisprudence consider copyright as a form of property? That is because the traditional copyright thinking has always used the old philosophical conceptions of the 19th century, which had been turned out to be old-fashioned and deeply improper by nowadays' reality. Although these fundamental ideas vary from different jurisdictions and regions, such as the "Anglo-American model" and "Continental European system", we can still find their theoretical common ground. First, from a comparative and historical perspective, since the beginning the differences between these two copyright systems have been neither as extensive nor as venerable as typically described; they all invoked and shared the same goals of encouraging investment in creation and rewarding author's labor to promote the progress of knowledge as their common justification.[6] But most importantly, with the global capitalism and the international trading upon copyrightable goods and services flourishing for more than centuries, the continual endeavor to bring different nations and jurisdictions to joint together, had led to nowadays' the fundamental conceptions of copyright actually being based on some overlapping consensus, which express themselves explicitly or implicitly in the way of copyright international conventions, such as Berne Convention, WCT and

[6] According to a comparative study of Literary Property in Revolutionary France and America, professor Jane C. Ginsburg found that the French revolutionary laws did not articulate or implement a conception of copyright substantially different from that of the regimes across the Channel and across the Atlantic. On the contrary, she found that mixed motives underlay the French revolutionary copyright laws as well as their U.S. counterparts. In most circumstances, they invoked both personal and external justifications for protection, and shared the same goals of encouraging investment in, and the creation of works of authorship to promote public education. See Jane C. Ginsburg, *Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 Tul. L. Rev. 991 (1989-1990).

TRIPS Agreement. So, let's take a deeper look into these fundamental conceptions and metaphors of copyright.

1. "Rational person" as subject status

First, few people do something in exchange for nothing. Creators of new goods are not different from producers of old ones: they want to be compensated for their efforts. This intuition is the most important and foremost presuppositions of current copyright regime, both in common law and civil law regions, although there is still a small difference. For example, rewarding authors' efforts and creativity is the direct and ultimate purpose of granting copyright in the *droit moral* regime in France, and rights of personality system in Germany. Under the utilitarianism copyright system, the sole interest of conferring a copyright is considered to be the general benefits of the public, instead of authors.[7] However, the only way to fulfill those public interests is by genius' hands and labors. So, the purpose of rewarding authors may not be exactly the same, but they all presuppose that authors need rewards, and therefore will respond positively to rewards. Put another way, authors act as a *homo economicus,* and thus if there are benefits in the creation of these objects then they have to be locked up in some way.[8]

In a word, our copyright jurisprudence starts with presupposing "purpose rationality" as the metaphysic of author nature, among which economic rationality is foremost. However, abundant visible facts tell us humans do not always seek benefit and avoid harm, they act emotionally, and sometimes altruistic. In most circumstances, the act of creation is more like a spontaneous process, not exactly a means to an end. Even though we admit professional authors may act in a purpose-rational manner, it doesn't mean that all the culture was produced in this way. Just like Lawrence Lessig says, "amateur culture is created almost unintentionally by people who produce not for money, but for the love of what they do, and compared with them, professionally produced culture is but a tiny part of what makes any culture sing".[9] What's more, if authors were really economic rational as presupposed, then perhaps most of authors, especially those with high talent would not probably choose to do the creating work, since creating has been turned out to be a high input but low income process along with high uncertainty, compared with other activities.

So, the hypothesis that an author is a rational person doesn't make too much sense in practice. On the contrary, creation needs a degree of dedication and the willingness to sacrifice precious time and efforts to uncertainty. It is a process of treads and full of incidents of fortuity and accident, which makes authors unable to rationally weigh means against purposes, and thus orient their actions toward those purposes. In contrast, altruism, dedication, suffering, uncertainty and fortitude, actually are part of the metaphysic nature of authors, especially for those great creators, Vincent van Gogh, Newton, Mendeleev. In a word, overestimating rewards

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[7] See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 52 S. Ct. 546, 547, 76 L. Ed. 1010 (1932).

[8] Drahos Peter, supra note, p.9.

[9] Lawrence Lessig, *Code version 2.0*, New York: Basic Books, 2006, pp.193-194.

and compensations may bring “Fast-food culture” and “Hollywood blockbuster”, but will do little help to great masterpiece of literature.

2. “Dynamic incentive” as external justification

Second, the rational persons’ presupposition leads to nowadays’ predominant metaphor of copyright, which is normally characterized as an incentive mechanism aiming at encouraging investment in creation for the progress of knowledge. According to the traditional utilitarian formulation, government offers copyright as a reward to creators, whereby providing an incentive for the creation and distribution of original works.[10] Although under a natural right perspective, the direct reason of granting copyright is not so instrumental, but rather more personal and deontological. However, the internal and personal approach still needs an external justification to ultimately back it up, because property is a legal framework reference to the relationship between individuals (subjects), and the internal justifications, such as input of labor, extension of paternity, embodiment of personality, whereas only reference to relations between certain subjects and objects. In other words, the way you deal with things cannot decide how others should deal with you. So, a complete justification of copyright or property must invoke two levels of justification, both internal and external. Among them, the external justification is more fundamental, it answers the question why we develop a property from *ex nihilo* to regulate an area which has been left unregulated in the past, and because it involves restrictions of other individuals’ freedom, and thus needs to be justified to citizens foremost. After the external justification, then the internal justifications deal with the problem of attribution, they answer the question to whom this new kind of property belongs? Such as the preliminary ownership of copyright normally belongs to authors, since they had contributed their labor and it embodies their personality.

In sum, both the common law and civil law system include these two kinds of justifications, although their emphasis may be different. However, even now, the justification of why government set up a new form of property upon information along with the problem of attribution, are still not so convincing. Since the external justification is more Meta and fundamental, we will take a deeper look into it first, and then leave the problem of attribution to the following part.

As mentioned above, the official answer to this question is quite a functionalist and consequent approach, the government offers property right to creators of certain works that would not be created, or not created as soon or as well, in the absence of those property, to promote the progress of knowledge. But this reason seems to be directed against both the *ratio* and *realitas*.

According to this, the primary function of copyright is to guide incentives to achieve a greater internalization of externalities, including beneficial and harmful effects. With the help of the copyright regime, the author now has the ability to exclude others from enjoying the fruits of his efforts, which guarantee his present expectation of obtaining the future income of his creation,

[10] See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case*

and thus in turn may encourage the production of creative works in the coming future.[16] As we can see above, this justification builds its ground on fostering the so called "dynamic efficiency" which focuses on the future benefits of both authors and society. However, theoretically it would seem insurmountable to assess today the future welfare impact of a legal rule, under the assumption that every stage of information process depends on the previous one, and assuming also that the circulation of messages is a significantly random and unpredictable progression.[17]

and Its Predecessors, 82 Columbia Law Review. 1600, 1610 (1982).

[16] The primary function of property as guiding incentives to achieve a greater internalization of externalities, which can be found by Harold Demsetz, *Toward a Theory of Property Rights*, 57 The American Economic Review 347, 350-356 (1967).

[17] Efroni Zohar, *Access-Right: The Future of Digital Copyright Law*, New York: Oxford University Press, 2011, p. 122.

In other words, in methodology the dynamic analysis, its estimate upon costs and benefits needs to model them over time, and projecting what would happen under counterfactuals (such as how many novels or pop songs really would be written in the absence of copyright protection, and who would benefit from such a situation).[11] However, how can one calculate the benefits of regulation in terms of the value that has not been created yet due to absence of copyright?[19] In a word, both sides of the copyright regime's cost and benefit analysis are difficult to determine empirically, and thus must always involve a high degree of guess.[12] And this poses a grave dilemma for the external consequentialist justification that copyright is an incentive to the public knowledge.

Besides, as copyright is automatically conferred on the author, there is no registration so no comprehensive data source on the whole span.[13] Since there is no empirical evidence on the incentive copyright played in knowledge production, the cause and effect relationship between copyright regulation and the level of creative production is nothing more than a metaphysical conjecture which descends from heaven to earth, although aspirational, in nature it is an imagined activity of imagined subjects.[14] So, whether this thought experiment really works in practice is highly dependent on how those imagined subjects can fit the real living individuals themselves. But unfortunately, in most circumstances, authors don't act in a means-ends manner, and commercial considerations don't play a significant role in real lives as well.

That is why there are so few domains of human creativity where intellectual property rights are the main reason for inventiveness. The "good old days", before copyright had been seriously taken into account, was one of the great eras of music, literature and philosophy: Mozart, Haydn,

[11] See ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY*, Cambridge: HARVARD UNIVERSITY PRESS, 2011, pp. 2-3. [19]

See Efroni Zohar supra note, p.122.

[12] See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harvard Law Review 281, 292 (1970).

[13] Ruth Towse, *Does Copyright Lead to Greater Output of Creative Works?*, ALAI: Copyright, to be or not to be, Denmark: Ex Tuto Publishing A/S, 2019, p.143.

[14] Karl Marx, Friedrich Engels, *The German Ideology*, New York: Prometheus Books, 1998, pp. 42-43.

Beethoven, Kant, Hegel, Bentham, Hume, Karl Marx and Adam Smith. The 20th century, the first in which philosophers have universally enjoyed the benefits of copyright in their works, has been one of the weakest centuries for philosophy, since the greatest philosophers of the 20th century – Wittgenstein, Russell and perhaps Habermas – are simply not as important as those of the 19th,

18th and 17th centuries or arguably of the last centuries before Christ.[15] So, just as Friedrich Hayek had said, "I doubt whether there exists a single great work of literature which we would not possess had the author been unable to obtain an exclusive copyright for it; it seems to me that the case for copyright must rest almost entirely on the circumstance that such exceedingly useful works as encyclopedias, dictionaries, textbooks and other works of reference could not be produced if, once they existed, they could freely be reproduced."[16] But nowadays, even in those exceedingly useful works of reference such as the encyclopedia as Hayek mentioned, it is still not obvious whether copyright is an effective way to stimulate the human creative process. Just thinking about the case of Wikipedia, the largest and most popular general reference work on the internet is created and maintained as an open collaboration project by countless volunteer editors who are both anonymous and not paid.

In sum, the incentive metaphor of copyright, together with its *homo economicus* presupposition, is in most circumstances against the empirical facts and our common sense. It is an ideology established on the bases of capitalist mode of knowledge production, and aims at subjecting the entirety of knowledge and culture to the cash nexusGiven the advent of free production and free technology, with free software, and with the resulting development of free distribution technology, this argument just simply denies the visible and unanswerable facts. And even more than that, fact is now subordinated to dogma, in which the arrangements that briefly characterized intellectual production and cultural distribution during the short heyday of the bourgeoisie are said, despite the evidence of both past and present, to be the only structures possible.[17]

3. "Romantic authorship" as internal justification

Third, *ut supra*, the whole justification of copyright must include an inducement to publication and a reward for authors' creativity. In continental Europe, authors are the heart of copyright. Although under a utilitarian system, copyright is a pragmatic entitlement given directly by law, it still carries and implies a certain degree of humanist cast and moral appeal as its *raison d'etre*. Without the moral force and natural right bases, copyright will have to be subject to more restrictions than it has now, such as the anti-trust regulation, the abuse of rights (*Rechtsmissbrauch*), *bona fide*, and the consumer protection policy, as other kinds of property. Besides, according to the utilitarian formulation, the scope and duration of copyright protection must be synonymous with the necessity of stimulating creation and distribution, which in turn

[15] See Peter Drahos, John Braithwaite, *Information feudalism: who owns the knowledge economy?*, London: Earthscan Publications Ltd, 2002, pp. 210-211.
[16] F. A. Hayek, *THE FATAL CONCEIT: The Errors of Socialism*, Chicago: The University of Chicago Press, 1988, p. 33.
[17] See Eben Moglen, *The dotCommunist Manifesto*.

will make copyright more closed to its traditional function, as a printing privilege. Under this circumstance, copyright will degrade into a commercial right whose main purpose is to against the unfair-competition like piracy, instead of a general right that regulates all kinds of use upon information, including copying, adapting and communicating as today. In a word, nowadays copyright owners' monopoly profits, along with the deadweight loss it poses on society, and its disproportional enforcement cost, their economic and moral legitimacy actually rests on authors' special status in natural law, instead of the consideration of utility maximization.

So, the *status quo* of copyright protection and the driving force behind its expansion goes beyond the utilitarian explanation, and therefore must recur to the natural right approach protecting and rewarding the so called "romantic author". In other words, the notion of romantic authorship is the internal justification of copyright that warrants treating it as a special reward preserved to its genius author. However, the rhetoric of romantic authorship is as vulnerable as its other philosophical conceptions in reality. First in history, the origination of copyright was neither for authors nor "romantic", it stems from the printing privilege which is a "best exploiter" regime, for the law placed the exclusive rights in the hands not of those who created the works, but of those who assured the means of public dissemination, both in England and France.[18] After the end of the *ancien rigime*, for much of the global copyright history, including the whole 19th century which had witnessed the flourishing of romanticism, registration and public dissemination was a condition of copyright protection. It is hard to imagine that the acquisition and exercise of a *jus natural*, could be so easily encumbered or even defeated by some administrative formalities. Besides, since the beginning, the protection of copyright has always been highly based on territoriality, and to a certain degree of diplomatic reciprocity. However, if copyright was truly a natural right coming from authors' creativity and protecting their autonomy, then why would copyright regime differentiate domestic authors from foreign authors. It seems that the authors' natural status along with his special creativity are universal, which should be regarded as the same for everyone without distinction, just like other kinds of human rights.

Second, the romantic rhetoric may be fine as long as copyright only dealt with the protection of fine art. But the world has been changing, and so does the law. With the means of distribution developing from printing press to analogue signals, and then to digital media, the subject matters of copyright have been extending from literature and art, to broadcast signal and video/audio, and next to computer programs and aggregation of mass data, and even software's products such as AI creations.[19] As we can see, technological advance has made copyright law become the most capacious domain among the whole legal system.[20] This process can be precisely characterized, in Marx's words, as "Whenever, through the development of industry and

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[18] See Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1064(2003).

[19] See "*Chinese court rules AI-written article is protected by copyright*", available at: https://venturebeat.com/2020/01/10/chinese-court-rules-ai-written-article-is-protected-by-copyright/ http://www.ecns.cn/news/2020-01-09/detail-ifzsqcrm6562963.shtml

[20] Paul Goldstein, *Copyright's Highway: From the Printing Press to the Cloud*, Stanford: Stanford University Press, 2019, p.194.

commerce, new forms of intercourse have been evolved, the law has always been compelled to admit them among the modes of acquiring property".[21] As a result, our current copyright regime now has functioned more like an instrumentality *System* which facilitates and safeguards the industrialized capital to capture more abstract objects with high exchangeable value in market, instead of focusing on the great creativity in literature and art, and thus guarantee the authority and autonomy of the geniuses in lifeworld (*Lebenswelt*).

But most importantly, if the romantic authorship aims at justifying that copyright is attributable to its author, then it amounts to beating a dead horse. Today, both, the romantic authorship and the possessive individualism social background where it grew, had been turned over by the corporate liberalism reality. Just as Jane C. Ginsburg said, "authors' creativity justifies moral and economic claims to the fruits of their creations, but it had been debunked by stressing that real authors rarely in fact benefit from their creativity. Rather, publishers and similar grantees hide behind the claims of the creators they promptly despoil. Copyright thus is merely a pretext for corporate greed".[22] The most obvious example is the work-for-hire rule, which provides that for all employees and some classes of independent consultants, the author of the work is deemed to be the corporation that commissioned it, rather than the individual who actually created it. Even apart from the work-for-hire rule, the doctrines of assignment and transfer have ensured that the vast majority of intellectual property rights end up not in the hands of authors or creators, but in the hands of corporate.[23] The result is that intellectual property is already done away with for nine-tenths of the population in modern society, as the *dotCommunist Manifesto* points out, for what they create is immediately appropriated by their employers, who claim the fruit of their intellect through the law of patent, copyright, trade secret and other forms of "intellectual property law".[24]

Hereby, I refer to Bernard Edelman's comment upon the development of copyright in film industries in France and Germany to further summarize how today the romantic authorship is striking and the *status quo* of individual creator, as follow. "The determinant influence of capital becomes, for the law, the creative influence; financial direction becomes creative direction; the authors become proletarians who are paid for the job which accomplishes 'a task' work and not a creative activity, halfway between the man and the machine."[25] So ironically, the law which was meant to improve authors' condition and guarantee individual autonomy, in turn demotes the honorable *Auctors* into proletarian workers with pan and ink, and transforms the most creative human activities into some kinds of estranged labor, which has caused that the creator is related to the product of his creativity as to an alien object. As a result, the more the creator spends himself, the more powerful the alien objective world becomes which he creates over-against

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[21] Karl Marx, Friedrich Engels*, The German Ideology*, New York: Prometheus Books, 1998, p.101.
[22] See Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1065 (2003).
[23] Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 Tex. L. Rev. 873, 883 (1996-1997)
[24] See Eben Moglen, The dotCommunist Manifesto.
[25] Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, London: Routledge & Kegan Paul, 1979, p.58.

himself, the poorer he himself his inner world-becomes, the less belongs to him as his own. [26] So, a better summary here comes to me, is that of St. Paul's: "For I was alive without the law once: but when the commandment came, sin revived, and I died" (Romans 7:9-10). The sin, aka, capital, "comes dripping from head to foot, from every pore, with blood and dirt".

III. Rethinking the circumstance of information property

Since these old philosophical conceptions of copyright cannot serve as explanations for current copyright regime, let along further justifying it, whereas, what makes them old fashion and unworkable? Being a Marxist, I suppose, is that legal relations could neither be understood by themselves such as a self-referential and autopoietic *System*, nor explained by the so-called general progress of the human mind, but that they are rooted in the material conditions of life, which are summed up by Hegel under the name of "civil society".[27] Hence, the anatomy of legal relations must focus on the social circumstances on which it was created andfunctions, which is sought in political economic and historical materialism approach, instead of the pure economic analysis of law which is turned out to be idealistic and oversimplifying the real lives, nor the dogmatic research which is more closer to a metaphysic heaven of conceptions, whereas far away from earth. So, we will see the existing copyright regime as a social phenomenon in human history, and then try to analysis the material conditions and social circumstances where it stems and how it functions, and thus get a better understanding of it.

1. Property and distributive justice

Although from ontology, it is difficult to define what law is, whereas, when talking about law, I suppose, most citizens have their own intuitive knowledge upon it, and the first thing that comes to their mind may be this: law is a mean to safeguard social justice. Actually, this is what we called pre-notional understanding (*Vorverständnis*), and the above pre-notional understanding about law is functionalism. As we can see, even though nobody knows what law is in nature, however, as a social phenomenon, so long as existing, law itself must display some certain social functions, which turns out to be a useful way to understand both how it works and thus get to its nature. So in order to obtain a better understanding upon property and copyright (law), we need to focus on their social functions.

"Law safeguards fairness and justice" is the broadest consensus accepted about the social functions of law, whereas the relations between law and justice can still be further concretized. Seen from the perspective of historical development, the problem of justice seems to arise initially in the context of reciprocal performances, for example one cannot ask for more than one deserves by one's own actions or more than one is owed from someone who has done one a

[26] Karl Marx, *The Economic and Philosophic Manuscripts of 1844*, New York: Prometheus Books, 1988, pp.71-72.
[27] See Karl Marx, *A Contribution to the Critique of Political Economy*, Chicago: CHARLES H. KERR & COMPANY, 2010, p.11.

wrong, which can be deduced from the importance of the norm of reciprocity in segmental societies, as known as commutative justice.[28] However, after entering feudal societies, the maxim of reciprocity was adjusted to their different social structures by putting a higher value on favors received from higher-ranked individuals, leading to the ultimate conclusion that God's favor cannot truly be earned by anyone.[29] As a result, the point of reference for comparing just shifted from "reciprocity" to "*dare cuique suum*", which is also known as distributive justice. Since the end of middle ages, the distributive justice associated with the privileges of the higher classes had increasingly disappeared, and the commutative justice was also limited within the freedom of contract. As a result, with the development of positivism the idea of justice had gradually been separated from the basic structure of society. After the second war, welfare states had witnessed the renaissance of natural law and distributive justice, both in legal and political system, in order to better address the ownership of resources in society, meanwhile, the commutative justice has further demoted to economic domain, as a supplement for contract law and tort law.

Anyway, in modern society, commutative justice mainly functions in the domain of law of obligation (*Schuldrecht*), and parallel to that, distributive justice has played more an important role, especially in property law (*Sachenrecht*). As mentioned above, the core principle of property is that it assigns to an individual control over an asset, and thus creates a one-to-one mapping between owners and assets.[30] In other words, as a social phenomenon, the primary function of property in modern society is as a mean to guarantee the distributive justice, whereby perceiving the fairness of how benefits and burdens are distributed and shared by its members.

2. The social circumstance of justice and property

Since property functions as a mean to guarantee distributive justice (although the patterns of distribution vary from society to society, and are themselves bound up with the modes of production in each society), distributive justice holds the key for understanding how property works. However, another thing calling for special attention is that we do not use the word "property" or "justice" as an abstract idea, but as an analytical concrete concept, which means they must always reference to a certain object when speaking of them (i.e., "property of what?", "justice upon which?"). According to this, we may ask, why do we have the property of lands, cars, machines or even data, instead of air and light, which are more vital for human life? Why do people claim justice upon wealth, education, opportunity, but seldom claim the justice of lifetime, sex, or dominion? Because property and justice are not some naturally occurring facts, nor can they work everywhere, instead, they are social constructions generated under specific social circumstances and limited by certain material conditions of life, which are characterized as circumstances of justice.

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[28] See Niklas Luhmann, *Law as a Social System*, New York: Oxford University Press, 2008, p.220.

[29] See Id, pp.220-221.

[30] See ROBERT P. MERGES, supra note, p.5.

Here, I borrow some ideas from political philosopher and political economist, especially John Rawls and Karl Marx. First, John Rawls describes the circumstances of justice as "the normal conditions under which human cooperation is both possible and necessary." Unless the circumstances of justice are met, human cooperation cannot be properly established, and among those background conditions that must be met to give rise to justice, objective circumstances are most important, which are concerning the natural state of the society. Moreover, the most crucial objective circumstance of justice, as he conceives, is that the resources available to the society must be moderately scarce. Because justice can only arise when natural and other resources are not so abundant that schemes of cooperation are superfluous, nor are conditions so harsh that fruitful ventures must inevitably break down.[31] When resources are so plentiful that anyone can have what he or she desires without the assistance of others (i.e. air, light), social cooperation is unnecessary. On the other hand, when resources are too scarce for everyone to fulfill even their minimal desires (i.e. three guys shipwrecked on an island with a bottle of water, which can only keep one alive), then human cooperation is not only impossible but against humanity, since it is more closed to Hobbes' "state of nature", everyman needs everything and thus claims the power upon everything, the result, every man is enemy to every man, in order to survive.[32]

In a word, the circumstance of justice lies between utmost abundant and extreme scarce conditions of social resources. This is why it seems to Karl Marx that after entering into communism, nowadays property will disappear along with the notions of justice. Citizens will no longer care about justice spontaneously in their everyday lives, since the circumstances where justice stems and how it functions has been crossed. However, Karl Marx goes even beyond the neoliberalism and other liberal paradigm above, for they all presupposed the legitimacy of the private ownership upon the means of production, as well as the wage labor, and then characterize property as a mean to safeguard and facilitate the fairness of social distribution upon benefits and burden. Marx believes that modern (capitalist) private property is neither just nor equal in nature, since it is a power possessed by private individuals in the means of production which allows them to dispose as they will of the workers' labor-power, and thus occupy the surplus value.[33] This not only constitutes the exploitation of the worker, but also the endless accumulation of surplus value further cause human's alienation. Individuals increasingly and openly view others as separated and antithetical, rather than joined or united, by their interests. However, all these are covered and safeguarded through the bourgeois property law and contract liberty (*Vertragsfreiheit*), in the name of (modern formal) justice.

Hence, bourgeois property is a right of inequality and Marx's conceptions of justice can be summed up in the single sentence: abolition of private property in the area of means of productions.[34] But right can never be higher than the economic structure of society and its cultural development conditioned thereby, as he says, so property and its defects are inevitable

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[31] See John Rawls, *A Theory of Justice: Revised Edition*, Cambridge: Harvard University Press, 1999, pp.109-110.

[32] See C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, NEW YORK: OXFORD UNIVERSITY PRESS, 1962, pp.20-27.

[33] George G. Brenkert, *Freedom and Private Property in Marx*, 8 Philosophy & Public Affairs 122, 123 (1979).

[34] See Karl Marx, Friedrich Engels, *Manifesto of the Communist Party*.

even in the socialist society as it is when it has just emerged after prolonged birth pangs from capitalist society. However, in a higher phase of communist society, as he imagines in the "Critique of the Gotha Program",

> "*after the enslaving subordination of the individual to the division of labor, and therewith also the antithesis between mental and physical labor, has vanished; after labor has become not only a means of life but life's prime want; after the productive forces have also increased with the all-around development of the individual, and all the springs of co-operative wealth flow more abundantly – only then then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs!*"[35]

"From each according to his ability, to each according to his needs", is the communist justice in Karl Marx's sense; it is not of the old liberalistic justice as an idea or social structure, but of a new mode of life, where the individual ownership is re-rested on the social conditions that means of production are in the hands of the public, and therefore the free individuality could be comprehensively developing. Although Marx's critics have often turned this against him, portraying it as a hopelessly improbable utopia, after all, before Internet and information revolution, who can imagine what kind of society could be as productive and liberal as that? However, the promise of new technological advance, i.e., information technology like 5G and Block-chain, Big-data and Artificial Intelligence, is that it could enact just such a liberation, or at least approach it on the information production domain, in digital spaces. Obviously, if this is to be true, as Slavoj Žižek says, the very nature of the World Wide Web seems to be communist,[36] then what will be beyond that horizon? What will come to us under the current copyright regime and information policy? All these questions are keenly worthy of our attention, and therefore will be further discussed in Part IV.

3. The economic foundation of information property

No right can be higher than the economic structure of society where it stems, and the material condition of property is that the resources available to society must be moderately scarce. However, the special case of copyright is more complicated than traditional property: for copyright concerns two kinds of resources: the material media as its carrier and the immaterial information as its content. Hence, the scarce condition of copyright references two kinds of scarcity which are totally different in nature: one is limited by the objective physical world, whereas the other is artificial and can be made only by law.

In the past, our copyright jurisprudences have tended to treat this point superficially by only focusing on the content level, i-e-the special nature of knowledge as common heritage, embodiment of personality, or public good. However, since its beginning our copyright system has always favored distributor rather than author and public. The reason is that information,

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[35] Karl Marx, *Critique of the Gotha Program*, Section I, 3.

[36] See Slavoj Žižek, *Trouble in Paradise: FROM THE END OF HISTORY TO THE EDN OF CAPITALISM*, London: Melville House, 2014, p.61.

although the ability to produce them is also limited, yet once they have come into existence, they can be indefinitely multiplied without any marginal cost,[37] whereas, the material media which carry information for dissemination do not have this merit. Moreover, the investment upon them has always been subjected to the so-called "discipline of diminishing marginal returns". In a word, if copyright's goal is to promote the progress of knowledge, then governments' choices would end up being narrowly limited. Since before internet's advent, paper was expensive, and mass distribution required paper, along with printing presses, bookstores, warehouses, trucks, movie cameras and movie theatres, broadcast towers and communications satellites – required, in other words, a significant capital investment, therefore, just as Jessica Litman summaries, "it can only make sense in that context to expect that as the revenues from works of authorship flowed from users to authors, most of the money would be diverted along the way to pay for expensive reproduction and distribution solutions".[38]

Hence, the material condition of the pre-internet society had witnessed an undeniable fact that the material media which carry the immaterial content for social dissemination, or logistic media for short, is much scarcer, and thus much more valuable and important than the content itself. From a political economic perspective, the logistic media is the core mean of production under the social knowledge production chain. And the owners of the means of knowledge production, the publishers, are definitely the rulers and real players of the copyright regime. Unfortunately, the research on copyright from the media's approach has greatly been undermined, which makes it easy for us not to notice the real nature and foundation of current copyright regime.

In sum, from a historical materialism perspective, the economic foundation of copyright law lies mainly on its media level, and the dynamic interactive relation between the media and content holds the key for further understanding. First, history tells us that for most of the human creativity, copyright is not a necessary condition, whereas, those creations may still be created without copyright, but would not be so successful in disseminating on a large scale to the public, which is the purpose of setting up a copyright system. Second, setting a copyright system arises of necessity when the existing logistic media in society has crossed from extreme scarce to moderate scarce condition. Before the printing press had been brought into the west world in 15th century, the production and dissemination of books were all concentrated in the church and few colleges, where monks and amanuensis duplicated a precious manuscript into another collectible and fine art item, through which a very skillful hand and a lot of patience were inevitable.[39] Under this condition, even the notion of modern copyright would be hard to imagine, since no surplus can be generated from the resources available, and the benefits of producing and disseminating a book would always fail to satisfy people's demands.

Only after the advent of printing press, can the production of books transform from handwritten art-item and small-scale circulation to mass distribution commodity. And only then, the necessity to set up a common regulation the daily recurring acts of production, distribution and exchange

[37] See F. A. Hayek, supra note, pp.32-33.

[38] Jessica Litman, *Real Copyright Reform*, 96 IOWA LAW REVIEW 1, 12(2010).

[39] See David Finkelstein, Alistair McCleery, *An Introduction to Book History*, New York: Routledge, 2005, pp.44-46.

of products, to see to it that the individual subordinates himself to the common conditions of production and exchange, could finally be met. This regulation, at first was the stationer companies' common practice, and soon, became copyright law.[40]

In a word, when the extreme scarce condition of logistic media was broken, it called for a legal system to subordinate the media owners to cooperate with each other, and thus made sure the benefits and burdens of using the logistic media were distributed and shared fairly. This system is rooted on the social circumstance that media is neither so abundant nor too scarce. Copyright law's main purpose is to make sure that entrepreneurs would not refuse to invest in new media on the one hand, and to regulate the number of individuals who possess and use the logistic media as means of production on the other hand, in order to maintain the moderate scarce condition of media. Moreover, the superstructure which attempted to induce and guarantee the overlapping investment in mass distribution would finally lead to a "de-personal" legal system, a form of property, to replace the Stationers' Copyright which were believed to be both personal and prerogative. And since the means of production must be intensively possessed by a small group of entrepreneurs, which shaped the copyright system further into a self-referential and autopoietic legal domain, a complicated *Lex Mercatoria* taught and conducted by a small circle of experts, instead of an *ius civile* which regulates daily routines and be practiced by the general citizens.

However in internet era, with the scarce condition of logistic media be broken, "*cessante ratione legis cessat ipsa lexcurrent*"[41]. So, the current copyright regime has to recreate its new scarcity, but this time it would be compelled to re-rest its foothold on a capricious resource, which in turn leads to its superstructure more vulnerable and conflicts more with its very social and economic system, especially facing new technology advance.

IV. Technological advance: new premises, threats and reality in information society

1. Internet: media abundance and new mode of life

The economic foundation of copyright rests on the scarce condition of logistic media, as said earlier, however, digital technology, with computer networks and the internet, has changed all that condition. First, compared with the old distributive networks invested and operated by entrepreneurs, nowadays foremost means of production, the Internet, is a public infrastructure

[40] This trend had already been indicated by Friedrich Engels long time ago, as: "At a certain, very primitive stage of the development of society, the need arises to co-ordinate under a common regulation the daily recurring acts of production, distribution and exchange of products, to see to it that the individual subordinates himself to the common conditions of production and exchange. This regulation, which is at first custom, soon becomes law". See Friedrich Engels, *The Housing Question*, Part II.

[41] "When the reason of a statute ceases, so does the statute itself".

built by government and owned in the hand of the commons, therefore, the first economic rationality of copyright as an inducement of investing in mass distribution is gone. Second, the reason why logistic media is so fundamental is that immaterial content needs material carrier to be embodied and distributed, which made the logistic media become the means of production, and thus gives the media owners their power to possess further the ownership of content. However, in digital space, information was liberated from the tangible "bottle" in which it has been enclosed for centuries,[42] with the cost of duplication and dissemination being obviously negligible, together have led to the position of traditional media and its owners plummeting.

With the change of the economic foundation, the entire immense superstructure is more or less rapidly transformed.[43] It seems like the current media abundance has forced copyright regime to transform its focus to content, by creating an artificial scarce condition of content to further control and regulate the use of new media, and therefore, redistributes the benefits and burdens of dissemination through internet. For example, the highly publicized record label lawsuits against individual users of peer-to-peer file-sharing applications turn out to have been a feint in a fight to hold Internet service providers liable for the activity of their subscribers; and legacy intermediaries (i.e. publishers, record labels, and movie studios) are fighting with new-fangled intermediaries (that is online service providers, platforms, and digital delivery businesses) to the death in order to get to eat the biggest piece of pie.[44] However, since the content or information scarcity are made directly by legal injunctions, it is considered to be both against common sense and difficult to implement in practice.

First, since making digital copies is an unavoidable incident of reading, viewing, sharing, improving, and reusing works embodied in digital media, there is no way to use any content in a digital context without that use producing a copy.[45] That is to say, the reality of media abundance has given the normal netizens the ability to "violate" the old copyright rule stemming from media scarce society on the one hand, whereas, increased the domain of copyright rule — from regulating a tiny portion of human life, to regulating absolutely every bit of life on a digital world on the other hand. So, copyright is no longer a *Lex Mercatoria* aimed at regulating the use of works in tangible media between professionals and commercial purposes, now it is a Magna Carta of the information society's knowledge order.[54] And all these along with our common moral intuition that "free use of information is not a free riding, it is neither unjust nor disgraceful"[55] has shaped today our new mode of life.

The fact is undeniable. Today, few people in good conscience can conduct normal business or enjoy a day of leisure without breaching a commandment of copyright by, for example, running a computer program, choosing a paper to view or download, or sharing a song with friends on the

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[42] See JOHN PERRY BARLOW, *SELLING WINE WITHOUT BOTTLES: THE ECONOMY OF MIND ON THE GLOBAL NET*, DUKE LAW & TECHNOLOGY REVIEW 8, 10 (2019).

[43] Karl Marx, *A Contribution to the Critique of Political Economy*, Chicago: CHARLES H. KERR & COMPANY, 2010, p.12.

[44] See JESSICA LITMAN, *WHAT WE DON'T SEE WHEN WE SEE COPYRIGHT AS PROPERTY*, 77 Cambridge Law Journal 536, 538 (2018).

[45] See Lawrence Lessig, supra note, p.192.

internet. This is so not only in China and other emergent economies, but increasingly in the United States and developed markets in general, as amply documented by academic researchers and industry analysts.[56] In other words, greed is no longer a valid justification for consumers' widespread noncompliance, since the open and free access to "pirate" copies has become "our daily bread" (Matthew 6:11), at minimal cost, a compulsory way of life in the consumer society, and a ritual for all people of good conscience.[57]

So a paradox here comes to us, is that "information actually is free", for the media is utmost abundant just like air and light, but "information should not be free", for the commandment of copyright has forbidden it. Although according to Kantian dualism, it is impossible to say "IS" leads to "OUGHT", the problem is that even though its normative premises had already vanished (as showed in Part II), and the whole material world along with the mode of civil life, are all against it, it's still denying and ignoring the visible and unanswerable facts. Worst of all, this commandment even forces the reality subordinated to its dogma!

2. Data economy and Artificial Intelligence: content abundance and Data rentism

If the digital technology had broken copyright's pre-internet foundation----the media scarce condition, the raise of artificial intelligence will finally break its content scarce condition in post-internet era. Recent achievements in AI-techniques have allowed machines to reach a level of autonomy that could make the human contribution trivial to the creative process. As widely reported in the media, AI is being used to generate news, compose music, create artworks

54 See Tomas Hoeren, *Urheberrect 2000 --- Thesen für eine Reform des Urheberrect*, MMR 3 (2000).

55 A culture could not exist if all free riding were prohibited within it. Every person's education involves a form of free riding on his predecessors' efforts, as does every form of scholarship and scientific progress. Further, a bedrock proposition of the common law is that persons ordinarily should not be required to pay for the benefit of others' labor unless they have agreed in advance to do so, by contract. See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 Va. L. Rev. 149, 167 (1992).

56 U.S. Chamber of Commerce has estimates in 2019 that global online piracy costs the U.S. economy at least $29.2 billion in lost revenue each year. See *IMPACTS OF DIGITAL VIDEO PIRACY ON THE U.S. ECONOMY*. Available at: https://www.theglobalipcenter.com/report/digital-video-piracy/
In Europe, according to the EUIP office, The average internet user in the EU accessed pirated content 9.7 times per month in 2018, see ONLINE COPYRIGHT INFRINGEMENT IN THE EUROPEAN UNION: MUSIC, FILMS AND TV (2017-2018), TRENDS AND DRIVERS, available at:
https://www.ippt.eu/items/euipo-report-about-online-copyright-infringement-in-the-eu

57 See Feng Xiang, *The end of intellectual property: Challenges beyond the "China Model"*, 2 International Critical Thought 99, 104 (2012).

(some of which have actually been sold in auctions), and produce scripts, viz., that we may be entering into an era where machines will not only assist humans in the creative process but create or invent all by themselves.[46]

[46] More details and examples of currently existing AI systems on creation domain, see Joint Research Centre (JRC) of the European Commission's science and knowledge service's report, "*Intellectual Property and Artificial intelligence: a literature review*", 2020, pp.12-14, available at:
https://publications.jrc.ec.europa.eu/repository/handle/JRC119102

This has raised a keen discussion upon how to protect AI and the creation of AI,[47] but what I concern about is what happens when this possibility is present under the current copyright regime and information policy. Since we are about to cross into a post- scarce society, where the material condition along with the relation of production, i.e. co-operative peer production through digital network is much closed to Marx's imagination in "*Critique of the Gotha Program*". And even those neo-conservatism will have to confess that communism is a better future after capitalism, whereas their main question is the possibility of approaching it. But getting past the content scarcity economically also means getting past it institutionally. Otherwise, as we will see, if we let the post-scarce knowledge production subordinate to the current copyright rule, the social order of knowledge will pass into the so-called "rentism".

As said earlier, the nature of intellectual property is different from real property, in core it is a power to control over the copying of a pattern. The 21th century is an era of information society and data economic, since intangible information has taken the place of land and machines have become the most important resource, it has witnessed the mutation of the property from real property to intellectual property, which catalyzes the transformation of economic order into something different from capitalism as traditionally understood. Capitalism is based on the process of commodity production by means of wage labor, whereas, with the widespread use of AI in creative process, nowadays wage mental labor will finally disappear, which will cause the legal foundation of recent capitalist relation of knowledge production---- "work for hire rule" to collapse. After that, the big company can only continue to accumulate money if they retain the ability to extract a stream of rents, or "IP royalty" in legal terminology, which arise from the power to control the use of content. Thus emerges a rentist economic system, rather than the capitalist.[48]

How could this happen? With the increasingly Intelligent Robotization, "Who Owns the Robots Rules the World",[49] however, AI relies heavily on software and data, the premise of AI systems lies on the data economy, and thus are highly dependent on data to train intelligent algorithms. Data digitization and data availability have been the key drivers of the most recent developments in AI. Most promising AI techniques, such as machine learning or deep learning, are highly dependent on large amounts of data. Millions of images, texts, videos, sounds, and raw data are required to feed and train AI systems.[50] However, under the current copyright regime, these data are mostly protected by copyright or sui generis right. Any temporary or permanent accessing, processing or reproduction of these data, or the extraction and reuse of a substantial part of the data contained in a protected database would need a license from the right holders.[51]

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[47] See JRC report "*Artificial Intelligence: A European perspective*" (2018), and *"recommendations to the Commission on Civil Law Rules on Robotics*" (2017).

[48] See Peter Frase, *Four Futures: Life after Capitalism*, London: Verso, 2016, pp.70-76.

[49] See RICHARD B. FREEMAN, *Who Owns the Robots Rules the World: The deeper threat of robotization*, Harvard Magazine, MAY-JUNE 2016. Available at: https://harvardmagazine.com/2016/05/who-owns-the-robots-rules-the-world

[50] See JCR's report: "*Intellectual Property and Artificial intelligence: a literature review*", p.10.

[51] See id.

Furthermore, these data above which were used for AI to generate new works will be treated as "original works" under the current copyright rule, which will give their owners the power to further control the AI creations automatically, for under this circumstance, AI creations would be treated as "derivative works".

In a word, through the disabling power given by intellectual property, data has become the most important means of production, a new form of capital in AI economy. However, this new kind of social order which rests on artificial scarcity and commodification of the flow of data, is not only irrational, it is also unequal. First, the only reason to have a capitalist market economy in the first place was to allocate scarce resources in a circumstance where everyone couldn't simply have as much as they want, as said earlier, and the new material reality has given us the opportunity to leave behind the property and market economy, as a social mechanism for managing knowledge scarcity. But ironically, commentators' discussion still cannot get rid of the pre-scarcity way of thinking, whereby concentrating on examination for protection against "market failure" or "create incentive".[52] However, the real crux of this problem is not the market failure, but the market itself! The only reason for those market failures still existing is directly because we privatized the information and data, commoditized them, and then subordinated them to the market system which is meant to be dysfunctional in a pre-scarcity society. Secondly, this kind of data rentism is both unequal and unfair, since IP holders demand payments simply because with the legal injunction they can control access to data, rather than doing anything on it. Just as its forefather feudalism, data rentism rewards data oligarchy and content guilds, it makes democratic citizens trespassers on knowledge that should be the common heritage of humankind, their educational birthright, and by dismantling the publicness of knowledge, will eventually rob the knowledge-economy of much of its productivity.[53]

How did we lose our way? Or just as Slavoj Žižek questions: "Is global privatization and commodification really the only way to do with data regulation? Are there no other forms of regulation?"[66] Fortunately, the future is not written yet. We can still shape it based on our collective vision of what future we would like to have.

V. Towards a new way of copyright jurisprudence and information regulation

Copyright now has become a perfect tool for exploiters to extract all the potential commercial value from the abstract content. Although this can still be fine, as long as copyright remains as a *Lex Mercatoria* aimed at regulating the use of works in tangible media between professionals and

[52] See id, pp.14-15.

[53] See Peter Drahos, John Braithwaite, supra note, p.219. [66]

See Slavoj Žižek, supra note, pp.61-62.

commercial purposes. However, since copyright has become the Magna Carta of the information society, it directly references to our knowledge order and information policy in digital era. And if we can't figure out a way to influence its current form, it will shape what we are able to read, write, view, hear, and say in ways so insidious that we may not even notice what we have lost.[54] So, we need a new way to look at copyright, upon which copyright regime therefore needs to be considered as being a part of a broader area of information regulation in data economy and information society.

But what should a just and reasonable "new copyright system" or so called "information law" look like? I suppose we do not have a concrete answer yet, whereas we do have some basic consensus about what a "good law" should be. If we want to change its widespread noncompliance by the general public, and towards a better future, the current copyright regime must be transformed to at least have some merits of being considered as a good law, which can be found from the widely known legal maxims (*Rechtssprichwort*), for instance

- "*Lex non cogit ad impossibilia" (Law does not compel a man to do what he is impossible to perform)----Digesta seu Pandectae*
- "*Common sense often makes a good law"*---- William O. Douglas
- "*Law too general are seldom obeyed; to severe, seldom executed*"---- Benjamin Franklin
- "*Law of the people, by the people, for the people, shall not perish from the Earth*"---- Abraham Lincoln

First, making digital copies is an unavoidable incident of every activity in digital world, and the open and free access to "pirate" copies has become a compulsory way of life for all the general public of good conscience. So, "*AD IMPOSSIBILE NEMO TENETUR*", no one should be obliged to do something impossible,[68] as said by Lon Fuller, which should first be considered by our copyright legislators. Second, in our common sense, copying or downing a piece of music varies from stealing a half of bread. We live in a world with "free" content, and this is not an imperfection, the fact that content at any particular time is free tells us nothing about whether using that content is "theft."[55] On the opposite, the centrality of copying and copies in digital world is precisely why reproduction is no longer an appropriate way to measure copyright infringement,[56] as long as we want to keep copyright commandment the same with citizens' moral intuition, and therefore make some sense to them. However, this does not mean that we do not need copyright totally. We still have to accept a copyright system but rather as an exceptional phenomena than a general rule, which means the protection of right holders' interest does not require that the copyright owner have absolute control of a work. It only requires that they have sufficient rights to protect their investment against competitors. Just like Ray Patterson had pointed out that the basic function of copyright is to protect the publisher, not against the author or the individual user, but against other publishers.[57] This suggests that

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[54] Jessica Litman, *Digital Copyright*, Michigan: Maize Books University of Michigan Press, 2017, p.169. [68] See Lon Fuller, *The Morality of L*aw, revised edition, Yale University Press, 1969. p.71

[55] See Lawrence Lessig, *The Future of Idea*, New York: RANDOM HOUSE, 2001, pp.249-250.

[56] See Jessica Litman, *Digital Copyright*, Michigan: Maize Books University of Michigan Press, 2017, p.154.

[57] Lyman Ray Patterson, *Copyright in Historical Perspective*, Nashville: Vanderbilt University Press, 1968, p.219

copyright should be limited again to its traditional function, as a commercial entitlement against unfair competition, not to a pattern upon any use of information in digital world.

More importantly, since copyright law is no longer a special law only for specialists, it is a norm for everyone in civil society, and thus must become a civil law "for everyone". Unfortunately, since the beginning of our copyright system, it has concerned little about the interest of mass individual users and thus of society. There is little place for individual users and the public voice in copyright bargain, and therefore, individual users and society have traditionally been regarded as an indirect rather than direct beneficiary of copyright regime. However, this kind of idea needs to be renovated with a new way of copyright jurisprudence, with which the center of copyright must transfer from the imagined "author" to the real "individual users", for the latters have become the main subjects of the copyright legal relationship, and directly decide whether the future copyright system could be accepted and work properly.

In a word, the subject status of copyright jurisprudence transforms from a handful of right holders (i.e. entrepreneurs and content cartels), to the mass individual users and thus to the public, called for a "mass line" mobilization of the current copyright regime in order to survive in digital era. The Chinese scholar Feng Xiang once analogized this "mass line" of intellectual property to the great contribution of St. Paul to the emerging Christianity, namely a flexible view on "Torah", the law of Moses, in order that the good news of the kingdom of God be accepted more conveniently by gentiles as well as Torah-abiding Jews.[58] For instance, the saint brushed aside such "old" covenantal stipulations as circumcision, sacrificial rituals and kosher food to convert gentiles. This compromising spirit, however, is for a new faith in the salvation "of all and for all".[73] It is therefore a new jurisprudence, a law without the law, as Paul described in one of his letters to gentile congregations that he founded (1 Corinthians 9:19-23):

> *"For though I be free from all men, yet have I made myself servant unto all, that I might gain the more. And unto the Jews I became as a Jew, that I might gain the Jews; to them that are under the law, as under the law, that I might gain them that are under the law; To them that are without law, as without law, (being not without law to God, but under the law to Christ,) that I might gain them that are without law. To the weak became I as weak, that I might gain the weak: I am made all things to all men, that I might by all means save some. And this I do for the gospel's sake, that I might be partaker thereof with you"*.

In conclusion, therefore, two observations may be in order. First, copyright must be limited to its traditional function as against unfair competition, not against the mass individual users' daily acts upon the use of information. Second, in order to attain a new universalism to survive in digital world, a new copyright regime must both "under the law" and "without (i.e., outside) the law", "free" or "weak", of all and for all to gain the more. Anyway, when the current copyright regime attempts to find its road to Damascus (Acts 9:3-6), it must always keep in mind that "*Vox populi, vox Dei*" (The voice of the people is the voice of God).

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[58] See Feng Xiang, supra note, pp. 105-106. [73]
See id.