



**THE CONFLICTS BETWEEN COPYRIGHT AND THE NORMS OF  
ONLINE RE-CREATIONS: AN EMPIRICAL ANALYSIS**

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***ABSTRACT***

*As a fundamental principle, by granting exclusive rights, copyright provides economic incentives to encourage authors and artists to express their ideas, and in that process, create a new work. As a general rule, when using a protected work, a person needs permission from the copyright holder of such work. However, this article finds that: economic interests provided by copyright are not the primary incentives for authors to create a work; and due to some obstacles, people cannot conform to the copyright rule that permission to use a copyright work is required. These conclusions are supported by an original empirical study on the social norms concerning the practice of online re-creations.*

**I. INTRODUCTION**

Possibly since the emergence of human society, people create works by using existing materials of previous creators. Facilitated by the Internet and digital technologies, people worldwide are now enabled to easily re-create works by using preceding works and distribute such re-creations on the internet at minimal cost. Those “online re-creations”<sup>1</sup>

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<sup>1</sup> The term should not be confused with “user-generated content” or “UGC” which is generally and broadly referred to content generated by consumers or users on the internet platforms where users are not merely passive viewers but also active creators of new works. UGC encompasses broader types of works: user-authored content, user-copied content and user-derived content. (Daniel Gervais, ‘User-Generated Content and Music File-Sharing’ in Michael Geist (ed), *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Irwin Law 2010) 465;

are for example, fan fiction<sup>2</sup>, mash-up<sup>3</sup>, fanvids<sup>4</sup>, parody<sup>5</sup>, and fan-made virtual world<sup>6</sup>. They typically involve copying, reproducing and sharing a copyright protected work without permission of the right holder of the work; therefore potentially infringe the exclusive rights of the right owner particularly the rights concerning reproduction and communication of the work to the public. Despite the lack of case law and uncertain legal status regarding these subsequent works<sup>7</sup>, infringements are usually assumed to occur.

This article will analyse the relation between copyright and the human behaviour of online re-uses in two main focuses: (i) incentives to create a work, and (ii) attitudes towards authorisation to use a work. To understand the relationship, the social norms concerning online re-creation activities need to be discovered. Since empirical research on the subject is sadly lacking in the legal academy, the original quantitative and qualitative study conducted in 2014 and 2015 contributes to the useful analyses. Supporting by the empirical evidence, the article concludes that economic interests provided by copyright are not the primary reasons for works to be created. It also finds that, in most cases, people cannot conform to the copyright rule to obtain permission to use a work due to some obstacles; and in some cases, people do not think it is reasonable to require authorisation to use a work.

## II. THE EMPIRICAL STUDY

The analyses in this article are mainly resulted from the empirical study designed to discover social norms concerning online re-creations from the perspectives of the stakeholders: original creator of a work, re-creator and the general public.<sup>8</sup> The data were

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Daniel Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (2009) 11 Vand. J. Ent. & Tech. L. 841, 858-859).

<sup>2</sup> Fan fiction can be defined as "any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as 'professional' writing." (Rebecca Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17 Loy. L.A. Ent. L. Rev. 651, 655).

<sup>3</sup> A mash-up involves taking and combining content of visual and/or audio works from multiple sources to produce a new work.

<sup>4</sup> Fanvids or viddings are fan-made videos where vidders remix footage from movies, television shows, or videogames, and synchronise the clips to a soundtrack or a popular song to express an aspect of the underlying story or the characters or to create entirely new storylines.

<sup>5</sup> Parody, in a broad definition, is a type of re-creations made to criticise, comment, mock or ridicule an object. It can be in any formats ranging from novel, song, picture, video, to virtual art.

<sup>6</sup> The term "virtual world" describes online immersive "game-like" environments where multiple users engage in the world simultaneously. Virtual worlds which are open world games allow players to choose how to play the game and give them freedom and facilities to create any virtual items which display on computer screen in sophisticated three-dimensional figures. Players can build virtual environments and create characters and any objects from their own imagination or based on works of popular culture.

<sup>7</sup> For example, in case of fan fiction, Stendell comments: "Because there are no reported cases, the discussion of the legalities of fan fiction is largely speculative, confined to the realm of law review articles and Internet discussions, produced by legal professionals and amateurs debating the issue." (Leanne Stendell, 'Fanfic and Fan Fact' (2005) 58 S.M.U. L. Rev. 1551, 1554).

<sup>8</sup> The main questions in the empirical research consist of the four keystones: perspectives on the issues of asking permission from the original creator, original creator acknowledgment, commerciality of online re-creation and

collected from two concurrent methods of data-gathering<sup>9</sup> i.e. survey and interview<sup>10</sup> undertaken between October 2014 and September 2015.<sup>11</sup> The survey<sup>12</sup> targeted the members of the public, namely any person in the society all over the world.<sup>13</sup> It was completed anonymously by 302 participants in total.<sup>14</sup> The interviews<sup>15</sup> were conducted to discover normative expectations of the original authors and re-creators. There were 14 original creators<sup>16</sup> and 9 online re-creators<sup>17</sup> participated in the interviews.

### III. DOES COPYRIGHT ENCOURAGE OR DISCOURAGE CREATIVITY?

The concept of creativity is complex and there is no single comprehensive definition of creativity.<sup>18</sup> Creativity as an object which copyright aims to foster has never been clearly defined by copyright policymakers. A concern is raised that the minimal investigation of the theories of creativity and the creative process is a serious shortcoming for copyright theorists.<sup>19</sup> Patry criticises that proclaiming that we wish to encourage creativity without knowing the kind of creativity we aim to encourage and then figuring out how to stimulate that creativity is “an empty gesture”.<sup>20</sup> Sawyer suggests that if the law is not aligned with the empirically observed nature of creativity, its goal to promote

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compensation to original creators. The data from the empirical research were used and analysed herein as pertinent to the purpose of this article.

<sup>9</sup> The purposes of using the two methods are to enhance the possibility of collecting data from a broad range of participants worldwide and to increase the ability to evaluate the collected data.

<sup>10</sup> All participants were anonymised and were over eighteen years of age consisting of any gender and ethnical backgrounds.

<sup>11</sup> The study was carried out substantially at the three popular culture conventions in London, England (London Film and Comic Con 2014 and MCM London Comic Con 2014 in October 2014, and MCM London Comic Con 2015 in May 2015) and at a convention in Washington State, the US (the World Science Fiction Convention 2015 in August 2015).

<sup>12</sup> There were 15 short questions in the survey comprising of multiple choice and rating scale types of questions. In some questions, respondents were given chance to write an alternative answer or comment in a textbox marked ‘other’. The survey could be completed both online and offline. The online version assists that anyone all over the world can potentially access and complete the questionnaire.

<sup>13</sup> Approximately 76% of the survey participants identified themselves as not a re-creator.

<sup>14</sup> The survey respondents came from a range of countries and ages. However, they were biased towards the younger half of the age range i.e. 25% of all survey respondents were between the age of 18-25 and 47% were between the age of 26-35. This is because the younger age groups tend to complete the online version of the survey and attend the comic conventions. Besides, most survey participants were from common law countries since the data were collected at the popular conventions in London in 2014-2015 and at the world science fiction convention 2015 in Washington, the US. (Approximately 60% of all survey participants are from the US, UK and other EU countries).

<sup>15</sup> The interviews were conducted face-to-face except two interviews with original writers: one was undertaken by phone, and another by written questionnaire. All interviewees are anonymised.

<sup>16</sup> They consist of 2 literary agents of an original writer and 12 original writers and/or producers.

<sup>17</sup> They were 6 fan fiction writers, one filking performer and parodist, one anime music videos maker and one scanlationer.

<sup>18</sup> From the historical research on creativity, the thoughts of creativity differ from periods of time: from the pre-Christian views, to Christian views (or early Western), Renaissance (or science), to Western and Eastern views. (See, e.g., Robert Albert and Mark Runco, ‘A History of Research on Creativity’ in Robert Sternberg (ed), *Handbook of Creativity* (Cambridge University Press 1999) 16-19).

<sup>19</sup> Molly Shaffer Van Houweling, ‘Bumping Around in Culture: Creativity, Spontaneity, and Physicality in Copyright Policy’ (2007) 40 U.C. Davis L. Rev. 1253; Cohen comments that the study of creativity has been problematic for copyright scholars and the boundaries of copyright’s epistemology excludes many other approaches to investigating the creative process. (Julie Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U.C. Davis L. Rev. 1151).

<sup>20</sup> William Patry, *How to Fix Copyright* (Oxford University Press 2011) 18-19.

knowledge and creative works will be less effective.<sup>21</sup> He concludes that the overall creativity of society may be better enhanced by modifying intellectual property law to better align with the empirical process of creativity and innovation.

Despite the absence of substantial understanding of creativity, lobbyists for the copyright industries tend to assert that copyright is the single most important prerequisite for creative culture and since “[n]o one wants to be against creativity, and if copyright equals creativity then no one wants to be against copyright.”<sup>22</sup> Under such influence, copyright lawyers and scholars are in the habit of assuming that copyright law is centrally critical in stimulating creativity.<sup>23</sup>

To understand the role of copyright in relation to creativity, the process of creation is therefore explored below.

### A. The Human Creative Process

Human creation has long been perceived as a mystery, divine and the supernatural. While Plato discussed divine inspiration or supernaturalism as the source of creativity<sup>24</sup>, Aristotle considered creation as a natural ceaselessly process of re-using existing materials<sup>25</sup>. The notion of divine creation *ex nihilo* has significantly been contested since the mid-nineteenth century. From a number of studies on creativity in diverse disciplines including philosophy, anthropology, psychology, and sociology, it is now agreed that creativity should be conceived as a natural human behaviour of creating a new work from something that previously existed.<sup>26</sup> Copyright scholars have also recently acknowledged the natural process of creation that creative activity is a result of cultural and social play based on preceding works and that humans cannot create out of nothing.<sup>27</sup>

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<sup>21</sup> R. Keith Sawyer, ‘Western Cultural Model of Creativity’ (2011) 86 Notre Dame L. Rev. 2027.

<sup>22</sup> Julie Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U.C. Davis L. Rev. 1151, 1192.

<sup>23</sup> Julie Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U.C. Davis L. Rev. 1151, 1192.

<sup>24</sup> Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005) 27-37.

<sup>25</sup> “Of things that come to be, some come to be by nature, some by art, some spontaneously. Now everything that comes to be comes to be by the agency of something and from something and comes to be something.” (Aristotle, *Metaphysics* (Ross W. D. (tr), Oxford University Press 1928) Book VII).

<sup>26</sup> Paul Oskar Kristeller, ‘Creativity and Tradition’ (1983) 44(1) *Journal of the History of Ideas*, 107; Thomas Ward, ‘What’s Old About New Ideas?’ in Steven Smith, Thomas Ward, and Ronald Finke (eds), *The Creative Cognition Approach* (MIT Press 1995) 157-178; Robert Weisberg, ‘Case Studies of Creative Thinking: Reproduction versus restructuring in the real world’ in Steven Smith, Thomas Ward, and Ronald Finke (eds), *The Creative Cognition Approach* (MIT Press 1995) 53-72; Raymond Nickerson, ‘Enhancing Creativity’ in Robert Sternberg (ed), *Handbook of Creativity* (Cambridge University Press 1999) 392-394; Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005); Leslie Kim Treiger-Bar-Am, ‘Adaptations with Integrity’ in Helle Porsdam (ed), *Creativity and Other Fairy Tales* (Edward Elgar 2006); Paul Thompson, ‘Community and Creativity’ (2009) 37(2) *Oral History* 34; Andreas Rahmatian, *Copyright and Creativity* (Edward Elgar 2011) 184-185; Phillip McIntyre, *Creativity and Cultural Production* (Palgrave 2012) 4; Graham Dutfield and Uma Suthersanen, ‘The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity’ (2004) *IPQ*, 379, 382.

<sup>27</sup> William Landes and Richard Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18(2) *Journal of Legal Studies* 325, 332; Pierre Leval, ‘Toward a fair use standard’ (1989) 103 *Harv L Rev* 1105, 1109; Justice Laddie, ‘Copyright: Over-strength, Over-regulated, Over-rated?’ (1996) 18(5) *E.I.P.R.* 253, 259; Ann Bartow, ‘Copyrights and Creative Copying’ (2004) 1 *UOLTJ* 75; Leslie Kim Treiger-Bar-Am, ‘Adaptations with integrity’ in Helle Porsdam (ed), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity* (Edward Elgar 2006) 75; Julie Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U.C. Davis L. Rev. 1151; Neil W Netanel, *Copyright’s Paradox* (Oxford University Press 2008); Olufunmilayo Arewa, ‘Youtube, UGC, and the Digital Music: Competing

Creations are always built on the existing works of the past either by taking them as inspiration or incorporating parts of them in the new work. Even the most famous artists, writers, and composers inevitably immerse themselves with talented works of former creators. Exemplifying the case of Einstein and Mozart, Einstein acknowledged that he could not have conceived the theory of relativity without the benefit of the discoveries and precedent theories of other great physicists who had come before him.<sup>28</sup> Similarly, the so-called child prodigies must have grown their experience and competence within a particular domain. For instance, the development of Mozart's musical experience indicates that Mozart only produced the distinctive music after a lengthy period of training as the outcome of a combination of personality, environment and hard work; his earliest works involved immersion in the works of contemporaries among whom he grew and possibly involved using former composers' music as models of composition.<sup>29</sup>

Creativity is crucially a result of an interactive process between individuals and significantly influenced by the environmental, social and cultural contexts<sup>30</sup> which happened through communication.<sup>31</sup> Creativity is not merely a matter of an individual but a matter of "people working in intended or unintended collaboration";<sup>32</sup> and to co-operate, participated co-creators need not agree with one another.<sup>33</sup> In the presently preferred sense, co-operation "involves kinds of interaction indirectly and at a distance, in different spaces and times, not just direct collaboration in a shared space- and time-frame."<sup>34</sup> In this regard, creators in the modern world can virtually co-operate with the creators of the former works. This is also particularly precise in the internet age where people can co-create a work, both with and without intention to co-operate, regardless of the place and time difference. In this aspect, creativity is perceived as a collective, team-based process rather than as individual genius.

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Business and Cultural Models in the Internet Age' (2010) 104 Nw. U. L. Rev. 431, 434. Rebecca Tushnet, 'Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters' (2010) 6(1) ISJLP 1, 2 ("Remix is the basic human condition."); David Simon, 'Culture, Creativity & Copyright' (2011) 29 Cardozo Arts & Ent. L. J. 279.

<sup>28</sup> Gerald Holton, 'Einstein's Search for the *Weltbild*' (1981) 125(1) Proceedings of the American Philosophical Society 1.

<sup>29</sup> John Hayes, 'Cognitive Processes in Creativity' in John Glover, Royce Ronning, and Cecil Reynolds (eds), *Handbook of Creativity* (Plenum Press 1989); Robert Weisberg, 'Creativity and Knowledge', in Robert Sternberg (ed), *Handbook of Creativity* (Cambridge University Press 1999) 235-236; Michael Howe, *Genius Explained* (Cambridge University Press 1999) 3-7.

<sup>30</sup> Csikszentmihalyi views that creativity involves an interaction between a person, a field and a domain (Mihaly Csikszentmihalyi, 'Society, culture, and person: a systems view of creativity' in Robert Sternberg (ed), *The Nature of Creativity: Contemporary Psychological Perspectives* (Cambridge University Press 1988) 325-339. Similarly, Cohen proposes that creative processes involve interactions between the individual and the cultural landscape. (Julie Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40 U.C. Davis L. Rev. 1151, 1153-1154).

<sup>31</sup> Carl Rogers, 'Toward a theory of creativity' in Carl Rogers, *On Becoming a Person: A Therapist's View of Psychotherapy* (Constable & Robinson 1961) 350; Daniel Goleman, *Emotional intelligence: Working with emotional intelligence* (Bloomsbury 2004); Walter Santagata, *The Culture Factory: Creativity and the Production of Culture* (Springer 2010) 28-29.

<sup>32</sup> David Harrington, 'The ecology of human creativity' in Mark Runco and Robert Albert (eds), *Theories of creativity* (SAGE 1990) 144.

<sup>33</sup> Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005) 66.

<sup>34</sup> Rob Pope, *Creativity: Theories, History, Practice* (Routledge 2005) 66.

Although, the ability to access and use the domains is indispensable for the human intellectual process<sup>35</sup>, copyright law limits the ability of people to re-use preceding works. Copyright law, with limited exceptions<sup>36</sup>, imposes a major rule on human behaviour that people cannot use copyright protected materials without authorisation of the right holders and/or royalty payment. In other words, the natural behaviour of human to use existing creations in making something new is lawful on the condition that permission from the right holder is attained, usually with a royalty payment. Copyright is designed to provide a protection for economic interests to encourage creation of new works; however, the legal rule that a re-creator has to obtain authorisation and pay royalties contradicts to the social practice on re-creations. This issue is criticised in part 4 below.

## B. Non-copyright incentives

It is widely believed that the exclusive rights under copyright law are granted to encourage production of creative works: authors of works are crucially incentivised by the economic interests. As in the words of Samuel Johnson, “[n]o man but a blockhead ever wrote, except for money.”<sup>37</sup> However, the necessity of copyright incentives has recently been contested. Copyright protection does not always contribute to a direct incentive to create a work.<sup>38</sup> There are other motives for creation including the desire for fame and recognition.<sup>39</sup> As Davies suggests, “the expectation of financial reward is not the only reason for authors and other artists to create. They are not necessarily motivated primarily by monetary interests; many are impelled to create as part of their personality, creation being in their nature.”<sup>40</sup> Some commentators propose that natural and intrinsic

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<sup>35</sup> Wallas proposed that the process of creativity consists of four stages: i.e. preparation, incubation, illumination and verification. The stage of preparation involves the gathering of knowledge or information is the vital part of the creative process. (Graham Wallas, *The Art of Thought* (Solis Press 2014)).

<sup>36</sup> There are some copyright exceptions that permit limited use of copyright works without authorisation of the copyright owner. However, they are too limited and do not usually allow many types of re-creations. Parody exceptions and the fair use doctrine are good examples. As to copyright exceptions for parody, the EU and UK require that a parody must be an expression of humour. The very restricted definition of parody significantly stifles critical re-creations. The scope of the US fair use exception (Section 107 in Title 17 of the United States Code) is also too narrow as it usually allows “parody” that mocks the style and expression of the underlying work in order to criticise that original work, but usually does not permit “satire” which borrows an existing work to criticise or ridicule someone or something that does not concern the borrowed work. (See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Dr. Seuss Enterprises v. Penguin Books USA Inc.*, 109 F.3d 1394 (9th Cir., 1997)). In addition, due the absence of the case law concerning online re-creations such as fan fiction, fanvids and mash-ups, the application of the existing copyright exemptions on these works remains obscure.

<sup>37</sup> See, e.g., *Acuff-Rose Music Inc v. Campbell* 510 U.S. 569, 584 (1994) (cited 3 Boswell’s Life of Johnson 19 (G. Hill ed. 1934)).

<sup>38</sup> This happens in many instances such as where copyright in works created in the course of employment, where academics write for tenure or promotion rather than for royalties, and other situations where creators are not the owners of copyright. In these circumstances, “salary and benefits are both the incentive and reward for creation. Although it can be argued that copyright protection provides the basis for the company’s ability to continue to pay its employees, and thus encourages the creation and dissemination of work, this link is far from direct.” (Teresa Scassa, ‘Interests in the Balance’ in Michael Geist (ed), *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2005) 52-53).

<sup>39</sup> Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) 248. Besides, some authors are even willing to pay money to have their works distributed. (See, e.g., Arnold Plant, ‘The Economic Aspects of Copyright in Books’ (1934) 1 *Economica* 167, 168-169).

<sup>40</sup> Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) 248.

motivations are much more important to encourage authors in creation of new works than extrinsic factors as financial reward.<sup>41</sup>

In this regard, Plant observes that “[t]here is . . . an important group of authors who desire simply free publication; they may welcome, but they certainly do not live in expectation of, direct monetary reward.”<sup>42</sup> Online re-creators are such group of authors.<sup>43</sup> By the nature of online re-uses such as fan fiction and parody, the primary incentive for re-creation is typically not generated by copyright or financial benefits. Fan authors are encouraged to write their stories by their own creative minds with a will to express their imagination. Parodists create works by their desire to comment upon something and communicate their opinions. Moreover, re-creators that are motivated by non-commercial factors tend to provide a broader array of creative content than creators that are incentivised solely by monetary rewards for mainstream markets.<sup>44</sup> The dissemination of these creative works contributes to the advanced society.

The importance of intrinsic and non-monetary motivations is evidenced by the empirical research findings.<sup>45</sup>

Concerning the incentives of re-creators, the survey data (Figure 1) demonstrates that most participants make re-creations for self-fulfilment, free expression, and participation in community. Among 72 re-creators who participated in the survey, 83% state that they make a re-creation because it is fun and they enjoy doing it. While 57% of the survey respondents want to express their thoughts about something, 40% want to participate in an online community. Some survey respondents state other reasons which illustrate a similar trend.<sup>46</sup> Evidently, monetary motivation does not play a significant role.<sup>47</sup>

<sup>41</sup> See, e.g., Rebecca Tushnet, ‘Economies of Desire: Fair Use and Marketplace Assumptions’ (2009) 51 *Wm. & Mary L. Rev.* 513; Diane Leenheer Zimmerman, ‘Copyrights as Incentives: Did We Just Imagine That?’ (2011) 12 *Theoretical Inq. L.* 29; Eric E. Johnson, ‘Intellectual Property and the Incentive Fallacy’ (2012) 39 *Fla. St. U. L. Rev.* 623.

<sup>42</sup> Arnold Plant, ‘The Economic Aspects of Copyright in Books’ (1934) 1 *Economica* 167, 169.

<sup>43</sup> See also, Carmit Soliman, ‘Remixing Sharing: Sharing Platforms as a Tool for Advancement of UGC Sharing’ (2012) 22 *Alb. L.J. Sci. & Tech.* 279, 287-289.

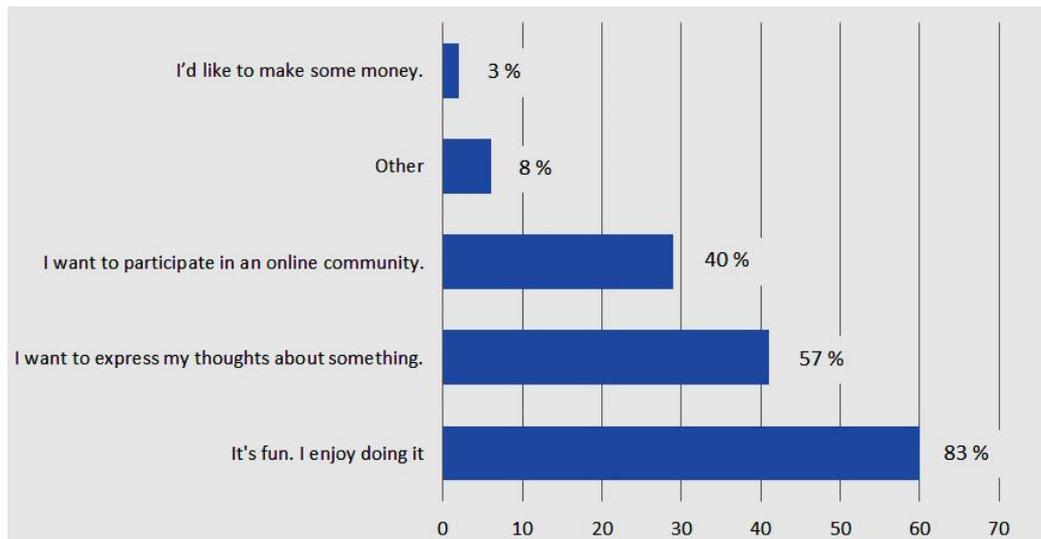
<sup>44</sup> “[N]oncommercial creative uses, precisely because they are not motivated by copyright’s profit-based incentives, are more likely to contain content that the market would not produce or sustain...” (Rebecca Tushnet, ‘User-Generated Discontent’ (2008) 31 *Colum. J.L. & Arts* 497, 507).

<sup>45</sup> It is noteworthy that the analysis of the re-creators’ motivations herein biased towards those who are amateur users of protected works, not authors in the creative industries. Nevertheless, even among the creators in the music industries which need a mechanism (i.e. copyright) to preserve commercial markets, intrinsic motivations or emotional benefits (e.g. self-expression, communication, peer respect and popularity) are significant drives for music production. (See, e.g. Jiarui Liu, ‘Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation’ (2015) 38 *Colum. J. L. & Arts* 467).

<sup>46</sup> 6 respondents give additional reasons:

- “It’s an activity I can do with and share with friends!”
- “I like to draw.”
- “I want to read the thing, and my Japanese isn’t fluent enough if I don’t sit down and translate it word by word. I don’t have the patience to do that only for myself, so I translate for many people.”
- “I do it for advocacy work.”
- “It’s a good way to engage creatively with others and to improve my skills.”
- “[It is a] way to appreciate something I love and put my own [materials] into it.”

<sup>47</sup> Only 2 re-creators state that they make a re-creation because they would like to make some money.



**Figure 1: Why make a re-creation? (survey data)**

From the interviews, the sample of online re-creators produced their re-creations in various forms ranging from written (fan fiction), visual (scanlation<sup>48</sup>), musical (filk<sup>49</sup>) to audio-visual works (anime music videos or fanvids). Similar to the survey results, their primary incentives to re-create works are enjoyment, fun and love in the underlying popular works<sup>50</sup>, not for economic rewards.<sup>51</sup>

In summary, though copyright fulfils some important functions to encourage creative practices and provide economic benefits<sup>52</sup>, it does not play a single and direct role to the stimulation of creative works.

<sup>48</sup> “Scanlation” (a portmanteau word of “scan” and “translation”) is produced by scanning an original Japanese comics or manga, then digitally erasing the Japanese characters and inserting a translation into another language. This practice is similar to fansub or fan-made subtitle. “Fansub” (short for fan-subtitled) is the term referred to the production of fan-produced, translated, subtitled version of a Japanese anime episode or foreign film and television shows.

<sup>49</sup> Filk, filking or filk song is a style of music that combines words that have a science fiction or fantasy theme such as names of places and characters from popular works into lyrics. It can be a complete original song (i.e. original lyrics and music involving words of popular culture) as well as new lyrics combined with pre-existing music. Filk songs can vary from funny to heart wrenching and from silly to serious. Although filks are traditionally to be performed at conventions, nowadays more fans post their filk songs and videos of filking performance online. The word “filk” was originally a typographical error for “folk” in a 1950s essay circulated among science fiction fans. The term had since been accepted and used to fundamentally mean science-fiction folk music. (Lee Gold, ‘An Ecocentric and Convoluted History of Early “Filk” and Filking’ (1997) <[http://www.fanac.org/Fan\\_Histories/filkhist.html](http://www.fanac.org/Fan_Histories/filkhist.html)> accessed 16 November 2016).

<sup>50</sup> All interviewed re-creators stated that they made and shared re-creations online because they enjoyed doing it and think that it was a fun thing to do. One interviewee said, “I love writing and enjoy doing it, also, I love the original books so much so combining the two things makes me and my readers who like [a particular popular work] happy.” Another said, “the works that I borrowed are the ones that inspired me.” Another re-creator commented that “when people do [re-creations], they are not trying to make money... they’re doing it because they love the stuff” and that “people spend a lot of time and money on these [online re-creations] and they are not looking to get reimbursed.”

<sup>51</sup> Regarding financial gain, 2 (out of 9) online re-creators in the sample gained small money from distributing their re-creations; one of them gained money merely sufficient for maintaining the website. One noted that “I would do more to gain money if I was more worried about the money.”

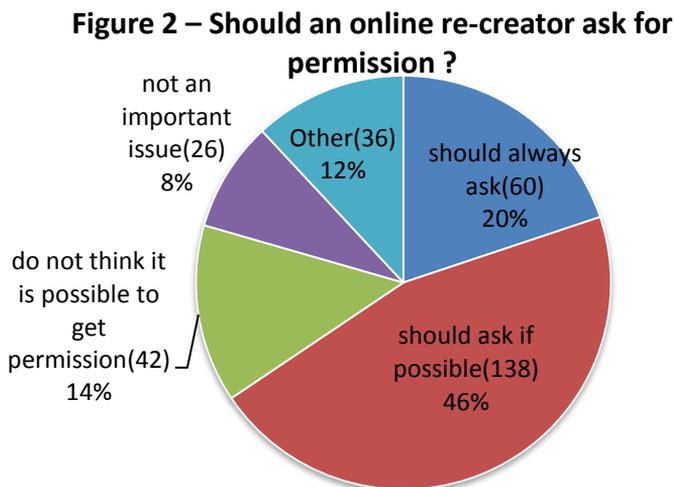
<sup>52</sup> Tyler Cowen, *In Praise of Commercial Culture* (Harvard University Press 2000).

#### IV. ATTITUDES TOWARDS OBTAINING PERMISSION

As discussed above, although copyright has an objective to stimulate creativity, it is not the single most important factor for authors to create their works. Copyright interrupts the natural process of creativity by imposing that, to use a work, authorisation from the right holder of the work is required. Nevertheless, it is almost impossible for a person to obtain permission to incorporate a copyright work into an online re-creation due to some practical issues analysed in this section. As a result, people tend to create new works using existing elements without permission and consequently tend to be violating the copyright rule.

##### A. Authorisation Difficulties

From the empirical research findings<sup>53</sup>, the majority of survey participants and interviewees agree that it is a good practice to ask for permission from the original creators of a work before using the work for re-creation. However, all stakeholders (i.e. original creators, online re-creators, and the general people) concern that there are difficulties in obtaining permission.



The majority of survey respondents think that a person should ask for permission before using a copyright protected work to re-create (see Figure 2).<sup>54</sup> However, some of the respondents do not think that it is possible to get permission.<sup>55</sup> Coherently, from the

<sup>53</sup> The empirical data were collected from two concurrent methods of data-gathering i.e. survey and interview. The details of the empirical research is given above in Part II of this article.

<sup>54</sup> Approximately 66% of the survey respondents think that a person should ask for permission from an original creator before using the original work. (46% think that an online re-creator should ask for permission from an original creator if possible while 20% think that online re-creators should always ask for permission).

<sup>55</sup> 14% do not think that it is possible to get permission (See Figure 2).

interviews with the original creators, re-creators should ask for their permission and original creators should maintain control over the use of their works. Most online re-creators participated in the interviews also agree that obtaining permission to use a work is desirable. Nevertheless, in practice, none of them has ever asked for permission to incorporate the original content in their re-creations<sup>56</sup> due to some obstacles.

## 1. PRACTICAL PROBLEMS

Under the current copyright law, obtaining a license to re-create is practically impossible. Remarkably, authorisation obstacles are raised by all stakeholders.

Some research participants concern that it is not practical to give and get permission mainly because it is difficult to communicate and negotiate with the creators of the original work,<sup>57</sup> and there are too many online re-creators for any given work; it is therefore not practical for an original creator to give individual permission to each re-creation. Some original writers remark that it would be difficult in practice when a large amount of people, sometimes, thousands or millions of people, contact the original creator asking for permission to use the work for re-creations. In that case, it is difficult to deal with “a flood of emails”. They propose that it is therefore better to draw a clear boundary of what can be done and what cannot be by inventing rules or a code of action so that the majority of people can enjoy that freedom but if they want to cross the boundary then they need to get permission. Due to the volume of online re-creations generated in the digital world, it is not practical for an owner of a popular work to individually grant permission to each use.

Another hindrance raised by an online re-creator participated in the interview is that the collective licensing scheme would not allow re-creators to alter the original content even for creative or communicative purpose such as parody.<sup>58</sup> Permission from the right owner to use a work to re-create would not likely be granted.

## 2. UNWILLINGNESS TO AUTHORISE

After finding the right owners and asking for permission to use a work, re-creator may face a problem of unwillingness to authorise. Although some right holders may consider

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<sup>56</sup> Acknowledging that their activities are unauthorised, all interviewed re-creators agree that they would remove their re-creations if the original creator requests them to delete or stop sharing their re-creations due to a copyright claim. Some of them state that: “I’ll stop because they’re the original creators”; “I would talk to them about it. If I could not convince them, I would stop”.

<sup>57</sup> A fundamental problem of obtaining authorisation from the right holder is that it is difficult to identify, locate and communicate with the proper owners of copyright due to the absence of registration requirement and due to the fact that copyright interests in a work can be split between multiple copyright holders: it is a tremendous hurdle to obtain licenses from a number of parties.

<sup>58</sup> Normal licensing schemes are designed for transactions between companies or professionals, not for amateur individuals. Besides, collective administration, a system that enables licensing from numerous owners to multiple users, is for non-altering uses rather than for re-creation of works or derivative works. (See e.g. Daniel Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2009) 11 Vand. J. Ent. & Tech. L. 841, 848-849). Indeed, copyright law was devised by and for industrial companies, not for individual end users. (Jessica Litman, ‘Revising Copyright Law for the Information Age’ (1996) 75 OR. L. Rev. 19).

granting permission to re-create, it is more likely that copyright owners will refuse to allow a re-creation of their works. Original owners of works tend to be less interested in licensing to amateur re-users who could yield them trivial or no revenue. Furthermore, there is an uncertainty on the part of the rights owner about risks in granting a license: thus they would rather decline the request in order to shield himself from possible problems. From the interviews, many original creators would consider approving online uses of their works on a case by case basis and may grant permission with some conditions as they concern, for instance, about the nature of the use<sup>59</sup>, the content of the re-creations and the alteration of the original work<sup>60</sup>, re-presentation of their work and reputation management<sup>61</sup>; some of them even prefer to fully have their control over any re-creation of their work. Nevertheless, allowing re-uses of existing works but maintaining much control leaves too narrow scope of permitted activities; as a result, suppresses freedom of expression of creative re-users.

One original author comments that he would prefer to grant permission or license to a professional company for example to make a film based on his book rather than to an amateur fan film. Another original writer states that if an original creator asks for his permission to use his works, he would legally have to decline the request in order to protect himself from possible problems.<sup>62</sup>

### 3. COST-PROHIBITIVE LICENSES

Even if the right holder is agreeable to permit a use of their original work, licensing fee for such use can potentially be cost-prohibitive.<sup>63</sup> Amateur re-users typically do not have sufficient fund to pay for high licensing fee like professional companies could invest because they normally disseminate their re-creations without charge. Negotiating a deal

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<sup>59</sup> For example, some of the original writers would allow online fan fiction based on his original characters if it is not involving money. Another writer viewed that there is no need to ask permission for writing something out of his story and have it at home or show it to friends but if someone wants to publish it online or sell it, they would need permission with an agreement of profit share (if it is done for commercial).

<sup>60</sup> Many original creators disapprove alteration of their original content e.g. fictional characters in such a way that it involved offensive materials and sexual relationship especially between characters of the same sex or the so-called "slash" fiction. Harmful contents that they are worried about are for example pornography, erotica or something bad for children if the audience of the original work are children.

<sup>61</sup> Original authors also want to protect the integrity of the brand they create and the reputation of the work. An original writer said "when you write a fan fiction... it's clearly a fan story... it's not the way I write or speak but when you put out a film that has my book's name on it and my characters, you don't know my level of involvement with the film but you have to assume that I said yes."

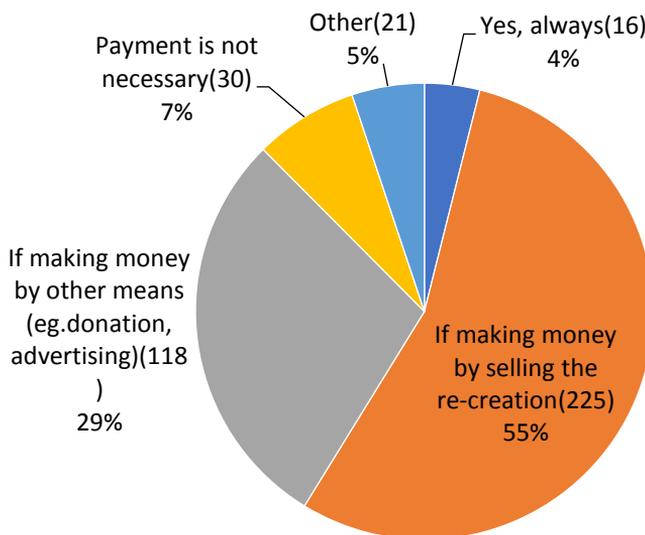
<sup>62</sup> When it comes to certain types of re-creation that original creators can license the right to a professional entity to produce an official and commercial work e.g. making a movie or play based on their original fiction, the original creators are reluctant to allow a fan or re-creator to make such work. This is because they are afraid that having granted a license to someone else would affect their right to license for potential markets. They are concerned that licensing or allowing a person for free to make use of their work such as making a film (e.g. fan film) will affect the right to sell such right to another to produce the work officially and commercially especially when the re-creation is of professional quality not just made by amateurs and consumed by a lot of people on the Internet (even if it is for non-commercial). They think that it would be less interested for business of any industry either publishers or film makers to buy the rights from them particularly the right to make a movie based on their original story.

<sup>63</sup> See, e.g., Urs Gasser and Silke Ernst, 'From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age' (2006) Berkman Center Research Publication 1, 13; Edward Lee, 'Copyright-exempt Nonprofits' (2013) 45 Ariz. St. L.J. 1433, 1443-1444.

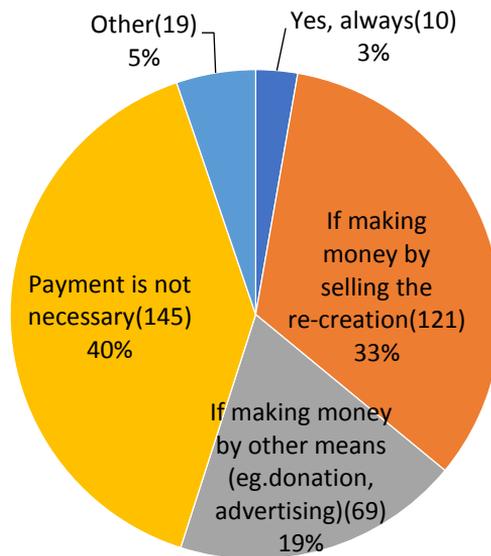
to authorise a use of protected works for online re-creations would predictably be extremely difficult.

Regarding licensing payment, the normative expectation of the general people can be concluded from the survey data that if an online re-creator makes money from their re-creation particularly by selling it, they should pay for using elements of the original work especially if the re-creation involved direct copy of the original work (see Figures 3 and 4 below). Some survey respondents comment that it is reasonable to also take into account the nature of the re-creation such as the purpose of the re-creation (e.g. for parody and criticism) and whether the re-creation competes with the original work.

**Figure 3 - Should an online re-creator have to pay for using existing work (by copying it directly)?**



**Figure 4 - Should an online re-creator have to pay for using existing work (*without copying parts directly*)?**



In the interviews, the online re-creators primarily think that an online re-creator should not pay for using parts of original work if the re-creation is not made for money especially when the original material is not directly taken. Interestingly, when considering the payment questions, the interviewed original authors give much weight to the commerciality of the re-creation rather than the nature of the work. As to the different kind of work, they consider written fan fiction to be more acceptable than other types of re-creations, certainly, provided that it is not made for money. In conclusion, original creators think that online re-creator who benefits financially from using parts of their works either directly or indirectly need to ask for their permission and negotiate licensing fee.

## **B. THE NATURE OF RE-CREATION AND NON-COMMERCIAL USE**

Remarkably, some survey respondents<sup>64</sup> suggest that it would not be possible to answer whether a person should ask for permission to use the work without taking into account other factors, namely the nature of the re-creation and commerciality of the new work:

- (a) If the use of an original work to re-create is reasonable, sufficiently creative, and different from the original work (e.g. the amount of the work taken is not substantial, the work is for creative or critical purposes, and it involves

<sup>64</sup> 36 people gave their opinions on this issue.

- indirect copy of original work such as fan fiction), the online re-creator of such work does not need to ask for permission;
- (b) There is no need to get permission to use an original work if the re-creation is not made for money.

In conformity, most original creators participated in the interviews think that a written fan fiction is more acceptable than other types of work provided that some conditions are met: e.g. if the fan fiction differs from the original story and does not involved earning money.

To summarise, if a use of a protected work is sufficiently creative and it does not involve gaining money, permission from the right holder should not be required.

## V. CONCLUSION

From the studies on creativity in diverse disciplines, it is a natural behaviour of people to create a new work by using existing materials of previous creators. The practice of benefiting from earlier creations has possibly become a norm since the emergence of the human society. Copyright then came into play and imposed a rule on the human conduct that in order to legally use the existing protected work, permission from the right holder of such work is required.

The empirical study finds that copyright law is significantly inconsistent with the social norm in re-creations and the legal rule does not effectively control re-making of existing materials particularly in the digital age. Most likely, people re-use existing works without permission. Although they consider it to be a good practice to ask for permission, certain issues stifle the desired behaviour. In some cases, people do not think it is reasonable to require permission; and in most cases, it is not practical to get and give permission.

The correlation between copyright and the practice of online re-uses can be summarised as follows.

First, the core incentive of creation is not copyright. Although copyright is widely thought of as an instrument to encourage creativity, in many circumstances, it is not the reason for works to be created. Many people create and re-create by non-monetary motivations including for self-fulfilment, free expression, and participation in the community of their choice, not for financial benefits. In summary, copyright reward has minimal impact on the motivation of online re-creation.

Second, according to the social norms, although re-creators should ask for permission from the right owners before using the protected work, there are difficulties in obtaining authorisation. The copyright-desired behaviour i.e. obtaining permission to legally re-create is forbidden by the following issues:

- a) It is difficult to communicate and negotiate with original authors and/or right holders.

- b) Due to the tremendous amount of re-creations in the online world, it is not possible to grant permission to each particular use.
- c) Permitted acts under the current licensing scheme are too limited. The collective licensing regime would not normally allow amateur re-creators to alter the original content.
- d) Original owners of works tend to be less interested in licensing their works to amateur re-users.
- e) Even if the right holders are agreeable to permit a use of their work, licensing fees for such use can potentially be cost-prohibitive. Amateur re-users typically cannot afford to pay for copyright royalties.

As a result, people cannot comply with the copyright rule.

Lastly, the copyright law is not sensible. According to the social norm analysed from the empirical findings, the law is unreasonably suppressing valuable non-commercial creative re-uses: if a use of a protected work is sufficiently creative and of non-commercial nature, permission from and payment to the right holder are not necessary. This normative expectation is possibly influenced by the fair use provision of the US copyright law<sup>65</sup> which gives much flexibility on a use of protected work particularly if such use is transformative<sup>66</sup> or non-commercial.<sup>67</sup> Nevertheless, the fair use exception is insufficient for creative re-uses.<sup>68</sup>

<sup>65</sup> United States Code 17 U.S.C. section 107.

<sup>66</sup> From the Supreme Court decision in *Campbell v. Acuff-Rose Music*, a new creation is 'transformative' if it does not merely "supersede the objects" of the original work but instead "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message". (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

<sup>67</sup> Under the fair use law, a use of a protected work is less likely to be fair when it has a commercial character. However, transformative nature overrides other factors including commercial nature of the use. From a number of cases, if the alleged work has a high transformative value, then such use may be fair and thus not an infringement, regardless of any commercial objective. For instance, the parody song was decided to be transformative and consequently was found to be fair use in spite of its commercial character. (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)). See also *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998), *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), *Mattel, Inc. v. MCA Records, Inc.*, 296 F. 3d 894 (9th Cir. 2002), *Mattel, Inc. v. Pitt*, 229 F. Supp.2d 315 (2002), *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), *Mattel Inc. v. Walking Mountain Productions*, 353 F. 3d 792 (9th Cir. 2003), *Blanch v Koons*, 467 F.2d 206 (2nd Cir, 2006), *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>68</sup> Though parody is regularly held to amount to fair use and thus use of existing work for parodic purposes would like be fair, other types of online re-creations are problematic. Furthermore, the absence of the case law concerning online re-creations such as fan works causes a high degree of legal uncertainty. Many scholars criticise the legality of fan fiction and other fan (re-)creations in relation to the US fair use provision and propose possible amendments to the fair use doctrine. See, e.g., Rebecca Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17 Loy. L.A. Ent. L.J. 651; Leanne Stendell, 'Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction' (2005) 58 S.M.U. L. Rev. 1551; Christina Ranon, 'Honor Among Thieves: Copyright Infringement in Internet Fandom' (2006) 8 Vand. J. Ent. & Tech. L. 421; Rebecca Tushnet, 'Payment in Credit: Copyright Law and Subcultural Creativity' (2007) 70 Law & Contemp. Probs. 135; Sarah Trombley, 'Visions and Revisions: Fanvids and Fair Use' (2007) 25 Cardozo Arts & Ent. L.J. 647; Nathaniel T. Noda, 'When Holding On Means Letting Go: Why Fair Use Should Extend to Fan-Based Activities' (2008) 5 U. Denv. Sports & Ent. L.J. 64; Patrick McKay, 'Culture of the Future' (2011) 24 Regent U. L. Rev. 117; Vera Golosker, 'The Transformative Tribute: How Mash-Up Music Constitutes Fair Use of Copyrights' (2012) 34 Hastings Comm. & Ent. L.J. 381.

The legal rules and governmental coercion are more likely to be obeyed when it is in agreement with what is happening in society.<sup>69</sup> If the gap between legal rules and public perception is wide, the legal force to reform established norms is likely to fail.<sup>70</sup> Social change is a crucial cause of discrepancies between legal rules and public sentiment.<sup>71</sup> The gap between the copyright rule and the re-creation practice has become wider due to the societal and cultural change caused by the digital technology. However, not only caused by the environmental factor, the discrepancy between the law and the social norms is crucially induced by the aforesaid practical problems that make it almost impossible to obey the law.

To render copyright law effective, Litman proposes that the rules must “first, preserve some incentives for copyright holders (although not necessarily the precise incentives they currently enjoy); second, make some sense from the viewpoint of individuals; third, [be] easy to learn; and fourth, seem sensible and just to the people we are asking to obey them.”<sup>72</sup> It is therefore important to make trustworthy law by narrowing the gap between the copyright norm and the public sentiments. The analysis in this article can be a useful contribution to the improvement of copyright law regarding the two issues: copyright should be better aligned with the empirical nature of human creativity; and in particular regard to the rule of obtaining authorisation, the practical issues need to be solved rendering it practicable.

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<sup>69</sup> “Positive laws which are inconsistent with customs, usages or habits will be ineffectual or illegitimate.” (Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 5); “... legislation has to seek standing ground on the existing mores, and ... to be strong [it] must be consistent with the mores.” (William Graham Sumner, *Folkways: a study of the sociological importance of usages, manners, customs, mores and morals* (Ginn and Company 1940) 55); John Morison, ‘How to Change Things with Rules’ in Stephen Livingstone and John Morison (eds) *Law, Society and Change* (Dartmouth 1990) 75.

<sup>70</sup> Christopher Jensen, ‘The More Things Change, The More They Stay The Same: Copyright, Digital Technology, and Social Norms’ (2003) 56 *Stan. L. Rev.* 531, 563-564; Chris Reed, *Making Laws for Cyberspace* (Oxford University Press 2013) 126-128.

<sup>71</sup> “A discrepancy between legal rules and public sentiment may occur when: (1) rules have lagged behind changes in public sentiment, (2) public sentiment has lagged behind changes in the rules, or (3) when popular anxieties arise because the aims of legal controls are poorly understood.” (F. James Davis, et al, *Society and the law: new meanings for an old profession* (Greenwood Press 1978) 89).

<sup>72</sup> Jessica Litman, ‘Revising Copyright Law for the Information Age’ (1996) 75 *OR. L. Rev.* 19, 39.