行政院國家科學委員會專題研究計畫 成果報告

由寇恩的法律典範論數位著作權法制之形成
研究成果報告(精簡版)

計 畫 類 別 ：個別型
計 畫 編 號 ：NSC 95-2414-H-004-011-
執 行 期 間 ：95 年 08 月 01 日至 96 年 07 月 31 日
執 行 單 位 ：國立政治大學法律學系

計 畫 主 持 人 ：陳起行

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處 理 方 式 ：本計畫可公開查詢

中 華 民 國 96 年 09 月 25 日

行政院國家科學委員會補助專題研究計畫成果報告

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執行單位：國立政治大學法律系

中　華　民　國　96 年　9　月　25　日

中文摘要

寇恩的法律典範在自發性法律的規制模式上有所改良，尤重自律的規制。本文擬以該法律典範檢視數位著作保護法律的形成問題。隨著網際網路的普及，數位著作之著作權保護課題急迫又極具爭議。無論就網際網路的規制或數位著作權保護程度，均形成理論以及執行上的難題。重視自發性，互生性以及原則性的寇恩法律典範，強調個別問題解決與公共意見形成乃至法律基本原則等的相互成全，是否能為極其複雜的數位著作保護，提供適當的規制模式，是本研究所要探索的主題。

Abstract

The new legal paradigm of Jean Cohen improves the reflexive regulatory theory, placing its emphasis on the regulated self-regulation. This research examines the law making of the protection of the digital copyrighted works based on Jean Cohen's legal paradigm. The coming of the Internet age brings forward the urgent and controversial issues of digital copyright. These issues are difficult both theoretically and in terms of enforcement, no matter one perceives them from the point of view of Internet regulation or copyright protection. Cohen's legal paradigm emphasizes reflexivity, co-originality and legal principle, and treasures the mutual enabling between the local solutions and forming of public opinions and legal principles. Whether such legal paradigm can serve as an adequate regulatory model for digital copyright protection is the focus of this research.

前言

本年度研究主題是承接上一年度的專題計畫，更進一步將研究焦點放在，以魯曼（N. Luhmann）系統論為基礎所發展的自發性法律（reflexive law）。雖然在德國，這方面理論的發展主要由Teubner 主導，在美國則有許多學者，並不以系統論出發，也發展了多樣的自律法律理論。Jean Cohen 是美國哥倫比亞大學（University of Columbia）政治系的教授[1]。她在Teubner 的基礎上試圖提出一項改良的模式，目的是要改善自發性法律私有化(privatization)及去管制化(de-regulation)的傾向，而無法真正做到Selznick 所強調的回應（responsiveness）；也就是自律的同時持續保持整體法律原則的維繫。

本年度的研究一方面深入闡述 Jean Cohen 的想法，並試圖運用其新法律典範觀察，批判數位著作保護的法律發展。數位著作保護是十分受到重視的法學研究領域，充滿的多元的理論及實踐上的想法與建議，如何將這些豐富的學理及社會實踐的經驗，納入國家法律形成的過程，是值得鑽研的課題。Jean Cohen 的新法律典範是否能提供理論基礎，更是本年度專題計畫有意深入探索的議題。

一、 研究目的

申請人認為，數位著作的保護，涉及許多不同意義脈絡下不同的保護考量。而同時在眾多不同的保護方案間，維持其原則上並未背離調和公益與私利等著作權基本原則，更是其困難所在。寇恩的新法律典範，似乎很適合作為架構不同著作權理念，與眾多地區性解決方案(local solution)[2]之間，相互檢驗，相互啟發，相互補充的規制架構基礎。一方面，有助於釐清數位著作保護理念的合理性及落實可能性；另一方面，個別數位著作規範環境下，基本權利義務關係，應該亦得以呈現其初期整全(integral) 的輪廓。

本計畫擬先闡明寇恩的新法律典範，及其在解決數位著作保護課題上可能的優越性所在。繼而整理美國學界就數位著作保護所提出之主張，及所論述之法律原則，做一整理，並加以比較分析，探索其理念核心。在此一基礎工作上，本計畫擬進一步就數位音樂或其他幾項數位著作的保護，其在執行面所面臨的困境，以及學者們所提出的保護主張間，展開整理，分析工作；並試著

[1] Cohn, Jean, Regulating Intimacy, A New Legal Paradigm, 2002,Princeton, Oxford: Princeton University Press

[2] 舉例而言，如數位音樂mp3, p2p問題; 數位資料庫的資料再利用問題; 數位著作授權契約是否應當審查，以及審查尺度的問題; 防盜拷錯失之違反與處罰問題，以及各類型的數位著作之合理使用問題等。

與先前整理的數位著作保護理念對話。其目的在探索數位著作保護的基本原則，以及國家法律（主要包括立法，與法院裁判）與自律環節（如系統業者，仲介團體以及各種商業同業公會，公益團體)，在寇恩法律典範指導下，應該如何進行分工，以及應如何提供其他環節重要的法律社會事實，以形成健全的數位著作權法制。此一規制架構下，何以能突破現在法制上所面臨的數位著作保護困境，是本項研究結論主要著墨之處。

二． 文獻探討

本年度研究計畫所涵蓋的文獻，在法學理論上，延續過去報告人理論基礎的文獻，只是更加深入。基本上，Cohen 同意 Teubner 綜合論述理論，系統論及回應型法律理論的理路，只是權衡重要性的分配上，有所差異。Cohen 發展其新法律典範的過程，更重視 Habermas 論述理性以及 Selznick 法律原則的理論。然而其理論所秉持的法律原則，與德沃金有重要差異，也值得進一步檢視。這是本年度計畫所涉及理論部分的文獻來源，請參考所附英文論文的參考文獻。

此外，本年度試圖將數位著作法律理論及實踐上的重要文獻檢視一番，並進一步探討 Jean Cohen 新法律典範是否可以為數位著作保護的法律形成提供新的思維。數位著作保護此一法學研究議題，目前受到極大多數的法學者的重視，論文量也因此特別多，本計畫由所發展出來的研究路徑，做了相當多的選擇。請參考所附本年度計畫執行時完成的中文論文的參考文獻。

四、研究方法與結論

報告人本年度研究計畫執行期間，以所附英文論文發表於 2007 年奧地利薩爾斯堡舉行的法資訊學國際研討會，並陸續修訂，目前已經投稿; 中文論文，探討美國近年來針對數位著作保護所提出得相當豐富的理論主張，因涉及時效，所以及早完成投稿，已經於 2007 年 6 月由台大法學論叢出版，成果豐富。

基本上，就資訊法律課題而言，如何結合公領域及私領域，共同為形成資訊法規範，是必然要走的道路。報告人將持續在此一研究路徑上，更加深入掌握法律實踐及法律理論上的議題。並思考如何進一步運用網際網路提升法行程過程的參與（eParticipation)。

六.自我評估

多年在資訊法律及法形成理論上的鑽研，報告人認為今後除了持續在法律爭議及理論上的辯論持續深入之外，也可以開始思考實際經由電子參與理論及實踐上的研究成果，試著將報告人這幾年的專題研究成果融入一項實驗性的網路對話平台，實際觀察理論及實踐上的課題。

Digital Copyright Law-Making and the Future Development of E-government

A critique of digital copyright law-making based on Jean Cohen's legal paradigm including constructive suggestions regarding theoretical and practical concerns related to the future development of E-government

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This research is sponsored by National Science Council of Taiwan. This paper further develops the thesis of my previous paper "The New Legal Paradigm of Jean Cohen and Its Implication for Public Online Dispute Resolution", which I presented at the 2006 Annual Meeting of the Law and Society Association in the United States. I want to thank the Chair and Discussant, and all participants for their comments.

Digital Copyright Law-Making and the Future Development of E-government

Abstract

Digital copyright protection issues are extremely controversial, and are highly interdisciplinary as they relate to both traditional legal scholarship and modern social political, economic, social and cultural dilemmas. This paper first provides a critical examination of the major efforts involved in digital copyright protection law-making in the United States, specifically the Digital Millennium Copyright Act (DMCA), as based on Jean Cohen's theory of the new legal paradigm. Related theoretical and practical concerns regarding the future development of e-government are then discussed.

Key Words: Co-originality, DMCA, E-government, Legal Principle, Reflexive Law

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I. Introduction

Digital copyright issues are no doubt one of the most widely experienced controversies of the modern era. The immediate conflict is between copyright owners and users of copyrighted works, digital music for example[i]. However, the long-term effects of the solutions to digital copyright issues reach far beyond these two groups. Balkin (2004) believes the digital copyright conflict is one of the most urgent modern constitutional challenges, and has great social and cultural impact.

Jinsburg (1997) classifies the usage of copyrighted work into two kinds. "Consumptive use" involves simple access and use of copyrighted work, while "transformative use" involves not just access and use of copyrighted work, but also use during an authoring process to create a separate original work. The difficulty in balancing the interests of the owners and the users of copyrighted work lies mainly in how one perceives the public interest associated with copyright, such as the public right of expression, education or right to information. As we enter the internet age, such perceptions became further pluralized.

That digital copyright issues have become ever more interdisciplinary reflects the growing complexity of the conflict. Goldstein (1997) believes the copyright regime itself is at a crossroads, since electronic contracts and encryptions have essentially taken copyright issues and changed them into contractual ones. Also taken away are the interests that historically have provided necessary checks and balances within the copyright system. In addition, the low authorship and highly collaborative nature of digital copyrighted work (Ginsburg (1990), Woodmansee (1994)) turn the copyright conflict into a conflict with the constitutionally guaranteed freedom of expression. Finally, as a later section of this paper points out, the major difficulty the copyright owners are facing when they attempt to enforce digital copyright law on the net is an unfavorable balance between their rights and the users of the copyrighted works' right to information privacy. In other words, a satisfactory solution to these digital copyright issues is bound up with the user's right to information privacy, creating yet another challenge for the development of information law.

These interdisciplinary and interrelated legal problems by no means show the whole landscape of digital copyright protection issues. The social, economical[ii], political and cultural dimensions of these issues not only inform the academic approaches to the problem, they also reflect the breadth of the impact of the issues.

Copyleft represents a major modern social and political movement; however, ironically, as Dusollier (2003) points out, the most successful story of Copyleft, like Open Source and Creative Commons, comes out of the copyright arrangement.

Basing on the distributive value, Houweling (2005) advocates the need to look at the digital copyright protection issue from the perspective of distribution and the exercise of creativity, and suggests that the a person's property status ought not to negatively affect her/his ability to create. A concrete solution to achieve such goals would be to allow free transformative use of copyrighted works in cases where the users intend no commercial gain. If the transformative uses do result in commercial gain, then solely the profits would be subject to copyright royalty allocation.

The academic approaches and solutions to this problem are extremely plentiful and some of the different points of view do counter each other[iii]. Starting out from theories of property law, Hunter (2003) believes the power of the copyright owner ought to be curtailed; but Wagner (2003) advocates greater control by the copyright owner. Wagner emphasizes the fact that information wants to be free, and hence the copyright owner cannot completely control copyrighted work. On the other hand, granting greater control to the copyright owner over a longer period should yield creative work with greater impact. However, borrowing from the concept of anticommons, Hunter thinks greater control by the copyright owner will lead to suboptimal usage of shared internet resources because "no one will be allowed to access competitors' cyberspace 'assets' without a license or other transactional expensive or impossible permission mechanism." (Hunter (2003):502-3) All these different approaches and theses are reasonable inquiries and it seems that a different law-making environment that facilitates dialogue and debate of these ideas is truly required before a much-needed comprehensive digital copyright protection scheme (Litman (2001:171-91)) can be realized.

Besides all of this important research into the search for balance in digital copyright legislation, Balkin (2004) provides another insight favoring a fresh look at digital copyright law-making. He believes the traditional public/private classification fundamental to the constitutional democracy has gradually shifted to a social and cultural relationship where every social interaction is meaningful and important in terms of cultural production and democratic development. The ways one receives information are vital to one's identification, which becomes the basis for the various personal exchanges that in the long run create culture. In an age where the digital environment has become the major arena for creation and interaction, technologies

that control the flow of information also control what and how one receives information. Therefore, digital copyright issues should be given utmost attention in the fostering of democratic culture.

This paper therefore believes that future e-government development, at least where digital copyright law-making is involved, cannot simply digitize all previous paper-based work. We really should see this as a test case in the search of a new paradigm. From a broader perspective, Lobel (2004) also finds real development in legal thought from regulation to governance where a bottom-up approach that emphasizes communication gradually replaces the traditional regulatory concept of command and control. This transformation is most evident in labor, environmental and information law.

Information law specialist Katsh (1989)[iv] gives an analytical explanation why the traditional system of command and control must not be used in the creation of information laws. He uses information chains as a metaphor to describe how knowledge creation and accumulation is reflected by the connecting and lengthening of the information chains. However, information chains not only grow longer, they are also volatile and may foster connections between branches of knowledge that were previously isolated. The dynamic nature of the context of information law, including digital copyright law, is the reason why law of state, searching for an empirical model to fit all applicable situations, will become increasingly impotent. As discussed in the following section, a legislative solution which heavily relies on a technological solution seems to be the best footnote to his observations.

This is also the reason why this paper chooses the new legal paradigm put forward by Cohen (2002) as the theoretical foundation for reexamining digital copyright law-making. As analyzed in the next section (Section II), Cohen basically emphasizes a principled solution through regulated self-regulation that requires a mutually enabling relationship between law of state and the self-regulation. In my opinion, self regulation through better public discourse is really what we need at this stage in order to create better digital copyright laws, since we must be conscious of the normative meanings which reside in the rich and dynamic context of the information chains Katsh describes. And such self-regulation can only be enabled by law of state and be effective through state supervision. Certainly, Cohen's model will not have a chance to be realized if the law of state is still in a command and control mode. That is why a reexamination of digital copyright law creation is so instrumental in providing the needed mirror of experience (Section III).

II. Cohen's Reflexive, Co-original and Principled Approach

Teuber (1983) synthesizes three social theories of law[v] to form the basis of his theory of reflexive law. The three theories differ greatly, but they all take an evolutionary view of the law. The general development from laissez-faire to the welfare model means the juridification of the law and extensive legal intrusions into society and private life are ever growing. Centered on Luhman's system theory[vi], Teubner offers a structural solution designed to overcome the problem of juridification of our highly complex society. He emphasizes a two-level law-making scheme with greater attention given to self-regulation. Under his model, law of state is responsible primarily for ensuring procedural justice in self-regulation where the substantive norm is derived. And the reflexivity of self-regulation, or sub-system, is further guaranteed by the structural requirement of self-regulation to open itself up and be responsive to all other interests affected by self-regulation.

Cohen wants to improve the reflexive model because she thinks that it has led to deregulation or privatization in effect. She emphasizes the importance of regulated self-regulation and I believe she redirects the reflexive model by further emphasizing Habermas's co-originality thesis and Selznick's principled approach. I will elaborate on these three elements central to Cohen's new legal paradigm with an eye on the purpose of the future development of e-government.

A. Reflexivity

It is a general objective of this article to point out the needed conceptual exploration for successful e-government, in other words, e-government does not mean simply to digitize whatever exists in paper form within the government. I believe one of the issues we must pay the most attention to is the potential conflict between reflexive law and its impact upon the rights holders[vii]. How the reflexive approach to the sexual harassment issue Cohen (2002) studied can be successful is due primarily to a principled judgment against the right of privacy claim of the disputed sexual harasser[viii]. It shows that in general there are theoretical as well as practical impacts which need be assessed and potential conflicts resolved before we can fruitfully turn an area of law reflexive. I will further elaborate on this point in the following sections in the context of digital copyright protection.

Reitz (2006:742-7) advocates the potential to reinvigorate democracy through

e-rulemaking. Through the requirements of the Administrative Procedure Act (APA), there has been an established tradition in the United States to go through a notice and comment stage before the rule-making power of an administrative agency is exercised. With the enactment of the E-government Act of 2002 (EGA), Reitz believes the comments an agency receives during the notice and comment stage will also be available to the public, though this is not expressly required by the EGA. Allowing public comments online and accessible is surely the first great step to enabling public dialogue and education, as Zavestoski (2006:405) believes: "[o]pen and discursive public involvement, which the Internet can provide if used reflexively, may hold the potential for a working out of science and value-based positions in a way absent in the current rulemaking process."

The result of another case study by Welsh and Fulla (2005) also finds that internet interactions between private citizens and government agencies do effect structural changes inside the organizations, along with the change to the community and citizen-bureaucrat relationship. It seems that it is not only desirable to explore the impacts of e-government upon the rights holders in order to reduce its negative effects and at the same time raise its acceptability but to do so is imperative since these changes are inevitable and may have already begun.

Another reason why the reflexive approach is worth exploring has to do with its structural improvement to the traditional single-level law of state setting. Cohen (2002:162) rightly points out that the Habermas's action theoretical model mainly has the formation of state-wide public opinion in mind and poses a formidable task of communication[ix]. The dual-level approach of reflexive law is compatible with the distributed processing trend that information technologies have brought about and runs parallel to the development of the legal thought in government which Lobel (2004) detects. Starting with the local public sphere empowered by the e-rulemaking of agencies and public organizations, future development of a networked state-wide public sphere is more likely to be successfully realized.

So far, administrative law-making seems to dominate this type of thought. However, I must point out that there may be an even more important e-governmental development on the side of judicial law-making. Again, I think Cohen (2002:177) is right to point out the significance of conflict resolution within the subsystem[x]. The courts and alternate dispute resolution (ADR) could be perceived reflexively just like administrative rule-making and self-regulation. Online dispute resolution can be designed as another public forum[xi] just like what the notice and comment process

may lead to in the sphere of administrative law-making.

I believe focusing on conflict resolution is also significant for the issue of empowering the subsystems. Fuller (2001) points out the significance of social interaction for leading reasoned arguments and opinions of adjudication to the development of doctrines of law which serve as the basis of social order. Online dispute resolution as a local public sphere can serve as an important mediation tool for the social interaction much needed in contemporary society. In addition, I would think that the local public sphere also has an organizing effect. In a budding subsystem where self-regulation is desirable but no community can undertake the responsibility, forming a local public sphere and fostering participation and communication may be a significant first step to the building of such a community.

B. Co-originality

The mediation of human activities through law is central to Habermas's (1996) discourse theory of law. An individual hence has two capacities under such a scheme. Private autonomy denotes the freedom one enjoys under the protection of the law to pursue whatever direction one pleases, while public autonomy denotes the participating individual in the public opinion formation process leads to the making of the law. These two autonomies are co-original in the sense that the one cannot exist without the existence of the other. Furthermore, the soundness of the one depends on the effectiveness of the other. Thus, the freedom one enjoys in one's private capacity is conditioned by the law, which is dependent upon one's participation in the public opinion formation leading to the legislation.

Cohen (2002) realizes the co-originality thesis in her plural reflexive model by emphasizing the mutual enabling relationship between law of state and self-regulation. Based on the digital copyright case study I discuss in the next section, I believe this is an important aspect of the future development of e-government. How to empower and guide the formation of the public sphere through the notice and command process and judicial decisions is one of the research issues in need of exploration and analysis. On the other hand, whether and how the improved public dialog and participation can enhance administrative as well judicial law-making is clearly another goal worth pursuing and studying.

The problem of social facts has long been the center of criticism from the perspective of sociological jurisprudence. In a pluralistic society, the problem of

social facts is further complicated by the different values and perspectives one may hold. That's why legal philosophers, including Habermas, adjudge the measure of the legitimacy of the law by the participatory conditions of the people affected by the legislation. A co-original reflexive law represents a balanced view of human rights and participatory democracy. How this delicate balance can be realized in a mutually enabling relationship between law of state and the subsystems is a research agenda essential to the future development of e-government.

C. Principle

Though the responsive law of Selznick is part of the synthesis which forms Teubner's theory of reflexive law, like Habermas's discourse theory, it is not the main guiding component. For Teubner, the main reason to become reflexive is increased social complexity. On the other hand, the purpose and internal morality of the law are what Selznick emphasizes. Institutional capacity is another of Selznick's criteria in deciding whether a reflexive subsystem can be given the responsibility to derive a substantive norm. In other words, one reason the law of state ought not to empower self-regulation may be that the institutional capacity of self-regulation is not adequate[xii]. These concerns are what Cohen (2002:178) wants to bring into her legal paradigm in order to move reflexive law toward regulated self-regulation[xiii].

I believe the legal principle in Dworkin can add significant content to Cohen's model. For Dworkin, principle is a form of legal argument which recognizes the need of value assessment and judgment. Judicial records from the judicial law-making process are essential to yielding a principled decision since they are full of chains of precedents and each of them represents the historical development of the law and a value to be weighed and selected during the court's decision-making process[xiv].

Value assessment also means that each decision made is not an isolated task which may lead to the runaway subsystem Cohen wants to avoid. With the introduction of the concept of reflexive law, decision-making based upon principle does not have to make a substantive selection and interpretation when it would be arbitrary to do so. The decision-maker could express reasoned concern and empower the subsystem for further dialogue before derivation of a substantive decision. Glendon (1991) has long worried about the impoverishment of the political discourse due to rights discourse. Whether the development of e-government based on Cohen's model can substantively redirect the development of the discursive situation of the law is definitely worth studying.

Finally, just like the judicial record keeping so essential for principled judicial reasoning, recording of the dialogue and process of normative derivation are also key to a principled reflexive approach. Although the internet provides a self-recorded environment, the way the process is structured and software mediation have discursive impacts concerning the rights holders. Hence, not only the issue raised by Balkin (2004) related directly to the development of e-government, but a wide array of other legal concerns is also involved. E-government is thus never simply a technological development challenge.

III. The DMCA (Digital Millennium Copyright Act) and its Critique

The DMCA (Digital Millennium Copyright Act) is the response to a rise in the need to protect digital copyrighted works, passed after the critical decision to commercialize the Internet in the early 1990's in the United States of America[xv]. A National Internet Infrastructure (NII) task force was created to study the changes necessary to facilitate the transformation to the internet age. Patent Commissioner Bruce Lehman chaired the Working Group on Intellectual Property and is responsible for devising a solution to protect the interests of content providers who are extremely vulnerable in a digital environment where millions of identical copies of their works can be made and transmitted all over the world.

In addition, copyright protection that is clearly in favor of the content providers is also essential to ensure a strong incentive to load the internet with content which is critical for a successful launch of the new information super highway. After a series of studies, hearings and commentarial processes starting in 1993, Lehman and his Working Group delivered its final report in 1995. The strategy Lehman took was basically to leave the fundamental structure of the copyright statute in tag jurisdiction and try to resolve the ambiguities involving digital copyright through interpretations favorable to the copyright owners. A series of court decisions[xvi] during this period also held that any physical loading of copyrighted material into random access memory required the authorization of the copyright owner to constitute a lawful copy. These court decisions ran parallel to the producing of the report, reflected the spirit of the time and marked the high point of copyright law extremely favorable to digital copyright owners.

Corresponding with the domestic efforts toward devising the digital copyright scheme for the Internet, the same endeavor in an international setting took place at the

Diplomatic Conference of the World Intellectual Property Organization (WIPO) held in Geneva[xvii], Switzerland, and produced two international treatises in December 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. This paper focuses solely on the WIPO Copyright Treaty since the two treatises contain substantive identical provisions on issues relevant to this discussion.

The WIPO Copyright Treaty is a landmark development of digital copyright protection since it fixes the primary scheme of such protection. The parties of the treaty under contract are obligated to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures used by authors. They are also required to protect the integrity of copyright management information. The treaty defines copyright management information as the information regarding the terms and conditions of use of the work and any numbers or codes that represent such information, and when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public[xviii].

The WIPO copyright treatise also serves as the basic framework for the DMCA. Though contrary to the expectation of Lehman and his Working Group who intended to keep copyright law in tag jurisdiction and accommodate change through interpretation, the DMCA did effect a change of course in the development of the copyright law. As discussed in the introduction section, Goldstein (1997) described the current status of copyright law as being at the center of a crossroads that could be wholly replaced by licensing contracts aided by the anti-circumvention clause.

A. The DMCA

-- "No person shall circumvent a technological measure that effectively controls access to a work protected under this title.[xix]"

A total of five titles are enacted in the DMCA, two of which are related to this discussion[xx]. The first is "WIPO Treaties Implementation" and the second is "Online Copyright Infringement Limitation". The first essentially governs the implementation of the general principles of the WIPO copyright treaty against circumventions of protection measures taken by digital copyright owners. The second title concerns Internet Service Providers (ISP), another major player in the internet, who provides storage and transmission services to the users of the internet and serve as the bridges connecting Internet users and content providers. The DMCA limits the liability of

ISPs in order to provide incentives for them to join the internet infrastructure.

The anti-circumvention clause of the DMCA was codified into the Copyright Act, Section 1201[xxi]. It contains three measures to secure anti-circumvention:

i) It forbids anyone from deactivating a technological protection measure that controls access to copyrighted works.
ii) It forbids trafficking in services or devices that aid anyone in violating §i.
iii) It forbids trafficking in services or devices that aid anyone in violating the control rights of the copyright owners other than access.

In order to prevent the anti-circumvention clause from overprotecting digital copyrights and obstructing the public right to access, the DMCA contains provisions of exemption for nonprofit libraries, archives and educational institutions to make a good faith determination of whether to acquire a copy of a commercially exploited copyrighted work; for law enforcement, intelligence, and other governmental activities; for identifying and analyzing those elements of the program that are necessary to achieve interoperability through reverse engineering; for activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works in order to advance knowledge; for preventing the access of minors to adult material on the internet; for protection of personal identification information; and for security testing[xxii].

Another measure the DMCA adopted to prevent overprotection is the authorization of the Library of Congress, upon the recommendation of the Register of Copyrights, to hold periodical reviews and determine the classes of works that are adversely affected by the non-circumvention clause in the DMCA for non-infringing use of copyrighted works[xxiii]. Users of these classes of works will not be subject to the anti-circumvention clause.

As to the liability of the ISPs, one of the goals was to limit their liability, which started with the NII initiatives but was not included in the WIPO copyright treaty. In 1997, the Online Copyright Infringement Liability Limitation Act was introduced to exempt ISPs from copyright infringement as long as the ISP did not place the infringing material online or generate, select or alter its content; did not determine the recipients; did not receive financial benefits; did not sponsor or endorse the material; and did not know the material was infringing[xxiv]. These provisions provided for a “safe harbor” status for ISPs.

Telephone companies, commercial ISPs, libraries and schools insisted on the inclusion of the safe harbor provisions as a precondition to the enactment of the WIPO copyright treaty implementation legislation (Litman (2001:134-5)), but the safe harbor provision alone was not accepted by content providers. As a compromise, the final DMCA provisions on the limitations on liability relating to material online[xxv] kept the safe harbor provisions and added a procedural safeguard allowing content providers to obtain subpoenas to identify infringers[xxvi]. Copyright owners can apply for subpoenas from a clerk of the federal district court to require ISPs to provide sufficient information to identify suspected infringers of their copyright.

B. Critique

The full impact of the anti-circumvention clause cannot yet be determined. Part of the reason is due to the fact that the digital rights management (DRM) system has not been adopted as the industry-wide primary scheme of protection due to the question of acceptance by consumers. Bechtold (2004:347-51) also points out that an effective DRM system must be secured throughout all phases related to the use of digital content. Often time the content providers need the cooperation from other parties, like manufacturers of consumer electronic devices. Content providers need to come up with strategies to force the producers of such equipment to integrate sufficient DRM security measures into their devices.

I want to comment on the anti-circumvention approach of the DMCA mainly from a conceptual point of view to demonstrate that the command and control model of regulation based on an objective approach like anti-circumvention is simply not working, especially in the creation of digital copyright protection laws as reviewed in this article, where the contexts surrounding actions vary widely and will have a profound impact on future cultural development. The varied contexts within the regulatory environment for digital copyright protection can be found in both the high interrelatedness of legal issues and widely held interests and the values of all the affected parties. This is the basic reasoning behind my criticism in this section. In the next section, I try to detail how digital copyright law-making can be improved by following Cohen's model as described earlier in this paper.

1. Regulation of the codes

The fact that the DMCA protects digital copyright owners primarily through

regulating the computer software codes[xxvii] that could interfere with copyright owners' copyright protection, which is itself another computer software code, has concluded that the DMCA cannot be a comprehensive solution. I think that the principle of anti-circumvention is hardly a legal principle because it lacks the normative reasoning accessible to the public in order to differentiate a legal usage of digital copyrighted work from an illegal one. Safeguarding digital copyright through technical measures is by no means the majority choice of digital copyright owners. On the other hand, a majority of digital copyright users are not capable of breaking the technical protections. If the major concern of digital copyright protection solely surrounds the breaking of the software codes shielding digital content, a software industry-wide regulation may be more effective.

In addition, the complicating effect the DMCA has upon copyright law is unfortunate. In the beginning, the Intellectual Property Working Group tried to leave copyright law untouched and provide needed incentives to content providers through favorable interpretation of the copyright law. In the end, the DMCA contains fifty pages of close to thirty thousand words full of technical definitions. The purpose of offering incentives seems clear, but the real question is whether digital copyright owners obtain only a false sense of security that may never be effectively realized. Moreover, the legislative impact of anti-circumvention upon the precariously balanced interests of a century's accumulation of copyright laws is indeed most worrisome.

There seems to be a pattern of information law-making which emphasizes a technological solution. The objective appearance of the technical approach may be one reason why it is favorable. However, the difficulty to come up with regulatory terms to adequately reflect the norm of behavior for information law may be a fundamental dilemma hard to resolve. This may explain why scholars are calling for a paradigm shift. It also constitutes the added reason why a reflexive approach discussed in this paper especially deserves better attention.

In 1996, the Communication Decency Act (CDA) was enacted by Congress of United States to protect minors from "indecent" or "patently offensive" information on the internet. It includes criminal penalties for someone who provides such information knowing that minors may receive them. The CDA was invalidated by the Supreme Court in Reno v. ACLU (521 U.S. 844, 1997) for being too vague and possibly obstructing the first amendment rights of the adults. Congress then enacted the Children's Online Protection Act (COPA) to substantially curtail the coverage and

used a well-received community standard established in Miller v. California (413 U.S. 15, 1973) to test the "harmful to minor" standard specified in the COPA. The COPA was again invalidated by the Supreme Court in Ashcroft v. ACLU (124 S. Ct. 2783, 2004). The final legislation which passed the Supreme Court test was the Children's Internet Protection Act (CIPA) that requires all public libraries receiving federal aid to install filtering software on computers their patrons use to access the Internet. In comparison with the digital copyright regulations that adopted the technical approach of anti-circumvention to protect copyrighted digital content discussed in this article, I believe it is especially interesting to compare the majority opinion in U.S. v. American Library Association (123 S. Ct. 2297, 2003)[xxviii] that favors the technological solution of adding software filters to the computers of the libraries to the minority opinions that emphasizes the need for self-regulation by the library association.

2. Representation of the Public Interest

As the development of copyright law has historically paralleled technological advancement[xxix], the impact from the advent of the internet is not unprecedented. Due to the highly technical nature of the copyright law issues, Litman (1989, 2001:35-69) analyzed the two major copyright amendments in the 20th century and found that Congress did not really conduct substantive deliberation before amending the law. The role of Congress was more one of pushing for compromise acceptable to all interest groups participating in the network of negotiating conferences led by the Library of Congress and the Register of Copyright Office. The latter focused on identifying the affected interests and inviting them to the conferences.

The amendments produced through the negotiating processes raised issues on legislative intent (Nimmer (2002)) and the judicial interpretation of the text of the copyright statute. However, the biggest problem may be the exclusion of the public interest. Litman (2001:51) found the representation of the public interest lacked organization or was premature, and including the public in the process presented the most difficult task. Peter Jaszi, a law professor at the American University in Washington, organized the Digital Future Coalition (DFC) to participate in the legislative process which led to the DMCA. But all the DFC got from the bargaining was a periodical exemption review conducted by the Register of Copyright to relieve classes of works from the non-circumvention rule[xxx].

Whether Cohen's model discussed in this paper is a better scheme for public participation is especially worth exploring in the case of digital copyright law-making.

That we can now use the internet as a public forum for the deliberation of related legal issues adds another dimension for such consideration. Stanley and Weare (2004) report an empirical finding involving the Federal Motor Carrier Safety Administration (FMCSA) which is required to develop a long-term strategy for improving the commercial motor vehicle and operator and carrier safety. In August 2000, the FMCSA opened a traditional docket, announced in the Federal Register, to solicit written comments. It ran a parallel web site, the 2010 Strategy and Performance Planning, to facilitate access to the related information and two-way interactive communication.

Stanley and Weare compared the written comments in the traditional docket and the digital communication through e-mails and the web site, and found that the character of participation was different. The respondents to the docket had much greater previous contact with the FMSCA while the topic broached on the web reflected new voices and concerns. For example, commercial drivers who never commented on the docket voiced the neglected concern of road safety, and more qualitative evidence shows the increasing input from stakeholders who typically do not discuss the commercial vehicle safety issues with the regulatory authority. Although more studies are needed before a conclusion can be made, such exploration is indeed much needed in comparison with the DMCA legislative process.

3. Interrelatedness of the Issues

Katsh (1989) points out that the information chains on the web tend to foster connections between traditionally isolated branches of knowledge, as previously discussed. This is exactly the dilemma for the enforcement of digital copyright currently facing digital copyright owners. As stated in the previous subsection, the DMCA balances the interests of copyright owners and that of ISPs by limiting the liability of ISPs so long as they retain the status of safe harbors and at the same time granting a subpoena right to the owners to pursue infringers. However, the copyright interest of the copyright owner is not the only legal interest protected by the law. As discussed in the beginning of the article, low authorship and increased collaboration tend to blur the boundaries of the issues of copyright protection and freedom of expression. Nunziato (2005) also observes that “[p]rivate regulation of speech on the Internet has grown pervasive, and is substantially unchecked by the Constitution's protections for free speech”. The copyright protection role of the ISPs should really be considered together with the issue of freedom of expression.

In addition, Katyal (2003) raises the issue of the privacy interest of copyright users. In RIAA v. Verizon Internet Service (Verizon, 359 US App DC 85, 2003) the court decided that in point-to-point communications where the ISP provides only the conduits for data transmission and retains no copyrighted works on its server, the ISP is not liable to provide information to identify the suspected copyright infringers. The DMCA notices the importance of a statutory limit of the liability of the ISPs. It caused a need to balance out the interests of the copyright owners and a subpoena procedure was therefore created. But in light of the discussion of this paper, ISPs can be directed to be an instrument of digital copyright self-regulation if they are progressively empowered to do so with congressional guidance and administrative supervision. The dialogue that can be initiated through this reflexive approach is valuable. Verizon seems to suggest that public participation and communication may be better than top-down command and control legislation, like the DMCA where in the end copyright owners still have to face the unexpected hurdle of enforcing their rights. Improved communications may also shed light on many other issues related to the usage of digital copyrighted works and provide valuable input to law of state development.

V. Some Thoughts on the Future of E-Government – Conclusion

We are in the nascent stages of e-government and there is a debate on the future of e-rulemaking between an optimistic view (Noveck (2004)) and a cautious view (Coglianese (2004), Shulman (2004)). In light of the discussions of this paper, it seems the critical factor is one of conceptual change that will not be easy to come by. Whether the reflexive approach Cohen and other scholars suggest can replace the traditional command and control mode of thinking to guide the development of e-government will be critical.

A reflexive approach that empowers self-regulatory bodies to derive the legal norm through participation and dialogue among the affected parties online under the guidance and supervision of state authorities is the right direction for the future development of e-government. This paper will end by detailing what this concept means for digital copyright protection.

The Copyrights Arbitration Royalty Panel (CARP) is a tribunal Congress created in 1993 to settle disputes related to copyright royalty and its distribution under the supervision of the Library of Congress and the Copyright Office. A recent conflict between webcasters and copyright owners was settled through the CARP. However,

the decision of the CARP was highly controversial and the cost of this proceeding prevented most people from bringing their claims to the CARP. Congress is currently in the process of overhauling the CARP and its procedures, but has been unsuccessful so far[xxxi].

Lemley and Reese (2005) suggest a fast and inexpensive scheme of settling digital copyright infringement claims due to the major infringement conflicts the p2p networks bring forward. They want to give the copyright owner an option either to bring the case to court or to pursue a claim in an administrative dispute resolution proceeding aided with the online submission of evidence and arguments before an administrative law judge in the Copyright Office.

In light of the discussions in this paper, it seems imperative to notice the disparity between governments managed CARP scheme for the resolution of digital copyright disputes and rich approaches to deal with the issues in the legal academic community discussed in the introductory section of this paper. The depth of the controversy is further reflected by the divided public. We therefore ought to bestow many government functions mentioned in this paper, like alternate dispute resolution or commenting process in administrative rulemaking, a new orientation. In short, e-participation should be the primary focus for e-government with first priority.

Specifically speaking, we need to study how to turn digital copyright online dispute resolution into a forum of the digital copyright law where different scholarly and public opinions can be freely engaged. The e-rulemaking process can also provide a platform on the Internet for exchanges of ideas and opinions related to the issues of a specific proposed administrative rule. Although this is not a paper about the design issues of these platforms, I believe any such platform ought to have three channels for different voices in the public. The first channel is provided for anyone who want to express yes or no for any specific proposed rule or regulation without any reason specified. The second channel is provided as a chat room for anyone wants to dialog or debate with someone else in the chat room. The third channel is provided for the exchanges of scholarly or professional opinions.

This paper does not survey the increasing literature on deliberative democracy, the internet as a public sphere or political communication, but what can be confirmed is that more studies on related issues are forthcoming. A lot of work involved in this study must also be explored further. In this paper, through analyzing the problems of digital copyright lawmaking, I simply hope to be able to demonstrate the urgent need

to grant e-participation high priority in the future development of e-government. I also point out the fact that successful e-participation requires empowering. Cohen's new reflexive paradigm provides the theoretical foundation and the guiding principles in that direction. I believe a network of public spheres on Internet built through empowering local normative development which emphasizes participation and communication is foreseeable and it will indeed represent the coming of a new legal paradigm.

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[i] Ginsburg (2002) believes the two extreme positions are both based on greed. The legislative extension of the period of copyright protection and the changing of the meaning of "sharing", from sharing what one owns with others to sharing others' belongings with everyone including oneself reflect such greed.

[ii] Please see (Takeyama et al. 2005).

[iii] Maybe what is really needed, and probably what we are moving toward unconsciously, is a new kind of scholarship which matches the nature of authorship trends of low authorship and high collaboration. The internet may be one of the intermediary channels by which the needed threads for reflective debate among different approaches can be provided and theoretical thought and empirical findings can be brought together. Such a picture is described by Froomkin (2003) in a different setting, where engineers reach solutions for various internet standards. This point will be further elaborated on later in this paper.

[iv] See also Katsh (1991).

[v] I.e. Luhman's system theory, Habermas's discursive theory and the responsive law developed by Nonet and Selzick.

[vi] Although Habermas's discourse theory is another ingredient of the reflexive law, Teubner (1998) specifically rejects the idea that communicative actions hold the key to the lawmaking crisis of today's complicated world and prefers a structural solution.

[vii] One of the articles by the author of this paper, "Toward a Discursive Public Reason in the Internet World", provided a co-original critique of both the public reasoning of John Rawls and Ronald Dworkin's companion theory of adjudication. The article was first presented to the 22nd World Congress of the International Association of Legal

and Social Philosophy, in Granada, Spain, 2005, and its publication is forthcoming.

[viii] As described in Cohen (2002), primarily chapter three.

[ix] "If Teubner fails to adequately address the problem of normative universalism, Habermas seems to purchase universalism at the price of efficacy on normative and empirical levels."(Cohen (2002):162)

[x] "On the reflexive paradigm this democratic articulation occurs at two levels. …, second, fostering the establishment of procedures, discursive structures, and mechanisms of conflict resolution within the subsystems that render them receptive to the influence of political publics and legal principles on the one side, and that open them up to what Beck called subpolitics, and what Teubner called learning, on the other."

[xi] One paper written by the author of this paper, "The New Legal Paradigm of Jean Cohen and Its Implication to Online Public Dispute Resolution", further develops this point. It was presented at the Sinica Academia Institute of Europe and America forum, The 6th Congress of East Asian Legal Philosophy in Taipei, Taiwan and at the 2006 Annual Meeting of the Law and Society Association in Baltimore, Maryland, U.S.A.

[xii] See Selznick (1994).

[xiii] "The idea of 'regulated self-regulation' as a form of reflexive law should, in my view, be reset on clearly defined legislative goals. But everything turns on how one understands the term *goal*. By this I mean principles, not outcomes." Regarding the case study of sexual harassment Cohen discusses in her book, she believes the Constitution as well as legislation has articulated legal principles like equality, anti-discrimination on the basis of race and sex, personal freedom, and protection of privacy. These principles are accessible to self-regulation for further development of the context of these principles. Cohen believes Selznick fails to see the accessibility of these legal principles to the subsystems.

[xiv] However, the social morality decisionmaking in Dworkin's theory of adjudication does not have the mutually enabling concept in mind and hence is not reflexive. I proposed an amendment to his theory in the paper mentioned above in note 7.

[xv] Please see Litman (2001), Nimmer (2002, 2003), Imfeld and Ekstrand (2005) and Herman and Gandy (2006) for the legislative history and comments on the DMCA.

[xvi] Mai Systems v. Peak Computer, 1992 US Dist. LEXIS 21892 (C.D. Cal. 1992), aff'd, 991 F.2d 511 (9th Cir. 1993); Triad Systems Corp. v. Southeastern Express, 31 U.S.P.Q. 2d (BNA) 1239 (N.D. Cal. 1994); Advanced Computer Services v. MAI Systems Corp., 854 F. Supp. 356 (E.D. Va 1994). Such an extreme reading was overruled by the DMCA and also did not prevail in later judicial decisions.

[xvii] The United States dominated the Conference (Nimmer (2003):175) and Litman (2001:128-38) believes Lehman was instrumental in both domestic as well as international digital copyright protection efforts. He also took the opportunity for interplay between these two efforts to move forward domestic legislation by pushing for the DMCA as the result of an international treaty, while ensuring American copyright interests are best protected and lead the world by setting a precedent of a tough digital copyright protection standard.

[xviii] For example, Taiwan responded to the WIPO copyright treaty by adding several clauses to existing copyright law to define anti-circumvention and copyright management information; to prescribe the principle against anti-circumvention and removal of the copyright management information; and to specify criminal liabilities for trafficking anti-circumvention devices and removal of copyright management information.

[xix] First sentence of 17 USCS §1201(a)(1)(A).
[xx] The other three titles are: III. Computer Repair or Maintenance Exemption, which overruled the extreme interpretation of the copyright law in favor of digital copyright owners as discussed in note 16 above and accompanying text; IV. Miscellaneous Provisions; and V. Protections of Certain Original Design.
[xxi] 17 USCS §1201. And 17 USCS §1202 protects the integrity of copyright management information.
[xxii] 17 USCS §1201 (d) – (j).
[xxiii] 17 USCS §1201 (a) (1) (B) – (E). Please see Herman and Gandy (2006) for a review of the DMCA exemption proceedings.
[xxiv] H. R. 2180, 105th Cong. (1997).
[xxv] 17 USCS §512.
[xxvi] 17 USCS §512(h).
[xxvii] Wagner (2005) also believes the DMCA is not a law about copyright, rather a law about technology.
[xxviii] Nunziato (2005) also criticizes the public forum reading of the court in this case which inadequately weighs the interests of freedom of expression and further degrades the Internet as a public sphere.
[xxix] Examining technological development as related to copyright law in the Final Report of the National Commission on New Technological Uses of Copyrighted Works (CONTU, 1978), p.15, one finds:
1802 Designs, engravings, and etchings
1831 Musical compositions
1856 Dramatic compositions
1865 Photographs and negatives
1870 Statuary and models
1912 Motion pictures
1972 Sound recordings
Certainly, we still need to add the two technological impacts CONTU studied, the photocopy machine and computer software.
[xxx] The Copyright Office specializes in expertise on technical copyright issues. Whether it can reflect the public interest in reviewing copyright use adversely affected by the DMCA is questionable. Litman (2001:74) finds the Copyright Office has traditionally viewed copyright owners its real constituency. And Herman and Gandy (2006) concludes that "the exemption proceeding is constructed not to protect noninfringing users, but to limit courts' ability to exonerate them via the traditional defenses to copyright infringement."

[xxxi] See Maxey (2003) for a discussion of CARP's problems and the Congressional attempt to reform its system.

美國數位著作保護的法理論述

陳起行*

Recent Jurisprudential Thinking for Digital Copyright Protection in the United States

ChiShing Chen

摘要

數位著作保護是極具爭議的法律課題。社會上，認爲數位著作保護不足以及認爲數位著作保護過度的主張，均十分強烈。此一辯論不僅影響著作權法未來的發展，也主導網路時代每個人自我認識及形成公共意見的資訊基礎，值得及早深入研究。本文就近年美國數位著作保護的法理論述，分別就數位著作保護的對象，以及著作權法益平衡上涉及的分配平等，財產權保障，及著作性等前瞻性主張，逐一闡明，供國內法學界參考。文末提出進一步提升此一課題的社會對話以及學理探討之道。

關鍵詞：數位著作權，公開進用，分配平等，想像自由, 公共領域, 財產權，著作性，線上爭議解決

Abstract

Digital copyright issues are extremely controversial nowadays. Copyright and Copyleft represent two equally strong and uncompromising positions in the society. Not only the future development of the copyright law, the information sources critical to individual self-recognition and the formation of public opinion are also at stake in an internet world. This paper examines the jurisprudential arguments in the United States related to the digital copyright protection. Illuminating thesis related to issues such as who ought to be protected, distributive equality, property control balancing and digital authorship are elaborated. And this paper suggests a needed procedural mechanism to promote social dialog and scholarly exchanges in the end.

Keywords: digital copyright, Copyleft, open access, distributive equality, freedom of imagination, public domain, property right, authorship, online dispute resolution

一、前言

典範移轉（paradigm shift）是科學哲學家孔恩（Kuhn）近半世紀前提出的概

念[xxxi]。所謂典範，是指人們習以爲常的思維模式或背景假設。孔恩指出，科學的發展，是一系列舊有思維模式被新的思維模式取代的過程。值得警惕的是，孔恩指出，往往是舊的典範無法回應現實發展而崩潰後，新的典範才有生機，取而代之。

已經有數位美國法學家指出，資訊科技對於法律所造成的衝擊，必須提升到典範移轉的層次，才能正確掌握住這一波的變遷[xxxi]。換句話說，僅僅在法制的層面，制訂新的法律，或修改法條，不足以回應資訊科技對社會所造成的結構性衝擊；必須檢視已經習以爲常的基本法律觀念與作爲，並據以規劃出新的規範架構。本文藉由整理美國法學論述近幾年針對數位著作保護議題的全面反省所發展出豐富的法理論述，期望在探索合於未來社會新規範架構的努力上，有所貢獻。

數位著作保護議題，並非只是著作財產權人保障其權益不受著作使用人侵害的一般性爭議。即使現今社會極力保障著作權的主張與強調分享而認爲著作權被過度保護的主張形成兩極，美國哥倫比亞大學著作權法教授Ginsburg指出，貪婪（greed）是這項對立背後的核心力量。無論就著作權人或著作使用人而言，皆因爲貪婪，欲在數位著作普及的過程中，更有所獲，導致現今數位著作保護課題，陷入死胡同[xxxi]。

著作權人的貪婪，反映在擁有眾多著作財產權的大公司，著眼於日益擴大的國際著作權市場，竭盡其所能地擴大其國際營收。其主要手段，是尋求立法，獲取更多的保障，包括延長著作權保護年限[xxxi]，以及阻止對著作使用人友善的技術之發展[xxxi]。而數位著作的使用人方面，其貪婪首先反映在對於傳統上「分享（sharing）」觀念的改變。傳統上，分享是高貴無私的行爲，將自己所有的東西，讓別人也能取得或使用；但自Napster案以後，在數位數著的環境裡，分享轉而指得是將原創者或所有人的著作，提供自己及第三者擁有或使用，甚至認爲只有在分享他人所有的著作時，其分享才最樂。所有人及使用人各自兩極化的主張及作爲，使得著作權法欲保障的真正公共利益（public interests）被模糊焦點，而真正公共利益之所在，也就是一個平衡的著作權體系，提供作者必要的誘因；又允許第二個作者足夠空間，在第一個作者的著作之上，進一步創作，並讓自主的消費者有合理的尺度享用該著作，在著作權人與使用人交互攻伐之下，受到最大的傷害[xxxi]。

著作財產權人與使用人之間兩極地拉扯現行著作權法制，固然是眼前著作權法亟待解決的紛爭；但是就未來社會文化發展而言，數位著作的保障，牽連到未來社會政治、經濟及文化等每一個環節。因而著作權法制開創未來社會的基本權益結構的任務，更不能因爲眼前的爭議而邊緣化。耶魯大學憲法學教授Balkin指出數位科技帶來典範式的衝擊。傳統的民主文化（democratic culture），置重於公領域以及公共意見的形成等課題，但是數位科技的衝擊下，文化本身取代公共政治，成爲未來民主文化的平台。所謂文化，指向群體意義的形塑（collective meaning-making）。而其基礎，在於每一個成員形成自身意義的主導。資訊科技在提供新的組織、過濾及接觸資訊的同時，也使得這些資訊的財產權保護以及組

織、過濾及接觸資訊等權力的歸屬與運用，成爲直接影響未來民主文化發展的關鍵。言論自由將一改過去背景式地提供民主基礎的地位，而直接成爲關鍵未來民主文化的第一道主要防線。數位著作保護成爲民主憲政上至爲重要的爭議，實不得只把它視爲權利人與使用人之間的財產利益之爭而已[xxxi]。

最後，文本仍要指出，數位著作保護課題，除了涉及前述著作權右派與左派之爭[xxxi]，以及未來民主文化的形塑外，也影響著倫理的核心價值，不應只將之視爲法律上的爭議。現今大量上傳及下載他人數位著作的風氣，實際上與另一項普遍存在，涉及倫理價值的行爲同步發展。這就是由小學到研究所都出現的抄襲風氣，甚而多數抄襲者會認爲抄襲便是寫作的常態。一項調查研究顯示，學術上的正直，逐漸隨著抄襲的風氣而消逝。Rutger大學學術正直中心（Center for Academic Integrity）主任McCabe證實，在一項問卷調查的回答中，74%的高中生承認在大考中曾作弊，72%承認在寫作作業上作弊。並且雖然 33%的學生承認有持續作弊的行爲，97%的學生則承認有值得質疑的行爲，如抄襲他人的回家作業或考試時偷看[xxxi]。隨著大量上傳及下載他人著作的風氣造成取得資訊對錯上的混淆，寫作時抄襲極易自網路上取得的相關文獻的是非對錯，也有動搖的趨勢。著作權法制目前能回應這些趨勢者，十分有限，這也是本文隨後主張應該促進社會有意義的對話，做爲著作權法制發展的基礎的主要考量。

數位著作權保障的課題所涉及的爭議，是少數整個社會均有所體驗的尖銳衝突，而此一爭議的解決又牽連到未來社會諸多層面的基本結構。面對此一社會轉型而法律典範亦移轉的時代性挑戰，非一篇文章便能將問題交代清楚。本文的目的僅在於整理美國法學界許多學者面對此一重大轉折，由許多不同的研究路徑，試圖找出解決之道的努力。期望對國內關心此一課題者，在問題意識的掌握、平衡權利義務上的思索路徑，或程序上如何設計出爭端得以真正化解的可能途徑等各端，有所啓發。

本文將美國法學者的研究及主張，由三個面向加以整理。首先分析的課題，主要因數位科技所引起。網路結構的深化使得傳統上著作權應保障作者還是出版者等散佈（distribute）著作的企業的辯論，又加入新的考量。資訊科技是否根本地改變數位著作傳遞的商業模式？出版者傳統的功能是否在此新的架構下喪失或大幅降低其功能？著作權法制是否試圖延續傳統結構而不利合於事理、以創作者爲核心的網絡式創作及傳遞模式？這都是由事理面延伸出的數位著作權法理探討。

本文第二個整理的方向，與數位著作權所涉及新的社會分配正義課題有關。是否因財產地位的不同而容許有創作地位的差異？易言之，若因爲無法支付對價取得授權而無法繼續創作，是否犧牲了居於社會弱勢的創作者？也犧牲社會全體享受可能的文化資源？更傷害到社會的分配正義？因此如何重新理解創作在言論自由上的意義，甚而體認到想像上的自由（freedom of imagination）在數位環境下的重要性，從而全新地解讀公共領域（public domain），都是美國法學界批判法治現實發展之餘，所提出對未來著作權法制極富啓發性的學理主張。當然，

由財產權理論出發，究應限制抑或放任著作權人對使用其著作所設的限制，則在美國法學界引起辯論，值得參考。

第三個整理的面向，環繞在程序方面。所思考的是如何由爭端解決程序等著手，提供數位著作權保障的程序性解決之道。筆者認爲，現今著作財產權人在運用私權確保（private enforce）其數位著作時，因可能侵害到著作使用人的隱私權而受到阻礙，是否能透過爭端解決的途徑，試著發展出合理的數位著作保障模式，值得探討。本文在此一小節，試著勾勒出可能的途徑。

二、保障數位著作創作者或出版、經銷者

著作權法應當以作者爲主要保護對象的主張，過去便經常被提起。論者認爲，著作權法以作者死後相當長的一段時間做爲著作權的保護年限，其設計的本意便是著眼於保障作者後人的經濟生活。此項立法目的是否確實落實，每遭學者的質疑。主要原因在於多數著作權經由移轉或授權，由出版或經銷商主導著作的獲利，使得後者成爲著作權法制發展上的主要訴求者及獲利者。

經由網際網路的數位傳遞方式，是否仍需要出版商及經銷商等中間人做爲作者與讀者之間的橋樑，不無疑問。尤其若出版商與經銷商不像紙本時代，有許多印刷、運輸、庫存等設備的固定成本，如果數位資訊的價格不降反升，就更增加人們探索新的合理模式，提供網路上出版及經銷的管道。

1. Max Planck 研究中心的經驗

數年前，筆者參與政大法學院圖書委員會，決議停止訂購約價值新台幣三十多萬的紙本法學期刊，改由線上資料庫的數位版本，供研究用。當時心中便有疑惑，紙本期刊停止訂閱，不影響已收到期刊的使用。但是數位期刊資料庫若停止訂閱，則無法再接觸期刊內容。因此對研究教學單位而言，研究資料的全盤數位化，似乎意謂著議價能力的降低或喪失。

在一篇發表於美國著作權協會期刊（Journal of the Copyright Society of the U.S.A.）的文章裡，德國國家型研究院Max Planck Institute的智慧財產權、競爭法及稅法研究中心主任Hilty教授針對資訊社會著作權過度保護所引起科學社群的反應，提供寶貴的心得分享[xxxi]。

Hilty指出Elsevier出版的 450 萬學術論文，而 80 所Max Planck研究中心訂閱約 430 至 440 種Elsevier的期刊，每年的訂閱價格總共約 330 萬歐元。如果整個Max Planck社群只訂閱一種期刊一份，訂閱價格只有原來的 35%,約 120 萬歐元。當時，Max Planck研究中心若要以電子方式接觸期刊資訊，要多支付 10%的訂閱金，也就是 33 萬歐元，使得每年總訂閱金爲 363 萬歐元。但隨後由於Elsevier改變提供期刊的模式，以電子期刊爲主要方式，若需要紙本，則另外加收訂閱金。Elsevier在訂閱期刊不變的情況下，要求Max Planck研究中心每年支付 390 萬。

Hilty指出，按照原先的計算，每年應支付 363 萬歐元給Elsevier；若以全Max Planck社群共同訂閱某一種電子期刊，而不是不同的Max Planck研究中心可能重複訂閱Elsevier的同一種電子期刊， 則總支付的訂閱金額更低，約爲 150 萬歐元，無論如何，都比Elsevier所要求的 390 萬歐元爲低。但Elsevier看準了研究單位不能沒有高水準的學術期刊，所以取得絕對的議價優勢，使得Max Planck很長時間都無法取得滿意的解決方案[xxxi]。

Max Planck 的回應方式，是在 2003 年 10 月 20 至 22 日間，在柏林召開了一項國際研討會，名爲：公開近用科學及人文知識研討會（Conference on Open Access to Knowledge in the Sciences and Humanities），獲得國際間各學術團體的熱烈參與，並於會後揭示「柏林公開近用科學及人文知識宣言（Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities）」。其具體的主張爲：

a. 鼓勵研究者或獲得研究計畫補助的主持人依據公開近用典範（open access paradigm）的原則[xxxi]出版該論文；
b. 發展線上論文審查機制，以維持學術品質及倫理；
c. 主張在公開近用模式下出版的學術論文，應該在升等及評鑑時被認可[xxxi]。

2. MP3 音樂下載

Ginsburg教授將著作的使用分成兩種類型：前一小節所討論的學術著作的使用，係典型創作過程中的使用，Ginsburg稱之爲轉化性使用（transformative use）；純粹欣賞而非創作過程中的著作使用，Ginsburg稱之爲消費性使用（consumptive use）[xxxi]。無論消費性使用或轉化性使用的情形，Ginsburg都認爲著作權應當保障的是創作者而不是出版、經銷等中介。她認爲由作者控制其著作權，尤其是讓過去被著作仲介所控制的散佈系統所排除的作者控制著作權，應該可以提供大眾數量更多內容也更多元的創作[xxxi]。Ku教授也認爲應該將創作與散佈分開對待。在數位環境下，公共利益只存在於創作而不及於散佈，因爲散佈在數位環境下，是由消費者所負擔的網路所負責。若將創作與散佈鬆綁，並使著作權保護僅及於創作而不保護散佈，唯一需要進一步考慮的是網路上著作的散佈對作者所造成的侵害，Ku認爲這反而爲作者在無需成本的情形下，解決了作者將其作品傳遞給每位使用者的困難。唯一需要的是立法收取使用網路的稅，然後依網路上各個著作的總使用量，決定權利金的分配[xxxi]。

Litman教授更爲音樂mp3 下載的爭議提出解決之道。她也是認爲網際網路使得傳統上大量散佈著作所需要的印製、運輸、儲存等成本大幅降低。數位著作的傳遞主要透過消費者本身。這種讓作者不經過仲介而直接將著作提供使用者，並透過消費者傳給消費者的散佈途徑應當是網路音樂最佳的商業模式。正如同網路的確有社會網路，提供使用者取得資訊的來源，所有提供音樂給他人的中介者，在這個音樂創作及近用（access）的環節，也發揮其功能，而應當有適當的回饋。

若再參考Ku的稅金方案，或者由參與點對點音樂轉輸者支付一定金額的概括性授權金，可以使整個網際網路就像一個音樂的饗宴般，每個人都可以盡情享用，也不會觸法[xxxi]。

三、著作權法益的平衡

本文前一節討論事理變遷後，法學論述重新思考數位環境下著作權法應調整保護架構，將保護的重心放在創作者而非出版或散佈著作的企業。最主要的原因是，有助於創作的質與量；並且如學術期刊問題所呈現者，學術提升等公共利益較不會因爲資訊作爲一項商品而受到貶抑。

本節所要討論的數位著作權保護的法學論述，則集中在法理上，如何思索Ginsburg 教授所說的著作權法目的之一，在平衡作者的財產權與其他作者利用該作品於創作過程的合理空間。這個問題，在數位時代之前便存在。不過自電腦多媒體普及後，利用眾多他人著作片段爲創作的元素，成爲創作的新趨勢，使得前、後作者間權益平衡的課題，顯得更重要。易言之，數位環境下，妥善解決創作過程中使用他人著作的合理尺度，成爲數位著作權法制是否能達成其立法目的的關鍵課題。

1. 分配正義的考量

Houweling 教授認爲，傳統著作權除了保障權利人財產上的利益之外，也有分配正義上思考量，包括了：

a. 著作權的授與間接地補助一些可能的創作者，有利其創作的工作取得資金。這使得並非只有財力的人才可以從事創作工作；
b. 對著作權的限制，例如合理使用的規定，也提供財力不足的創作者在一定限度之內，可以在他人的創作之上，續爲創作，並且無須取得同意；
c. 在數位環境普及之前，著作權權利人很少向支付不起著作權利金的侵權者主張其權利[xxxi]。

若從有財力的創作者與財力不足的創作者的創作機會均等觀之，這些著作權法上分配上的考量十分重要。因爲著作權同時協助創作者取得資金，也是創作過程中可能的成本之一。就財力不足的創作者而言，他們的創作活動如何受到著作權的協助與阻撓，從分配正義的角度視之，是值得關心的課題[xxxi]。

除了創作機會均等之外，著作權人與利用其著作創作的人之間權益的平衡，也值得由表意機會（expressive opportunity）均等思考。言論自由，並不因爲財力的差異而有別。法律制度面各種言論的補償措施、廉價媒體的保存（preserve）以及必須載播（compelled carriage）等規定，都落實了表意機會均等的原則[xxxi]。著作權法制的分配上考量及制度上的落實，也符合了表意機會均等的基本原則。

可惜在數位環境下，無論就散佈其創作或是利用他人的作品於創作過程而言，資訊科技以及數位環境提供創作者絕佳的平台。這項發展也使得著作權權利人更積極地保障其權益。在此一大環境的轉變過程，由分配的考量觀察，受害最深者莫過於欠缺財力，又無商業目的，純爲興趣或表達而創作的作者。在著作權人無區別地主張其權利，而合理使用的空間也遭到壓縮[xxxi]的情況下，創作以及表意都受到了限制。這不只是創作人或表意人個人的損失，整個社會豐富而多元的文化內涵，也容易僵化，無法全面、活潑地發展[xxxi]。

Houweling教授舉了數項改進之道[xxxi]。就平衡著作權人與利用其著作於創作過程的作者方面，氏提出一項基本原則：非爲金錢目的而爲創作者，應免除其侵害著作權之責任；有獲利的創作，作者只在其所獲得之利潤範圍內，有支付著作權人權利金的義務[xxxi]。

這項原則在落實過程有賴公平的程序平衡著作權人及利用其著作創作者的權益。這項課題的探討，本文將在下一節進行。此處本文由著作權法上的公共領域（public domain）概念，繼續探討分配正義課題。

公共領域在著作權法制裡，指著不具著作權保護，大眾可以隨意使用的著作，無論是消費性使用或是轉化性使用。所有著作權屆滿的著作，均屬於公共領域著作。不過，影響公共領域範圍的因素，往往牽涉到著作權法的解讀，以及解讀者的著作權法理念。例如著作權只及於著作權的表達而不及於觀念，觀念便是公共領域的一部份，可以隨意取材。美國智慧財產權知名法官 Learned Hand 便指出，觀念與表達的二分，只能有個案式（ad hoc）的解決。這顯示觀念與表達上的判斷，有極大的裁量空間，法律理念成爲重要的決定因素。從公共利益出發與從財產權人權益出發很可能得到不同的判斷結果。

Lange教授便爲數位環境下的公共領域，提出了他的法律理念。氏認爲公共領域是個人原創表達（creative expression）得以發揮的神聖之地。其神聖處在於提供個人明確保障，以免私人財產上的主張威脅到個人的表達。公共領域因此不應當是如一般想像的，是一個地方，而應該是一個狀態或身份（status）。這個身份是由於一個人發揮創造性的想像力而取得。如同前述Rubenfeld所提出的想像的自由[xxxi]，是現今社會表意自由最好的詮釋[xxxi]。

一個重視想像自由的公共領域，Lange認爲對於合理使用（fair use）會有不同的解讀。傳統上認爲合理使用是一項阻卻違法事由，Lange則認爲任何人只要認定有創造性的表達，就構成合理使用。不像Leval法官所提出的轉化性合理使用（transformative use），合理與否，是加值部分的創造力如何而定，創造力愈高，愈能更構成合理使用[xxxi]。換言之，Lange的合理使用標準，只有在無法找到具創造力的作爲時，才被認定不具合理使用[xxxi]。

Lange 提出在數位環境下，重視想像自由的重要性，重新思考公共領域。其主張是否實質上超越 Houweling 的主張？也就是除了非營利爲目的的創作，取材上應不受著作權的限制；而以金錢收益爲目的的創作，則以利潤的部分，做爲著作權權利金分派的範圍。Lange 的主張，解讀起來似乎強調想像自由的同時，具

體地認爲只要有原創的元素可以被發掘，便滿足合理使用的要求，無須取得著作權人之授權。但是是否也因此沒有權利金分派的問題？若是，則 Lange 的主張是相當強烈的著作權左派思想。

Lessig教授則透過對另外一位學者Frischmann教授的評論，提出了更細緻的分析[xxxi]。Lessig贊同Frischmann首先將非敵對性資源（nonrivalrous resources），也就是不因某人使用而減少的資源，如智慧財產，分爲兩類：一類是純消費性的非敵對性資源；另一類則是中介性（intermediate）的非敵對性資源。後者係在輸入製作或創造其他財貨過程的資源。這兩種不同的非敵對性資源的區別實益在於：非敵對性資源由於會被他人不付費而享用，導致降低創造的誘因，因此需要以專屬式的財產權加以保障；但這項解決方案對於中介性非敵對性資源而言，並非毫無代價，因爲可能的續創造會因爲須取得授權而停止。

這種由市場機制解決非敵對性資源在創造誘因與近用兼顧[xxxi]方面，會出現更大的問題，當這類中介資源中的一部份一般性（generic）而非具體地參與（input）其他財貨的製造。Lessig與Frischmann稱這一類i)非敵對性；ii)中介；又iii)參與廣泛財貨或服務的製造，包括私人財、公共財及非市場財等之製造的中介財（intermediate goods）爲基礎架構（infrastructure）。其主要論點在於：這類提供社會及公共財的基礎架構不能依賴市場規制[xxxi]。

Lessig舉費城市計畫提供無線上網的補助，被賓州議會在私人企業的影響之下，以市場能提供爲理由，決議政府無須也不應提供此一補助。Lessig認爲上網符合前述基礎架構的三個要素，由市場機制提供只能滿足部分需求，正如同私人道路只佔全部道路的一小部分；或私人快遞較之郵政系統有更多的限制[xxxi]。

隨即，Lessig將討論聚焦於基礎架構，如網際網路，的規劃原則，而同意Frischmann的主張，市場與政府都不是最好的規劃者[xxxi]。最佳的規制模式，應當是公開近用（open access）。而公開近用最佳寫照，應當是點對點（end to end）的網際網路基本架構。但如何是確保點對點公領域（end to end commons）的規範或規則呢？

Lessig回顧過去，確保點對點架構的兩個基本主張，也反映出兩個不同的政策選擇。1990 年代末，公開近用明確要求網路所有者允許競爭者與其線路連結，以確保提供上網服務者之間的競爭。而最近由美國聯邦通訊委員會（Federal Communications Commission）主席Michael Powell所提倡的「網路自由（internet freedom）」。網路自由並不將重點放在相互連結的可能，而重視網路提供者不偏袒或阻礙消費者的選擇，使得網路維持「中立（neutral）」[xxxi]。

Lessig 認爲相互連結未必達到競爭的目的；網路中立也好壞參半，見證了垃圾郵件、病毒，同時也喜見網路電話等的發展。需要更多的研究，才能知道如何規制公開近用的領域。本文的心得則認爲由規制發展到治理（governance）的論述，是未來探索的道路上，不容忽視的一個路徑。本文在下一節進一步剖析。

2. 財產權的考量

著作權保障的範圍，一直是著作權學理致力解決的難題。數位著作權將這個難題帶入新的環境，也添加許多變數。前一節學理的探討，是從分配正義、言論自由、公共領域的重新解讀，以及涉及基礎架構的中介資源規制等角度，試圖探討公共利益如何能在數位環境中受到維護，甚至發揮文化創新的功能。本節所討論的學理，則是由財產權的角度出發。Gordon教授早期以市場失靈（market failure）的理論解釋何以著作權法應保留合理使用的空間[xxxi]。本小節討論Gordon用洛克（John Locke）的自然權理論分析著作財產權人與公共利益的協調。基本上，Gordon認爲一般誤以爲Locke的自然權使得財產權成爲一項絕對的權利，財產權人就其財產，無論在使用、收益或排除損害上，都有完全的控制。Gordon強調洛克自然權建立在任何人都不應傷害他人的基本原則之上。而且任何人從自然界經由自身勞力的結果取得財產時，都應當保留足夠而等值（enough, and as good）的資源給其他人。由這一點出發，則著作權的財產權人與公共利益的協調，可以找出平衡的路徑。由於Gordon的論述極具參考價值，因此雖與數位著作保護無直接關係，本文亦在此小節討論之。

本小節另外要討論的一項難解的學理論辯，是關於數位環境下，究竟應當給予數位著作權人對其財產更多的控制抑或應降低其控制。Hunter 及 Wagner 各執一項主張。這項論爭，短期內難有妥善的解決之道，不過論述過程有利於對數位著作財產權保護的課題，有更深一層的思考。

（1）Gordon就洛克自然權的分析[xxxi]

在自然狀態下（state of nature），洛克認爲並沒有實證法授與財產或賦予某人權利命令他人。人與人之間只有道德義務（moral duties）約束人的行爲。由於自然狀態之下人性平等，我們對他人所負義務也是他人對我們的義務。權利也是一樣。洛克理論中的權利有兩類：自由權利（liberty rights）以及主張的權利（claim rights）。前者並無相對之義務，後者則由他人對權利擁有者負有義務。在財產權保障方面，Gordon 認爲洛克的理論可整理出四項一般的自然權利與義務：

a. 最主要者，所有人都有不傷害他人的義務；
b. 主要的自由權利有兩項：處置個人努力的成果，以及利用公共財（commons）。這兩項權利顯示，至少在欠缺極端需要的情況下，自然法並不授與人們對於他人非侵害性地利用自身的成果，而有權利上的主張；或者對於他人非侵害性地利用公共財而主張權利；
c. 所有的人有兩項核心的義務：除了自己的身體以及會造成自己危急情況之外，人們應該在他人有急需的情況下讓他人分享自己的資源；當資源有損壞或浪費的情形，也是如此；
d. 所有的人都有義務不干涉他人經由勞力自公共財處取得或製造的資源。這項

義務是負有條件者，也是道德上證成財產權的關鍵[xxxi]。

由上可知，我們所取得者，有些是靠我們的作爲，有些則是靠我們的人性。基於人性而取得，最重要的有三：不受侵害的主張；當有急需時，分享他人充分的資源的主張；以及利用公共財的自由權利。這三者可以稱之爲「基本人性權益（fundamental human entitlements）」。人們雖然可以更加努力而獲得比他人更多的資源，但努力不能讓我們損害他人的基本人性權益。例如我們不能經努力而賺到侵害他人的權利，也不能經努力而賺到損害他人近用公共財的權利。但是如果公眾基本權益與智慧財產的創造勞動者的道德主張相衝突時，應如何解決呢[xxxi]？

Gordon以洛克的但書（proviso）作爲基礎，尋求解決途徑。易言之，個人對於自己的勞動所得是否能主張權利，端視洛克所主張的是否留給他人足夠且等值的機會在公共財中有所收穫。反過來說，也就是財產權人權利主張的結果，若造成他人自公共財中創造財貨的機會減損，便不得主張財產權[xxxi]。

（2）財產權人控制程度的辯論

網際網路普及之初，接觸網路的人都會感染到一種網路自由的氣氛，網路上的資源可以自由利用，網路上的言論可以毫無顧忌。整個網路世界，像是法律假期之所在。可是隨即有學者所謂網路上圈地（enclosure）的發展，各式各樣的使用條件（term of use），以及財產權人運用資訊技術嚴密控制其數位財產的作法，引發爭議。

Hunter教授認爲將網際網路用一種空間（space）的隱喻類比之，是造成困境的原因[xxxi]。過去學者以「公共財的悲劇（tragedy of the commons）」形容由於每個人都有權使用，使得財產被過度使用或濫用[xxxi]。例如過度的濫捕魚類；無限制的放牧所造成木草生長上的傷害；或是被過度砍伐的森林[xxxi]。網路空間化以及網路上圈地運動的結果，則造成正好相反的災難，亦即「反公共財的悲劇（tragedy of the anticommons）」[xxxi]。Hunter認爲Heller並非首先提出反公共財（anticommons）的觀念。過去，在理論上已有這方面的討論，只是由於一般學理上認爲，要每一個權利人都阻撓其他權利人使用其資源，反公共財的情況才成立，在現實生活上，可以舉出的例子便很難找到。Heller則指出，並不須每個權利人，只要有一些權利人都彼此相互阻撓各自權利的行使或者資源的利用，便構成反公共財的悲劇。這項悲劇之所以悲，是彼此阻撓的結果，造成資源無法充分被利用或甚而完全無法被利用的情況。

Hunter認爲早期網際網路上許多創新的資源利用情形，如將各媒體內容集於一處的新聞總覽網頁等，隨著一個個訴訟，多數判決結果都使得網路資源無法像判決前那樣有效被利用。這樣的發展趨勢遲早使得網路形成一個反公共財的悲劇[xxxi]。

反之，Wagner則首先提出不完全掌控（incomplete capture）的觀念，指出智

慧財產權人無論如何都不可能完全擁有其創作所產生的所有資訊及社會價值[xxxi]。一項創造出來的資訊，可以分成三個部分。而可以看出，無論是哪一個部分，權利人都無法如一般人理解的完全掌控。

第一個部分是該資訊本身，也就是著作等智慧財產權保護的對象。由於實際上權利人無法完全貫徹其權利的主張，總有人侵害權利而逍遙法外，在數位著作環境，這種情形佔據頗多的比率。第二類被創作出來的資訊，是直接由該資訊所衍生的資訊。如著作權法上的衍生著作。著作權法上有合理使用以及觀念與表達二分等規定，存在相當大的模糊空間，權利人也因此無法完全掌控。第三類則是間接發展自該創作，而不在智慧財產權保護範圍內的利用。

第三類的資訊很重要，可以再分爲兩種情形，都不是創作內容的一部份。第一種情形是一般看問題的觀點、對於過去原則的改變、一項可能成功的研究方向、或對某種材料所發現的新的利用方式。例如美國電視劇生存者（Survivor's）運用真人實境的手法成功，引發許多電視節目的仿效[xxxi]。第二種三類資訊則是受原創作刺激（stimulate）所致。例如Eminem的音樂引發婚姻暴力的公眾討論。

由以上的分析，Wagner 得出一項論點，即給予權利人更多的控制很可能會造就整體更多更好的資訊。因爲：

a. 即使完全控制之下，公開資訊仍會持續被製作及散佈，有如前述；
b. 在長期以及給予控制與創作誘因積極正面的關係之下，完美（perfect）的控制[xxxi]會造就更多公開資訊[xxxi]。

本文認爲，數位著作保護涉及極其複雜的利用關係與利用情境，Hunter 與 Wagner 之間或許並非孰對孰錯的問題，而是什麼情境下 Hunter 較有理，而什麼情境下 Wagner 的主張較值得考慮。如何讓各種關係與情境能充分反映，可能是更爲重要的當下課題。這也是本文下一節所要引導出的一項論點。不過，本節尚有一小節需要先討論學理上關注的另一項課題，有關作者的重新定義或解消？

3. 著作性（authorship）的發展趨勢

資訊科技及網際網路使得創作有更形低度創作（low authorship）以及高度協同（collaboration）的趨勢。這項發展與專利發明上，越來越少如愛迪生式的大發明家，而越來越多創新團隊一點一滴式的累積與改良式的模式同樣反映整個環境的大趨勢。不過在著作權法制上，這項發展確實引發重新思索作者定位的論述。這也是爲何本文在之前討論到目前廣泛存在的兩個現象，普遍違法下載音樂或其他資訊和學生撰寫報告或論文時抄襲網路上文章，可能不應當立刻以傳統觀念認定罪刑重大。如何協助新的規範產生，則是具挑戰性的課題。

Dusollier舉法國自由藝術授權（Free Art License）以及美國開放原始碼（Open Source）的一般大眾授權（General Public License, GPL）爲例[xxxi]，法國自由藝術

授權是一群藝術家與理論家發展出的授權制度，鼓勵作者以交換、自由複製、甚至佔用（appropriation）的方式保護其著作，所以是一種典型的「反著作權（Copyleft）」[xxxi]。開放原始碼的一般公眾授權則是電腦程式的類似發展。軟體著作人提供其軟體的原始碼，在不准管制或必須以同樣方式繼續授權等約束下，任何人得以使用、修改或進一步開發該軟體。

就反著作權與著作性關係而言，Dusollier指出這項新的發展與後結構主義（post-structuralism）及後現代（postmodern）文學批判解構（deconstruct）作品及作者的概念，有雷同之處。後結構主義者認爲作品依隨特定歷史及論述秩序（orders of discourse）。Roland Barthes主張作者已死，因爲是語言而不是作者在發聲。作品實際上是去中心化（decentralized）、非封閉（unenclosed）且多元的文字，並非涵蓋單一目的性的意義，而是多層次的空間，與許多作品相結合或批判；沒有那一件可以主張原創。文本基本上是文化無數中心的一連串引言。寫作與閱讀的界限因此被打破，公眾成爲作品的產出者。讀者在此意義脈絡下，並非單純消費作品而感無聊（bored）的人；而是積極參與創作，添加生命於著作的協同創作者。也因爲如此，Barthes[xxxi]認爲唯有作者死亡，讀者才有新生的機會。Dusollier再以自由藝術授權機制爲例，雖然以作品爲中心，不過所謂作品，已被界定爲公共作品（public work），包括原始的創作以及隨後所有的衍生著作。這項公共著作是由原始作者透過授權，界定了隨後貢獻者的條件。透過這樣的法律機制，並不只是原始作品喚起大眾自由創作的意願；而是這項一直演化、被修改、並往多個方向發展的作品整體，成爲自由創作的動力。人們對於作品的享受，由於多重的可能使用及使用者，促進新的創造條件並增進可能的再創造。

有趣的是，Dusollier 指出，Barthes 及 Foucault 的理想並未受其鼓吹而實現。反而是現今透過法律對權利人授權條件的保障，發展出自由藝術及開放原始碼等創作空間。易言之，反著作權終究要經由著作權及契約，才能達成。這確實是對於未來著作性的發展，值得參考的觀察。

四、程序上的解決途徑

前一節的論述，無論是由分配正義、財產權或是著作性思考著作權權利人與使用人間的權益平衡，都是由實體法律的角度出發。本節所要整理者，是如何由程序的角度，思考數位著作權保障課題。這一節中，本文先指出數位著作權人在現行著作權保護架構下，由於與使用人個人隱私的權益保護發生衝突，以致於在確保權益的努力上，出現困境。尋求更好的爭議解決之道，也因此勢在必行。其次，本文介紹 Lemley 等學者提出的一項制度設計。這項爭議解決的途徑欲藉網際網路，提供快速而低成本的數位著作權爭議解決途徑。不過由本文前兩節的論述，筆者認爲 Lemley 的建議並未掌握到數位著作權爭議無論牽涉事理或法理的複雜性與困難程度。本節最後以治理（governance）和網路規制的一項理論出發，勾畫出一項重視論述及學理的爭議解決架構。

1. 數位著作權與資訊隱私

Katyal以新的監視（new surveillance）形容網路上個人資訊隱私權[xxxi]遭遇到的新困難[xxxi]。智慧財產權與隱私權似乎有相似之處，兩者都涉及平衡創作者對於特定資料的掌控與消費者近用及再散佈該資料的渴望[xxxi]。在點對點傳輸（peer to peer）架構之下，數位著作財產權人靠個人保障（private enforce）其著作財產權的努力，所遭遇到的最大困難，便是著作財產權人欲偵察對象的個人隱私。因爲點對點傳輸不像過去，可以經由系統服務業者（Internet Service Provider, ISP）管理數位著作的使用，或提供使用者的相關資訊。

Katyal指出，著作財產權人依賴大量使用「聰明代理人（smart agent）」，運用電腦程式，在網際網路上指認被認爲構成著作權侵害的行爲，並直接聯繫可能的侵權者[xxxi]。美國唱片業協會（Recording Industry Association of America, RIAA）雇用一個團隊的網路專家，運用 24 小時工作的網頁爬行者（web crawler）[xxxi]蒐集可疑的資訊，並提交網路系統業者或學校，以進一步追索可疑的侵權者。這些資訊也可以分辨出使用人係自其他網址下載侵權資訊還是取材自個人所有的光碟，以進一步釐清是否侵害著作權。這種無所不在的監視動作，對個人產生的威脅，Katyal認爲是法律應該更加關切的議題[xxxi]。

不過，就合法確保著作權權益而言，美國唱片界協會並不順遂。美國數位千禧年著作權法（Digital Millennium Copyright Act, DMCA）就網路系統業者平衡著作權人的權益以及網路使用人的隱私權，有詳細規定[xxxi]著作財產權人在發誓所請發的傳票只用在找出侵害其著作權人的資料後，可以向任何一個聯邦地院的書記官（clerk），發出傳票，請求特定網路系統業者提供足以指認侵害著作權之人的資訊（information sufficient to identify the alleged infringer）[xxxi]。2003 年美國唱片業協會（RIAA）控告Verizon網路服務公司[xxxi]未依傳票提供侵害RIAA音樂著作權的侵權嫌疑人的資訊敗訴。法院在該判決中，確立網路系統業者若只是使用人連結網際網路的管道，並未儲存資料在系統業者伺服器上者，無須提供可疑侵權人的個人資訊。未來應如何妥善平衡著作權與隱私權之間的保障，會是學理以及實務上積極論戰的課題。不過，由網際網路普及以來，原則上以法律保障反盜拷措施的數位著作權法制，除非權利人大規模的轉向數位著作權管理（digital rights management）系統，以尋求其數位著作權權益的保障[xxxi]，否則在致力保障私人著作權權益上，無論在執行面或法制面，都不易貫徹權利人數位著作權的權益。網路使用人個人隱私保護上的考量，會更加深追索上的限制，如何有效地調和著作權人與使用人間的權益，仍有待進一步探討。

2. 數位著作的線上爭議解決（Online Dispute Resolution, ODR）

無論是數位財產權人與侵害其權益的人之間，或是數位著作權人與其授權人

之間，很容易形成爭議。這類爭議，無論由成本考量，或由解決的速度上考量，都不一定適合在傳統法院起訴。Lemley和Reese於是建議立法，成立一個運用網路輔助的爭議解決的管道，以回應點對點傳輸所引起的數位著作權爭議[xxxi]。

Lemley和Reese指出，目前著作權人需要低成本而快速的管道，解決其與侵權者之間的爭議。在網域名稱上已有類似的發展，約有 7500 網域名稱的爭議在前四年設置網域名稱爭議解決管道後完成，每件個案花費在 1000 至 1500 美金[xxxi]。

Lemley和Reese認爲，一項數位著作權爭議解決的程序，可以發展出公平而平衡地選任裁判官的程序，對於爭議解決的結果，吾人也可以允許進一步的行政救濟以及對於濫訴者處罰的程序。處罰的方式可以是金錢損害賠償、可靠地從網路上移除侵權資訊或侵權人行爲本身的機制。當然還有執行這些機制的輔助措施。也因此，Lemley和Reese建議的機制，需要著作權立法的配合[xxxi]。

其實，非線上的爭議解決管道，早已存在，只是成本上與時間上的考量都不經濟。美國國會曾試圖修法改善此一管道的運作，不過至今未果。這項管道就是在美國著作權局之下運作的著作權權利金仲裁評判小組（Copyright Arbitration Royalty Panel, CARP）[xxxi]。著作權局長收到權利金比率或權利金分派上的爭議時，可以召集該小組審議[xxxi]。

CARP的處理程序基本上是當有爭議發生時，美國著作權局局長先訂定一段期間，由爭議的雙方談判其爭議。談判不成，才進入CARP程序。兩造應先提出書面的案由，說明其認定的合理授權金爲多少。著作權局接著展開一段期間的調查。調查結束後，由著作權局局長從仲裁人名單中選任兩位仲裁人，再由這兩位仲裁人選任第三人出任仲裁主席。仲裁庭可以召開公聽會，也可以令雙方進行交互詰問，在 180 天法定期間內，完成仲裁程序，作出權利金的決定。該決定提交國會圖書館館長（Congress Librarian）後，館長在著作權局局長協助下，在 90 天之內必須決定接受仲裁庭的決定與否。若不接受，館長和局長在 30 天內必須作出權利金的最後決定。不服此決定，可以上訴至美國聯邦上訴法院所屬的華盛頓特區上訴法院[xxxi]。

自 1993 年CARP成立以來，完成 9 件仲裁，較具爭議的是最近完成的網路播出者（webcasters）須支付的權利金[xxxi]。這個個案，除了CARP的最終決定受爭議外，數百萬美元的費用也使得一般權利人不願意選擇此一解決爭議的管道。而仲裁庭的臨時性質也不利於一致性的決議做出[xxxi]。這些都是CARP無法成爲數位著作權爭議解決主要管道的原因。由本文第二及第三節的討論，應該可以發現權利金費率以及其他數位著作權爭議實已包涵太多的爭點，而每項爭點彼此糾結，又需要深入探討。由學理上觀之，不同研究路徑與不同的主張爲數不少，都使得由行政機關內部研究或交由少數仲裁人判斷，都不易化解爭議。如何讓各種不同的使用態樣，不同的使用情境能在程序上充分反映，又在解決爭議的過程讓不同的學理能經由交流、論證，而讓最好的主張得以逐漸浮現，應當是比較合於現今需要的爭議解決機制。這也是本文最後一小節的焦點所在。

3. 由訴訟外爭議解決開啓對話

本文一開始便提及多位美國法學者提出資訊法學的典範移轉說。這些具體針對資訊法律問題所做的觀察，如果放在更大的整個法學思想的發展此一角度上觀之，似乎也有類似的脈絡可以體察得到。Lobel教授用再新政（Renew-Deal）來形容此一法學思想的轉向[xxxi]。新政（New Deal）是美國經濟大恐慌之後，美國總統羅斯福領導下，透過強化政府規制（regulation），積極因應環境的鉅變，並開啓新局。一般也認爲是美國進入規制國（regulatory state）的開始。大量的行政機關（regulatory agencies）被設置。這種許多兼具行政、立法、司法功能的行政混合機制在法律思想以及實踐制度面，都引起強烈的爭議與反彈。最有名的就是美國聯邦最高法院九名大法官的多數在多次宣告羅斯福總統新政的立法違憲而無效之後，引發的憲政危機。最後在九位大法官中的一位轉變陣營後，危機才化解[xxxi]。

也一如本文一開始所言，希望本次典範的移轉不會如孔恩所言，只有在舊典範完全無法回應現實的挑戰時，新典範才有發展的機會。因爲果真如此，則可預期未來將有一番人權上極高的社會成本必須支付。本文在此最後一小節，嚐試藉Lobel 的再新政，試著捕捉正在進行的轉變，論述其主要特徵爲何，並探索因應的方向何在。

Lobel首先指出一系列的學理如自發性法律（reflexive law）、軟性法律（soft law）、協同治理（collaborative governance）、民主實驗（democratic experimentalism），以及其他許多的主張[xxxi]，其共通處在於指出治理的法律思想的出現。這類主張在勞工法、環境保護法以及資訊法等較新發展的法律領域最爲明顯[xxxi]。治理有別於過去規制的思想，在於認爲中央命令及控制（central control and command）的結構不再可能。新經濟快速的轉變、科技的進步以及持續的異質化（heterogeneity）都使得傳統規制的模式日益無力[xxxi]。

治理模式回應了法律規制在目標以及能力上的改變，它基本上將法律控制（legal control）改變爲動態（dynamic）、自發（reflexive），以及彈性（flexible）的領域。治理的基本原則在於提振其他社會領域或次系統內部自我規制（internal self-regulatory）能力，而與治理互動。此外，治理同時將部分市場的機制引入公共領域，而將公共價值注入新的私領域經濟[xxxi]。

本文認爲，似乎規制的模式是一個發展不完全的模式，由美國法制發展經驗上，司法審查行政作爲尚難找到一般基本原則，可以得到佐證。而治理模式開始正視自我規制（self-regulation）以及其與行政、立法、司法等國家法治之間的良性互動。當然，這項由規制轉向治理的路，並非沒有危險。至少在思想上，賦予自律的空間，由國家以外的環節積極擔負起形成法律的權責，其所涉及法律思想以及實務上的轉變與適應非同小可。與法治斌教授形容新政時期美國聯邦最高法院所涉及的憲政革命，恐怕有相當的衝擊輻度。Lobel也正確地指出治理模式重

視各層級的對話。無論在地區社群、各經濟環節、區域性、國家乃至於國際間的對話，在治理模式重視協同（collaboration）原則之下，日形重要。此點正好對應規制的路徑，常被批判爲受權利論述影響所及，每每是全有或全無的決定模式[xxxi]。不過，筆者認爲，若將治理理解爲國家與社會在法律形成上進一步的合作，則更重要者，可能在於如何管理其界面（interface）[xxxi]。

網路上爭議解決作爲一種訴訟外爭議解決的機制，適時地可以擔負起開啓對話以及銜接國家法律與自我規制間的任務。以本文所討論的數位著作權保護問題爲例，透過線上爭議解決帶動社會對話是值得進一步研究的發展方向。其目的在於讓社會上不同的數位著作使用類型及情境以及不同的價值訴求能夠呈現；同時，不同的學理主張能透過此一對話機制進一步辯論或共同發展研究議題[xxxi]。無論是日後當事人將爭議帶入法院，或是類似案件在法院提起訴訟，數位著作權爭議解決過程在網路上所留下事實以及各項論述的紀錄，應當是值得法院參考的重要資訊。反過來看，法院在判決理由中對網路訴訟外程序發展出來的主張所做的直接或原則性回應，也對日後訴訟外爭議的程序，有指導其發展的意義。最起碼，國家法律的形成與適用過程，與人們透過自律及爭議解決過程所發展出的豐富對話，有機會開啓互動的可能，這似乎是未來法律發展上一個新的重要里程碑。

五、結語

本文由美國法學論述就數位著作保護的實體以及爭議解決機制兩方面的討論爲介紹對象。試圖爲思考這個課題的研究者提供更多的思考糧食。數位著作保護課題不會很快地結束其爭議的特質，本文介紹的學理也不可能就是解決之道。本文更要提出者，是解決數位著作保護課題可能涉及法律典範的移轉；或法律規制模式的新里程碑的探索。不論在法律思想、制度、實體規定以及爭議解途徑，都值得探索數位著作保護課題所帶來的衝擊。

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