行政院國家科學委員會補助專題研究計畫成果報告

由富勒的社會法理學論資訊隱私權及其規制(I)

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中　華　民　國 97 年　9 月　14　日

中文摘要

本計畫為期三年，以富勒所開啟的社會交往法律理論及其發展脈絡為中心，批判並再建構自發性法律規制模式，並將該模式試行於資訊隱私權規制之上。本報告為第一年的工作成果報告。以闡明富勒的法律思想為主;尤其著墨於富勒的人際交往理論，這是富勒理論的主要論點，也是其理論獨特之處。本年度研究成果主要為兩篇論文; 一篇中文論文以闡述富勒人際交往法理學，並用以批判美國最高法院判決 Grosker v. MGM, 以富勒人際交往的法律觀檢討數位著作保護課題兩極化的發展，一篇英文論文則探討德渥金與富勒法律理論上的差異，以及重新建構德握金法律原則以兼顧人際交往觀點的可能。

Abstract

This is a three-year research project. The main objective for the project is to analyze the social interaction theory of Lon Fuller and use it to reconstruct the reflexive model of regulation. This project then applies the improved regulatory model, with the insight of information privacy jurisprudence, to derive a better approach for information privacy regulation. In the first year, the main emphasis is on the elaboration of Lon Fuller’s legal theory. Fuller’s human interactive point of view is especially under review, and two research articles (draft attached) are primarily the result.

前言

報告人研究主題環繞資訊科技對法律的衝擊以及可能帶來法律形成上新的模式兩方面。九十年研究台灣法律資料庫的現狀及未來發展會面臨的課題。該計畫實地訪談了各環節的法律工作者、國內法律資訊工作者，以及相關政府部門的主事官員。部分研究成果發表於中研院出版之調查研究。適當時機，報告人將提出後續進一步的研究計畫，試圖與報告人理論上的研究成果結合。

隨後三年，報告人連續在貴會補助下，進行理論研究。分別針對德渥金（Ronald Dowrkin）的裁判理論以及哈伯瑪斯（Habermas)對該裁判理論所提出的批判，進行剖析; 並試著提出補強方案。研究成果發表於中研院歐美所舉辦之美國聯邦最高法院判決評釋研討會，並刊登於該所學術期刊「歐美研究」，該文亦收錄於該所主編之專書：「美國聯邦最高法院判決評釋2000—2003」。

德渥金的裁判理論及法哲學，與羅斯(Rawls)的政治自由主義中的公共理性一脈相承，報告人因此進一步探索其間之關連，以及哈伯瑪斯對公共理性所提出之批判。報告人認為這是繼社群主義者對自由主義所提出的批判後，另一波來自社會法哲學的重要攻擊，值得重視。尤其以該項討論為基礎，可以進一步思考隨網際網路盛行的線上爭議解決機制(online dispute resolution)及其在法形成上的意義。報告人這項研究，以Toward a Discursive Public Reason in the Internet World, 先發表於國際法哲學大會，並已出版於東吳法律學報。

德渥金與哈伯瑪斯等的理論，均以國家法律的形成為主要關懷對象，而其對於日益重要的自律(self-regulation)，則不重視。報告人94年以特補樂(Guenther Teubner) 的自發性法律(reflexive law)為下一個研究焦點。研究過程中，發現美國哥倫比亞大學寇恩（Jean Cohen）教授改良特補樂自發性法律，所提出的新法律典範，值得探索。因此完成論文一篇：The New Legal Paradigm of Jean Cohen and It’s implication for Public Online Dispute Resolution。該文經貴會補助，發表於美國巴爾的摩舉行的「美國法律與社會學會年會」，並已出版於中研院歐美所所編的「歐美研究」季刊。

寇恩教授以性騷擾作為其理論闡明的法律領域。一個理論若要能經得起考驗，只在理論提出時所展示的法制領域內成立是不夠的，報告人95年因此試著運用寇恩的法律典範於資訊法律之中一項重要又具爭議的法律領域:數位著作法律保護課題。所完成的一篇論文：Digtal Copyright Law-Making and the Future Development of e-Government，先後發表於奧地利薩爾斯堡舉行的第十屆國際法資訊學研討會，以及2008年美國法律與社會學會年會。

自發性法律最早奠基於系統理論，寇恩對該理論的再建構，實際上反映了美國法理學上，注重法律原則的理想面向。不過，寇恩重視社會自律一節，則並非美國法理學上的主流想法。這方面有一例外，即哈佛法學院的法理學教授富勒（Lon Fuller)。報告人因而決定嘗試帶入富勒的思想，看看理論上是否得以更為融貫，以及以這項新的理論基礎，處理新興資訊科技引起的法律問題，是否更得以發展出回應性更佳的機制。

一． 研究目的

報告人認為，富勒雖然未能發展出體系完整的社會法律理論，但是已經為該理論注入相當豐富的養分，正好能夠彌補實證理論上的缺陷。 本年度的工作因此在理論方面，將得渥金與富勒理論作一對比，同時探索是否能發展出令二者相補充的理論。藉由波士梯瑪（Postema）三個層次的法律 （亦即：國家法形成，國法與社會法形成之間的互動，以及社會人際互動的法律形成等三個層次的法律形成)，本研究在制度面，有限度地闡明，得渥金的法律原則確實為能涵蓋三個層次的法律形成，並指出如何能透過納入富勒人際交往的理論，能夠兼顧法形成的三個層次。

制度面，本研究以美國最高法院Grokster v. MGM 有關點對點（p2p）傳輸侵害著作權判決，由富勒人際交往法律理論，做出批判。網路使用著作權模式十分多樣，並且新的使用模式隨科技進展而層出不窮。過去以抽象法律概念欲涵蓋一般太樣而進行規範的方式，受到嚴峻挑戰。如何在不同使用人之間，透過對話及相互理解，化解彼此針對著作保護意見上的歧異，並且網路對話所留下來的社會意義脈絡（social context）更可以提供日後立法，行政規制以及判決上的參考，是目前各國積極研究電子參與(eParticipation)的重要推動力量。

二． 文獻探討

台灣就富勒法律思想深入研究的論文尚十分缺乏，本年度的研究成果補足了部分這方面的內容。國外文獻方面，富勒雖然不是法理學研究的重點對象，但一直有文章出現。報告人相信隨著網路帶來規範上的新挑戰，日後重視人際交往的法理，應當是一個值得重視的趨勢。茲將相關外文文獻，探討餘下：

* 早期得渥金與富勒的論戰：Dworkin, R., Philosophy, Morality, and Law-Observations Prompted by Professor Fuller’s Novel Claim, 113 U. Pa. L. Rev. 668, 1965; Dworkin, R., The Elusive Morality of Law, 10 Vill. L. Rev. 631, 1965; Fuller, L., *A Reply to Professors Cohen and Dworkin*, 10 Vill. L .Rev. 655, 1965 .

- 早期哈特 （HLA Hart）與富勒的論戰：Hart, HLA., Book Review: *The Morality of Law by Lon Fuller*, 78 Harv. L. Rev. 1281, 1965 ; Hart, HLA ., *Positivism and the Separation of law and Morals*, 71 Harv. L. Rev. 593-629, 1958; Hart, HLA .,*The Concept of Law*, 1961; Fuller, L., Positivism and Fidelity to Law – A Reply to Professor Hart, 71 Harv. L. Rev. 630, 1958; Fuller, L., The Morality of Law ; Nicholson, P., *The Internal Morality of Law：Fuller and His Critics*, 84:4 Ethics 307, 1974; Ketchen, J., *Revisiting Fuller's Critique of Hart-Managerial Control and the Pathology of Legal Systems：the Hart－Weber Nexus*, 53 Univ. of Toronto L. J. 1, 2003.

- 富勒學說主要參考文獻 (這部分並非富勒的所有文獻，而是報告人論文中有論述者)：Fuller, L., *The Morality of Law*, 1964; Winston, K., ed., *The Principle of Social Order, Selected Essays of Lon Fuller, Revised Ed.*, 2001; Fuller, L., *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975:1 BYU L. Rev. 89, 1975; Fuller, L., *The Justification of Legal Decisions*, 6 World Congress on Philosophy of Law and Social Philosophy 77- (1972).

- 較新討論富勒學說的論文集：Witteveen & Burg ed., Rediscovering Fuller：*Essays on Implicit Law and Institutional Design*, 1990。

四、研究方法與結論

報告人本年度研究計畫執行期間，完成所附的兩篇論文，其中 Human Interaction and Legal Principle, 與去年完成的 Digital Copyright Law Making and the Future Development of eGovernment, 均發表於 2008 年 5 月在加拿大蒙特樓舉行的美國法律與社會學會年會。中文論文則已經投稿。

誠如前述，一方面網路帶來新的規範上的挑戰，這項挑戰亟需重視人際交往，溝通的理念與制度; 另一方面，網路在適當的理論指引與制度設計之下，可以發展出所需要的這項重人際交往與溝通的平台。本年度報告人繼續在理論以及制度面，探索社會的法律理論以及其對現行資訊法制發展的批判。

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。 這兩年，報告人增加與歐美學者的接觸與切磋，無論在電子參與的網路平台設計以及相關法律理論及制度上的研究，均有進展。期待在貴會持續的支持下，能夠發展出現實所需要的電子參與法律形成平台，並進一步與國內外相關學者形成研究團隊，持續研究。

The Law and Society Association

Welcome: Chi-Shing Chen

View Paper Session Session

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Theoretical Accounts of the Political Work Law Does in Society 3519

Sponsor:

Keyword Area
SOCIAL THEORY AND LAW

Schedule Information:

Scheduled Time: Sat, May 31 - 4:30pm - 6:15pm **Building/Room:** conference / RM 19
Title Displayed in Event Calendar: Theoretical Accounts of the Political Work Law Does in Society 3519

Session Participants:

Session Organizer: Christine B. Harrington (New York University) Christine.Harrington@nyu.edu

Chair: George Pavlich (University of Alberta) gpavlich@ualberta.ca

Reflections on the Relations between Habermas and Rawls
*Hugh W. Baxter (Boston University)

Human Interaction and Legal Principle
*Chi-Shing Chen (National ChengChi University)

The Politics of Conscience and the Asylum Seeker
*Anna Farmer (University of Warwick)

Reflexive Law in a Post-Confucian Island
*I-Ming Liao (University of Kaohsiung)

Law As Practice
*Thamy Pogrebinschi (Rio de Janeiro State University)

Discussant: Verity Smith (Harvard University) vsmith@fas.harvard.edu

Abstract:

This panel examines the extent to which Marx, Habermas, Dworkin and Teubner's engagement with legal theo – not just philosophical analysis – is able to formulate sociolegal grounding for inquiry into "the materiality of la law", and "the internal structure of law".

Human Interaction and Legal Principle

Chishing Chen*

Abstract

Dworkinian legal principle embraces the relationship between law and morality and believes morality can be included into law through arguments of principle in hard cases; however, Dworkin has been consistently insensitive to the relationship of law and society. Dworkinian judge is criticized as conducting monologue in the adjudicative process. This paper believes such deficiency is not irreparable. Lon Fuller's social theory of law which emphasizes human interaction and its reflection can contribute to the social dimension of Dworkinian legal principle, if the competing conceptions of social morality Dworkinian judges needs to weigh truly reflect the social interactions that meet the criteria of the morality of duty Fuller advocates. Otherwise, legal principle should not always lead to the one right answer as Dworkin advocates; judges occasionally ought to initiate and guide further social interaction through legal principle. As a result, such legal principle provides the needed responsiveness what Jean Cohen tries to add to her reflexive model of law; it also provides the theoretical basis to resolve the emerging issues of adjudication.

Key Words: Dworkin, Theory of Adjudication, Law and Morality, Law and Society, Community, Human Interaction, Legal Principle, Responsiveness

I. Introduction

Ronald Dworkin is a system builder. In the meantime of a prolonged debate with Hart and his followers, Dworkin first constructed his theory of adjudication based on the right thesis and legal principle in "the Hard Cases"[1]. With his central thesis intact, Dworkin further developed his legal philosophy based on the theory of interpretation, integrity and equal concern and respect in "Law's Empire"[2]. Then,

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[1] Dworkin, R., Hard Cases, in Taking Rights Seriously 81-130 (16th printing 1997). This paper advocates the need to look into the law and society part of the debate regarding Dworkin's theory and will not and cannot discuss the famous Dworkin-Hart debate. The author notices there is another round of such debate has just began since the publication of the Justice in Robes, see Ripstein, A., ed., Ronald Dworkin (2007); Priel, D., Forty Years On, working paper could be obtained from papers.ssrn.com; and Green, S., Dworkin v. the Philosophers: A Review Essay on Justice in Robes, 2007 University of Illinois Law Review 1477 (2007).

[2] Dworkin, R., *Law's Empire* (1986).

equal concern and respect was again the kernel for Dworkin's political philosophy where distributive equality is the primary issue of concern in "Sovereign Virtue"[3]. Surely, it must be pointed out that this development of thought is not linear, especially major works included in "Sovereign Virtue" came out before "Law's Empire". "Justice in Robes"[4] represents another milestone of Dworkin's construction, and there is no sign to show that his construction has ended.

This paper intends to raise the attention of another equally important debate which is treated disproportional to the law and morality debate between Dworkin and the legal positivists by the legal community. Frank Michelman first started the critique by naming Dworkinan judges as conducting monologue and the Dworkinian integrity reaches only to the community of the judges and not the whole society and therefore the personified community Dworkin constructed is questionable[5]. Dworkin has never replied to any of these criticisms and what came close was his reply to Raz's concept of law which Dworkin considered it sociological and classified it into the criterial as oppose to the interpretive concept Dworkin favors. Dworkin believes such concept was not sufficient enough to yield philosophically interesting "essential feature"[6].

This paper wants to further explore the insufficiency of Dworkin's theory for lacking the social point of view by criticizing Dworkin's concept of community. Dworkin seems to duplicate his idea of the personified community whose moral agents are judges who try to reach decisions of the community of integrity through the

[3] Dworkin, R., Sovereign Virtue (2000).
[4] Dworkin, R. Justice in Robes (2006). In this book, Dworkin further elaborates his theory of interpretation. It is interesting to note that Dworkin further develops the idea of vertical coherence and horizontal coherence and makes him closer to Kant. First in Dworkin, R., Life's Dominion 146 (1993) and again in Freedom's Law 83 (1996), Dworkin defined vertical coherence as "a judge who claims a particular right of liberty as fundamental must show that his claim is consistent with the bulk of precedent, and with the main structures of our constitutional arrangement." And then Dworkin defined horizontal coherence as "a judge who adopts a principle must give full weight to that principle in other cases he decides or endorses." Here, I think, the horizontal coherence a judge builds through out her career quite likes the maxim Kant used in his categorical imperative and the vertical coherence comes close to the universal law the legal community can uphold. In Dwrokin, R., Justice in Robes 12- 13 (2006), Dworkin further points out that he believes the legal doctrinal concept is an interpretive concept, and hence in the jurisprudential stage, the general account of the legal practice should be one that must find the mix of values that best justifies the practice by studying the aspirational concept of law to determine which values supply the best conception of the doctrinal concept, or which other values best explain the rule of law as a political ideal. "At this stage, reflections on the doctrinal and the aspirational concepts come together."
[5] Michelman, F., Traces of Self-Government, 100 Harv. L. Rev. 4 (1986); Michelman, F., Law's Republic, 97:8 Yale Law Journal 1493 (1988). Such criticism is joined by Juergen Habermas and Drucilla Cornell from different points of view. See Habermas, J., Between Facts and Norms, trans. Rehg, W., 224 (1996); Cornell, D., Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation, 136 University of Pennsylvania Law Review 1135 (1988).
[6] Dworkin, R., Justice in Robes 228, emphasis by Dworkin.

process of the principled argumentation. As a result, a true community[7] in a society demonstrates the principled feature, like the personified community as a whole, which is grounded in equal concern and respect. Considering simply that in any community in the society there is no adjudicative mechanism parallel to that of the community as a whole suggests that Dworkin's community theory is flawed. Equal concern and respect in a community in society does not necessary means principled solution of conflict, it could mean open dialog with everyone concerned[8].

This paper further believes that the flawed sociological idea of Dworkin can be mended and Lon Fuller's jurisprudence based on human interaction holds the key. In other words, Dworkin is right to demand judges take an interpretive attitude and view law based on a conception of integrity. He is also right to point out that we would reach such conclusion if we treat each other with equal concern and respect. But the same may not be considered true in any community in society. Any community in a society, even fully developed into a Dworkinian true community, does not have the capacity to adjudicate, like that of the community as a whole. All cases of a community as a whole reach the community of judges in charge of settling disputes of the whole community. Any adjudicative structure of a community in society, no matter how well institutionalized, is qualitatively different from that of the whole community and does not response to all disputes of the community as a whole. The guiding principle of such community in society cannot be integrity in the sense of a personified community as a whole who speaks consistently in one voice. Instead, treating each other with equal concern and respect requires any community in society open to anyone concerned, including the judges of the community as a whole.

Part one of this paper discusses the critique of the monological aspects of the Dworkin judge by Michelman, Habemas and Cornell. Part two further explores this critique by pointing out where the Dworkinian concept of community is flawed. Part three tries to correct such insufficiency of Dworkin by introducing Fuller's human interaction conception of law and how such idea can complement Dworkin's. Part four concludes this paper by demonstrating that this Dworkin-Fuller idea of law is what we need to improve the practice of law in a time of trial crisis.

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[7] Dworkin defines a true community as a community whose members:

1) regard the group's obligations as special, i.e. holding distinctly within the group and not toward outsiders;
2) accept the responsibilities as personal, i.e. running from member to member directly;
3) see their responsibilities as based on a more general responsibility which requires each member concerns the well-being of others in the group;
4) suppose that the group's practices show not only concern but an equal concern for all. See Dworkin, Supra note 2, 199 – 201.

[8] Pahel, K., The Public Process of Moral Adjudication, 11:2 Social Theory and Practice (1985).

II. The Critiques of Dworkinian Community of Principle

Legal principle plays a fundamental role throughout the development of Dwrokin's legal theories. In "Hard Case", Dworkin differentiates principles from utility, principle as a way of legal argumentation is also differentiated from the argument of policy. For Dworkin, law making, especially judicial law making should be based on principle and not policy or utility. A principled way to approach the law, both as a general attitude[9] and in practice, is also the natural result of the Dworkinian right thesis. In nature, both principle and right are characterized by their distributional effects. In practice, only arguments of principle can honor individual right by requiring the needed "distributional consistency from on case to the next"[10]. Otherwise, individual right is meaningless.

The association of principles with rights is also significant in another aspect, both theoretically and in practice. Practically speaking, to decide which party of a dispute has the right in hard cases asks judges conduct argument of principle that involves weighing of values. Theoretically speaking, the process of value weighing also involves the incorporating of moral concepts, or named background rights, into the law, which represents an important disagreement with the separation thesis of the legal positivists. Above all, a legal right is an institutional right, and hard cases provide one with the opportunity to redefine and reconstruct the meaning of legal institution. Such redefinition and reconstruction are unimaginable without the argument of principles[11].

In Law's Empire, the concept and practice of legal principle are still central to Dworkin's theory. Unlike the analytical approach demonstrated in the "Hard Case", in "Law's Empire", Dworkin takes an interpretive approach. In such an approach, Dwrokin needs to argue that integrity both better fits the legal practice than the conventional and pragmatic description in general and is also the most attractive among the three conceptions of the law. Answering why we should pursue integrity,

[9] Looking closer, we may still spot some difference of strength of this proposition. In Hard Case, supra note 1, especially 82-4, Dworkin points out that the legislature is competent to pursue arguments of policy and adopts programs that are generated by such arguments. But in Law's Empire, supra note 2, 176 – 224, legislative coherence, in addition to adjudicative coherence, are also required by integrity. Dworkin begins his chapter on integrity in Law's Empire with the two principles of political integrity, one of them is adjudicative principle, the other is the legislative principle, which requires "lawmakers to try to make the total set of laws morally coherent". See supra note 2, 176.
[10] Dworkin, supra note 2, at 88.
[11] Id., 90 – 105.

Dworkin rejects the theory of consent, universality or any natural duty of justice[12] as his reason, and grounds integrity on fraternity and community that embrace equal concern and respect. Here, the same arguments for attractiveness also work for legitimacy. Dworkin believes some kind of associative obligation that demonstrates integrity is not only attractive, but can also provide the foundation for members of the community to obey its law[13]. Dworkin creates a personified community to serve as the moral agent of the community as a whole, and holds that integrity requires that the personified community speaks with one voice and resolves conflicts according to principle and not by compromise. It must be so because general reciprocity[14]and equal concern[15] are adopted as the virtues of the member of the community as a whole.

Unfortunately, I think Dworkin expands his jurisprudence of legal rights, both theoretically as a special case of institutional right and practically with articulated methods of legal reasoning based on the arguments of principle and coherence in the constitutional, statutory and common law settings in "Hard Case", to a fully grown legal philosophy based on an interpretive approach that emphasizes integrity and associative obligation in "Law's Empire" without realizing the important difference between legal rights and social norms. The criticism of the lacking of dialogue in Dworkin's arguments of principle, i.e. Hercules is a loner[16], is more evident after such expansion since Dworkin must but he cannot reconcile his theory of the integrity of the society as a whole[17] with his long held strong judicial internal point of view[18].

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[12] Id., 194.

[13] He believes that "a political society that accepts integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force." Dworkin, supra note 2, at 188. Later in the same chapter, he further qualifies such community with the virtues of general reciprocity and equal concern and respect; in other words, such community is a community of principle in short.

[14] Dworkin explains "the reciprocity we demand cannot be a matter of each doing for the other what the latter thinks friendship concretely requires. … The reciprocity we require for associative obligations must be more abstract, more a question of accepting a kind of responsibility we need the companion ideas of integrity and interpretation to explain." Dworkin, supra note 2, 198 - 9.

[15] In addition to equality and concern, if members of a community also recognize their group responsibility are special and personal, then the community becomes a true community that can exercise its coercive forces legitimately. Dworkin, supra note 2, 199 – 202.

[16] "… What is lacking is dialogue. Hercules, Dworkin's mythic judge, is a loner. He is much too heroic. His narrative constructions are monologues. He converses with no one, except through books. He has no encounters. He meets no otherness. Nothing shakes him up. No interlocutor violates the inevitable insularity of his experience and outlook. Hercules is just a man, after all. He is not the whole community. No one man or woman could be that." Michelman, Traces of Self-Government, supra note 5, at 76. This criticism is also quoted by Habermas, supra note 5, at 224.

[17] The society as a whole consists of not only the judicial community but also various communities in the society.

[18] "The question is: whose integrity? Dworkin says that legal integrity "'asks the good citizen, deciding how to treat his neighbor when their interests conflict, to interpret the common scheme of justice to which they are both committed.'" But in what sense is that true? It is not, after all, citizens who are immediately called upon for the work of legal integration. The narrativistic theory of law as integrity

The flaw really starts early in Dworkin's theory of adjudication. Dworkin advocates that a theory of adjudication must meet two requirement: it must have an aspect of history to establish the legality of the adjudication, what follows is the existence of the 'fit' stage to test what legal decisions or decision chains can be considered the controlling laws or chains of precedents for the case under dispute; it must also have the stage of justification where the adjudicator chooses one conception that coheres the best with the political morality embedded in all previous decisions from the set of competing conceptions of social morality contained in decisions that pass the fit stage. The problem occurs at the selection of the competing conceptions of social morality. Dworkin's strong and exclusive judicial internal point of view actually does not really care whether the competing conceptions of social morality the adjudicator need to select from are really social in the sense that they are indeed held by individuals or groups of people in the society. The adjudicator simply constructs these conceptions based on the case at hand and the judicial records. As a result, even in cases where competing conceptions of social moral issues are diverse in the society, and these competing conceptions are poorly or mostly not reflected in the cases facing the courts, Dworkinian judges can still reach his or her one right answer.

The problem becomes even worse when Dworkin joins the interpretive turn and builds his theory again around the idea of integrity and community of principles. First of all, Dworkin seems naïve, or insensitive at least, to the long held differences between legal sociologists and positivists regarding whether social norms are law. Legal positivists like John Austin and Hans Kelsen explicitly expel social norms from the realm of law; while legal sociologists since Eugene Ehrlich[19] has taken a inclusive attitude toward social norm. Dworkin is not clear on this issue, but his communal interpretation of integrity puts him inevitably in a position to confront such debate.

Dworkin exemplifies how his communal approach resolves conflicts with justice by offering an example. In the conflict, equal concern for daughters and sons in a community requires parents to exercise a kind of dominion over one relaxed for the

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seems a vindication of the moral freedom of judges -- displaced, in Dworkin's account, onto the citizens." Michelman, id., at 69.

[19] Ehrlich clearly includes a variety of social norms like customs into the definition of law. See Eugene Ehrlich, The Fundamental Principles of the Sociology of Law (1936). Many social theoretical approaches try to bridge these two camps. See Philippe Nonet and Philip Selznick, Law and Society in Transition: Toward Responsive Law (1978). Locating within the system theory of Niklas Luhmann, Guenther Teubner synthesizes three neo-evolutionary theories of law, namely, the responsive law of Nonet and Selznick, Habermasian organizational principle of society, and Luhmann's socially adequate complexity theory, and brings forward that of reflexive law, see Guenther Teubner,, Substantive and reflexive elements in modern law, 17 Law & Society Review, 239-286 (1983). Jean Cohen recently improves the reflexive model; see Jean Cohen, Regulating intimacy: A new legal paradigm (2002).

other[20]. Dworkin believes "that associative responsibilities are subject to interpretation, and that justice will play its normal interpretive role in deciding for any person what his associative responsibilities, properly understood, really are."[21] Dworkin offers a series of test to resolve such conflict between community and justice. These criteria are:

a) whether the community is a true community[22];
b) whether the bare facts of social practice of the community are indecisive;
c) whether principles necessary to justify the rest of the institution condemn the practice of dominion, in case such dominion is settled and unquestioned in the community[23].

No one, answering the last test, can definitely be sure to expel all the unjust feature of an associative institution based on the interpretive attitude, especially in difficult instances where "the unjust dominion lies at the heart of some culture's practices of family, or that indefensible discrimination is at the heart of its practices of racial or religious cohesion."[24] Dworkin further illustrates the complex structure in the difficult instances by expanding his family quarrel by asking: whether the daughter still have an obligation to abide by her father's wishes in cultures empower parents to choose spouses for daughters but not sons?[25]

Dworkin believes before answering this question, we need to examine whether the bare institution of family in question met the four conditions for a true community just illustrated,[26] since only genuine responsibilities derived from a true community obligate the members of the community. This examination surely involves a series of interpretations. We want to know whether the culture under examination accept that women are as important as men and see the difference of treatment as a way to protect daughter's interests? Dworkin believes if the discriminatory practice is grounded in some more general assumption that daughters are less worthy than sons, than the association is not genuine and no associative obligation to accept this discriminatory practice could derive from the community. If, on the other hand, the discrimination against daughters is inconsistent with the rest of the institution of family, than it may be seen as a mistake and not a real requirement, thus the conflict is settled. Suppose the culture accepts the equality of sexes but in good faith thinks that equality of

[20] Dworkin, supra note 2, at 202.
[21] Id., 202 – 3.
[22] See supra note 7 for Dworkin's idea of a true community.
[23] Id.
[24] Id., at 203.
[25] Id., at 204.
[26] See supra note 7.

concern requires paternalistic protection for women and this practice is consistent with the rest of the family institutions, but such institution is seriously unjust, for instance, what such protective practice is consistent with is the established practice of the family to force its family members to commit crimes in the interest of the family, then the discriminatory practice can not be justified. In the end, Dwrokin believes a real conflict occurs if the paternalistic practice of the institution is the only feature we are disposed to regard as unjust. Dworkin thinks in such case, such practice of choosing spouse for daughters but not sons may be overridden by appeal to freedom or some other ground of rights; but still, since the difference of treatment is not a mistake, and it is also not the case where the discrimination is consistent with a more unjustifiable general responsibility of the family, the daughter responsibility to defer to parental choice in marriage is genuine and a daughter marries against her father's will therefore owes her father an accounting or an apology, and should strive to continue her standing as a member of the community she otherwise has a duty to honor.[27]

This article does not dispute with Dworkin's argument of principle demonstrated in the case just described. I only want to raise two questions that are more general. First, whether the reasoning in the case a reasoning of law or a reasoning of social norms? Second, who is the person Dworkin has in mind to conduct such reasoning, the daughter, the parents, the mediators of the community; the judge in the court adjudicates the case, or again, Hercules?

The first question is asking whether Dworkin takes an inclusive view of social norms and treats them as part of the law. Just like what he believes legal principle part of the law when he debates with the legal positivists. It is not clear by reading the text of "Law's Empire" and I believe the question is one that worth pursuing. Personally, I believe the role of legal principles should be expanded for a better coordination between the laws of the state and social norms derived from the human interaction in the society. I will discuss this point further in the next section of the paper.

The second question raises the doubt that Dworkin expands his requirement of coherence of the judge to the individual citizen. Judges has next to her or him the full judicial records that contain most or all previous related facts and other judges' legal reasoning in those cases. That's how judges can be expected maybe to come close to Hercules to interpret and construct legal principles and make judgments of coherence. We simply cannot expect the daughter, father or mediators of a community to conduct

[27] Dworkin, supra note 2, 202 – 6.

such interpretation, especially when they are situated in the culture that shape the community and at the same time lacking the sufficient records of facts of related conflicts and reasoning of other members in the community. On the other hand, if what Dworkin has in mind is judges or Hercules doing the reasoning, then his theory of associative obligation and community of principle is incomplete. In the next section, I want to first discuss Fuller's theory of Law as rational reflection of human interaction and then propose one way to resolve the theoretical problem of Dworkin's communal approach.

III. Human Interaction and Legal Principle

Gerald Postema provides a useful analytical scheme for us to pinpoint where Dworkin's theory needs improvement[28]. Postema intends to illustrate how the convention approach of HLA Hart and Lon Fuller's emphasis of coordination can be integrated into a general theory of law[29]. Postema considers three points of intersection of law and social life at which significant problems of coordination seem to arise. Level one coordination problem occurs out of human interaction and the law in some form is introduced to help solve the problems. Level 2 problems arise between officials and citizens; and level 3 problems arise among law-applying officials themselves[30]. It should be noted that each level of the tri-level analytical scheme represents a bi-directional relationship. The level 2 problems thus involve not only how the officials apply the law to the citizens as its recipients, it also involves the reading of the laws applied from the perspective of the citizens and the process of transforming and adapting the law promulgated into level one actions toward one

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[28] Gerald Postema, Coordination and Convention at the Foundations of Law, 9 Journal of Legal Studies 165 – 203 (1982). Later, Postema uses a similar approach to analyze Lon Fuller's human interactive theory of law. For a better understanding of the idea of the three levels of the coordination problems, please see the following quote:

> "Fuller's general thesis is that implicit, interactive practice is pervasive in all legal systems – not just in those heavily dependent upon ""customary law,"" but even in those apparently dominated by enacted law and formal lawmaking and law-applying institutions. We can distinguish three broad contexts of interaction in which practices of the sort Fuller describes are in evidence. The first context is essentially ""horizontal,"" where interaction occurs between parties related as ""equal."" In the simplest cases these relations are bilateral, as in contractual arrangements or business partnerships; but they can also be complex, multilateral relations, as in relations amongst citizens in a political community. The second context involves interaction among parties related ""vertically,"" as authorities to subordinates; for example, as officials and players, judges and litigants, and lawgivers and subjects. In the third, interaction occurs between or among authorities or officials themselves." Gerald Postema, Implicit Law, in Rediscovering Fuller: Essays on Implicit Law and Institutional Design 255, 259 (Witteveen and Burg ed., 1999).

[29] This article can be seen as an attempt to serve as the first effort of exploration to integrate the principled approach of Dworkin with Fuller's emphasis of law as facilitator for human interaction.

[30] Postma, Coordination and Convention at the Foundations of Law, supra note 28, at 182 – 183.

another. The latter of the level 2 and the whole level one problems of coordination tends to be neglected by the legal positivists, including Dworkin. We may call it the positivistic view. On the other hand, a social point of view tends to emphasize level 1 and citizen-to-official part of the level 2 problems.

Viewing from this tri-level analysis, Dworkin's right thesis, arguments of principle, theory of interpretation and integrity discussed in the previous section contribute more to the level three and the official-to-citizen direction of the level 2 relationships. His theory of associative obligation and community of principle in "Law's Empire" represent his theoretical extension to the level one problem.

However, what Dworkin needs to makeup in his theory is still the social point of view. The critique of Dworkin's Hercules as loner who conducts monologue is essentially challenging Dworkin's theory for its insufficiency of the citizen-to-official part of the level 2 coordination, since what are really the competing conceptions of social morality in the society have been consistently overlooked by Dworkin's judges. What is more, although Dworkin extends his theory to include level one problem of coordination by introducing the concept of associative obligation and community of principle, but the way he extends his theory, as criticized in the previous section, has been a simple expansion of his accomplishment in solving level 3 and the official-to-citizen part of the level 2 problem to all levels of the coordination. In short, Dworkin did not quite catch the social point of view.

Lon Fuller is one of the few legal philosophers devote to a social theory of law based on human interaction[31]. Human interaction has always been in the core of

[31] For a general account of Fuller's academic development and theories of law, see Robert Summer, Lon L. Fuller (1984). The sociological approach to law, especially as a legal theory, has not been well received by the legal academic community. As Philip Selznick observed that Fuller's contribution to the legal philosophy has not been recognized by the academic community as he should be:

> "At some point in the future, when we become more open to the moral relevance of social inquiry, more empirical in our study of philosophical issues, more capable of uniting moral and social theory, Lon Fuller's work will stand as a landmark…".

See the preface Philip wrote for the book Rediscovering Fuller, supra note 28, at 11. Lacking of adequate understanding of Fuller's sociological approach also contributes to poor communication in the 1960's, when Fuller debated with Dworkin. As Fuller pointed out:

> "One of the embarrassments about a debate like this is that it becomes apparent at an early point that many of the differences derive from tacit assumptions that are made on both sides".

See Lon Fuller, A Reply to Professors Cohen and Dworkin, 10 Vill. L .Rev. 655 (1965)。Dworkin's comments can be found in Ronald Dworkin, Philosophy, Morality, and Law-Observations Prompted by Professor Fuller's Novel Claim, 113 U.Pa. L. Rev. 668 (1965) and the Elusive Morality of Law, 10 Vill. L. Rev. 631 (1965). Hart has also been critical to Fuller's idea of morality of law. See HLA Hart, Book Review: The Morality of Law by Lon Fuller, 78 Harv. L. Rev. 1281 (1965); Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958) and the Concept of Law, 195-8, 202 (1961).

Fuller's idea of law[32]; norms derived from human interaction always exist and ought to be the basis and primary concern of the law. Legislative and judicial law making should not be simply a one way projection of the law to the people, legislators and judges ought to be sensitive to the existing human interactions involved and try their best to direct these social interactions back into sound patterns[33] and not lay down substantive requirement whenever possible since sound social interaction is a better basis to achieve good social order and substantive norm laid down by the law of the state may obstruct further interactions of the people due to its insensitive to the context of the social facts or its been misinterpreted by different roles in the society involved[34]. Fuller's theory of law can thus be considered one that best emphasizes the level 1 and the citizen-to-official relationship of the level 2 coordination[35].

The interplay between formally enacted law and the social context to which that law is applied is what Dworkin's legal theory lacks and it remains so even when Dworkin switches to the communal approach as discussed above. Fuller defines social context as the "interactional patterns and reciprocal expectations that have come into being without the direct guidance of state-made law.[36]" Such interplay exists, only differs in degree, in all application of the law. Here Fuller agrees with Dworkin that it

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However, Hart did not fully realize that Fuller was focusing on the legitimacy of the law based on what's the process involved in the legal decisions making. The eight ways that the law may fail represent Fuller's procedural normative threshold for evaluation after we interpret how the legal actors of a legal system interact with each other and produce law. They are not substantive normative threshold or principles of good craftsmanship, as Hart claims, for one to apply. See David Dyzenhaus, the Legitimacy of Legality, 46 University of Toronto Law Journal 129, 130, 140 (1996); James Ketchen, Revisiting Fuller's Critique of Hart-Managerial Control and the Pathology of Legal Systems: the Hart-Weber Nexus, 53 Univ. of Toronto L. J. 1, 8-9 (2003).

[32] Postema thinks Fuller has always been inspirational, though he did not develop a full theory of law. See Postema, Implicit Law, supra note 28, 258. In fact, the three levels of coordination developed by Postema represent his attempt to integrate Fuller's human interactive point of view of the law with Hart's conventionalism. See Postema, Coordination and Convention at the Foundations of Law, supra note 28.

[33] Whenever Fuller uses the word social order, he means good social order. The scholarship of good social order has occupied Fuller's mind and he calls it 'Eunomics'. See Lon Fuller, Means and Ends, in the Principles of Social Order 61-2 (Kenneth Winston, Ed., 2001). In fuller's theory, a sound pattern of social interaction is one that meet the requirement of the morality of duty, which is characterized by reciprocity that are achieved through mutual consent, exchanges with comparable value or reversible roles. See Lon Fuller, the Morality of Law, 13 – 27 (1964).

[34] Lon Fuller, Law as an Iustrument of Social Control and Law as a Facilitation of Human Interaction, 1975:1 BYU L. Rev. 89 (1975) and Lon Fuller, Human Interaction and the Law, in the Principles of Social Order, id., 231. The latter article was further expanded and supplemented by Lon Fuller, Some Presuppositions Shaping the Concept of "Socialization" in Law, Justice and the Individual in Society 33 (Tapp & Levine ed., 1977).

[35] Another inspirational approach can be found in Jean Cohen's new legal paradigm. She improves the reflexive model of Teubner and emphasizes Habermasian co-originality and legal principle in addition to reflexivity. See Jean Cohen, Regulating Intimacy – the New Legal Paradigm (2002). Chishing Chen, the New Legal Paradigm of Jean Cohen and Its Implication for Public Online Resolution, 37:4 EurAmerica 513 (2007).

[36] Lon Fuller, the Justification of Legal Decisions, 6 World Congress on Philosophy of Law and Social Philosophy 77 (1972).

is in vein to seek legislative intention in hard legal interpretation; only that Dwrokin looks for remedy in arguments of principle, but Fuller emphasizes that the social context involved should never be overlooked[37]. Fuller believes the difficulty lies in the achievement of congruence between the demand of the state-made law and the 'extra legal-qualities of the human relationship' to which the law is applied[38].

I believe it is hard to imagine one can tackle the difficulty without emphasizing dialog and reflection. Dialog between disputing parties with adequate participation by other parties of interests both inside and outside the community can improve mutual understanding and reflection. Such process of communication should be accessible and the primary target of state-made law[39]. In such scheme, both the interplay and reflection of state-made law and its social context are enhanced and mutually re-enforcing.

Dworkin has made headway to address all three levels of social coordination Postema points out when he turns to associative and communal approach in "Law's Empire", but his task is unfinished[40]. I believe Dworkinian theory can be complete if one incorporates considerations of social context in Dworkin's legal principle. Specifically speaking, in case we are conducting arguments of principle in a hard case, we don't simply always go to a more general principle to try to achieve coherence; instead, we judge[41] whether it is more appropriate to enable dialog among disputing parties and the public, and we direct such dialogic and reflective process through legal principle handed down to the disputing parties and the public, all three levels of

[37] Id., 77 – 83. The social context of our society tends to become more rich and polycentric; the legal thought has also shifted from a command and control mode toward a bottom-up and dialogical mode. See Orly Lobel, the Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 Minn, L. Rev. 342 (2004). This trend is increasing in the area of information law, and it is predicted that state-made law becomes more impotent in the internet age. See Ethan Katsh, the First Amendment and Technological Change: The New Media Has a Message, 57 Geo. Wash. L. Rev. 1459 (1989). The social context of law is indeed a subject worth focusing now and in the future.
[38] Fuller, id., 80.
[39] See Chen, supra note 35.
[40] Commenting Dworkin's idea of liberal community, Selznick also believes Dworkin's task in unfinished. See Ronald Dworkin, Liberal Community, 77 Calif. L. Rev. 479 (1989) and Philip Selznick, Law, Community, and Moral Reasoning – Dworkin's Unfinished Task, 77 Calif. L. Rev. 505 (1989). In terms of emphasizing the interplay between state-made law and its social context, Selznick is similar to Fuller; he calls it responsiveness of the law and holds it as the key to the jurisprudence of Communitarian Liberalism, See Philip Selznick, the Jurisprudence of Communitarian Liberalism, in Communitarianism in Law and Society 19 (Paul van Seters ed., 2006).
[41] One guidance for such judgments can be found in the idea of discursive coherence provided by Robert Alexy and Aleksander Peczenik. See Alexy & Peczenik, the Concept of Coherence and Its Significance for Discursive Rationality, 3 Ratio Juris 130-47 (1990). The discursive coherence of the social context can provide a good threshold to determine whether coherence requires legal decision makers ought to looking for a more abstract principle or empowering further dialog and reflection. See Chishing Chen, Toward a Discursive Basis of Public Reason in the Internet World, to be published.

coordination can be well attended[42].

IV. Conclusion

Courts everywhere are under great pressure due to congested case load. At the same time, the number of trials in courts is also reducing with an alarming speed[43]. Whether such trend is worth pursuing is in doubt[44], even if Dworkin's theory can still fit the description of the practice. Dworkin has made a great step to incorporate all communities in his legal theory, but he needs to do more. This paper is an effort to suggest a first step for such further improvement. On the other hand, the courts has undertaken its catalyst roles in the emerging era of governance[45], such transformation should be more and not less evident in the future. However, we are still in need of a general legal theory to guide such transforming efforts. Fuller's human interaction perspective is what we really need to bring back to our attention. This article is a first attempt to show how the perspective of Fuller might be incorporated into Dworkin's legal philosophy. Hopefully it can raise some attention, which is in great need in a time of change.

[42] Susan Sturm gave a good example. Sturm points out that the second generation of employment discrimination is a byproduct of ongoing interactions shaped by the structures of day-to-day decision-making and workplace relationships". Sturm applauds the Supreme Court's handling of sexual harassment cases by refusing to give specific substantive content that constitutes sexual harassment; and instead, the Court provides the defendant employers with affirmative defenses if they exercise due care to avoid harassment and resolve the conflict if it does occurs. By doing so, dialog and reflective thinking are empowered and guided by the court. See Susan Sturm, Second generation employment discrimination: A structural approach, 101 Columbia Law Review 458, 469 (2001).

[43] See Judith Resnik, Whither and Whether Adjudication, 86 Boston U. L. Rev. 1101 (2006).

[44] Courts decisions can serve its expressive function if general reciprocity is highly experienced in the society. If, on the contrary, the social trust is low, courts messages cannot be expected to get across the society and even be treated with cynicism. See Jason Mazzone, When Courts Speak: Social Capital and Law's Expressive Function, 49 Syracuse L. Rev. 1039 (1999).

[45] See Joanne Scott and Susan Sturm, Courts as Catalysts: Rethinking the Judicial Role in New Governance, 13:3 Columbia J. European L. (2007).

由富勒人際交往的法理學論

MGM v. Grokster 案

陳起行*

目　　次

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摘要

富勒是繼龐德之後出任哈佛法學院法理學教席的美國法理學家。不過，由於富勒的法理學以人際交往的社會理念作爲基礎，雖然發展出眾多發人深省的法律理論，卻始終未能成爲法理學研究的重點，甚至逐漸遠離法理學論述的焦點。這個現象在近幾年有了改變，深入探討富勒法理學的論著有增加的趨勢。本文認爲，資訊科技所引發的法律典範移轉，似乎也正朝向富勒重視人際交往的法理學轉向。本文以涉及運用點對點傳輸技術侵害數位著作的 Grokster 案爲中心，探討此一問題對法律所構成的挑戰，以及爲何我們應當更加正視富勒的法理學，才能尋找到回應新興資訊科技法律問題之道。

關鍵詞：富勒 人際交往 數位著作權 點對點傳輸 隱藏性法律 調解

Abstract

After Roscoe Pound, Lon Fuller held the jurisprudence professorship at Harvard Law School. Fuller's sociological approach emphasizing human interaction is, however, not so welcomed in the jurisprudential world. It is believed that such trend may need a change. This paper discusses the Grosker case first, one that involves digital copyright infringement through the P2P model, and then advocates the need to take Fuller seriously in order to response to the legal challenges brought forward by the information technologies.

Key Words: Lon Fuller, Human Interaction, Digital Copyright, P2P, Implicit Law, Mediation

壹、個案事實

點對點傳輸是一項網路上資源分享的模式。其特點在於去中心化，也就是無須單一來源的資源提供者。例如被認定侵害著作權的 Napster 網站，存放大量音樂、歌曲供人下載，音樂著作使用人均必須透過連絡 Napster 網站，才能搜尋、下載音樂著作。在點對點傳輸的模式下，雖然個別運作上有差異，但基本上資料的傳輸，是直接由數位資料的提供者傳輸給數位資料的使用者。資料提供者往往也是經由網路上其他資料提供者直接取得該項資料，並將該資料持續保存在分享資料夾中，供網路上有意下載的使用者下載。

Metro-Goldwyn-Mayer Studios, Inc., et al. v. Grokster, Ltd., et al. (545 U.S. 913, 2005, 以下簡稱本案) 被上訴人Grokster[1]便是免費提供網路上點對點傳輸電腦軟體的系統業者。Grokster所提供的點對點傳輸軟體會指定某些電腦作爲超級連結點（supernode），或稱爲索引電腦（indexing computer），網路資源需求者透過這些索引電腦所提供的索引，可以進一步連結到存放所需資源的電腦，直接由存放該資源的電腦透過網際網路將該項資源傳輸至需求者的主機[2]。

點對點傳輸普遍受到歡迎的原因主要是Napster模式被判定侵害著作權之後，Grokster所採用的點對點傳輸模式並未儲存侵害著作權的數位資料於Grokster網站，資料直接由使用者的電腦傳給另一位使用者的電腦，Grokster點對點的傳輸模式與Napster並不相同，有可能因而排除其侵害著作權的責任。不過，一般相信，絕大多數點對點傳輸被用於傳輸音樂等受著作權保護的著作。本案原告MGM提出專業的統計數字，指出 90%透過Grokster點對點傳輸模式提供下載的檔案是受著作權保護的著作[3]。Grokster質疑此數字，並指出免費下載受著作權保護的檔案中，有些可能受有著作權人的授權。Grokster也辯稱未侵害著作權的點對點傳輸雖然在數量上較少，但在著作種類上看來，有其重要性。例如一些音樂演出者透過點對點傳輸方式免費提供下載他們的音樂，因而增加聽眾；未受著作權保護的數位內容提供者也利用點對點傳輸的方式散佈其數位內容檔案。

Grokster承認其知悉有人利用其點對點傳輸軟體傳輸侵害著作權的數位內容，即使確定的下載時間與內容無法掌握。更有甚者，Grokster有時也會回應使用者的詢問，對於如何播放下載的電影，提供指引。証明Grokster直接知悉其使

[1] 本案另一位主要被上訴人Streamcast Networks, Inc.雖在個別行爲上與Grokster稍有不同，但是由於其差異並不影響本文之立論以及分析，因此本文不加以討論。

[2] Streamcast使用的技術則不需要索引電腦作爲仲介，直接搜尋提供所需資源的電腦並下載資料，545 U.S. 922。

[3] 545 U.S. 922-3。

用者侵害著作權的事實[4]。此外，本案事實也顯示，Grokster也主動試圖接收Napster的客戶，繼續透過Grokster的模式，下載音樂。任何使用者搜索“Napster”或“免費分享”等關鍵詞，都會被導引到Grokster的網站。Grokster使用群的人數因此維繫於免費取得受著作權保護的著作。由於Grokster經營的商業模式並非靠使用者支付使用其軟體的費用，而是靠出賣廣告的空間，將廣告傳給每一位使用Grokster軟體的使用者，Grokster的主要目的難以脫離下載免費著作。即使Grokster在收到著作權人威脅信函時，會傳送電子郵件，警告其使用者勿傳遞侵害著作權的內容，Grokster並未阻斷這些使用者繼續使用Grokster的軟體分享受著作權保護的數位內容[5]。

一、本案美國聯邦地方法院及上訴法院的判決

本案於聯邦地方法院審理時，法官認定Grokster的使用者直接侵害了著作權，但以簡易判決的方式認爲Grokster提供現在版本的點對點傳輸軟體並不構成著作權的侵害，因爲Grokster並不知悉其使用者侵害著作權的特定行爲（specific acts）[6]。聯邦上訴法院維持地院的判決。上訴法院引用Sony案[7]認爲散佈具備相當程度非侵權使用（substantial noninfringing uses）商用產品的一方無須爲該產品負共同侵權責任（contributory liability），除非散佈者確實的悉特定的侵害個案而未採取行動。由於點對點傳輸模式的分散性質，著作是直接由點對點傳輸軟體之使用者之間傳遞，Grokster並無實際侵權上的認知。上訴法院也不認定Grokster需付輔助侵權（vicarious infringement）的責任[8]，因爲Grokster並未監控或控制（monitor or control）其軟體的使用；並未由協議而取得權利或有能力監督（supervise）其軟體的使用；也沒有獨立的義務警戒（police）侵權的軟體使用行爲[9]。

二、聯邦最高法院的見解

美國聯邦最高法院一致地（unanimously）推翻了上訴法院的判決，並由蘇特大法官（David H. Souter）執筆，撰寫法院見解。金斯柏格大法官（Ruth Bader Ginsburg）撰寫了協同意見，瑞恩奎斯特（William H. Rehnquist）以及甘迺迪大法官（Anthony Kennedy）加入其意見；布萊爾大法官（Stephen G. Breyer）也提出協同意見，由史蒂芬斯（John Panl Stevens）及奧康諾大法官（Sandra Day O’Connor）加入。

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[4] Id.
[5] 545 U.S. 923-7。
[6] 545 U.S. 927。
[7] Sony Corp. of America v. Universal Studios,Inc. 464 U.S.417（1984）。
[8] 共同侵權係指共同侵權行爲人有意圖（intention）引誘或鼓勵直接侵權；輔助侵權行爲則係指因他人直接侵權而獲利，又未行使權利阻止或限制侵權的產生。
[9] 545 U.S. 927-8。

法院上基本認爲本案的關鍵問題是：對於提供可以合法使用也可以非法使用的商品的一造而言，什麼時候要爲第三人使用其產品而侵害他人著作權負責。法院認爲若侵害者的目的是鼓勵侵害著作權，經由明確的表白（clear expression）或其他肯定的步驟（affirmative steps）以促進侵害，則必須爲第三人的侵權行爲負責[10]。易言之，法院認定有事實證明Grokster意圖鼓勵其點對點傳輸軟體的使用者侵害他人著作權，因此要爲其使用者侵害著作權負責。

由於 Sony 案是上訴法院所引用的判例，蘇特大法官由該案開始分析。Sony 美國公司所製造的錄影機，也因爲使用者用來複製電影，遭到環球影城等原告控告侵害著作權。美國聯邦最高法院認爲 Sony 錄影機具有大量非侵權性使用（substantial noninfringing uses），並且使用者將電視上所播放原告電影錄製後觀賞，屬於轉移時間（time-shifted）的著作合理使用，因而判定 Sony 勝訴。本案是否也以 Grokster 的軟體具備大量非侵權性使用爲關鍵的考量因素，受到蘇特大法官的質疑。

蘇特大法官認爲，Sony案並未排除法官就意圖上的認定。如果在產品同具備侵權性與非侵權性使用之外，顯示有言詞或行爲指向鼓勵侵害，則產品提供者應負侵害著作權之責。Sony提供的錄影機確實具備侵害性與非侵害性使用，但由於Sony並無任何鼓勵購買其產品的使用者侵害著作權，因此單純因產品具備第三人侵權性使用不能構成Sony負責的要件[11]。本案與Sony案有別，在於Grokster除提供點對點傳輸軟體之外，確實有言語及行爲鼓勵其使用者侵權，因此應當負侵害著作權之責。

如前所述，有事實證明 Grokster 於其使用者以電子郵件詢運如何播放下載的電影時，提供引導；Grokster 也主動試圖接收 Napster 的客戶；其經常發出的電子新聞稿強調 Grokster 的點對點傳輸軟體下載流行音樂的能力。Sony 案提供商品提供者享有著作權安全港保護的同時，也包括了引誘的規則（inducement rule），作爲其受保護的前提，亦即商品提供者有言語或行爲引誘使用者侵害著作權時，即不再受著作權安全港的保護，而應負責。因此 Grokster 應當爲其使用者侵害著作權之行爲負責。

蘇特大法官最後整理出三點證明Grokster有引誘其使用者侵害著作權之意圖。第一，Grokster顯示出其滿足一個眾所周知的侵害著作權的意圖，這個市場是由過去Napster的客戶所構成；第二，Grokster並未嘗試發展軟體或其他技術以

[10] 545 U.S. 918。

[11] 單純知悉侵害的潛力或實際的侵權性使用，不足以構成產品提供者負責的條件（mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability）, 545 U.S. 937。

降低使用者運用其軟體侵害他人的著作權；第三，Grokster由販賣廣告空間獲利，越大的使用者群越能提高Grokster廣告上的獲利，Grokster商業上的敏感度會驅使其尋求大量的使用者，即便這些使用者有侵權性使用的事實。此點單獨來看難以認定Grokster不法的意圖，但由整個紀錄的意義脈絡看來，其不法的意圖則很明顯[12]。

認定事實證明Grokster有引誘侵害著作權的意圖，應當是美國聯邦最高法院大法官們一致的見解，但是本案究竟對於網際網路及點對點傳輸等新興科技在散佈數位著作的公共利益與數位著作權權利人保障間的利益平衡採取什麼立場？雖然主筆大法官在撰寫法律意見一開始便提及此點[13]，但並未深入探討。由於此課題涉及本案日後的解讀，尤其是本案是否改變Sony案的見解，十分重要。也因此金斯柏格大法官撰寫了協同意見，而布萊爾大法官擔心金斯柏格大法官的協同意見會造成誤解，以爲本案已經改變或限縮Sony案的判決，所以另外撰寫了協同意見予以闡明。

基本上，金斯柏格大法官認爲Grokster的軟體已經被使用一段期間，並且絕大多數（overwhelmingly）被用來侵害著作權；而其侵害也是Grokster產品主要的獲利來源。而證據也不足以顯示一定程度或具商業意義非侵害性的使用經過一段時間以後會發展出來。依此，聯邦地院武斷地給予Grokster簡易勝訴判決並不妥當。布萊爾大法官則強調上訴法院對於Sony的解讀以及事實的認定，並無不當。Grokster案涉及 10%的非侵權性使用與Sony案相當。布萊爾大法官並且舉出相當多的具體案例，例如分享軟體以及將古代典籍數位化的古騰堡（Gutenberg）計畫等日益增多的數位公共領域。布萊爾大法官的用意是要指出Grokster個案並不影響點對點傳輸等分享數位內容模式的發展。Grokster不應解讀成限縮或變更Sony案平衡公共利益與私人財產權利益的標準而損害網路上數位內容的分享。在協同意見最後，布萊爾大法官重申他認爲本案並沒有顯示Sony判決應當被變更，使得對於Sony的解讀更加限縮。事實上，若再考慮變更Sony判決可能帶來限制科技發展的不良影響，布來爾大法官認爲應維持Sony判決，以他解讀Sony案的方式來解讀本案，也因此希望第九上訴巡迴法院再次審理Grokster案時，能確認有關Sony案的解讀問題[14]。

三、台灣相關判決

在美國最高法院作出MGM v. Grokster一案的判決後不久，台灣的地方法院也先後做出兩項判決：其一被告爲全球數碼科技股份有限公司（EZPeer，以下簡

[12] 545 U.S. 939-40。
[13] 545 U.S. 928-9。
[14] 545 U.S. 948-660。

稱全球數碼）[15]，另一案被告包括飛行網股份有限公司（Kuro，以下簡稱飛行網）[16]。不同之處在於美國Grokster案是民事判決，而台灣兩項相關案件則均屬刑事判決。

全球數碼經營模式與Grokster相類似，提供會員軟體，使會員彼此可以分享檔案。不同的是，全球數碼向會員收費，以點數回饋，會員每下載一個檔案，扣若干點數。若會員提供檔案供其他會員下載，全球數碼也會提供點數以資獎勵。法官基本上認爲民事責任與刑事責任無法等同，而著作權法益，尤其在數位環境下，仍未確立，理應由主導財富分配的市場運作釐清，或由私法平衡損益。若要以刑法保護此一不成熟的法益，適用上便必須嚴謹。法官認定全球數碼提供會員的點對點傳輸軟體，是由會員自主地上傳或下載檔案，無論全球數碼有無維護集中的檔案索引資料，其負責人並無法 24 小時間監控會員間資料的傳輸。而點對點傳輸模式，是可以分享公共領域或不侵害著作權的內容。依此，法院判定被告無罪[17]。

全球數碼判決後的數個月後，臺北地方法院對飛行網案做出判決。本案的關鍵事實是被告爲提供大量的檔案供下載，大量購入市售的音樂光碟，轉換格式之後，在數個月之內上傳約三萬多首錄音著作到被告電腦內，侵害著作權罪證確鑿。而飛行網除提供會員點對點傳輸軟體之外，在會員下載非法音樂檔案的全程，多有介入，因此與會員侵害著作權的行爲具備因果關係。

民國九十六年六月十四日，立法院修訂著作權法，正式將Grosker的見解納入著作權法。該法第八十七條第一項第七款[18]規定在未經著作財產權人同意或授權的情形下，任何人意圖供公眾透過網路公開傳輸或重製他人著作，侵害著作財產權，而受有利益者，視爲侵害著作權。而對於意圖的認定，同條第二項[19]也將Grokster 案所涉及的各項鼓勵侵害數位著作權的行爲整理納入。

四、小結

全球數碼與飛行網的兩個個案，時間上與 Grokster 的判決時間先後距離不到

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[15] 台灣士林地方法院，92 年度訴字第 728 號，民國 94 年 6 月 30 日判決。

[16] 台灣台北地方法院，92 年度訴字第 2146 號，民國 94 年 9 月 9 日判決。

[17] 本案法官明智地指出，以刑罰處理著作權侵害，必須謹慎。不過，本案是否有如接下來介紹的Kuro案被告一般，以另外的網址提供下載音樂等檔案，似應進一步查明。尤其鑑定人確實曾經找到此網址，並指出該網站係全球數碼所有。

[18] “有下列情形之一者，除本法另有規定外，視爲侵害著作權或製版權：

… 七、未經著作財產權人同意或授權，意圖供公眾透過網路公開傳輸或重製他人著作，侵害著作財產權，對公眾提供可公開傳輸或重製著作之電腦程式或其他技術，而受有利益者。”

[19]“前項第七款之行爲人，採取廣告或其他積極措施，教唆、誘使、煽惑、說服公眾利用電腦程式或其他技術侵害著作財產權者，爲具備該款之意圖。”

三個月，顯示全球化時代，權利人在網路上權利的確保，不分國界；也反應數位著作權課題的全球性。檢討美國的發展，對台灣數位著作法制也有直接的參考意義。本文將於下一節提供理論上的觀察依據後，再對 Grokster 案所彰顯的數位著作保護議題，進一步深入批判。本小節旨在提出問題意識，以便爲接下來所提出的理論基礎引言。

Grokster案判決理由在是否具有實質非侵害使用的認定之外，另闢意圖引誘侵害的判斷依據，再一次驗證居於法理學家德沃金（Ronald Dworkin）法學理論重心的法律原則（legal principle）的存在。誘引他人侵害權利，應負間接責任是普通法早已樹立的原則。即便法規未明文規定，與本案相關的Sony案此一判例也並未明白闡明於該制例之見解中，並不影響法律原則的存在與適用。Grokster案地院及上訴法院將重點放在實質非侵害使用上，以Sony案所確立的主要物流原則（staple article of commerce）[20]考量Grokster的責任基礎。美國聯邦最高法院的法官們則一致由引誘侵害的意圖判斷本案，最後依此原則確定Grokster應爲其點對點傳輸軟體使用者侵害著作權的行爲負責。

不過，誠如德沃金指出，法律原則所涉及衡量，並非全然應適用某一原則，而其他原則便毫無適用之可能。其間的考量是程度上的，涉及價值上的判斷。具體而言，Grokster 案並非只能適用主要物流原則或只能適用引誘侵權原則，這中間涉及價值衡量。也因此雖然參與審判 Grokster 案的大法官們都同意 Grokster 具備引誘侵權的意圖，但是金斯柏格主筆的協同意見與布萊爾大法官主筆的協同意見之間，在價值衡量上，有明顯的差異。金斯柏格大法官明顯認爲 Grokster 案所代表的點對點傳輸模式基本上就是一種引誘侵權的模式，未來也不太可能發展出實質的非侵害性使用。針對此點，布萊爾大法官要求第九上訴法院重新審理此案時，應就 Sony 案是否受到限縮做出說明，以確定 Grokster 案判決的影響範圍。布萊爾大法官認爲 Sony 判決是平衡商品創造者與受影響權利人之間的一項好判決，千萬不可因爲 Grokster 的判決被認爲美國聯邦最高法院已經變更 Sony 案的見解。布萊爾大法官期待大眾能理解 Grokster 引誘侵權的意圖屬個案，並不影響點對點傳輸模式本身，最高法院也無意用 Grokster 改變 Sony 案的見解。

著作權人與著作使用人之間的利益衡量，一直是著作權法上一項挑戰，數位著作更加突顯這項衝突。不過，著作的使用一般分爲消費性使用，也就是使用人單純閱讀或觀賞著作，並不是爲創作上的引用而使用著作，如 Grokster 案涉及的著作使用形態；另一種使用形態，稱爲轉化性使用，係指使用人也是創作者，而爲創作的目的使用他人著作。轉化性使用所涉及的利益衡量較深，不同的見解更爲紛歧。但無論消費性使用或轉化性使用，如何適當平衡著作權人與使用人間的

[20] 即具有合法與非法使用的商品提供者，不應爲非法使用該商品負責。例如製造刀子的廠商不應爲持其所製刀子殺人的行爲負責。

權益，是當今社會上極重要的議題。然而本文的見解是，整個法律形成（law making）的主導想法，對於這項時代的挑戰，回應的並不理想，值得反省。

首先，美國數位千禧年著作權法，也是各國仿效的立法模式，基本上以不得規避技術保護措施的原則，回應數位著作權的保護問題。一方面，這項立法將數位著作保護問題指向與數位著作保護相關的電腦程式的發展上，使得數位著作保護課題演變成保護措施與破解技術的大戰；更重要的，所有涉及數位著作權保護與公共利益的平衡課題與社會上極豐富的不同想法，完全沒有也無法進入法律形成的過程，使得法律的發展與社會脫節。

網路時代，無論從意見的參與或文化的形塑上觀察，每個社會成員如何充分接收資訊，以便自主地形成個人見解，並且反映在民主及文化形塑上的參與，是極爲重要的課題。數位著作權的規範直接涉及每個社會成員是否以及如何接收資訊，事關重大。但是整個數位著作的規範，由於法律形成觀念上的偏差，並未環繞在最值得重視的辯論及議題上，而形同被數位著作權利人與侵權人共同綁架的局面。

以 Grokster 案及台灣同步發展的全球數碼與飛行網案觀之，主要是音樂及電影等數位著作權利人全球防堵侵害其著作權的法律攻防戰的一幕。Grokster 是 Napster 網站被法院認定侵害著作權遭關閉後，新一波利用分散式點對點傳輸模式的經營者。美國聯邦最高法院正確地依引誘侵權的意圖明顯而判定 Grokster 侵害著作權。但是只有在協同意見中，與公共利益至關重要的點對點分享模式的命運才被討論，而且大法官們的見解並不一致。姑且不論日後 Grokster 會如何被解讀，但可以確定的是，主要數位權利人有系統、有組織的循法律途徑繼續追訴侵權者會是普遍的現象，而整個數位著作權規範也依此定調。如同受破壞的生態般，生物多樣性的理想受摧殘的結果，數位著作的規範世界，只剩下在保護與破解技術上較量的兩造。

美國法理學家富勒（Lon Fuller）是批判這種現象的重要理論家。氏以社會交往（social interaction）形成人際之間行爲上的相互期待上的穩定，作爲秩序的基礎；而這種相互期待的關係也及於人民與政府之間。因此富勒十分反對主權者制定法律由人民遵守的想法，強調沒有一定社會交往，即使進入法院裁判，也無法藉由法院的裁判理由，形成法律信條，作爲秩序的基礎；立法者與人民之間，不從彼此的觀點與期待著手，經由互動而調整，也難以形成提供社會秩序基礎的法律。

本文接下來先介紹富勒人際交往的法律理論，再以該理論作爲基礎，批判由 Grokster 案所顯現的數位著作權困境。

貳、富勒人際交往的法律理論

富勒（Lon Luvois Fuller，1902-1978）從事法學教育工作 46 年，早期任教於奧勒岡（Oregon），伊利諾（Illinois）及杜克（Duke）大學，自 1939 年起，進入哈佛大學法學院，一直任教至 1972 年。在二次大戰期間，富勒以 40 歲的年紀，參加麻色諸塞（Massachuse）州的律師考試，隨後進入波士頓（Boston）市的一間律師事務所，多半從事勞工爭議的仲裁，顯得很有技巧並成效顯著。契約法是富勒在哈佛教授的主要專業科目，並撰有教科書；不過，真正令富勒成名的是法理學。這個科目於 1910-1940 年間是由著名的龐德（Roscoe Pound）任教。龐德的法理學博大精深，但只能及於少數的研究生；富勒於 1948 年接掌龐德所留下來的法理學教席後，成功的將法理學轉變爲無論研究生或大學部學生都歡迎的科目[21]。

學術思想上，一般認爲富勒深具啓發，但並未形成完整的理論體系。不過，本文隨後將指出，人際交往（human interaction）或社會交往（social interaction）是貫穿富勒思想的基礎，只是富勒社會傾向的法律理論，並非法律思想上的主流，也未被富勒主要的辯論對手正視；而富勒深信法理學應探索蘊含在實際法律運作中的意義，不重抽象概念及其間論證的演繹，也增添了掌握富勒理論全貌的困難度。

富勒的法律思想豐富，呈現出法律實用主義[22]（legal pragmatism），現代自然法[23]以及法律程序學派[24]的意義脈絡。本文無意全面而深入的探討富勒的法律理論，立論主旨在於提出富勒以社會交往爲中心思想的法律理論，確實是當今法治所嚴重缺乏的要素。本文欲闡述富勒的社會交往的法律理論，並以之作爲基礎，批判數位著作權法的發展以及Grokster案。

本文在這一節中，將先試圖以社會交往的核心思想，整理富勒的法律理論；再藉由氏與哈特（HLA Hart）及德沃金的辯論，彰顯其社會交往法理論的特殊之處；最後本文指出，富勒強調法律應旨在提供每個人安排及追求個人美好生活的

[21] 參考Griswold, E., Lon Luvois Fuller ,—1902 to 1978, 92 Harv. L. Rev. 351(1978)。

[22] 參考Winston, K., Is/Ought Redux：The Pragmatist Context of Lon Fuller's Conception of Law, 8 Oxford Journal of Legal Studies 329-49(1988)。

[23] 參考Bix, B., Natural Law Theory：The Modern Tradition, in The Oxford Handbook of Jurisprudence and Philosophy of Law 61 (Fules Coleman & Scott Shapiro eds., 2002)；Sturm, D., Lon Fuller's Multidimensional National Law Theory, 18：4　Stanford Law Review 612-39(1966)。

[24] 參考Eskridge & Frickey, The Making of "The Legal Process", 107 Harv. L. Rev. 2031(1944)。有關Fuller生平及理論的評述，參考Summers, R., Lon L. Fuller, 1984。有關美國法律程序學派的討論，參考陳起行，美國法理學發展概述，1870-1970，政大法學評論，第 69 號，頁 1-27。

過程中，與他人交往之際，形成行爲上的相互期待。這類相互期待規範上的意涵，是法律意義的形成所繫。這是法實證主義者與現代法制所忽略之處。然而，富勒就立法者、法官或其他法律人如何就這類豐富地，並且經而由人際交往所奠基的法律意涵做出法律判斷，諸如立法或判決，則並未提出完整的理論。使得富勒可以說是一個十分具有啓發性的批判者，但並未完整的提出以人際互動爲本的完整法律理論。當然，本文的重點置於富勒成功地批判，這將也是本文下一節的重點。

一、人際交往的法律觀

由人際交往作爲出發點，富勒許多的理論主張都深刻反映互動的精神，本小節試著由富勒調解（Mediation）、裁判理論（Theory of Adjudication）以及立法（Legislation）等制度面的主張；以及富勒對於自由和道德的理解，試著指出人際交往觀是富勒理論發展的基礎。

1. 調解

富勒是少數重視調解制度的法理學家，或許與其在二次大戰期間擔任勞工爭議的仲裁工作有關，不過由富勒重視社會交往的理論基礎觀之，富勒重視調解是人十分自然的發展。長期研究富勒法律思想的法學家溫士頓（Kenneth Winston）認爲富勒重視調解，與他長期廣泛閱讀法律史及人類學的書籍有關。溫士頓並指出富勒在一封寫給同事的信中，認爲許多人類學家覺得原始社會重視共識，會運用調解的方式而不是裁判的方式解決問題。富勒認爲我們社會遇到與原始社會類似情境的問題也應當更重視調解。這種情境一般而言具有極強而複雜的相互依賴關係（heavy and complex interdependance），如結婚、少數人組成的公司、國民住宅裡的承租人以及共同寫作的作者。在這些情況下，促進彼此了解的方式比用裁判決定權利的歸屬更爲重要[25]。

富勒將法官與調解人的性質作比較，以彰顯調解的制度特性。一般認爲法官命令當事人遵從（conform）規範，調解人則用說服（persuade）的方式。富勒認爲不然，他指出調解人並非使雙方朝向遵從規範的方向努力，而是使雙方當事人自行發展出相關的規範[26]。

若進一步分析，富勒指出，調解的價值並不在於加諸規則於雙方當事人，而是協助雙方獲致新的、共同分享的雙方關係，這項雙方關係的新觀點（perception）

[25] 參考Winston, K., ed., The Principle of Social Order, Selected Essays of Lon Fuller, Revised Ed., p.141(2001)。

[26] Fuller, L., Mediation—Its Forms and Function, in The Principle of Social Order 144(Winston, K. Ed., 2001)。

會使雙方以新的態度重新面對彼此[27]。

2. 裁判理論

富勒也以社會交往爲核心思想建構其裁判理論[28]，富勒認爲，裁判給予雙方當事人辯論機會，而由第三者做出有理由（reasoned opinion）的判決。西方長久以來都是靠這些理由中的法理，整理出法律教條（legal doctrine），作爲社會秩序（social order）的基礎[29]。與社會交往理念相關的是，要能由判決理由整理出法律教義，富勒認爲，必須是所爭議的議題，有相當一段時間，經歷社會交往的過程。否則，例如資訊科技帶來新興法律問題，問題剛發生便由法院裁判，這樣的判決無法期待能經由其法院判決理由整理出法律教義，形成社會秩序。反過來說，富勒的法律理論處處可見法律的目的在於給予人們空間藉由交往形成具相互期待的規範。雙方的行爲，造成彼此意外時，各自都會有所調整，而朝向滿足相互期待的行爲方式。遵守這樣的行爲方式，便形成規範，是法律的基礎，也是法律所要營造的環境。

3. 立法

以社會交往爲中心的法律理論如何看待立法？應當是一個令人好奇的問題。不錯，富勒的立法者不是一個理性的建構者，並據以制定法律制度；而比較像前述的調解者一般，旨在促進人們藉由相互期待的調整形成自律規範，只有在無法自律的情況，立法者會介入，而且以最小限度的介入方式，力圖使人們能回復到交往而形成自律的模式。這是富勒理想的立法者。富勒兒時住在加州的一個山谷地區，水資源貧乏，如何分配水資源變成每年的重頭戲，一般認爲公權力的強力介入是分配達成的必要途徑，富勒以其兒時深刻印象指出，每一個人高度的參與凝聚成一個社群才是真實的情況，完全打破一般個人主義的想像，以爲個人對抗大自然是美國開拓領域的圖像[30]。富勒因此傾向接受海耶克（F. A.Hayek）批判立法權介入的觀點，因爲這種介入多半笨拙而最終多以徒勞無功的結果收場[31]。

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[27] Id, p.162。

[28] 參考陳起行，由裁判理論的觀點析論United States v. American Library Association，收錄於焦興鎧主編，美國最高法院重要判決之研究：2000-2003，頁 20-22。該文就富勒的裁判理論介紹完整。本文此處僅論其理論重點。

[29] 社會秩序是富勒法理論所探求的一項重要觀念。與其說社會秩序，不如說是社會良序。富勒經常指出其所致力者爲良序之學（Eunomics）。所謂社會秩序，富勒指出，並非任何秩序，例如集中營裡也有其秩序; 而是指具有正義、公平、可行、效果，並且尊重人性尊嚴的秩序，研究如何營造這種秩序的學問，也就是富勒所創的良序之學。參考Fuller, L., Means and Ends, in Principles of Social Order, p. 61-2。

[30] Fuller, L., Irrigation and Tyranny, in Principles of Social Order, p. 208,209。

[31] 參考Winston, K., Legislators and Liberty, 13 Law and Philosophy 389, 407(1994)。

富勒的立法，一般是廣義的，小到從爲當事人撰寫私文書，如契約或遺囑；也可以逐漸擴大，所涉及的人也更多，最終以公眾全體作爲客戶。其基本原則很簡單：立法在於建構人際合作的框架（construction of frameworks for human collaboration）[32]。富勒因此反對訴訟的律師觀，也是美國經由法律實在主義（legal realism）影響之下，主流的見解，認爲法律人的工作在於預測（predict）及影響國家權力的運作[33]。這種法學教育，富勒認爲，將法律學生訓練成法匠，忽視法律的目的[34]。

4. 自由

由人際交往的出發點，富勒的自由觀也有別於一般所理解的個人自由。簡單的說，由人際交往的觀點，個人的自由必須同時有他人的限制，才能成立。富勒反對消極自由與積極自由的區分，指出最初自由意指授權（enfranchised），允許參與議會、家庭或部落[35]。將自由看成是一種單純不受拘束的力量展現，因此不正確，也很危險。構成社會秩序的限制（constraint）與權力（power）是互動的（interaction），限制決定權利的意義與效果，反之亦然[36]。基本上，

> “我們在社會上能夠有意義的行為之前，我們需要做出合理而可依賴地有關他人行為的預測。不論是強加還是自願接受，除非他人的行為遵循可辨識的模式，否則我們無法做出這些他人行為的預測。社會行動，或用流行的用語—社會交往，需要形式的框架以及指導性的管道[37]。”

5. 道德

“法律的道德（The Morality of Law）”是富勒最受重視的一本書，在書中富勒提出法的內在道德（the internal morality of law）的主張，並與哈特及德沃金進行論戰，下一小節本文將討論此項論戰。此外，本文依據本小節的旨趣，試著勾勒出富勒人際交往的道德理論。

雖然富勒被認爲是自然法學家，但有必要進一步界定清楚是何意義下的自然

[32] Id., p. 394。
[33] Id., p. 395。
[34] Id.
[35] Fuller, L., The Case Against Freedom, in Principles of Social Order, p. 323
[36] Id., p. 322。
[37] Id., p. 320。 “Before we can act meaningfully in society, we need to be able to make reasonably dependable predictions about what other people will do. Such predictions are impossible unless the behavior of others follows some discernible pattern, either imposed or voluntarily accepted. Social action—or to use the fashionable term—social interaction, requires confining forms ,directive channels.”

法。富勒並不主張法律之外有一普世價值或神，作爲評價法律的標準。反倒是從人際交往出發，認爲人能形成社會，並且長久共同生活發展，人際之間一定有某種道德維繫，才有可能。法理學要探求的，是這樣的道德有何特質，能否加以掌握，以進一步發展良序社會。

富勒認爲道德可以分爲兩種。一種是勵志的道德（Morality of Aspiration）；另一種是義務的道德（Morality of Duty）。勵志的道德與我們如何最佳利用短暫的生命有關，富勒以經濟學上的邊際效益（marginal utility）比喻之，因爲後者探討的是如何最佳利用有限的資源。平衡（balance）各種追求與主張，也是二者主要的工作[38]。

勵志的道德探索如何達到個人以及社會最佳的發展；義務的道德則是維持社會使之成爲可能的最低度要求，也是個人起碼要遵守的道德，否則社會無法維繫。相互性（reciprocity）是義務道德的基礎。相互性就個人而言，就是要用衡量他人的標準衡量自己。就人際交往而言，相互性提供形成人際義務道德標準的線索。富勒認爲我們可以分辨出三個這項義務能夠形成的最佳條件。直接由受特定義務影響的人自願地依同意而形成的相互義務是其一；其二是相互履行的作爲，其價值應相當；其三是義務的關係（relationship of duty ）必須理論上以及實踐上能夠反轉（reversible），也就是今天我對你應盡的義務，有一天你也對我有此義務。簡言之，自願性，價值相當以及角色可以相互對調是三個義務道德得以最佳實踐的三個條件。富勒認爲市場經濟上相互交換的商人社會是一個好的例子[39]。

二． 富勒與德沃金及哈特的辯論

本文認爲，在深刻體會富勒理論的出發點—人際交往後，較容易理解富勒與德沃金等學者的辯論，以及其理論出發點之不同所形成的差異。誠如富勒回應德沃金時，一開始便言明“這種辯論令人難堪的是顯然一開始許多的分歧造因於雙方默示的假設”[40]。人際交往的出發點，至今仍是法學，以及法理學邊緣之學，未受重視。這也注定了富勒與法實證主義學者爭論的結果。

富勒在法律的道德一書中，論述兩種道德之後，隨即在第二章，討論“使法律可能的道德（The Morality that makes Law Possible）” 。氏舉出八項可以使法律失敗的方式：

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[38] Fuller, L., The Morality of Law, pp. 13-19 (1964)。

[39] Id., pp. 19-27。

[40] “One of the embarrassments about a debate like this is that it becomes apparent at an early point that many of the differences derive from tacit assumptions that are made on both sides”參考Fuller, L., A Reply to Professors Cohen and Dworkin, 10 Vill. L .Rev. 655 (1965)。

(1)以特別的（ad hoc）方式決定每一個問題；
(2)不公告法律；
(3)回溯立法（retroactive legislation）；
(4)無法使法律規則令人理解；
(5)制定相矛盾的規則；
(6)要求不可以遵守的法律；
(7)朝令夕改；以及
(8)法律規則與官員行爲之間的一致（congruence）[41]。

德沃金認爲如果富勒主張合於這八項要求是任何稱得上是法律所必須，無論是經由制定或適用而形成，所必須；即使是壞的法律，則德沃金接受富勒的見解。但有疑問的是，這八個要求與道德何涉[42]？德沃金舉一位暴君Tex爲例，他有不道德的野心，有意奴役其一部分的人民。Tex也可以符合富勒的八項要求而達到他的目的。如何能稱這八項要求，是法律的內在道德[43]？甚至我們寧願Tex的歧視立法違反富勒的要求，條文間並不一致或是模糊不清，使其執行受阻。一般的立法，經常看到立法技術很差的情形，即使造成相當程度的困惑與無效率，並不會涉及不適法的情事。品質很差的立法在執行上可能會有可怕的道德上的影響，但這取決於這項法律如何被使用，與法律起草的方式無關[44]。

德沃金進一步指出，遵循某項道德原則比技術上符合該原則所要求的行爲還要多。如果一個人傷害他人，並主張依據他的道德規則其傷害有理，則這些規則自我矛盾或無法遵循，是確立我的行爲道德上不適當的重要一步。單純不符合某項道德規定本身，並不是一項道德上的錯誤[45]。

與富勒理路相近的賽爾資尼克（Philip Selznick），指出富勒探討法律的模式不是概念的分析，而是與實際運作的緊密聯結，在運作中找出其蘊含的意義，任何理論的探討也要能落實在實踐上的意義[46]。富勒認爲，任何用語，要看放在何意義脈絡下，才能確定其意義；而其評析，也不能和所要達成的目的分離。因此，富勒擔心立法者基於建構理性（constructive rationalism ）創造法律，由人民遵守的想法。法實證主意者的法律觀，是單向的由權威者投向人民，自難以被富勒接受[47]。

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[41] Fuller, L., The Morality of Law, pp. 33-94。
[42] Dworkin, R., Philosophy, Morality, and Law-Observations Prompted by Professor Fuller's Novel Claim, 113 U.Pa. L. Rev. 668, 669 (1965)。
[43] Dworkin, R., The Elusive Morality of Law, 10 Vill. L. Rev. 631, 632 (1965)。
[44] Id., p. 633。
[45] Dworkin, R., Philosophy, Morality, and Law, p.685。
[46] Selznick, P., Book Review: Anatomy of Law, 83 Harv. L. Rev. 1474 (1970)。
[47] "我建議我們要接受法律內在道德是要看待法律，並不是單向的將權力向下投射。而是存在於

哈持也是從類似的角度批判富勒的八項法律內在道德的要求。哈特認爲富勒的法律內在道德並不是道德原則，而是好的立法技術（good craftsmanship）原則。哈特舉下毒（poisoning）爲例。欲達到目的，下毒者一定會遵守諸如選擇不起眼的毒藥，以避免被發現等下毒的內在原則。但是這些有效率地達到目的（efficiency for a purpose）的手段絕對不能和這些行爲及目的的道德上的最終判斷相提並論。遵守富勒八項內在道德的人，也可以立下道德上壞的法律；法律與道德在富勒法律內在道德論中，也因此不必然有所聯繫[48]。

有筆者認爲，持社會法律理論觀點的評論家，可能比較能掌握富勒與德沃金、哈特間的爭論。論者認爲哈特與韋伯（Max Weber）相同，在描述性的法律理論（descriptive theory of law）之內，正當理由的問題（questions about justificatory claim）只要在約束法律規則形成過程的合理性與有效性原則（principles of legality and validity）之內尋找解答即可[49]。

本文則欲進一步指出，富勒重視社會交往的法律理論，也可以從社會學家涂爾幹（Durkheim, E.）找到思想線索。富勒到了晚年，仍然試圖建構其人際交往爲中心的社會法律理論，在一篇“社會控制工具的法律與促進人際交往的法律”文章中，富勒試著由許多例子，指出制定的法律，其用語也確實會被放在相互交往的人們相互期待之下的詮釋上尋求其意義。正如同習慣的拘束力來自於社會意志的展現，或涂爾幹所說的集體意識（Collective Consciousness）[50]。

務斯特(Daniel Wueste)教授指出，雖然富勒探討各種社會法律形成秩序的形式(forms of socio-legal ordering)，包括契約、調解、裁判以及管理性的指導(managerial direction)，立法形式的內在要求，是富勒最重視者，原因是立法乃將人的行爲隸屬於規則的治理之下的工作(the enterprise of subjecting human conduct to the governance of rules.)。法律內在道德的要求因此是立法者角色所伴隨的責任。這項道德是在立法者與人民之間存在、發展；是立法者要求人民守法之前，自身

立法者與人民之間的互動之中，雙方對於對方互負責任。（So, I suggest that all we need to do to accept the idea of an internal morality of the law is to see the law, not as a one-way projection of power downward, but as lying in an interaction between law-giver and law-subject, in which each has responsibilities toward the other)". Fuller, L., Supra note 38, at 661。

[48] 參考Hart, HLA., Book Review: The Morality of Law by Lon Fuller, 78 Harv. L. Rev. 1281 (1965)；Hart, HLA., Positivism and the Separation of law and Morals, 71 Harv. L. Rev. 593-629 (1958)；Hart, HLA., The Concept of Law, pp. 195-8, 202 (1961)；Fuller, L., Positivism and Fidelity to Law – A Reply to Professor Hart, 71 Harv. L. Rev. 630, 1958; and Nicholson, P., The Internal Morality of Law：Fuller and His Critics, 84:4 Ethics 307, 312-13 (1974)。

[49] 參考Ketchen, J., Revisiting Fuller's Critique of Hart-Managerial Control and the Pathology of Legal Systems：the Hart-Weber Nexus, 53 Univ. of Toronto L. J. 1, 8-9 (2003)。

[50] Fuller, L., Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction, 1975:1 BYU L. Rev. 89, 94 (1975)；該文亦收錄於Archives for Philosophy of Law and social Philosophy (ARSP), Beiheft no. 8 (1974)。

應遵循的道德要求，欠缺這項道德，法律不可能發展[51]。

忽視富勒這種蘊含在社會不同角色之間的關係上的道德觀，是哈特與德沃金直接看待八項法內在道德要求爲一般道德原則，是可以經由批判理性發展出的抽象道德原則，可以立刻不顧其情境地運用演繹的方式操作。富勒與這兩位法實證主義者，確實在不同的跑道上。

三．富勒法律理論在法制上的啓發

嚴格來說，富勒的社會法律理論並未發展完全，是一項極具啓發性，批判性的訴求，但還不是一個完整的理論。透過相互期盼的調整而生的規範，固然有人民自主形成自律的優點，法律的實效性也強，但是這畢竟不可能是法律的全貌。不同相互期待之間的衝突，法律人是否可以藉由其它的法源消彌爭議？或是要如何看待這類的衝突？單單一個人與人之間相互性的訴求，似難以說清楚法律的運作，或是提供指導。此外，類似德沃金整全法律(Law as integrity)所主張，有些法律難題，確實要靠發展出某種全社會的觀點，以尋求解決問題的正當性基礎。富勒法律內在道德充滿詮釋空間，是否可以發展某種整全的法律理論，是持續建構富勒社會法律理論上的重要功課[52]。不過，誠如本文這一節的規劃，是要藉助富勒極富批判性的人際交往法律理論，提供改善資訊著作權法律的形成，本小節以下便以此作爲討論的核心。

塞爾茲尼克爲一本富勒法律思想爲主題的論文集引言時，作了這樣的結語「在未來的某個時間點，當人們更能接受社會研究的道德相關性，更能接受哲學問題的實證研究，也更能結合道德與社會理論時，富勒的理論將如同一個里程碑般樹立。…[53]」而網際網路所引發的法律問題，尤其有必要由社會交往的觀點檢討，這也是本文以下的論述重點[54]：

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[51] 參考Wueste, D., Book Review: Fuller's Processual Philosophy of Law. Lon Fuller, by Robert Summers, 71 Cornell L. Rev. 1205, 1212-28 (1986)。Robert Summers回應這篇書評，指出他自己過去也對富勒的法律內在道德的主張，採取批判的態度。但仔細再閱讀之後，覺得這項要求也具有批判道德(critical morality)的意義，因爲立法並遵守法律內在道德的要求，是人民選擇(choice)遵守法律的前提。換句話說，富勒法的內在道德的提出，給予人民選擇接受法律與否的機會，具批判性。見Summers, R., Book Review：Summer's Primer on Fuller's Jurisprudence-A Wholly Disinterested Assessment of the Reviews by Professors Wueste and Lobel, 71 Cornell L. Rev. 1231, 1234 (1986)。

[52] 這方面的努力，參考Postema, G., Coordination and Convention at the Foundations of Law, 11 Journal of Legal Stiudies 165(1982)。

[53] Witteveen & Burg ed., Rediscovering Fuller：Essays on Implicit Law and Institutional Design, 1990。

[54] 將資訊法律列爲指標性的法律，反映出最近法律思想由命令式的控制轉向由下而上的協調的趨勢。參考Lobel, O., The Renew Deal：The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 Minn, L. Rev. 342 (2004)。

本文首先借用穆茲(Mootz, F.)對富勒法律理論的詮釋，以利進一步掌握富勒的觀點[55]。穆茲認爲富勒的理論旨在提供法律知識得以發展的架構。這種法律知識的取得，並不是藉由理性的解釋或是真實概念的演繹，而是一項修辭、詮釋(rhetoric－hermeneutical)的活動，只有在社會之中進行，才有可能[56]。在法律領域遇上頑強而難以決定的案件(stubbornly undecidable case)是常態，富勒曾經發展出一項著名的假設性個案—洞穴探索者 (speluncean Explorers)，描述五位探險者掉入一個洞穴，眼看五個人都無法存活，他們決定犧牲一個人，以提供其餘四個人存活機會。有一個探險者未簽署同意書，但最後居然抽到這位探險者，其餘四人則將他吃了。隨後這四名探險者獲救，整個案子在法庭上審理之際，五名法官各自提出其論述。穆茲指出，富勒藉由這個個案，是要彰顯法律的運作，主要目的在於促進修辭知識的形成過程。法官就洞穴探險者案件所提出的見解，正是這個過程；因此與其重視法官個案判決見解的適用不如看重整個過程的架構理性及相關意義脈絡間的互動[57]。

穆茲因此指出，若要說富勒的法律規範理論中，存在著某項實質的自然法，那麼那項自然法應當是指開啓、維持並保護溝通管道的整全(the integrity of the channels of communication)，使得人們可以交流彼此的觀點、感覺及渴望[58]；在尋求視域融合（fusion of horizon）的過程，每個人體會到自身成長的歷程所形成的觀點與其他人在不同成長歷程所形成觀點上的差異。共同目的以及行動的採取，是在彼此透過對話與互動而發展，並不是以一項既定的目的作爲前提，理性而客觀的觀察並蒐集與之分離的外在世界資料，而作出判斷。穆茲認爲富勒的法律內在道德的要求，並不是作出判斷所依據的演算法則；而是尊重人在社會處境之下的論點[59]。

在“人際交往與法律”（Human Interaction and the Law）一文中，富勒分析習慣法（Customary Law），契約以及制定法，對實證主義之下，只有國家承認下的習慣才是法律的狹隘理解，提出批判[60]。富勒認爲，最好的理解方式，是將習慣法描述爲互動的語言（language of interaction）[61]。人們要有意義的互動，需要一定的社會結構，使得參與者的行動能落在可預期的模式之內。如同我們用先人的

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[55] 參考Mootz, F., Natural Law and the Cultivation of Legal Rhetoric, in Rediscovering Fuller 425-52 (Witteveen & Burg ed., 1999)。氏此一思路下，較新的著作，參考Rhetorical Knowledge in Legal Practice and Critical Legal Theory, 2006。

[56] Id., p.426。

[57] Id., p.427。穆茲也指出哈特與德沃金對於富勒的批判，也是由於未能洞察富勒主張手段與目的的相互作用，而且無論手段或目的，都涵蓋於社會結構之中，並不能夠將之分離開來，任意作概念上的演繹。法律因此也是只有在於人際交往所形成的社會脈絡之中，並非權威單向對人民所發出的命令。見Id, pp. 430-4。

[58] Id., p.435。

[59] Id., p.446。

[60] Fuller, L., Human Interaction and the Law, in the Principles of Social Order, pp. 231-266。

[61] Id., p.233。

語言溝通，目的是被理解，我們遵循習慣行事，是因爲習慣長期發展自人際交往，其間已經被賦予意義，這些意義在人際互動中，負擔讓彼此相互理解的功能，使人際交往能持續進行[62]。

有人際交往的地方，就有互動的語言，持續發展，也就有習慣法穩定彼此間的相互期待。這是現實社會的一部分，不因我們承認或重視習慣法與否而不同。制定的法律，需要我們所進一步解讀時，就必須進入互動的語言世界裡推敲。富勒指出即使是社會上早已定型，不容質疑的殺人罪，在一個涉及是否構成正當防衛的個案中，當事人、被害人及相關人之間的互動模式與情境，仍然是衡量的對象，及作出決定的基礎[63]。當然，我們也可以說，國家法律的介入，也對日後人際交往的相互期待的穩定過程，加入更新的要素與力量。富勒所要呼籲的是，法律與社會意義脈絡（Law and Social context）的互動是存在的，我們不應視而不見。時下一般人的觀念只有遵守法律，再要不只有訴諸道德。這種單純的他律與自律的想法，忽視負擔在人們互動語言的習慣法的存在與重要性[64]。

人際交往的法律觀視人們互動之際，經由彼此期待對方行爲與自身行爲的調整，形成隱含性規則（implicit rules）。波士提瑪（Postema, G .）指出，富勒的理論中，堅持現代法律是這類非正式社會運作（informal social practices）的延續，並且基本上取決於這些非正式社會運作，是其理論獨特之處。這種隱含性的規則，至少存在於人民與人民之間，稱爲平行規則（horizontal rules）；官員與人民之間，稱爲垂直規則（vertical rules）以及官員彼此之間[65]。這些隱含性規則內在於（internal）法律意旨，並且存在於人們審酌（deliberation）之中；而且成爲人們行動的理據，而不只是行動的諸多參數（parameters）[66]。如果法律系統性地無視而違背這些隱含性的規則，則社會秩序難以期待。這並不是說社會必然陷入混亂，而是指期待法律提供人們行爲上指引的目的，難以達成[67]。

近幾年，由社會法律理論發展出重視國家法律與人民自律兩種法律發展模式及其互動的理論，漸漸受到重視。寇恩（Jean Cohen）改良屠步涅（Teubner , G.）自發性法律（reflexive law），便是一個例子。寇恩稱之爲新的法律典範（new legal paradigm），認爲法律正朝此一方向邁進。國家法律在新典範之下，給予自律發展的空間，實質的法律判斷，儘量留給人民經由自律規範作出，國家只提供結構上以及程序上符合正當性的確保。在這樣的模式之下，國家法律與人民自律高度互動，彼此影響對方的健全發展，而法律原則的探索、落實與賦予內涵，則正是整

[62] Id., pp.233-7。
[63] Id., pp251-2。
[64] Id., pp257-66。
[65] Postema, G ., Implicit Law, in Rediscovering Fuller, pp. 255, 256-64。
[66] Id.
[67] 波士提瑪將富勒的這項理論稱爲融合性理論（The congruence thesis）。見Id., pp. 265-6。

個過程之所繫[68]。

寇恩以性騷擾爲例，指出美國聯邦最高法院提出不得性騷擾的原則，而未實質列舉購成性騷擾的具體要件，開啓了民間各公司引進專業人士協助內部建立性騷擾爭議的處理程序與規範，以及各項積極的措施。認爲這是新法律典範的成功範例[69]。

本文認爲，寇恩所依據的理論，基本上是盧曼（Luhman , N.）系統論經由屠步涅引進法學理論所發展的自發性法律。系統論是一項非規範性的社會理論，由演化的觀點，認爲社會複雜度的大幅提昇勢必造成自律法律系統的分裂與發展。然而本文所探討的富勒法學理論，則是不折不扣的實質規範性理論，說明本來人際交往所形成的各種社會活動，是法律發展的環境。法律的主要目的，應當在於提供反思這些必然存在並且持續發展的人際互動的架構、程序與指導。國家與人民間的互動關係，是人民互動關係的延伸。法實證主義忽視了這項國家法律與人們互動之間的對話，而法律內在道德正是整個互動過程的基礎[70]。富勒在 1960 年代，便思索發展這樣深具前瞻性的理論，即便不完整，但已經深具啓發性與指導意義了。

參、由富勒重人際互動的法律觀論數位著作保護的法律形成

數位著作保護的問題成爲焦點，與 1990 年代美國決定將網際網路由最早的軍事目的，以及隨及加上的教育研究目的，大幅轉型成以商業目的爲考量的網路有關。當時，擔心內容產業（content industry）因爲易遭受著作權侵害爲由，不願意加入；也擔心網路系統業者（Internet Service Provider）因爲易遭受著作權、言論自由等法律上的責任，不願意加入；因此整個立法過程刻意以過度有利於內容產業與系統業者的方式解讀著作權，以提高這些攸關網際網路商業化成敗產業的上網誘因。

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[68] 參考Jean Cohen, Regulating Intimacy-A New Legal Paradigm（2002）。

[69] Id., 以及Sturm, S., Second Generation Employment Discrimination：A Structural Approach, 101 Columbia Law Review 458（2001）。

[70] 參考Lon Fuller, The Justification of Legal Decisions, 6 World Congress on Philosophy of Law and Social Philosophy 77- (1972).此篇文章是富勒晚年參加在布魯塞爾召開的國際法哲學大會所發表的作品，也是他將國家法律與人際互動之間的關係說明最清楚的一篇著作。在這篇文章中，富勒闡明制訂法(state-made law)與社會意義脈絡（social context）之間的互動，而社會意義脈絡具體地包括了人際交往的模式（interactional pattern）以及相互期待（reciprocal expectation）。”The primary focus of my attention, I should explain, is on the interplay between formally enacted law, on the one hand, and, on the other, the social context to which that law is applied, the social context in question being that composed of interactional patterns and reciprocal expectiations that have come into being without the direct guidance of state-made law.” Id. p. 77.

這段期間美國法院一系列的判決，也以超乎尋常的方式，以有利於著作財產權人的方式，解讀著作權法。例如：Advanced Computer Services v. MAI System Corp.[71]，法院認定經由網際網路系統暫時性的重製數位著作於記憶體內，也構成著作權的侵害。這項過度有利於著作財產權人的著作權解釋，隨及遭到立法及司法判決推翻。十多年後的今日回顧此一發展，不能不爲法律的工具性心生警惕。富勒始終重視以社會交往作爲法律的根基，反對無視於人際交往所形成的規範意義脈絡，將法律單向地投射到人們身上，可以爲這一段著作權法的發展歷程，寫下註腳。

實際上，立法者的社群也有其互動的模式；只是一般而言，立法上的互動與整個社會脈絡脫節，而富勒所期盼的立法者與人際交往間的充分交往，作爲立法基礎的良序上的要求，無論在理論上或實踐層面，多屬於法學及法理學的邊緣，不受重視。美國 1990 年代數位著作權保護的立法發展，只是眾多例子的一個。美國尋求立法保障數位內容產業以邁向網路時代之際，也是國際間透過國際組織探討如何保障數位著作的時刻。立特曼（Jessica Litman）教授指出，美國主導了國際上數位著作保護的努力，而負責美國國內及國際上數位著作保護的美國專利局局長利曼（Bruce Lehman）想藉由在國際上推動較強的數位著作保護，再回到美國國內，試圖通過美國國內的相關立法，以減少阻力[72]。

就是在這樣的情境下，不得破解或規避保護數位著作的科技保護措施成爲美國、國際組織以及各國保障網際網路上的數位著作的主要方式。一方面，這項保護方式凸顯技術保護措施的中心地位，也進一步造成極力主張保護著作權的捍衛者與堅持反對著作權保障的著作使用者之間一系列的對抗。本文所探討的 Grokster 案只不過是這項發展過程中的一個環節。更重要的是，這項保護方式難以落實。眾多的例外，使得適用之際不易掌握分際；社會大眾更難以據以引導行爲上的尺度。

美國數位千禧年著作權法（Digital Millennium Copyright Act，DMCA）除了豎立不可規避技術保護措施的原則之外，也對網路系統業者的責任，進一步規定。爲平衡系統業者受表意自由的保障，並鼓勵其在網際網路上提供服務，以及著作

[71] 854 F. Supp. 356（E. D. Va. 1994）。

[72] 參考Litman, J., Digital Copyright：Protecting Intellectual Property on the Internet, pp. 128-38(2001)；Nimmer, D., Copyright Sacred Text, Technology, and the DMCA, p.175(2003)。美國數位千禧年著作權法的立法過程及其討論，除上述兩本著作，請參考Nimmer, D., Appreciating Legislative History the Sweet and Sour Sports of the DMCA's Commentary, 23 Cardozo L. Rev. 909(2002)；Imfeld & E. K strand, The Music Industry and the Legislative Development of the Digital Millennium Copyright Act's Online Service Provider Provision, 10 Communication Law and Policy 291(2005)；Herman & Gandy, Catch 1201：A Legislative History and Content Analysis of the DMCA Exemption Proceedings, 24 Cardozo Arts & Entertainment Law Journal 121(2006), 以及Chen, C., Digital Copyright Law-Marking and the Future Development of E-government, 待出版。

財產權人合法的利益，美國數位千禧年的著作權法規定了安全港（Safe harbor）措施[73]，只要系統業者並未放置侵害他人著作權的數位內容於網上，並未從中獲得利益等幾項情事，便免除系統業者的侵害著作權責任。而另一方面，該法提供一套程序，讓著作權人取得傳票（Subpoenas），要求系統業者提供可能侵害其權益的會員身份資料，以利內容業者追訴[74]。

這類立法者本於理性計算所作的利益平衡，正是富勒所不樂於見到的；一則基本上，這種立法是以立法者的觀點，單向地將其利益平衡加諸於社會；二則立法者作出決定，與人際互動所發展出來的社會互動脈絡脫節，對於人們行爲上的指引，很難發揮作用。實際的發展，也符合這項觀察。在 2003 年的RIAA v. Verizon Internet Service[75]一案中，法官判定系統業者Verizon無須提供原告利用其網路服務者的身份資料，原因是疑似侵害著作權的使用者，並未將數位內容存放於Verizon的伺服器上，只是藉由Verizon所提供的線路，彼此傳輸檔案。涉及這種點對點傳輸模式的系統業者，被認爲並非數位千禧著作權法要求系統業者提供會員身份資料的類型。這次的判決使得數位內容產業在追訴侵害其著作權的網路使用人士上，仍然陷於困境。

除了未能解決保護數位著作權執行面的問題外，數位千禧年著作權法在針對內容業者私領域執法（private enforcement）的規範上，也過於粗糙。最近一項統計，指出內容業者認爲有侵害其著作權的情事，而要求系統業者提供使用人身份資料的個案中，有超過 30%並沒有侵害著作權的情事[76]。數位著作權財產權人爲追查網路上的可疑侵權者，更是大顯神通，利用間諜軟體（spyware）毫無顧忌的探索網路使用人檔案的上傳與下載，置個人隱私於不顧[77]。

這項由內容產業與權利侵害人之間一系列網路上的抗衡，是技術、法律以及社會輿論等的全面掃蕩。受負面衝擊最深的其實是其餘社會大眾，尤其是在各領域藉由網路資訊合理的使用，能夠在政治、經濟、社會乃至於文化上有所進展的社會大眾。因此嚴格說來，整個社會都是輸家。

寇恩（Julie Cohen）教授將這個現象稱爲一項全面分散式的著作權行使（pervasively distributed copyright enforcement）。全面指得正是權利人在技術上、法律上及社會形象塑造等全面的圍剿；分散則意指所有這些努力是在全球各個角落發動，有別於一般致力於立法的環節。寇恩認爲發展成一項永久性的危機

[73] 17 USCS §512。
[74] 17 USCS §512(h)。
[75] 359 USA pp.DC85，2003。
[76] 參考Urban & Quilter, Efficient process or “Chilling Effects” ？：Takedown Notices under section 512 of Digital Millennium Copyright Act, 22 Santa Clara Computer & High Tech. L. J. 621 (2006)。
[77] 刺探網路使用行爲的軟體發展，參考Liedtke, M., Software Tool Goes After Net Copyright Threats，Marketing News, April 15, 2007。

（permanent crisis），是讓權利人可以營造這種規訓的體制（disciplinary regime）。而這項規訓的體制，有別於傳統藉由中央的權威或分散式、內化的規範，而是經由一系列相互協調的程序，主導資訊的流動（coordinated processes for authorizing flows of information）而達成[78]。

寇恩指出，著作權權利人利用下列方式，一步步將數位內容商品化，以擺脫著作權法上的法益平衡：

1. 結合技術、契約法及營業秘密法，權利人能確保各種播放數位內容的電子產品確保技術保護措施有效率的被貫徹，技術保護措施的標準也因爲列爲營業秘密，而不得外洩；
2. 有計畫的依據數位千禧年著作權法，追訴任何公司或個人研發足以干擾權利人技術保護措施的技術，研發人員擔心訴訟的負擔，會改變研究課題；Grokster案法院並未清楚界定技術開發者減少侵權可能的責任限度，也增加權利人以訴訟的方式嚇阻的空間；
3. 許多大廠投入力量，試圖發展可信賴系統（trusted system），直接從邏輯（Logic）與實體（physical）的層次完全掌握數位內容。這些大廠各自或結合成群體，全力投入可信賴系統的研發，包括微軟（Microsoft）、Intel、IBM、AMD、HP、Sony、Sun Microsystems、Hitachi、Matsushita、Toshiba；
4. 利用間諜軟體追查可疑的侵權者，再要求系統業者公佈這些疑似侵權者的真正身分，以利追訴；
5. 大規模的在各地直接起訴侵權人，讓網路使用人覺得侵害著作權很危險，以改變使用者的行爲模式；除了起訴之外，權利人也利用私人紛爭解決中心（private settlement service center）大量的以 3000 至 6000 美金的賠償額度，與侵權者和解，侵權者則可以因此避免其身分地位曝光；
6. 最後，則使用文宣，將侵害著作權與竊盜、強盜、共產主義、瘟疫、流行病及恐怖主義份子相類比[79]。

著作權長期以來，除了保障權利人的利益之外，在教育、知識普及乃至文化發展上的貢獻，原本可以經由網路時代的來臨，將人類社會推至新的境界。但是權利人與侵權者之間的戰爭，已經將著作權法本身，推向死亡的邊緣。富勒增進人際交往的法律觀，在此時此刻，顯示出其智慧。2004 年考艾特（Jonathan Caouette）自製的短片在坎城影展上大放異彩。他是用借來的麥金塔電腦將自己拍攝的短片與市上的音樂、影片剪輯而成，全部只花 218 元美金，被影評人喻爲傑作（master piece）。在權利人全面掃蕩侵權人的過程，剪輯軟體被認定是違反著作權法不得

[78] 參考Cohen, J., Pervasively Distributed Copyright Enforcement, 95, Geo. J. 1 (2006)。
[79] Id., pp.3-190。

規避技術保護措施的規定[80]。考艾特估計若必須取得授權，則製作他的影片，需花費 40 萬元美金以上，不是一般人可以考慮的嘗試。

郝威林（Houweiling，M.）教授因此由分配平等的出發點，強調不應當由於財力而影響人的創作自由。任何人要創作，若非以獲利爲目的，應當可以自由利用他人著作；只有在有獲利的部分，應當與其他著作權權利人分享該獲利[81]。學理上，探討公平的網路著作權規範課題者，提出相當多精闢見解[82]。

這些見解之間以及與各意義脈絡下的使用行爲之間的互動若能有系統、有制度的進行相互反省與批判，則毫無疑問，網際網路在數位著作權法制良序地發展下，再開創出每個人都站在巨人肩膀上，無論在政治、經濟、社會、教育以及文化上，大放異彩的新局面，不難想像[83]。富勒要求法律上重視人們溝通模式的設計與建立，誠非無的放矢。

即使不從理想發展的角度論之，而由最低度秩序的維持上而言，現今的數位著作權法制也顯露其弱點。在一項大學校園著作權規範上的實驗中，發現若提醒人們分享檔案違反著作權法以及授權，對於分享檔案的行爲以及道德態度，完全沒有影響；無怪乎權利人要變本加厲，只是方向上事倍功半。實驗又發現，如果採取將侵權者公佈於校園內，則分享檔案的行爲以及道德態度明顯地會受影響[84]。貫徹數位著作權保障的最佳管道，仍然是在社群人際互動情境的發展與良序的導入；否則，法律規定與人民的期待脫節，侵權者對於欠缺期待性與正當性的法律，很難產生行爲上的正確思考[85]。

伍、結語

法律典範的移轉正在進行。資訊法正處於這項典範移轉的轉捩點上。數位著作保護上的困境與令人惋惜的發展，也正反映了舊有法律典範的窘境。典範的核

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[80] 參考 321 Studios v. Metro Goldwyn Mayer Studios, lnc., 307 F. Supp 2d 1085（N.D. Cal. 2004）；Houweiling , M., Distributive Values in Copyright, 83 Tex. L. Rev. 1535, 1537（2005）。

[81] Houweiling , id.

[82] 參考陳起行，美國數位著作保護的法理論述，台大法學論叢，第三十六卷，第二期，頁 131-64。

[83] 持相同見解，請參考Sunder , M., IP3, 59 Stan, L. Rev. 257（2006），認爲智慧財產權立法應擺脫狹隘地以平衡創造誘因與著作利用的經濟觀點爲目的；更應從政治、經濟乃至文化的角度思考每一個人的認同（identify）及其合理發展。

[84] 參考Feldman & Nadler, The Law and Norms of File Sharing, 43 San Diego L. Rev. 577, 608-14（2006）。

[85] 系統業者是數位著作使用上人際互動的樞紐，不應忽視這一環節在形成秩序上的意義。由法律思想日益重視由下而上的治理發展趨勢而言，法制的重心，也應當放在系統業者與權利人、使用人間有效溝通管道的建立，相互爲期待上的調整，才可能發展。學理上，亦主張應重視系統業者責任者，參考Lichtman & Posner，Holding Internet Service Providers Accountable, 14 S. Ct. Econ. Rev. 221（2006）。

心，是當代人們視爲理所當然的想法。典範欲成功移轉，也因此主要視核心觀念是否先能轉移。本文認爲富勒重人際交往的法律理論，爲探索下一個法律典範，提供了方向上的指引，並藉由美國聯邦最高法院的 Grokster 判例的討論，以及整個數位著作權法制發展的批判，試圖勾畫出新舊典範的理論以及制度面旨趣之差異，期盼在歷史洪流處於轉折點的當下，能提供反省與前瞻的思考素材，進而帶動轉變的力量。

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