

TIANXIANG HE*

Fansubs and Market Access of Foreign Audiovisual Products in China: The Copyright Predicament and the Use of No Action Policy

| | |
|--|-----|
| Introduction | 308 |
| I. The Rise of Fansubs | 309 |
| A. The Video Tapes and Cassettes Era | 310 |
| B. The Internet | 311 |
| C. Motivations | 311 |
| D. Community Ethos..... | 313 |
| II. The Problem: An Examination of Fansubs Under Current Chinese Laws | 316 |
| A. Copyright Law..... | 317 |
| B. Contract Law..... | 319 |
| C. General Principles of Civil Law..... | 322 |
| III. Behind the Fansubs: Opportunities and Challenges of the Digital Revolution | 323 |
| A. The Beleaguered Copyright Laws..... | 323 |
| B. Peer-to-Peer Technologies | 324 |
| C. Unstoppable Trend of Online File Sharing | 326 |
| D. Business on the Edge | 328 |
| IV. Solutions? | 333 |
| A. The Old Path | 334 |
| B. The New Path? | 335 |
| Conclusion..... | 345 |

* Ph.D. researcher, Faculty of Law, Maastricht University; Ph.D. student, Law School, Remin University of China. The author wishes to thank Professor Eric Priest, for his valuable suggestions, as well as Wendy Gordon, Peter Yu, Rogier Creemers, Hongsong Song, Lucy Montgomery, Kyu Ho Youm, Yu Zhao, and the participants of the symposium on “Copyright and Media Pluralism in China” that took place at University of Oregon in April 2014, and where this Article was presented and discussed.

INTRODUCTION

With the development of new digital technologies, online piracy is getting more and more severe at breakneck speed. The current global copyright regime is therefore facing critical challenges stemming from worldwide piracy activities. Billions of unauthorized copies are made and distributed online globally each year, and seemingly the world lacks proper countermeasures. Notably, most of the existing solutions rely heavily on local courts, but just as a United States court noted, “the impracticability or futility of a copyright owner’s suing a multitude of individual infringers”¹ has already decided that eliminating piracy through traditional means is a mission that can hardly be accomplished. Even economic analysis is supportive of this view.² This is especially the case for copyright enforcement abroad. On the other hand, endeavors such as enhancement of technical controls are facing backlashes from the public for reasons like possible fundamental rights violation.³ Thus, it is fair to say, there is a universal deadlock in the course of fighting piracy.

If we take a careful look at online piracy, we might discover something interesting: nowadays fan activities of foreign audiovisual products in China, such as fansubs and fanvids, are deeply entwined with online copyright piracy. Fans appropriate segments or core elements from the original copyrighted works and use them to create something new: it could be a creative translation of the subtitles of a movie; it could also be a parody, or a proposal video using a copyrighted romantic song. Some of these activities may be justified by fair use doctrine or similar regimes in the copyright laws of the United States and China; however, some of them are deemed derivative but unauthorized, which are condemned by our copyright laws. Interestingly, evidence shows that many fan activities are not detrimental to the original copyrighted works. Some cases show that for their economic benefits, and for other reasons related to the political environment and practical considerations, foreign audiovisual industries are tolerating most fan activities in China. Moreover, as previous studies have indicated, the piracy problems in China are more than just complex: they involve historical, cultural and political considerations. These are all contributing to the lax

¹ *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003).

² See T. Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 628 (2008).

³ See, e.g., Julie E Cohen, *DRM and Privacy*, 46 COMM. OF THE ACM 47 (2003).

enforcement of Chinese authorities.⁴ Research has also demonstrated that the existence of some aberrant activity is crucial to the development of civic engagement and democratic participation in China.⁵ Nevertheless, the current copyright law regime we have is incapable of distinguishing the beneficial activities from piracy. Fan communities are still deemed pirates, and their labors are not fully recognized.⁶

This paper aims to dig deep into one form of fan contributions, fansubs, and substantiate that with the help of the No Action Policy (NAP), they can be used to solve some of the existing copyright problems. In Part II this paper will briefly introduce the history of fansubs; in Part III the legal analysis of all the fan works under the Chinese laws will be demonstrated. In Part IV the opportunities and challenges behind the fansubs will be delineated, follow by a proposed solution and the possible implications of this solution in Part V.

I

THE RISE OF FANSUBS

We are now living in a digital age, one in which countless copyrighted content, whether foreign or domestic, can be downloaded via the Internet, and one that offers unprecedented chances to the public to participate in events and make themselves heard by others. Just a decade ago, this would have been almost inconceivable. Fan activities in the digital era are the perfect example of Internet use that

⁴ See generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (Stanford University Press 1995); Eric Priest, *The Future of Music and Film Piracy in China*, 21 *BERKELEY TECH. L.J.* 795, 821–29 (2006) (summarized the problems that copyright owners will face if they were to crack down hard on piracy in China); see also CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* 165 (Hyperion, 1st ed. 2009) (“Piracy extends to virtually every industry in China, a combination of the state of development of the country and its legal systems and a Confucian attitude toward intellectual property that makes copying the work of others both a gesture of respect and an essential part of education.”).

⁵ See generally William Hennessey, *Deconstructing Shanzhai-China’s Copycat Counterculture: Catch Me If You Can*, 34 *CAMPBELL L. REV.* 609 (2012); see also Robert S Rogoyski & Kenneth Basin, *The Bloody Case That Started From a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in Modern China*, 16 *UCLA ENT. L. REV.* 237 (2009).

⁶ See Hye-Kyung Lee, *Participatory media fandom: A case study of anime fansubbing*, 33 *MEDIA, CULTURE & SOC’Y* 1131, 1141 (2011) (“[T]he industry is framing fansubbing as piracy . . .”).

involves both copyright issues and civic engagement, and raises many critical questions to the current copyright law regime. Amongst others, fansubs are no doubt the most widely spread fan activities in China, thus it is useful to take a historical review of them.

“A fansub is a fan-produced, translated, subtitled version of a Japanese anime programme.”⁷ Now the concept had been expanded to include fansubs of all types of audiovisual works. The so-called “fansubbing” activities can trace back to the Japanese anime production explosion in the ’80s. During that period, many Japanese anime works were unofficially introduced to the United States market by anime fans there. The fans of certain titles formed in groups to translate their favorite anime works into English. And due to the breakthroughs in digital technologies, fansub groups are now growing rapidly around the world.

A. The Video Tapes and Cassettes Era

The emergence of the initial fansub can be traced back to 1986. It was in the late ’80s when fansubbing as a collective action surfaced in America. It is also believed that video-recordable tapes or cassettes like VHS and Betamax were the first carriers of fansubs.⁸ During this period, fans first needed to purchase the original copies from Japan and then use special equipment, a large investment, to overlay the translated subtitles with the video and record it with tapes. These final products were then circulated by mail within the fan community. Because of the costliness and time required to produce and send these fan-made tapes, they only reached a limited number of people.⁹ This model of fansub production lasted till the mid ’90s, when the personal computer became a mass-consumer good and the Internet became accessible to the public. However, compared with their counterparts in the United States, fans of certain foreign audiovisual works in China during this period did not have equivalent equipment, knowledge, source, or funding to make fansub copies with videotapes.

⁷ Jorge Díaz Cintas & Pablo Muñoz Sánchez, *Fansubs: Audiovisual Translation in an Amateur Environment*, J. SPECIALISED TRANSLATION 37, 37 (2006).

⁸ Sean Leonard, *Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. 189, 192 (2005).

⁹ Jordan Hatcher, *Of Otakus and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright Law*, 2 SCRIPT-ED 545, 549 (2005).

B. The Internet

After entering the digital age, fansub activities were solidified and amplified greatly by modern digital technologies. Consequently, fansubs in the digital age can theoretically be shared with countless people, hence it is extremely hard to control and monitor the figures related to distribution. Furthermore, we cannot depict the nascent digi-subbing activity as merely a fandom activity that focuses on Japanese animes anymore: the boundary of the small coterie is gone. Now “fansub” is used to illustrate fan translations of all kinds of foreign works. “Fansubber” thus characterizes those people who translate foreign audiovisual works into their home languages and disseminate it.

C. Motivations

Fansubbing first emerged as a pure fandom activity. The major motivation to make fansubs for fans in the beginning was to promote fansubbers’ loved Japanese animation works among other fans. Study shows that, in order to promote anime more effectively, from the late 1970s to the end of the 1980s international fan clubs of Japanese anime were established in the United States.¹⁰ Fansubs were first shared among fan groups, with limited members and distribution methods. This changed after the beginning of the digital age: the coverage of fansubs was extended from merely Japanese animes to almost all kinds of audiovisual works. Accordingly, the motivation of fansub groups to share anime works among fans was transformed into the motivation to share their loved audiovisual works with everyone via the Internet. More specifically, the dominant motivations of most Chinese fansubbers is to practice English and video production, and gain a sense of belonging and community.¹¹

One of the subsidiary motivations of fansubbing is that when a foreign audiovisual work is not officially in the local market, fansubs are one of the easiest ways to get access to that title. However, this inexistence could be caused by market withdrawal or market entry problems. Take old foreign audiovisual works that are already out of production as an example: it is very hard to urge film companies who

¹⁰ Leonard, *supra* note 8, at 204.

¹¹ Donna S.C. Chu, *Fanatical Labor and Serious Leisure: A Case of Fansubbing in China*, in *FRONTIERS IN NEW MEDIA RESEARCH* 259 (Francis L.F. Lee ed., Routledge 2012).

own the copyright of these titles to reissue them in China if the cost-benefit analysis of doing so does not look good. As for new products, when entering the market of foreign countries they will face lots of restrictions.¹² While these products await unpredictable future licenses, fansubs are an alternative choice for consumers.

Moreover, previous studies show that imported audiovisual works have problems with integrity in different countries. For instance, Japanese animations in the United States market are under severe censorship to filter violence and sexual content and to adapt them to the local language environment.¹³ The most notorious case is the rewriting of Hayao Miyazaki's *Nausicaä of the Valley of the Wind* (1984), which was adapted in 1986 and proved to be a failure. Isao Takahata, the producer of the original work said "censoring them is worse than betraying them" in an open interview.¹⁴ Moreover, even some of the local cartoons are sanitized when they go on television broadcasting in the United States.¹⁵ Imported audiovisual works in China are facing the same problem as well: an interview done by CCTV shows that the imported animation works are under multiple levels of censorship for the purpose of adapting the works for children.¹⁶ Some legislations and regulations also indicate that topics like sensitive political content are included in the standards for censorship.¹⁷ The outcome of these policies is that most foreign

¹² E.g., barrier to trade, screen quota, censorship, government policies, market analysis and company choice, etc. See generally Priest, *supra* note 4.

¹³ Sean Leonard, *Progress Against the Law: Anime and Fandom, with the Key to the Globalization of Culture*, 8 INT'L J. CULTURAL STUD. 281, 285 (2005).

¹⁴ Cedric Littardi, *An Interview with Isao Takahata*, THE HAYAO MIYAZAKI WEB (July/Aug. 1992), http://www.nausicaa.net/miyazaki/interviews/t_corbeil.html#fn4 (Ken Elescor trans., Oct. 1993).

¹⁵ JASON MITTELL, *GENRE AND TELEVISION: FROM COP SHOWS TO CARTOONS IN AMERICAN CULTURE* 64 (Routledge 2004).

¹⁶ *Imported Anime's influences on the values of children in China*, CCTV special report on the social responsibilities and direction of TV media, available at http://www.cctv.com/tvguide/tvcomment/special/C11876/20041012/101985_4.shtml (last visited Apr. 23, 2014).

¹⁷ See Guangbo Dianying Dianshi Bu Guanyu Yinjin Haiwai Dianshiju De Shencha Biaozhun (广播电影电视部关于引进海外电视剧的审查标准) [Examination Standards Concerning Imported Foreign Television Dramas] (promulgated by the St. Admin. of Radio, Film & Television, Nov. 28, 1990, repealed Dec. 17, 2003) art. 4 (China). See also, e.g., Jingwai Dianshi Jiemu Yinjin Bochu Guanli Guiding (境外电视节目引进、播出管理规定) [Foreign Television Program Import and Broadcast Management Regulations] (promulgated by St. Admin. of Radio, Film & Television, Sept. 23, 2004, effective Oct. 23, 2004, by SARFT Decree No. 42) art. 15 (China); Dianshiju Shencha Guanli Guiding (电视剧审查管理规定) [Television Drama Examination Management Regulations] (promulgated by St. Admin. of Radio, Film & Television, Sept. 20, 2004, effective Oct. 20, 2004, by SARFT Decree No. 40, repealed July 1, 2010) art. 20 (China); Dianshiju

audiovisual works are sterilized and thus vary from the original versions. Some adaptations change the content of the originals a lot, leaving the audiences a vague and misleading version. In these cases, neither the copyright owners nor the fans are delighted. In a sense, we can say fansubs are the ramification of censorship: fans create and distribute fansubs because they believe that the licensed version may not reflect, sometimes even distorts, the original expression of the foreign audiovisual works. Fansubs are indeed offering fans—that had watched the licensed but censored version and still want to dig out more—a chance to access the originals. In other words, some fans did create and distribute fansubs with the subsidiary motivation of keeping the integrity of the originals. Interestingly, a report shows that some fansub groups are under the surveillance of the State Administration of Radio, Film, and Television (hereinafter as SARFT). Every two or three months, the SARFT will send letters to famous fansub groups, telling them to make sure their fansubs avoid certain works with obscene and sensitive contents.¹⁸

D. Community Ethos

Although fansubbers have all kinds of good faith and motivations, fansubs are often criticized for their potential copyright infringing nature. Because of commercial pirates taking advantage of fansubs—seizing the fan-translated subtitles, and even seizing the video files and selling them directly—and because of concern about copyright troubles in the future, fansub groups started putting certain warnings and disclaimers into their fansubs.¹⁹

One part of these notices are noncommercial claims such as “Not For Sale Or Rent” and “Translation Studies Only, Not For Any Commercial Uses.” These noncommercial claims were commonly seen in the preliminary stage of the whole fansub movement. The initial purpose of this was to maintain a pure community of anime

Neirong Guanli Guiding (电视剧内容管理规定) [Television Drama Content Management Regulations] (promulgated by St. Admin. of Radio, Film & Television, May 14, 2010, effective July 1, 2010, by SARFT Decree No. 63) art. 5 (China).

¹⁸ Lele (乐乐), *Bufen Zimuzu Shouru Da Baiwan Yuan Yingshi Wangluo Fanyi Quzhi Youdao* (部分字幕组收入达百万元 影视网络翻译取之有道) [*Some Fansub Groups Make Millions a Year: Internet Visual Translation Reap with Their Way*], LAODONG BAO (劳动报) [LABOUR DAILY], Aug. 6, 2009, <http://ld.eastday.com/1/20090806/u1a610796.html> (China).

¹⁹ In most cases, it contains warnings such as “not for commercial purposes.” See, e.g., *Website Term and Conditions of Use*, FANSUB-SHARE.ORG, <http://fansub-share.org/tou/>.

sharing for true fans. The fansub groups believed that the existence of commercial elements would breach this purpose and would lead fansub groups to an unsteady and unpredictable future. These noncommercial notices are still a common practice in current fansub groups. After entering the digital age, some new disclaimers such as “Translation Studies Only” appeared in China, simultaneously with the possibility to distribute the subtitles and raw audiovisual files separately online.²⁰ Other disclaimers such as “For Internet Services Test Only” and “For Evaluation Purposes Only” are also commonly used by Chinese fansubbers.²¹

The rest of these notices mainly concern the duration of fansubs. The purpose to put notices like “Cease Distribution When Licensed” and “Please Delete Within 24 Hours” is to avoid direct conflict with the copyright owners’ economic interests. According to previous studies, it is evident that in the early days most fansub groups did cease the release of fansubs, after the original foreign works were officially launched domestically.²² But fansub groups in China have different perspectives. Most of them put the “Please Delete Within 24 Hours, Please Purchase Licensed Product If You Like It” warning on their fansubs instead of the “Cease Distribution When Licensed” warning. Some fansub groups do continue to fansub famous titles because of integrity, even after those works have been officially licensed in China.²³

To sum up, fansub groups adopted multiple rules to regulate their behavior. These rules together formed the so-called fansubbing ethos.²⁴ It started with simple rules to keep the fan community under control in the VHS age; later these rules were varied and ramified in the digital era for different reasons. But “noncommercial use” remains

²⁰ An argument for copyright infringement exemption like “for translation studies” is only possible if the subtitle file and audiovisual file are detached.

²¹ The original Chinese words will be “仅供网络测试用” and “仅供学习和试看用.”

²² For instance, the Kiotsukete fansub group in distributing the title “Koko wa Greenwood,” and William Chow of the Vancouver Japanese Animation Society in distributing Japanese Animes are following that rule. See Leonard, *supra* note 8, at 217.

²³ For instance, Toei Animation licensed the famous Japanese Anime *One Piece*, to Star Group Limited China. But Maplesnow Fansub group (枫雪), which is well known for its fansubs of *One Piece*, continued their distribution after Star Group start broadcasting the dubbed version of *One Piece* in mainland China since 2008. The distribution of *One Piece* fansubs parallel with the Star Group broadcast till now. But obviously fansubs did a better job than Star Group in keeping the pace with the original broadcast.

²⁴ Generally the fansubbing ethos refers to three major rules: Noncommercial, cease distribution when licensed, and continue distribution if licensed products are heavily censored. See LaToya D. Rembert-Lang, *Reinforcing the Tower of Babel: The Impact of Copyright Law on Fansubbing*, 2 INTELL. PROP. BRIEF 21, 22–23 (2010).

the basic principle for most fansub groups.²⁵ During the VHS times, groups that chose to charge for tapes or postages instead of using the SASE (self-addressed, stamped envelope) method were deemed pirates or bootleggers.²⁶

Nowadays the fansub groups still face the problem of operating costs. An estimate shows that the costs of running a fansub site (including the costs of server, bandwidth, and maintenance) in China takes around 60,000 RMB (U.S. \$9,753) per year.²⁷ Fansub groups have to rely on advertising revenues to cover that expense. However, the boundary between making enough money to keep their sites or forums running and making a profit is quite vague. Although most fansub groups do claim that the advertising incomes are only for maintenance purpose and will be kept in that level, some fansub groups do cross the line evidently. For example, Btpig, a Chinese fansub group that is famous for fansubbing Japanese TV series and animes such as *Naruto*, broke down into two groups in 2006 due to differences in the understanding of the fansubbing ethos. The Subpig fansub group (猪猪乐园) now focuses on fansubs of Japanese TV series; the Zmpig, later the Jumpcn fansub group (猪猪字幕组) inherited the anime line. While Subpig still adheres to its fansubbing ethos, Jumpcn now has crossed the border of noncommercial use by merging advertising clips of sponsors and their online accessory shop into their fansubs. Moreover, most of the accessories they are selling, such as T-shirts with printed copyrighted anime characters on them, are not licensed. However, their “betrayal” triggered the discontentment of fan communities and audiences. Jumpcn was boycotted and alienated by other anime fansub groups who believe Jumpcn’s action will draw too much attention of the copyright owners. Audiences dislike Jumpcn’s choice because the quality of

²⁵ Most famous Chinese fansub groups like TLF (The Last Fantasy) and Maplesnow all have similar warnings. See, e.g., *TLF History—the Memoirist of the TLF Fansub Group*, THE TLF FANSUB GROUP OFFICIAL SITE, <http://sub.eastgame.org/wp-content/uploads/2011/03/%E4%BA%86%E8%A7%A3TLF%E5%AD%97%E5%B9%95%E7%BB%84-TLF%E5%85%83%E8%80%81%E5%9B%9E%E5%BF%86%E5%BD%95.pdf>; see also *Disclaimer of Maplesnow Fansub Group*, THE MAPLESNOW OFFICIAL SITE, <http://bbs.fxdm.net/disclaim.htm>.

²⁶ See *Fansub*, ANIME NEWS NETWORK, <http://www.animenewsnetwork.com/encyclopedia/lexicon.php?id=63>. See also Leonard, *supra* note 8, at 218–19 (Leonard picked William Chow of the Vancouver Japanese Animation Society as the example.).

²⁷ Wang Lei (王磊), *Wangluo Zimu Zu Huoli Qudao Fenxi* (网络视频字幕组获利渠道分析) (*Analysis of Profit Channels of Internet Video Fansub Groups*), *Dianying Xinzuo* (电影新作) (NEW FILMS), no.2, 2012, at 10.

fansub deteriorated as low quality advertising clips were added. Consequently the fans turned to other fansub groups working on the same title, but still Jumpcn has its loyal followers. In addition, a 2009 report illustrated that some of the distinguished Chinese fansub groups with huge member bases in hand could earn millions of RMB per year from advertising revenues. Sponsors are willing to pay because these big sites could bring in considerable clicks. But only the administrative members can lay their hands on that money,²⁸ and apparently profitability of fansub groups varies from case to case.

In sum, fansub groups in China are still evolving, but since most of them are doing translations on foreign audiovisual titles,²⁹ and there is a lack of communication between foreign copyright owners and Chinese fans, the evolution is indeed arbitrary and in need of proper guidance.

II

THE PROBLEM: AN EXAMINATION OF FANSUBS UNDER CURRENT CHINESE LAWS

Before digging deep into the options to address problems raised by fansubs in the digital age, it is useful to go through the laws related to fansubs to see whether these fan activities are infringing on the law, and whether the current copyright regime can solve these problem.

Theoretically speaking, since China is a member of the Universal Copyright Convention (UCC)³⁰ and the Berne Convention for the Protection of Literary and Artistic Works (Berne),³¹ and both of these conventions explicitly prescribe the principle of national treatment,³² copyrighted audiovisual products of member countries are all under protection in China.

²⁸ Lele, *supra* note 18.

²⁹ In China, only some domestic productions that use local dialogs need translation.

³⁰ Universal Copyright Convention as revised at Paris on 24 July 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 [hereinafter UCC]. The United States acceded to the revised UCC in 1972, China in 1992, and Japan in 1977.

³¹ Berne Convention for the Protection of Literary and Artistic Works (Paris Act of July 24, 1971, as amended on Sept. 28, 1979), WIPO Publication No. 287(E) (Geneva: World Intellectual Property Organization, 1992), 828 U.N.T.S. 221 [hereinafter Berne Convention]. The United States acceded in 1989, China in 1992, and Japan in 1899.

³² UCC, art. II(1); Berne Convention, art. 5(1).

A. COPYRIGHT LAW

Although supported by numerous fans and many scholars, fansubbing is undeniably copyright infringement in most countries. Despite all sorts of motivations and self-regulations, fansub groups still cannot avoid their legal problems. Even though some of the fansub groups work on works in the public domain and on works with free licenses, the majority of the fansub groups are distributing unauthorized copyrighted audiovisual works. In the beginning, most fansub groups believed that copyright holders were aware of their suspect distributions and chose to tolerate their action for various reasons, based on the fact that no litigations were raised against fansub groups. They further claimed that their fansub activities were therefore justified and that the fansub movement was actually beneficial to the copyright owners as fansubs can serve as free advertisements or develop foreign markets.³³ However, recently some copyright owners of the fansub works have demonstrated their discontentment by sending cease-and-desist letters to fansub groups, because they believe fansubs will affect the willingness of foreign licensors to license their audiovisual works³⁴ and their homeland sales.³⁵ Nevertheless, fansubbers themselves do recognize that fansubbing is a copyright infringement activity under the current legal regime.

Starting from only Japanese anime, fansubbing activity has now spread to almost each and every type of audiovisual work. It is believed that fansubbing is “a particular type of non-commercial translation subtitling process of foreign mass media products.”³⁶

³³ Although some argue that “fansubs and illegal video downloading sites have had a deleterious effect on the anime industry, despite fans’ attempts to suggest fansubs promote the industry . . . for new markets that have not yet gained recognition,” like China, “illegal uses may be beneficial.” Tiffany Lee, *Fan Activities from P2P File Sharing to Fansubs and Fan Fiction: Motivations, Policy Concerns, and Recommendations*, 14 TEX. REV. ENT. & SPORTS L. 181, 188 (2012–2013).

³⁴ See Leonard, *supra* note 8, at 230 (“[G]ranted permission might thwart the incentive of said syndications to be the first to bring the shows to the public.”).

³⁵ See Mikhail Koulikov, *ADV films*, ANIME NEWS NETWORK (May 12, 2007), <http://www.animenewsnetwork.com/convention/2007/anime-central/advfilms> (“[F]an subtitling is hurting the industry both in the US and in Japan.”).

³⁶ Y. Tian, *Fansub Cyber Culture in China* (Apr. 26, 2011) (unpublished M.A. thesis, Georgetown University, UMI No. 1491553) (available by subscription in ProQuest Dissertation and Theses database, <http://search.proquest.com/docview/865649108?accountid=12339>).

Because online distribution of unauthorized copies of the original works is deeply entwined with most fansubs, the resultant copyright problem is to be expected. If we consider the individual elements of it respectively, the only thing that can be deemed as “transformative” is the translation of the subtitles.

According to the copyright law in China, translation, one of the derivative works that has been clearly stated in the law, is also subject to the permission of or license from the original author. The translation of a movie’s subtitles is no doubt deemed a derivative work in China as well. Apparently unauthorized translation and distribution of the movie subtitles infringes the copyrights of the underlined works.³⁷ Admittedly the online distribution of the original work with add-in fan-translated subtitles constitutes copyright infringement because obviously doing so substitutes the original work. Therefore fansubbing is ostensibly illegal. Although their noncommercial claims seem fair, there is still no exception made for fansubs in the law with regard to their online publicity and free accessibility. Apparently they fall short of the copyright exceptions listed in the Copyright Law of China.³⁸

³⁷ According to an interview, Prof. Wang Qian’s view of fansubbing is clear: “If a fansubbing activity is without authorization and do not qualify as fair use, then in China, they probably will infringe the translation right and the information network transmission right of the foreign audiovisual product.” See Jin Wenjie (金文婕), *Meiju Zimuzu Bei Shoubian Huo Leifeng Yao Zhuanqian* (美剧字幕组被收编 “活雷锋”要赚钱) [*Fansub Groups of American Drama were Incorporated, “Living Lei Feng” Needs Money*], XINWEN CHENBAO (新闻晨报) [SHANGHAI MORNING POST] (June 16, 2014), http://www.jfdaily.com/shanghai/bw/201406/t20140616_448050.html (China).

³⁸ Copyright Law of China (promulgated by the Nat’l People’s Cong., Sept. 7, 1990, amended Feb. 26, 2010), translated in LawInfoChina (P.R.C.) (last visited Dec. 15, 2012) [hereinafter CCL] art. 22:

In the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are mentioned and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced:

- (1) use of another person’s published work for purposes of the user’s own personal study, research or appreciation;
- (2) appropriate quotation from another person’s published work in one’s own work for the purpose of introducing or commenting a certain work, or explaining a certain point;
- (3) unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical and radio and television program, for the purpose of reporting current events;
- (4) publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc. on current

B. Contract Law

One of the most relevant defenses for fansubs in the field of contract law should be the implied license doctrine. The doctrine, which is essentially viewed as a ramification of contract law, is used to presume the intent of the contracting parties in order to supplement their agreement.³⁹ Implied license is created by law when the conduct of the parties can be used to deduce whether an agreement was reached or not in the absence of an expressed license between the parties. Some commentators have predicted that implied licensing will—and should—play an important role in the allocation of intellectual property rights on the Internet.⁴⁰ Fan groups may use implied license doctrine to justify their activities. However, whether this defense could be invoked depends heavily on the legal framework of a certain country.

political, economic or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted;

(5) publishing or broadcasting by the media, such as a newspaper, periodical, radio station and television station of a speech delivered at a public gathering, except where the author declares that such publishing or broadcasting is not permitted;

(6) translation, or reproduction in a small quantity of copies of a published work by teachers or scientific researchers for use in classroom teaching or scientific research, provided that the translation or the reproductions are not published for distribution;

(7) use of a published work by a State organ to a justifiable extent for the purpose of fulfilling its official duties;

(8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc. for the purpose of display, or preservation of a copy, of the work;

(9) gratuitous live performance of a published work, for which no fees are charged to the public, nor payments are made to the performers; (10) copying, drawing, photographing or video-recording of a work of art put up or displayed in an outdoor public place;

(11) translation of a published work of a Chinese citizen, legal entity or other organization from Han language into minority nationality languages for publication and distribution in the country; and

(12) transliteration of a published work into braille for publication.

(translation from WIPO).

³⁹ KIM LEWISON, *THE INTERPRETATION OF CONTRACTS* 152 (Sweet & Maxwell 3rd ed. 2004).

⁴⁰ John S Sieman, *Using the Implied License To Inject Common Sense into Digital Copyright*, 85 N.C. L. REV. 885, 893 (2006–2007).

As a country of civil law system, China embraced no case laws, thus courts in China cannot ground its judgment on precedent. Furthermore, the CCL provides no indication that these fansubs can be defended by implied license. However, according to the terms stipulated in the *General Principles of The Civil Law of China*⁴¹ and the *Contract Law of the People's Republic of China*,⁴² it is possible that a contract can be made in more ways than just writing.⁴³ However, it is hard to say that the fansubs and a copyright owner have a contract, if the copyright owner is intentionally ignoring their activities and trying to avoid direct contact with these groups.

Interestingly, the China's State Council had adopted the *Regulation on the Protection of the Right to Network Dissemination of Information* in 2006.⁴⁴ Article 9 of the Network Information Regulation provides that:

A network service provider, before making available, free of charge, to the public in rural areas through information network, for the purpose of aiding poverty-stricken areas, a published work of a Chinese citizen, legal entity or any other organization which deals with a topic of aiding poverty-stricken areas such as cultivation and breeding, prevention and treatment of diseases, or prevention and reduction of disasters, or which satisfies the basic needs for culture, shall announce the title of the work to be made available and the name of its author as well as the rates of remuneration to be paid. Where the copyright owner raises an objection to the making available of the said work within 30 days from the date on which the announcement is made, the network service provider shall not make the said work available. Where the copyright owner raises no

⁴¹ See Minfatongze (民法通则) [the General Principles of the Civil Law of China], adopted and promulgated by the Second Session of the Ninth National People's Congress, on Mar. 15, 1999, effective Mar. 15, 1999, translated at World Intellectual Property Organization, WIPO Lex No. CN135, http://www.wipo.int/wipolex/en/text.jsp?file_id=182628.

⁴² See, Hetongfa (合同法) [the Contract Law of the People's Republic of China], adopted by the National People's Congress on Mar. 15, 1999, and promulgated by the Presidential Order No. 15,15 (hereinafter "the Contract Law of China"), translated at World Intellectual Property Organization, WIPO Lex No. CN137, http://www.wipo.int/wipolex/en/text.jsp?file_id=182632.

⁴³ See, e.g., Minfatongze, *supra* note 41, at art. 56 (stating that "a civil juristic act may be in written, oral or other form") (translation from WIPO); see also Hetongfa, *supra* note 42, at art. 10 (stating that "a contract may be made in a writing, in an oral conversation, as well as in any other form") (translation from WIPO).

⁴⁴ Xinxi Wangluo Chuanbo Quan Baohu Tiaoli (信息网络传播权保护条例) [Regulation on the Protection of the Right to Network Dissemination of Information] (promulgated by), (adopted at the 135th Executive Meeting of the State Council, on May 10, 2006, effective as of July 1, 2006) (China), translated at World Intellectual Property Organization, WIPO Lex No. CN064, http://www.wipo.int/wipolex/en/text.jsp?file_id=182147. [hereinafter Network Information Regulation].

objection upon expiration of 30 days from the date on which the announcement is made, the network service provider may provide his works and pay the corresponding remunerations to the copyright holder in light of the announced rates. After a network service provider provides any work and if the relevant copyright holder disagrees to the upload, the network service provider shall immediately delete the copyright holder's works and pay the relevant remunerations corresponding to the display period of the copyright holder's works in light of the relevant announced rates.

No financial benefit may be directly or indirectly gained from the making available of a work in accordance with the provisions of the preceding paragraph.⁴⁵

This regulation has established an “opt-out” mechanism and allows for the creation of an implicit contract in specific situations. For example, under this regulation network service providers could provide copyrighted works related to topics such as “cultivation and breeding” for free to poverty stricken areas, to promote growth. The only requirement is that they put up a notice and wait for the authors to “opt-out” after a certain period of time. If no objection is raised, then an implied license is granted.

After the Network Information Regulation came into effect, many related cases subsequently emerged.⁴⁶ From these cases, two factors have emerged to determine whether an implied license is present or not. The courts have determined that Article 9 of the Network Information Regulation establishes a preliminary implied license model within the field of Chinese copyright law. First, the copyright owner needs to post an “offer” which includes information of the works, the authors, and the rates of remuneration. Second, the copyright owners need to explicitly or implicitly express their attitude toward the use of their material within the time specified in this regulation. This clause not only confirms that an implied license regime can be employed by China, but also illustrates the requirements of a possible “opt-out” claim. Even though many

⁴⁵ *Id.* at art. 9.

⁴⁶ *See, e.g.*, Heilongjiang Jin Nong Xinxi Jishu Youxian Gongsi Yu Beijing San Mian Xiang Banquan Daili Youxian Gongsi Ji Haerbin Lang Xin Keji Fazhan Youxian Gongsi Qinfan Zhuzuoquan Jiufen Yi An (黑龙江金农信息技术有限公司与北京三面向版权代理有限公司及哈尔滨朗新科技发展有限公司侵犯著作权纠纷一案) [Heilongjiang Jinnong Information Technology Co. Ltd. v. Beijing 3rd Mianxiang Banquan Agency Limited Company and Haerbin Langxin Technology Development Co. Ltd.], (Higher People's Ct. of Heilongjiang Province, Heizhizhongzi no.4 decision, Dec. 10, 2008) (黑龙江省高级人民法院 [2008] 黑知终字第 4 号民事判决书).

restrictions were still placed on it, the clause itself could be an example for future implied contracts between fans and copyright owners. However, for the time being, there is no sign that this legal defense can be invoked by fans to justify their activities. Nor is it clear that China will establish it in the near future.

C. General Principles of Civil Law

Unlike pure theft, fan activities in some cases do have a close relationship with the copyright owners. It is also obvious enough from the foregoing sections that the industry is lenient towards fans for many reasons, maintaining a close relationship is definitely one of them. This history of no legal action between these parties may make it possible for the latter to invoke the defense of good faith if a copyright dispute does arise in China.

Chinese courts use the good faith principle as an equitable defense to handle complex cases. Unlike the specific equitable rules applied by the United States courts, such as laches and estoppel, good faith is a fundamental principle and generally applicable in civil lawsuits. Article 4 of the General Principles of Civil Law provides that, “In civil activities, the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed.”⁴⁷

Precedent shows that if the situation is obviously unfair to one party, but there are no directly applicable laws or the applicable laws are somehow ambiguous, Chinese courts can invoke the principle of good faith to adjudicate copyright-related cases.⁴⁸ However, unlike the United States, the “equitable” function of the good faith principle is comparatively vague and unstable. Since it is a general principle, and there is a lack of judicial competence of the contemporary Chinese judges in copyright matters,⁴⁹ rulings can be delivered arbitrarily and without proper analytical reasoning.⁵⁰ Thus, it is hard

⁴⁷ Minfatongze, *supra* note 41, at art. 4 (here “honesty and credibility” is equivalent to “good faith”).

⁴⁸ Li Xie (李纒), *Chengshi Xinyong Yuanze de Sifa Shiyong—Yi Alexy de Yuanze Lilun Wei Shijiao* (诚实信用原则的司法适用—以 Alexy 的原则理论为视角) [Judicial Application of the Principle of Good Faith—From the Perspective of the Principle Theory by Alexy], in *RENDA FALV PINGLUN* (人大法律评论) [RENMIN UNIVERSITY LAW REVIEW] 131 (2013), available at <http://old.civillaw.com.cn/article/default.asp?id=58622>.

⁴⁹ See Li Yuwen, *Professional Ethics of Chinese Judges*, PERSPECTIVES CHINOISES 38 (2003); see also Priest, *supra* note 4, at 826–28.

⁵⁰ Li, *supra* note 48.

to say the principle of good faith is a reliable defense for the fan community.

III

BEHIND THE FANSUBS: OPPORTUNITIES AND CHALLENGES OF THE DIGITAL REVOLUTION

As stated previously, fansubs are no doubt copyright infringements according to Chinese law and fan creators will probably lose if a copyright owner brings litigation against them. However, foreign copyright owners are very hesitant to bring legal action, because they have to face the revolutionary changes brought by the Internet era.

As a product closely related to digital technologies, fansubs are one of the side effects of globalization and digital evolution. Without the help of digital technology, these copyright problems raised by fans would likely never catch the attention of academia, and fansubs would probably have remained in a more small-scale private form, which is more controllable to copyright owners. However, digital developments changed the fansubbing activity and made it a global phenomenon. In order to clarify the current status of the fandom development, to see whether a solution for fansubs can be obtained through legal means, the opportunities and challenges of the digital evolution behind them must be examined.

A. The Beleaguered Copyright Laws

The existing copyright law regimes worldwide are encountering challenges in the face of new advancements in digital technology.

Generally speaking, the economical function of a copyright is to control the copy and distribution of the copyrighted works and to ensure the owner can benefit from those exclusive rights. Before entering the digital age, audiovisual content could only be conveyed to the public through tangible media. Thus, the ability to copy and disseminate was highly restricted, and in the hands of professionals. However, digital technologies changed this by lowering the barriers to copy, change, and distribute. Once it is possible to copy and spread contents with negligible cost, copyright owners lost their control over distributing their property. It is not practical to locate everyone who

has infringed on a copyright, especially the high number of parties involved, and the possible economic costs.⁵¹

In the United States, copyright owners have invested heavily in lobbying to ensure passage of favorable legislation in order to retain control of their property. As soon as new rules are established in the United States and at the international level, developing countries including China will have to follow suit. However, it seems these efforts are more of a result of global political compromise rather than a plan with an end goal. Almost every new law and trade agreement related to copyright faces difficulty in getting passed. Critics point to several issues regarding these proposed regulations: (1) many believe that it is economic factors rather than public interest that is the driving force behind these types of legislation,⁵² (2) the standards that are being set do not provide a clear guidance,⁵³ and (3) they are biased towards copyright owners.⁵⁴ Therefore it is not hard to understand from examples such as the Uniform Computer Information Transactions Act (UCITA) and Anti-Counterfeiting Trade Agreement (ACTA) why new domestic and international legislation have a tough time garnering support.

B. Peer-to-Peer Technologies

It is no exaggeration to say that the Peer-to-Peer technologies are heavily responsible for the fast development of fan groups. Because without the help of this participatory, anonymous, and untraceable file-sharing client, works of fan labor would never have become a global phenomenon in such a speed. That is to say, P2P technologies are crucial to the distribution of fansubs, therefore whether these technologies will be accepted by law, is of top concern especially for fansub groups.

The peer-to-peer (P2P) network is an internet-related concept, as opposed to a client-server network. Technically speaking, a network

⁵¹ See Wu, *supra* note 2, at 617–18.

⁵² Martin F. Halstead, *The Regulated Become the Regulators—Problems and Pitfalls in the New World of Digital Copyright Legislation*, 38 TULSA L. REV. 195, 228–29 (2002).

⁵³ Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & INTELL. PROP. 21, 30 (2013).

⁵⁴ See Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 1015 (2002); Glynn G.S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 844 (2001); see also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 294–97 (1996).

is considered to be P2P if the elements (peers) that form the system both provide services to other elements (peers) and request services from them.⁵⁵ Unlike the server based client-server network, P2P technologies are decentralized, and thus can lower costs of the first distributor largely by partitioning tasks to other peers. As more peers join the network, the available capacities of P2P network and the stabilities of resource also increase proportionally. In a client-server network the situation is the opposite.

Simply, these traits of a P2P network changed the cultural landscape of file sharing by putting the privilege of content distribution from recognizable distributors to anonymous individuals. Fan labor is no doubt a perfect example of this technical update. Although distribution methods using a client-server network like Internet Relay Chat (IRC) channels, File Transfer Protocols (FTPs), and file hosting services are widely adopted by fan groups, P2P tools such as Bittorrent and eMule are still the dominant distribution tools. Unlike a centralized network, a P2P network usually does not have a system administrator. The participatory nature that “everyone is a distributor” makes it more complicated when handling copyright related issues.

A 2005 study on P2P file sharing done by CacheLogic shows that,⁵⁶ nearly 73% of the overall P2P traffic worldwide is video and audio file sharing,⁵⁷ and most of these flows are copyright-protected contents.⁵⁸ For a long period of time, P2P technologies have been accused of promoting unauthorized online copyrighted content exchanges, including fan distributions. Many copyright owners claimed that the P2P technologies threatened the stability of the current copyright protection regime and endangered the public interest. As a result, copyright litigations against P2P service

⁵⁵ G. Camarillo, Ed., *Peer-to-Peer (P2P) Architecture: Definition, Taxonomies, Examples, and Applicability*, RFC 5694, IETF Networking Group, Nov. 2009.

⁵⁶ A British P2P traffic management and network intelligence solution company.

⁵⁷ ZDNet Research for IT Facts, *61.44% of P2P traffic is video, 11.34% is audio*, ZDNET, (Aug. 10, 2005), <http://www.zdnet.com/blog/itfacts/61-44-of-p2p-traffic-is-video-11-34-is-audio/8641>.

⁵⁸ *Report: Movie piracy nearing music levels*, MEDIA LIFE MAGAZINE, July 14, 2004, http://www.medialifemagazine.com:8080/news2004/Jul04/Jul12/3_wed/news8wednesday.html.

providers frequently emerged.⁵⁹ Both sides have strong arguments to support their positions. For the P2P service providers, the ruling of the *Sony Corporation of America v. Universal City Studios*⁶⁰ case plays a crucial role, because the court confirmed that P2P technologies could be used for non-copyright infringing purposes. In addition, studies show that no lawsuit concerning P2P technologies has ever been raised in China,⁶¹ but some related rulings show that the courts believed the distribution technology can be used in non-infringing ways, and thus potentially, this software and technology could be legal.⁶²

Even though P2P technologies have many disadvantages, one should not neglect the opportunities they offer. P2P networks can be used as a channel to distribute licit works (e.g., works in the public domain and licensed works). As many scholars noted, we must not turn a blind eye to the endless possibilities of the P2P technologies.⁶³ In short, the concern from fan groups that the P2P technologies will be terminated is unnecessary. P2P, together with other Internet distribution methods, formed the new era of online file sharing.

C. Unstoppable Trend of Online File Sharing

There are various online file-sharing methods nowadays. There is no doubt that the P2P distribution method is the most remarkable one in all online file sharing approaches. But the fact is, even if the P2P technologies were banned, fansub groups can easily find other

⁵⁹ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1029 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161–62 (9th Cir. 2004).

⁶⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁶¹ He Dufeng (何笃丰), *Wo Guo Bu Cunzai Zhenzheng Yiyi Shang De P2P Qinquan An* (我国不存在真正意义上的 P2P 软件侵权案) [*There existexistsexist no P2P software infringement lawsuit in China*], DIANZI ZHISHI CHANQUAN (电子知识产权) [ELECTRONICS INTELLECTUAL PROPERTY] no. 5, 2009, at 90.

⁶² *Guangdong Zhongkai Wenhua Fazhan Youxian Gongsu Su Guangzhou Shulian Ruanjian Jishu Youxian Gongsu An* (广东中凯文化发展有限公司诉广州数联软件技术有限公司案) [*Zoke Culture Group, Limited. v. Poco Co., Ltd.*], (Shanghai First Interim. People's Ct., IPF.No.384, Dec. 12, 2006) (China 沪一中民五(知)初字第 384 号, 2006).

⁶³ See Alfred C. Yen, *Law, Technology, & the Arts Symposium: "Copyright and Personal Copying: Sony v. Universal Studios Twenty-One Years Later": Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 CASE W. RES. L. REV. 815, 818 (2005) (mentioning the social benefits of the P2P technologies); see also LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 66 (Penguin Press 2004) (mentioning P2P sharing is different from piracy, and the industry should find a way to protect artists while enabling P2P sharing to survive).

alternatives. Compared with statistics from its previous study, the recent IPOQUE report states that, although P2P still produces most Internet traffic worldwide, its proportion has declined significantly across all monitored regions, while web traffic like file hosting sites and media streaming sites raised simultaneously.⁶⁴ File hosting and media streaming sites are gaining more popularity by reason of upgrades in bandwidth and data transfer speed.

As for fan distributions, many Chinese fansub groups use file-hosting sites to distribute their fansubs for their stability and elusory features. Once a sharing community is established, the members within will simply upload the renamed fansub files to a file-hosting site and share the download address with their followers. A BBC report shows that some distributors even used certain software to split the to-be-distributed content into multiple parts and upload each part to different sites. Their followers will receive a list of address where the parts of the files can be downloaded.⁶⁵ With common software like *WinRAR*, the original files could be restored if all the parts were successfully downloaded. Although file names and extensions could reveal some information about the files origins, when the files are split into multiple parts, it is impossible for service providers to tell which file is unauthorized copyrighted content and which file is not.

For example, in China, there is currently a national campaign named “Eliminate Pornography and Illegal Publications—Cleanse the Internet 2014,” initiated by the government.⁶⁶ It has placed restrictions on Chinese Internet service providers (hereinafter ISPs), and is in effect from April 2014 to November 2014.⁶⁷ During this campaign, ISPs are forced to apply additional technical measures to their platforms and software to filter out prohibited content. For instance, the popular download software, Xunlei, which is developed by Thunder Networking Technologies (Thunder), declared that it will be “fully cooperative and resolutely resist any content that involves

⁶⁴ Schulze, Hendrik, K. Mochalski, *Internet Study 2008/2009*, IPOQUE (2009), <http://www.ipoque.com/resources/internet-studies>.

⁶⁵ *File-sharers swap more than video*, BBC NEWS, (Aug. 11, 2005), <http://news.bbc.co.uk/2/hi/technology/4139314.stm>.

⁶⁶ A.k.a. the “Saohuangdafei” Office (全国“扫黄打非”工作小组办公室).

⁶⁷ Liu Jiayi, *No to internet piracy and pornography, China cracks down on P2P video platform*, ZDNET (Apr. 24, 2014), <http://www.zdnet.com/no-to-internet-piracy-and-pornography-china-cracks-down-on-p2p-video-platform-7000028693/>.

pornography and copyright issues.”⁶⁸ It was deemed as the most commonly used BitTorrent client in the world.⁶⁹ It is also the most common means of unauthorized distribution of copyright contents in China. Because the downloading speed boost function is based on their cloud storage, they are actually censoring every file that goes through their cloud server. Any file with sensitive words will be marked and cannot enjoy their speed boost function. However, uploaders easily got around this protection by spiltting the original file or compressing it before they upload it. In that case, the system is unable to identify whether the file contains illicit content or not.

This diversity in file sharing methods and increased popularity brings opportunities. P2P users have decreased in number, and users of file hosting sites and legitimate media streaming platforms like YouTube have increased. Therefore, the controversial issues caused by P2P distributions are diminished to some extent simply because of decreasing popularity. Because of this, the legitimate market of copyrighted works may have the opportunity to strengthen itself. This should be done with caution: unauthorized distributors have shown that they can move from one network to another due to legal pressure from industry groups.⁷⁰ New online distribution methods and related tools, such as MagNet URI scheme, emerge and make it much harder for content industry to protect their audiovisual works from unauthorized online distribution. The content industry and the law must respond changing technological landscape.

D. Business on the Edge

Today, most of the copyrighted audiovisual works are controlled by the content industries. Although most people believe authors should be the major beneficiaries of copyright revenues, economic research has shown that the link between profit and copyright is largely irrelevant. It is more or less a winner-takes-all game in most cultural industries.⁷¹ Moreover, the concentration of copyright ownership is enhanced by the control that big business exerts on the

⁶⁸ Xunlei Declaration, Xunlei.com, *available at* <http://act.vip.xunlei.com/vip/2014/report/>.

⁶⁹ Ernesto, *Thunder Blasts uTorrent's Market Share Away*, TORRENTFREAK (Dec. 4, 2009), <http://torrentfreak.com/thunder-blasts-utorrents-market-share-away-091204/>.

⁷⁰ *File-sharers move from BitTorrent*, BBC NEWS (Aug. 30, 2005), <http://news.bbc.co.uk/2/hi/technology/4196642.stm>.

⁷¹ *See generally* MARTIN KRETSCHMER & FRIEDMANN KAWOHL, *The History and Philosophy of Copyright*, in MARTIN KRETSCHMER & FRIEDMANN KAWOHL, MUSIC AND COPYRIGHT 21, 21–53 (Simon Frith & Lee Marshall eds., 2004).

industry. Lawrence Lessig showed that five companies control 85% of the U.S. media sources, five big recording labels control 84.8% of the U.S. music market, and five cable companies broadcast to 74% of the United States cable subscribers.⁷² Compared to their U.S. counterparts, the Chinese market is still in a preliminary stage. But still, in most cases the China is on the same path as the United States.

Content conglomerates own a considerable amount of material that fansub groups are interested in, whereas fan works only take up a small portion of the total unauthorized distribution of content that is owned by these conglomerates. However, it is widely believed that the threats of unauthorized online distribution of copyright contents in China are severe.⁷³ Because both distribution and fan works are unauthorized and unstable factors, the interest-oriented business nature of these conglomerates urges them to eliminate both of them to the best of their abilities, and retain control over their property. One of the tried methods is to extend the length of a copyright works in order to prolong the business life of their products.

In the United States, the 1998 Sonny Bono Copyright Term Extension Act was the result of extensive lobbying from the Walt Disney Company, which is the largest media conglomerate in the world by revenue.⁷⁴ As a result, the Act is also known as the "Mickey Mouse Protection Act."⁷⁵ Tom Bell showed that the copyright protection term in the United States has expanded dramatically since the 1790 Copyright Act, from a maximum 28 years to more than 100 years of protection.⁷⁶ In China, the situation is similar.

For the purpose of joining the Berne Convention, China enacted its first Copyright Law in 1991, in which the general copyright

⁷² Lessig, *supra* note 63, at 162.

⁷³ See 2014 Special 301 Report On Copyright Protection And Enforcement, IIPA, Feb. 7, 2014, at 24, <http://www.iipa.com/rbc/2014/2014SPEC301CHINA.PDF> ("... China is fast becoming the largest potential market in the world, and while some progress has been made to license services in China, the challenge of online infringement and illegal web and mobile services harming right holders in (and outside of) China has grown faster than the legitimate market.").

⁷⁴ Richard Siklos, *Why Disney wants DreamWorks*, CNN/MONEY (Feb. 09, 2009), http://archive.fortune.com/2009/02/09/news/companies/disney_dreamworks.fortune/index.htm.

⁷⁵ Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001).

⁷⁶ Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741 (2001).

protection term was fifty years after the author's death. Before that, the general copyright protection term is thirty years after the author's death.⁷⁷ Tracing back to the very first draft of the legislation in China in 1957, the protection term extended just twenty years after the author's death.⁷⁸ However, merely extending the copyright term is not enough, because in terms of transnational unauthorized distributions, it is not the protection term, but the local law and enforcement that really matter. Therefore it is no wonder that the political pressure from outside the country forced the CCL to adopt many crucial changes during the past twenty-five years since its enactment. As a result, the CCL was revised frequently and is currently undergoing its third major revision.⁷⁹ Furthermore, today more Chinese content conglomerates are requesting stronger copyright protection in both legislation and enforcement,⁸⁰ but the attitude of the Chinese government is ambiguous for now. The government will probably decide whether to follow suit based on its own needs.⁸¹

How to evaluate the copyright law enforcement is a tricky question, as it is believed that China "has a relatively sophisticated legal infrastructure for the grant and enforcement of copyright rights."⁸² Copyright owners commonly use the traditional way of copyright enforcement in China,⁸³ in that sense China is very active.

⁷⁷ Cao Xinming (曹新明), *Guanyu Zhuzuo Quan Baohu Qixian De Tanta* (关于著作保护期限的探讨) [*On the Copyright Protection Term*], FAXUE (法学) [Law Science] no. 4, 1991, at 22.

⁷⁸ Baozhang Chuban Wu Zhuzuo Quan Zanxing Guiding Caoan (保障出版物著作权暂行规定草案) [Provisional Rules on Protection of the Copyrights of Published Works (Draft)] (PRC Ministry of Culture, 1957) (China); accord WENWEI GUAN, *INTELLECTUAL PROPERTY THEORY AND PRACTICE: A CRITICAL EXAMINATION OF CHINA'S TRIPS COMPLIANCE AND BEYOND* 55 (Springer 2014).

⁷⁹ Hong Xue, *A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law*, INFOJUSTICE.ORG (Apr. 25, 2012), <http://infojustice.org/wp-content/uploads/2012/04/hongxue042012.pdf>.

⁸⁰ See generally Lucy Montgomery & Brian Fitzgerald, *Copyright and the Creative Industries in China*, 9 INT'L J. CULTURAL STUD. 407, 418 (2006); see also Joseph A. Massey, *Legal Implications of a Rising China The Emperor Is Far away: China's Enforcement of Intellectual Property Rights Protection, 1986--2006*, 7 CHI. J. INT'L L. 231 (2006).

⁸¹ Peter K. Yu, *Still Dissatisfied After all these Years: Intellectual property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. INT'L & COMP. L. 143, 153 (2005).

⁸² Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High Piracy Environment?*, 27 HARV. J.L. & TECH. 467, 473 (2014).

⁸³ 51,351 civil copyright cases were litigated in China in 2013. Supreme People's Court (最高人民法院), *Zhongguo Fayuan Zhishi Chanquan Sifa Baohu Zhuangkuang 2013* (中国法院知识产权司法保护状况 2013) [*Intellectual Property Protection by Chinese Courts in 2013*], in *Renmin Fayuan Bao* (人民法院报) [People's Court Daily], Apr. 26,

However, in terms of the unauthorized online distribution, things have not changed very much. But it does not necessarily mean that the Chinese government and the industry are vulnerable in this part. Actually, the Chinese government uses certain national campaigns such as the “Eliminate Pornography and Illegal Publications—Cleanse the Internet 2014” campaign to fight unauthorized online distribution. Interestingly, it is usually the political considerations, rather than economical incentives, that are the driving force behind these campaigns. For instance, in 2004 SARFT issued a regulation that required every participant who engaged in information network dissemination of audiovisual works to obtain an “Information Network Dissemination of Audiovisual Programmes License.”⁸⁴ For years, online content distributors engaged in unauthorized distributions and chose to ignore this regulation, simply because no specific enforcement measures were taken. However, at the beginning of 2008, SARFT and the Ministry of Information Industry together released a more detailed regulation, which clearly that Internet content provider cannot engage in Internet audiovisual program services without obtaining the abovementioned “License”.⁸⁵ Enforcement action began soon after the release. Famous BT sharing sites like BT China, an important platform for distribution of fansubs, were shut down for failing to obtain a license. These actions are mostly for the purpose of regulating the market and political considerations. The requirements for obtaining a “license” limited piracy to a degree, but also eliminated a large portion of small online audiovisual service providers, with the ultimate beneficiaries being those big media conglomerates.

2014, available at http://rmfbyb.chinacourt.org/paper/html/2014-04/26/content_81363.htm?div=-1.

⁸⁴ Hulanwang Deng Xinxi Wangluo Chuanbo Shiting Jiemu Guanli Banfa (互联网等信息网络传播视听节目管理办法) [Measures for the Administration of the Publication of Audio-Visual Programs through the Internet or Other Information Network] (promulgated by SARFT Decree No. 39, July 6, 2004) art. 6 (China), translated at China Copyright and Media (Rogier Creemers trans.), <http://chinacopyrightandmedia.wordpress.com/2004/07/06/internet-and-other-information-networks-audiovisual-programme-dissemination-management-rules/>.

⁸⁵ Hulanwang Shiting Jiemu Fuwu Guanli Guiding (互联网视听节目服务管理规定) [Administrative Provisions on Internet Audio-Visual Program Service] (SARFT and Ministry of Information Industry of the People’s Republic of China, Decree No. 56, Jan. 31, 2008), Art. 7, translated at Lawinfochina, <http://www.lawinfochina.com/display.aspx?lib=law&id=6582>.

It is apparent that the audiovisual industry in China is on edge: it is facing critical challenges brought by the Internet, but its responses are so traditional that the industry is powerless in the face of unauthorized online distributions. Although new campaigns led by government agencies will occasionally pop up and clean up some of the illicit online copies, these campaigns are only temporary and new methods of file transfer emerge in an endless stream. It is foreseeable that the frequent downloaders and uploaders will keep on distributing as long as the related technologies exist, and this “cat and mouse game” will probably be a story that never ends.

Luckily, the modern content industry may have more possibilities than ever before in the digital age. The extent of the cost and loss of unauthorized online distribution of copyrighted content seems to be an urgent question without an answer. Many practitioners in both academia and the audiovisual industries claim that the unauthorized distribution of copyright contents on the Internet is a disaster to the copyright owners, which will not only take away a large proportion of revenue from them but also decrease their incentive to produce. For example, the Motion Picture Association of America (MPAA) in their 2011 report claimed that the U.S. economy lost \$58 billion per year in profits due to content theft.⁸⁶ But at the same time, different voices arose from different areas, saying that the current situation represents a turning point to a new form of copyright protection, and the unauthorized distribution of copyright contents are harmless, if not beneficial to the copyright owners. For instance, author Rob Reid questioned MPAA’s \$58 billion number in a recent TED event, and he further indicated that the overall movie revenues are not down but, on the contrary, are increasing.⁸⁷ In sum, whether the unauthorized online distribution of copyright contents is endurable is controversial in both theory and practice. However, writers in economic fields like Chris Anderson have noted that if copyrighted products are digital, then sooner or later they are going to be free,⁸⁸ and people can’t “compete with free,”⁸⁹ let alone stop it.⁹⁰ Apparently, the content

⁸⁶ *MPAA Statement on Strong Showing of Support for Stop Online Piracy Act*, MUSIC INDUSTRY NEWS NETWORK (Dec. 18, 2011), <http://www.mi2n.com/print.php3?id=149522>.

⁸⁷ Rob Reid, *The \$8 billion iPod*, TED Talks (Mar. 2012), http://www.ted.com/talks/rob_reid_the_8_billion_ipod.

⁸⁸ Anderson, *supra* note 4, at 191.

⁸⁹ *Id.*, at 201.

⁹⁰ *Id.*, at 202.

industry is facing a call for reform, which could have profound consequences.

IV SOLUTIONS?

Besides the abovementioned possibilities and pitfalls brought by the Internet, foreign copyright owners of audiovisual works will also have to handle endemic problems such as censorship and local protectionism, if they are to enter the Chinese market.⁹¹ Together these factors are contributing to the rampant piracy in China and lax enforcement of the government agencies.⁹² Moreover, foreign audiovisual works are not protected by Chinese regulators to the same extent as local productions.⁹³

In such circumstances, bringing litigation against fansub groups is arguably not a priority for foreign copyright owners, because neither copyright litigations nor the international obligations imposed by foreign powers will serve their purpose in China. Without an ideal solution, copyright owners will be forced to ignore or tolerate most of these unauthorized uses and chase only the commercial pirates and contributors of infringement instead.

If we consider the problem of fansubs in a transnational perspective, it is apparent that copyright owners are now facing two big problems in China: the massive amount of copyright infringement and the market access. Once a fansub is complete and uploaded to an open platform that can be easily accessed by ordinary Internet users, the scale of possible infringement infinitely increases. Market access is also a big problem with respect to transnational licensing, since countries like China have their own pace and plans regarding the domestic audiovisual market. Any solution for fansubs will have to tackle these two problems. In the final part, this paper will first examine the current measures that the copyright regime is taking in

⁹¹ Priest, *supra* note 4, at 821–29. There are similar censorships in other areas such as the publishing market. See generally Hongsong Song, *Dancing In Shackles: Copyright In China's Highly Regulated Publishing Market*, 60 J. COPYRIGHT SOC'Y U.S.A. 285 (2013).

⁹² See Jordana Cornish, *Cracks in the Great Wall: Why China's Copyright Law Has Failed to Prevent Piracy of American Movies Within Its Borders*, 9 VAND. J. ENT. & TECH. L. 405, 424 (2006).

⁹³ Tianxiang He, *What Can We Learn from Industries? The Differences Between the Domestic and Oversea Copyright Protection Strategies towards Fan Activities*, 62 AM. J. COMP. L. 1009, 1032–33 (2014).

solving the fansub issues, and propose a new solution framework subsequently.

A. The Old Path

There is no doubt that fansubbing constitutes copyright infringement. However, hardly any law suits against fansub groups are filed in China. Generally, infringers will cease the distribution of certain titles when they receive a take down notice from the copyright owner, but little else occurs. According to the analysis of previous parts, foreign copyright owners have no incentives to bring litigation against fansubbers because the costs of doing so are too high, and selective enforcement will have no deterrent effect in a field with such widespread violations occurring on a daily basis. Moreover, copyright owners are leery of turning on the fans, since fansubs do have a promotional effect, and fans are advocates and potential consumers of their products.

Another indirect route to solve this problem is to lower the piracy rate via international treaties such as TRIPs. By way of international obligations, the foreign audiovisual industry could exert pressure on their own governments to force the Chinese government into assuming a stronger regulatory role. In an ideal scenario, as the copyright protection standard rises, and the government is more serious about their law enforcement in China, the foreign copyright owners could lower the local piracy rate there by focusing on infringement facilitators such as ISPs, rather than individuals. By doing so, the unauthorized online sharing of copyrighted works, such as fansubs, will be limited to a reasonable level, since they all need a platform to exchange audiovisual files, and the platforms would now be under control. However, as was discussed before, local interests and insufficient enforcement will prevent this ideal scenario from happening.⁹⁴ Subsequently, other countries will be forced to address the issue on international platforms like WTO via international political bargaining. The United States raised two WTO disputes related to several of China's official policies, practices, and enforcement measures for intellectual property rights protections in 2007 and 2008.⁹⁵ It is generally believed that international channels

⁹⁴ Donald P. Harris, *The Honeymoon is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 *FORDHAM INT'L L.J.* 96, 167 (2009); see also Rogoyski & Basin, *supra* note 5, at 252–54.

⁹⁵ Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009); Panel Report, *China—Measures*

are “not the ideal forum” for content industries in countries like the United States to gain “meaningful access to Chinese markets quickly” because it is a “lengthy process.”⁹⁶ Indeed, if fansubs are taken into consideration, the promotional effect generated by merely tolerating the copyright owners in a closed market cannot be replicated and utilized in China, if the “advertisement” is out but with no products on the market. Seemingly, the copyright owners will have to “figure out how to collect” the benefits through other channels in the future, just as Bill Gates had put it.⁹⁷

B. The New Path?

The traditional legal remedies, both domestically and internationally, are not helpful in the case of fansubs for various reasons discussed above. It is also very hard for foreign copyright owners to reap the direct benefits of fansubs in China, which are generated by China’s indulgent attitude, because the market access for foreign audiovisual products there is highly restricted and subject to various degrees of censorship.

The problem with fansubs, to put it bluntly, boils down to the universal conflict between the demand for instant access to every audiovisual title in existence, and the failure of the copyright owners to supply accordingly. Part of this failure is due to political and economical considerations in regulating cultural markets between different countries. Another reason is that copyright protection gives copyright owners the rights to prevent hundreds of millions of copyrighted works from entering the public domain, which will limit the creativeness of the next generation of creators. Research shows that the majority of film holdings in the United States are orphan

Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R (Aug. 12, 2009).

⁹⁶ Elanor A. Mangin, *Market Access in China—Publications and Audiovisual Materials: A Moral Victory with a Silver Lining*, 25 BERKELEY TECH. L.J. 279, 308 (2010).

⁹⁷ Charles Piller, *How Piracy Opens Doors for Windows*, L.A. TIMES, Apr. 9, 2006, available at <http://articles.latimes.com/2006/apr/09/business/fi-micropiracy9> (“Although about 3 million computers get sold every year in China, people don’t pay for the software. Someday they will, though,” Gates told an audience at the University of Washington. “And as long as they’re going to steal it, we want them to steal ours. They’ll get sort of addicted, and then we’ll somehow figure out how to collect sometime in the next decade.”).

works,⁹⁸ by which it means it will not be possible for someone to utilize the copyrighted content, even if he/she is willing to pay. This is a side effect of big copyright conglomerates trying to extend the copyright terms of their valuable holdings—the “hot” titles. Those big productions are enjoying a long business life, whereas most productions in the audiovisual industry are viable for a much shorter time. In other words, a great number of audiovisual works do not need such a long protection term. Many companies have gone out of business before the copyright life of the works they are holding ended, and the copyright status of some film productions are too complicated for average individuals to easily identify their copyright holder. However, the copyright laws are unable to distinguish these differences in productions, since a uniform copyright protection term applies. For private users on the Internet, if they want to use copyrighted content and it is available online, the cost of risk to infringe is far less than the cost to locate the copyright owner and initiate the normal procedure of copyright licensing.

For that reason, many scholars in the copyright field are trying to identify a way to artificially insert a large number of these works into the public domain or make them “semicommons,”⁹⁹ so that creative users will be able to obtain more content without worrying about copyright issues. One of the most famous solutions is the copyleft licensing, which encourages the copyright owners to grant parts of their copyrights to the public voluntarily. Amongst others, the Creative Commons (hereinafter CC)¹⁰⁰ and the No Action Policy (hereinafter NAP)¹⁰¹ are the most renowned proposals. However, they are not so helpful in light of the problems this article is trying to solve, mainly because they are helpful in terms of unleashing potential works, but all fail to consider the larger issue: how to reap the benefits brought by fan activities. In that regard, the new model ought to build on the idea of the NAP, since CC licenses are not as flexible because the design of a CC license is to encourage copyright

⁹⁸ JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 9 (Yale University Press 2008).

⁹⁹ See generally Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271 (2007).

¹⁰⁰ Creative Commons is a nonprofit organization that enables the sharing and use of creativity and knowledge through free legal tools. Creative Commons, *About*, <https://creativecommons.org/about> (last visited Apr. 4, 2014).

¹⁰¹ See Wu, *supra* note 2, at 634 (“‘No Action Policy’ is ‘a unilateral, non-exclusive, potentially revocable license from the media owner to all members of the general public who meet its terms.’”).

owners to irrevocably license some of their copyrights to the public,¹⁰² whereas the NAP do not.¹⁰³ This flexible feature will make it possible for copyright holders of big commercial titles to utilize this type of license.

Tim Wu borrowed the idea of NAP from the ex post notice and the safe harbor regulatory regimes.¹⁰⁴ According to his design, the aim of the NAPs is “to enforce without deterring complementary use of the underlying work.”¹⁰⁵ In order to achieve this, the copyright owners will have to give “secondary creators some clarity and certainty as to what they may and may not do” related to the works they are holding, by “a simple posting on the web or elsewhere that details the secondary uses of a work that a secondary author can make without gaining further permission of the owner.”¹⁰⁶

To solve the problem of fansubs, the design of the copyright regulations could be more specifically and openly delineated. In short, the NAP for audiovisual works should aim to provide an exemption, rather than a license, to use copyrighted contents in a designed way. Copyright owners could thus set boundaries for the fansubbers without licensing their rights, and fans will know how to act without violating copyright protections and laws accordingly. Firstly, fansubs, as discussed above, are actually translations of subtitles of certain audiovisual works. Hence, they are infringing the translation right of the copyright owners according to CCL. When the subsequent online distribution involves the video files of the copyrighted works, or the merged video files that encompass the fan-translated subtitles, then they are no different from any other pirate activity. Therefore, if the copyright owners are willing to have their works distributed freely by fansub groups in a foreign market such as China, they could of course state clearly by a NAP on their official site, and set certain limits on the distribution. However, if they wish the opposite, then their NAP should clearly indicate that the distribution of video files is out of the question.

The next step is to address how to regulate their fan creations, namely the translated subtitles, properly. Otherwise, the beneficial

¹⁰² See Loren, *supra* note 100, at 276–77.

¹⁰³ See Wu, *supra* note 2, at 634.

¹⁰⁴ *Id.* at 625.

¹⁰⁵ *Id.* at 628.

¹⁰⁶ *Id.* at 633.

effects generated by these fan creations may vanish or even be utilized by commercial pirates in China.¹⁰⁷ To accomplish this, a certain degree of mutual trust and cooperation must be established between foreign copyright owners and the local fan communities. However, it seems that this relationship doesn't currently exist in China. Unlike the audiovisual market in the United States and Japan, the Chinese counterpart is an emerging one; the audiovisual industry and the fan communities are both underdeveloped, and the latter is desperately in need of guidance. But considering that China is a huge market with significant restrictions on market entry, the beneficial effects of the fansubs are unclear, and the risk of losing revenues, at least for now, makes copyright owners reluctant to acknowledge fansub groups officially but rather just tolerate them,¹⁰⁸ and it is understandable why the mutual trust cannot be established. Nevertheless, since the Internet had lowered the costs of locating fansub groups as well, a new design of NAP may solve this problem.

In view of the above discussion, with respect to fansubs in China, the design of the NAP should be as follows:

First, foreign copyright owners should distinguish two periods by the degree of market entry. The first period is the “out of market” period. During this period, the underlined audiovisual products are not officially in the Chinese market through channels such as theatre, TV broadcasting and online streaming. In the second period, the products are officially introduced in the Chinese market.

Second, different NAPs should be applied to different periods. In the first period, if the underlined exotic audiovisual product cannot, or does not, plan to enter Chinese market in the near future, then the revocable NAP should exempt fans from copyright infringement liabilities if they plan to freely distribute the copyrighted contents of the copyright owners online. Furthermore, they could set a clear term for that exemption in their NAP declaration, so that the owners could revoke it or renew it after that term ends, and fansubbers could thus

¹⁰⁷ Zhang Moning (张墨宁), “Daohuo” de zimu zu (“盗火”的字幕组) [*Fansub Groups that “Steal Fire”*], Nan Feng Chuang (南风窗) [South Winds], Oct. 19, 2013, available at <http://mobile.nfcmag.com/article/4319.html>.

¹⁰⁸ See, e.g., Leonard, *supra* note 8, at 201 (In explaining why Japanese anime company refuse to officially give fans a license to reproduce, Leonard states as follows: “The reasons involved protections of copyrights; the impracticality of studios in Japan giving written permission to informal American fan groups to show their animation; the risk of losing the opportunity to sell their programs to American syndicated TV markets if the American TV representatives felt that there were already too many bootleg video copies in circulation; and other cavils of this nature.”).

make sure that within that period their fansubbing activities will not be subject to penalties. The reason to do this is simple: the copyright owners are not able to cash in some of their copyrighted products in China themselves, due to the reasons mentioned above, and merely toleration offers little help in reaping the fan efforts, only active intervention will assist in building crucial relationships with fans.

In the era before the Internet, if the copyright owners wished to merely tolerate all the unauthorized distribution of their copyright contents, it was still workable. The western products would somehow gain their publicity through underground channels. Since commercial piracy is comparatively easier to locate, and most fans do not have enough resources to reproduce the copyright contents massively, it is still within foreign copyright owners' control if they choose to tolerate some unauthorized distributions such as fansubs. Moreover, after about a decade or so, when they officially launch their audiovisual products in the Chinese market, content producers may indeed have a considerable number of followers. However, because private individuals can now easily reproduce, create, and disseminate new content based on copyrighted content, in the digital age, the foreign copyright owners have actually lost their complete control. Therefore, merely tolerating fan groups without giving any guidance to them is as risky as giving them official license to act as copyright owners.¹⁰⁹ Furthermore, unlike in past eras, there are far more competitors in the Chinese market now. Apart from the local audiovisual production companies,¹¹⁰ foreign content providers such as Japanese and Korean audiovisual production companies are all competing with each other in the Chinese market.¹¹¹ It is not guaranteed that a good foreign production will attract its deserved attention in China, simply because there are far too many good

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., Thomas Mentel, *China's Film Industry Takes Measures to Compete With Hollywood*, MOVIESCHEATSHEET, June 20, 2014, <http://wallstcheatsheet.com/entertainment/chinas-film-industry-takes-measures-to-compete-with-hollywood.html?a=viewall>.

¹¹¹ See, e.g., Alex Stevens, *The Chinese Obsession with Korean Dramas is Making Bad Chinese TV Look Bad*, SHANGHAIIST, Mar. 3, 2014, available at <http://shanghaiist.com/2014/03/03/chinese-obsession-korean-dramas.php>; CoCo Kdrama, *Chinese Entertainment Faces Tough Competition From Korean Dramas*, DRAMAFEVER, Mar. 3, 2014, available at <http://www.dramafever.com/news/chinese-entertainment-faces-tough-competition-from-korean-dramas/>; Gavin J. Blair, *China's iQIYI and Japan's Fuji TV Link on Drama Production*, THE HOLLYWOOD REPORTER, June 17, 2014, available at <http://www.hollywoodreporter.com/news/chinas-iqiyi-japans-fuji-tv-712401>.

productions on the market. The keen competition between foreign products and the rise of local productions will all affect the market share of productions from one foreign country. If foreign audiovisual companies are not going to step in to prevent these fan activities, they may not provide the stable growth in fan numbers that the foreign copyright owners expect. A revocable NAP stating that the copyright owner will exempt the fansubbers from copyright liability for their distribution activities of the copyrighted works, which are unable to enter the Chinese market anyway, will initiate the necessary communication between the production companies and the fans.

During the second period, when the foreign audiovisual products have successfully landed in the market, the copyright owners should classify their audiovisual works and determine what specific NAP terms shall apply separately. For a NAP that concerns small productions that use free distribution as part of their commercial model,¹¹² foreign copyright owners could continue with the free distribution term. In terms of large productions, the corresponding NAP could put more focus on complementary uses of the underlined audiovisual products, since the promotional effect is secondary.

In a nutshell, the next step for foreign copyright owners is to determine in what way they wish to allow fans to develop their works. It is broader than the original NAP design since it covers more than encouraging secondary creativity. If the copyright owners intend for their copyrighted content to be distributed along with fan-translated subtitles, they could pinpoint that in their NAPs, by indicating that the distribution of the video files will not attract legal issues as long as they are satisfied by the conditions set by the copyright owners. Alternatively, content producers could forbid the free distribution if there are available channels such as official licensed online streaming. In the latter case, the copyright owners should explicitly delineate the conditions and limitations of that exemption in the subsequent terms, such as whether the audiovisual work could be commercially

¹¹² For example, BitTorrent have released their new “Bundles” platform that enables “direct-to-fan” publishing, it “gives the content creators the power of choosing how they want to benefit from their film,” you could “give users the film for free if they first share a link to your film’s website.” See Noam Kroll, *Breakdown Of The Major Online Indie Film Distribution Platforms*, PREMIUMBEAT.COM, Dec. 13, 2013, available at <http://www.premiumbeat.com/blog/breakdown-of-the-major-online-indie-film-distribution-platforms/>. (For example, BitTorrent have released their new “Bundles” platform that enables “direct-to-fan” publishing, it “gives the content creators the power of choosing how they want to benefit from their film,” and you could “give users the film for free if they first share a link to your film’s website.”).

distributed or not, and should define the venue that the exemption covers.

The utilization of fansubs, however, is firmly connected with the last part of this NAP design, which concerns how the connection between foreign copyright owners and fansubbers can be established so that the benefits can be identified and reaped. In order not to just observe but to make use of these fan efforts, foreign copyright owners will have to maintain a certain degree of interaction and control over the fans. Here the function of a NAP is to clarify that it is not a license of rights, but rather an exemption of liability. Copyright owners must allay their concerns about waiving their valuable copyrights in a nascent market, and at the same time, the fans will know the bottom lines of the copyright owners and act accordingly. The purpose is to give fan creators a certain degree of freedom, and let them develop in a natural way. The best way to achieve this is to provide them the platform or sufficient tools, and set a “demilitarized zone” (DMZ) with the help of a NAP. In the case of fansubs, the copyright owners could provide fans a platform, or utilize existing platforms, such as online streaming or a BBS, and provide them with advanced tools to engage in fansub activities. The purpose is to drive them away from the illicit video resources, and provide them with a legitimate one. The fan participators will be exempted from copyright liabilities and be provided with incentives if their contribution is deemed valuable. For example, if the fan translation is deemed good enough for commercial uses, copyright owners could cooperate with local online streaming platforms in China, or establish an official site for fans, to award and officially license some of these fan translations. In fact, fansubs are deemed much more nimble than official translations in offering more details about foreign cultures,¹¹³ and some of the official translations were even criticized by fan translators as “not professional.”¹¹⁴ Besides, at least for now, online streaming is the only channel that enjoys more freedom compared with traditional ones, by which it means if the foreign copyright owners could create

¹¹³ See Cintas & Sánchez, *supra* note 7, at 46.

¹¹⁴ “Jia Fanyi Fengbo Xu”: Wo Meiyou Bei Haolaiwu Fengsha (“贾翻译风波”续：我没有被好莱坞封杀) [*Translator Jia’s Trouble” Continued: I am not Blocked by Hollywood*], in *Shidai Zhoubao* (时代周报) [TIME WEEKLY], Aug. 23, 2013, available at http://ent.ifeng.com/movie/news/toutiao/detail_2013_08/23/28939468_0.shtml (described how that Miss Jia, the official translator of the *Pacific Rim* & *The Man in Black III*, was criticized heavily by senior fansubbers as “lacking basic training and experience”).

demand on the Chinese market, it is possible for them to deliver their audiovisual titles to the Chinese audiences, as long as they could pass government censorship.¹¹⁵ If we take the motivations of fansubbers into account, it really makes sense since this proposal meets most of their requirements.

Chinese video platforms are now cooperating with fansub groups in order to get a better translation of the subtitles.¹¹⁶ For example, the department head of the American TV series of Tudou also pointed out that since they have expanded their collection of foreign titles, they are in great need of subtitle translations. The cooperation between video platforms and fansubbers is a win-win solution.¹¹⁷ During an interview, Zhang Chaoyang, the CEO of SOHU also noted that piracy is still present but exerts minimal influence over the market now, in terms of audiovisual products. Piracy has also helped in fostering better relationships with the fansub groups that are capable of delivering high quality translations.¹¹⁸ However, as previous studies have demonstrated, the cooperation model between copyright owners and the amateur fan contributors, or, to put it another way, the combination of market norms and fan community norms, must be carefully designed, otherwise the great fan creative power might be turned into a mediocre one.¹¹⁹ Considering the fact that video

¹¹⁵ Bree Feng & Shanshan Wang, *China Orders 4 U.S. Shows Off Streaming Sites*, N.Y. TIMES, Apr. 27, 2014, available at http://www.nytimes.com/2014/04/28/business/international/china-orders-4-us-shows-off-streaming-sites.html?_r=0 (“the government has indicated in private talks with Internet companies that it plans to close this control gap with new rules this year”).

¹¹⁶ Zhang, *supra* note 107.

¹¹⁷ Lu Fei (陆飞), Shipin Wangzhan Yinjin Meiju Shui Shu Shui Ying? (视频网站引进美剧谁输谁赢) [*Video Platforms introduce introduce introduce American TV series series series series, Who's the Winner?*], Beijing Qingnian Bao (北京青年报) [BEIJING YOUTH DAILY], Sept. 30, 2011, B11, available at <http://bjyouth.yinet.com/3.1/1109/30/6305923.html> (last visited June 18, 2014).

¹¹⁸ Zhang Xuejing (张雪静), Sohu shipin jiang daliang yinjin meiju shishui meizong (搜狐视频将大量引进美剧 试水美综) [*Sohu Video will introduce Massive mount of American TV seires, and will test the waters of American variety shows*], www.lmtw.com (流媒体网) [STREAMING MEDIA NET], Feb. 19, 2014, at <http://sm.lmtw.com/dongtai/201402/101032.html> (last visited Jun. 18, 2014).

¹¹⁹ See, e.g., LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 237 (Penguin Press 2008). (Every company building a hybrid will face exactly the same challenge: how to frame its work, and the profit it expects, in a way that doesn't frighten away the community.) For the discussion about the trouble when social and market norms collide, see DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 68–88 (Harper 1st ed. 2008). For the discussion about the trouble when markets reach into spheres of life governed by nonmarket norms, see MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 84–91 (Farrar, Straus & Giroux 1st ed. 2012); see Lee, *supra* note 6,

platforms are only acting as intermediaries and that fan translators are only awarded with precious little money under the current cooperation model,¹²⁰ this model is obviously not good enough.¹²¹

It is the foreign copyright owners, rather than the intermediaries, that should take the lead in future cooperation with fansub groups. The owners could set up an official fansub site and offer the fans tools to generate and share their translations, and use a NAP to exempt them from copyright liabilities. Good translations could be officially adopted, and the fans could thus be rewarded in many ways. For example, the names of the translators could be listed in the cast of audiovisual products as encouragement, or the online streaming site could add the fan translations to their mediums that are open to all the audiences. Although too much involvement will increase the copyright owners' legal risk, since general civil law rules such as good faith and implicit consent may apply, for private individuals like fans, it is much more important not to get involved in law suits than winning one.

However, seemingly the Chinese government is not so supportive of this kind of diversity. According to related regulations, in order to introduce foreign audiovisual works to China, all the subtitles must be submitted for censorship purpose,¹²² and "subtitles not submitted

at 1137 ("... what is more interesting about fan-translation and distribution is that it represents a new model of cultural work that cannot simply be imitated by the industries' commercial operation.").

¹²⁰ The payment for translating an episode is 400 yuan, which is less than 70 dollars. Zhang, *supra* note 107. In some cases, the price for translating an episode is even less than 80 yuan, and yet that amount has to be divided equally among five people. See Chen Cen (陈岑), Xingxing Fanyi Tuandui: Gongzuo Jiuxiang Dazhang Choulao Budao 20 Kuai (<星星>翻译团队: 工作就像打仗 酬劳不到 20 块) [*The Translation Team of the "My Love From the Stars": Working like it's War but Payment is Less than 20 Yuan*], JinLing Wanbao (金陵晚报) [JINLING EVENING POST], Mar. 1, 2014, available at <http://www.chinanews.com/yl/2014/03-01/5898503.shtml>.

¹²¹ It is noted that the Chinese fansub groups are hesitating about that kind of "commercialization," because some of the core members believe that the commercialization of the fansub groups is contrary to their original purpose, and "that degree of cooperation means nothing." See Zhang, *supra* note 107.

¹²² Foreign Television Program Import and Broadcast Management Regulations (promulgated by St. Admin. of Radio, Film & Television, Sept. 23, 2004, effective Oct. 23, 2004, by SARFT Decree No. 42) art. 9(6) (China) (When applying for importing foreign film and television dramas, the following materials shall be submitted: ... Chinese and foreign language subtitles of title and end credit that are consistent with the specimen tape...); Dianying Juben Genggai Beian Dianyingpian Guanli Guiding (电影剧本(梗概)备案、电影片管理规定) [Provisions on the Archival Filing of Film Scripts (Abstracts) and the Administration of Films] (promulgated by SARFT Decree No. 52, May 22, 2006) art.

along with the reviewed demo tapes cannot be added during broadcasting. . . .”¹²³ Furthermore, only the “wholly State-owned or State-controlled work unit” can engage in “business of publication of audio-visual programs through information network.”¹²⁴ Therefore, considering the fact that not only the business but also the subtitles are highly regulated and under strict censorship as well, fan-translated subtitles as an option might have to be implemented through an unofficial means. For instance, the download function of the video source file could be set open, or the video source file could be allowed to stream on third party software in which the subtitle files could be loaded. In that case the demanding users will download the fan-translated subtitles and load them into the videos themselves whereas the undemanding parties will stay at the official site. This idea is feasible since it is technically possible to set certain limits on the video file to ensure page view of the licensed platform, and it is much more time consuming and complex to download than to stream it online on official sites, therefore the copyright owners will not have to worry too much about the potential trouble of private distributions. As for those titles that are not accessible in China now or ever, it is advisable for the copyright owners to utilize the first period NAP to exempt fans from copyright liabilities for possible infringing activities such as distribution of copyrighted contents, since they will manage to get them anyhow. They could further turn to the second period NAP to exempt fans from liabilities for transformative uses when the underlined titles are officially introduced, or they could stick to the

17 (China), *translated at* CHINA COPYRIGHT AND MEDIA (Rogier Creemers trans.), <https://chinacopyrightandmedia.wordpress.com/2006/05/22/film-script-outline-filing-film-management-regulations/>. (The completed film shall be reported to the corresponding film examination organ for examination. For film submission, the following materials shall be provided: . . . 7, a complete screenplay set. . .). *Dianshiju Shencha Chengxu* (电视剧审查程序) [Television Drama Examination Procedure], SARFT, Aug. 16, 2007, at <http://www.sarft.gov.cn/articles/2007/08/16/20070913171221490947.html>. (5. Requirements about demo tapes of various kinds of Television Dramas that sent for approval . . . all imported TV dramas (including Animation) . . . must have Chinese subtitles in the demo tapes that sent for approval. . .).

¹²³ *Id.*

¹²⁴ Measures for the Administration of the Publication of Audio-Visual Programs through the Internet or Other Information Network (promulgated by SARFT Decree No. 39, July 6, 2004) art. 7 (China), *translated at* China Copyright and Media (Rogier Creemers trans.), <http://chinacopyrightandmedia.wordpress.com/2004/07/06/internet-and-other-information-networks-audiovisual-programme-dissemination-management-rules/>; Administrative Provisions on Internet Audio-Visual Program Service (SARFT and Ministry of Information Industry of the People’s Republic of China, Decree No. 56, Jan. 31, 2008), Art. 8(1), *translated at* Lawinfochina, <http://www.lawinfochina.com/display.aspx?lib=law&id=6582>.

first period NAP if there is no way for the underlined works to enter the Chinese market, and to direct the passion of fans to relevant tangible merchandises.

The duration of the NAP for fansubs, especially the second period NAP, should be indefinite. The main purpose of building a safe zone is to communicate with fans in a foreign market. That is to say, even if the copyright owners choose to withdraw their promise about the exemption, it will make not too much difference as fan activities of contributive individuals in countries like China will likely to continue, as the hunger for information and knowledge and the restriction on access in China will likely persist in the long term, and the cost of copyright enforcement aiming at individuals are too high.

CONCLUSION

Anderson claimed that, despite the fact that numerous copyrighted materials are being infringed in countries like China, if the industry could and change their business model accordingly, they might discover more profit channels in the future.¹²⁵ By then, the legal issues we are currently facing may not be a problem at all. That is increasingly the case, considering that the majority of the hottest foreign audiovisual titles are available on Chinese online streaming platforms now. It indicates that a big chunk of the free riders—which are neither fans nor commercial pirates—will eventually be diverted to legitimate platforms, because all they want is easy and fast access. Those who want to do more with the copyrighted content than merely watching will be clearly divided. The fans within should be treated delicately so that the copyright owners can maintain a good relationship with their fans, and possible complementary creations and effects could be discovered, rewarded and officially borrowed. As for the commercial pirates, they will have no place to hide.

The reasons to subdivide all the unauthorized users are simple and clear: considering the previously mentioned technical, economical, and transnational obstacles, it is impossible for foreign copyright owners to deal with every possible online copyright infringement that is happening in China via traditional means. Besides, fan activities like fansubs could actually be of help in different levels. If they are tolerated but offered no guidance, they may cause damages which

¹²⁵ See generally Anderson, *supra* note 4.

could exceed the benefits they generate.¹²⁶ Moreover, the copyright owners may find that their fans are not there in the end, since the competition in the Chinese market is so fierce that audiovisual works lack the publicity that is equal to products of low competitiveness. The promotion budgets of audiovisual companies are usually limited, thus they could only be spent on big productions. Since the traditional paths to profit in the majority of foreign audiovisual works are hampered in the Chinese market, the potentials of those audiovisual works need to be developed further in order to identify more profit channels. Thus, using NAPs which encourage civic engagement should be a wise choice for foreign audiovisual industries that are conducting business in China.

It is comforting that cooperation with fansub groups is in progress. However, the fragile cooperation between fansub groups and video platforms won't last long if substantive changes do not occur. Moreover, according to MPAA's argument, local protectionism has created a piracy market in China.¹²⁷ One of the reasons is that people are trying to bypass government censorship and obtain their desired titles via underground channels, which is out of the control of foreign copyright owners. If that situation is true and cannot be changed easily in the short run, maybe it is time to seek new revenue streams.¹²⁸ A specifically designed NAP could help the foreign copyright owners regain that control, and build a closer connection with their adherents in China, so as to promote their works, collect new ideas, and develop new profit channels. It is also in accordance with the purpose of the copyleft movement: to rebalance the current restrictive regime of copyright, to adjust the relationship between the interests of the copyright owners and the public, and to further release the creative power of the masses.

¹²⁶ For instance, most doujinshi works in Japan are tolerated by the copyright owners, but if the fan work contains pornographic elements that are deemed harmful to the original work (a children's manga), or bears a strong resemblance to the original one, which may cause confusion, the copyright owners will notify the fan authors. *See* He, *supra* note 94. In terms of fansubs, online streaming platforms, even commercial pirates constantly lift fan-translations without any permission, and fansubbers can do nothing to change that because they believe they have no rights in their fansubs. *See* Zhang, *supra* note 107.

¹²⁷ *See U.S.-China Trade: Preparations for the J. Commission on Commerce and Trade: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection, of the H. Comm. on Energy and Commerce*, 108th Cong. 45–55 (2004) (testimony of Fritz E. Attaway, Executive Vice President of MPAA).

¹²⁸ *See* Priest, *supra* note 82, at 515 (“... creative works can be consumed—and monetized—in a theoretically unlimited variety of formats and locales, the health of a creative industry ultimately depends on its ability to effectively monetize works for each market in which they are consumed.”).