

A Relational Theory of Authorship

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A. INTRODUCTION

Over the years we have heard the debate as to whether authorship emanates solely from the individual or from the cultural context in which he inhabits. Writers such as Professors Woodmansee, Jaszi, and Cohen have asserted a cultural theory of authorship.¹ On the one hand, there is the liberal philosophy of autonomous creativity evidenced in the notion of a “romantic author” (after the period known as romanticism). On the other hand, we have more of a communitarian notion—that the author acts in a cultural context and authorship to some extent must be linked back to the social existence within which the author is situated.

This chapter argues that for too long we have privileged the notion of the romantic author so much so that it is hard to argue for any other approach to copyright than one that focuses primarily on the author and their assignees, such as publishers or associated commercializing agents, such as recording companies. Furthermore it suggests that this approach fits awkwardly with the burgeoning networked society fuelled by the Internet to the point where it threatens innovation and the potential for productivity. To this end the chapter argues that we should more explicitly acknowledge

1 See, generally, Peter Jaszi, “Towards a Theory of Copyright: The Metamorphoses of ‘Authorship’” (1991) 2 Duke L.J. 455; Martha Woodmansee, “The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author’” (1984) 17 Eighteenth-Century Studies 425; Julie E. Cohen, “Creativity and Culture in Copyright Theory” (2007) 40 U.C. Davis L. Rev. 1151 [Cohen, “Creativity and Culture”]; Carys J. Craig, “Reconstructing the Author-self: Some Feminist Lessons for Copyright Law” (2007) 15:2 Am. U.J. Gender Soc. Pol’y & L. 207.

the contribution of culture to authorship and, more so, the role of each and every individual in assisting and nurturing that authorship, as well as the contribution of users to creativity, through consumptive, productive, and transformative use of copyrighted works.

B. RECONCEPTUALIZE AUTHORSHIP

Since the birth of the modern copyright system, authors have been enshrined as people of individual genius whose “vivid sensation” and the “spontaneous overflow of powerful feelings” became the elements of creativity and thus authorship.² They have been seen as creating something entirely new and original.³ By the middle of the eighteenth century this romantic conception of authors had become a “universal truth about art,”⁴ and, furthermore, the doctrine of originality was “so orthodox that Samuel Johnson could state flatly that the highest praise of genius is original invention.”⁵

However, this romantic notion on which the modern copyright regime was founded turns out to be more far-reaching than we could have imagined.⁶ In recent years, it has been argued that the traditional concept of authorship, with its implications of individualism and authority over the interpretation of textual meaning, has been overthrown in theory, if not entirely in practice.⁷ Since the romantic movement, literary definitions of “author” have changed a lot; however, the changes in literary definitions have not appreciably influenced legal definitions.⁸

2 Jacqueline Rhodes, “Copyright, Authorship, and the Professional Writer: The Case of William Wordsworth,” online: www.cardiff.ac.uk/encap/journals/corvey/articles/cco8_no1.html.

3 See, further, Paul M. Zall, ed., *Literary Criticism of William Wordsworth* (Lincoln, NE: University of Nebraska Press, 1966) at 182.

4 James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, MA: Harvard University Press, 1996) at 54.

5 Mark Rose, *Authors and Owners: the Invention of Copyright* (Cambridge: Harvard University Press, 1993) at 5.

6 For how this notion was invented and incorporated into the modern copyright laws, please see further Woodmansee, above note 1; Jessica Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001); Rose, *ibid*.

7 Jacques Derrida, *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1976).

8 Martha Woodmansee & Peter Jaszi, “The Law of Texts: Copyright in the Academy” (1995) 57 *College English* 769 at 771. Woodmansee & Jaszi continued: “. . . while legal theory participated in the construction of the modern ‘author,’ it has yet to be affected by the structuralist and post-structuralist critique of authorship.”

Romantic aesthetics emphasize that the author is the monarch of their writings; however, this proposition has been challenged since Roland Barthes' 1968 essay "The Death of the Author".⁹ Barthes argues that a text cannot be attributed to any single author because "it is language which speaks, not the author."¹⁰ This theory, labelled as "structuralism" or "post-structuralism," demonstrates that an author is not simply a "person" but a socially and historically constituted subject.

Michel Foucault argues in his 1969 essay "What Is an Author?" that all authors are writers, but not all writers are authors.¹¹ In Foucault's theory, an author exists only as a function of a written work, a part of its structure, but not necessarily as part of the interpretive process, although the author has been used as an anchor for interpreting a text. The author's name "indicates the status of the discourse within a society and culture."¹² In this approach the readers' importance is re-examined and more explicitly asserted in the construction of meaning.

Emerging notions of "hypertext" and "intertextuality" further highlight the need for the reconsideration of reader's position.¹³ They disclose the evolutionary, modifiable, and open nature of the text and support the concept that the meaning of an artistic work does not reside in that work, but in the viewers.¹⁴ More recent post-structuralist theory re-examines intertextuality as a production within texts, rather than as a series of relationships between different texts.¹⁵

Along with the critique of romantic authorship by literary theory, questions are also raised by emerging legal practices and theories.¹⁶ Mod-

9 Roland Barthes, "The Death of the Author" in Roland Barthes, *Image, Music, Text*, trans. by Stephen Heath (London: Fontana, 1977).

10 *Ibid.*

11 Michel Foucault, "What Is an Author?" in Josué E. Harari, ed., *Textual Strategies: Perspectives in Post-Structuralist Criticism* (Ithaca, NY: Cornell University Press, 1979) 141.

12 *Ibid.*

13 Intertextuality is "the shaping of texts' meanings by other texts. It can refer to an author's borrowing and transformation of a prior text or to a reader's referencing of one text in reading another. The term 'intertextuality' has, itself, been borrowed and transformed many times since it was coined by post-structuralist Julia Kristeva in 1966." "Intertextuality," online: <http://en.wikipedia.org/wiki/Intertextuality>.

14 See, further, Barthes, *Image, Music, Text*, above note 9.

15 See, further, Daniela Caselli, *Beckett's Dantes: Intertextuality in the Fiction and Criticism* (Manchester: Manchester University Press, 2005).

16 The perception of the author as a "creative genius" possessing the "capacity to leap significantly beyond present knowledge and produce something new" is problematic

ern copyright law is an author-centred regime, and creativity in this model is “an individual activity, and the rights over its outcomes are clearly attached to the individual whose labour (mental creativity) is apparent in that outcome.”¹⁷ However, networked media technologies have presented the world with a completely different picture. The peer production of information and knowledge is a new creativity model; a decentralized innovation pattern. In this sense creativity is being recast as a collaborative activity rather than an individual activity.

The collaborative nature of literary and artistic creation has been pointed out by many scholars. As Jack Stillinger has explained in many cases, the singular authorship concept does not accord with the facts of literary production. He found that “numerous texts considered to be the work of single authorship turn out to be the product of many hands.” Therefore, he asked: how many authors are being banished from a text or apotheosized in it?¹⁸ It has also been argued that current copyright law fails to recognize the collective nature of authorial and artistic creations. Lior Zemer has complained that as a legal and social institution copyright rejects the very nature of copyright creation as a collectively imagined and produced activity, and denies the contribution of the public to the copyright creation process, imposing and maintaining an imbalance between private and public interests.¹⁹

Furthermore, some scholars have proposed that authorship is not at all a matter of heroic, individual creation but rather it is a social process. This proposition is composed of three aspects. First, there is collaboration, the fact that creative acts depend on interactive networks. Second, authorship is social in that it involves the recombination of existing symbolic materials from a historically deposited common stock. Third, social authorship is incremental in nature. Significant new developments result from many small innovations rather than major breakthroughs by single creators.²⁰

to those challenging existing copyright standards. Lior Zemer, *The Idea of Authorship in Copyright* (Aldershot, UK: Ashgate, 2007) at 76.

17 James Leach, “Modes of Creativity and the Register of Ownership” in Rishab Aiyer Ghosh, ed., *CODE: Collaborative Ownership and the Digital Economy* (Cambridge: MIT Press, 2005) at 31.

18 See, further, Jack Stillinger, *Multiple Authorship and the Myth of Solitary Genius* (New York: Oxford University Press, 1991).

19 See, further, Zemer, above note 16.

20 See, further, Jason Toynbee, “Beyond Romance and Repression: Social Authorship in a Capitalist Age” *Open Democracy* (28 November 2002), online: www.opendemocracy.net/media-copyrightlaw/article_44.jsp.

To this end the “copyleft” movement can be seen as a better translation of the postmodern space of *creation* rather than *copyright*.²¹ From open source to art, a radically new view of creation has been mapped out, within which not only the location of the author, but also the location of the work and of the user, have been shifted and reconfigured.²²

In summary, over recent years the western world has witnessed the romantic notion of authorship being questioned both by literary critics and by legal scholars. The former argue that the work/text is a product of the author’s cultural influences rather than her mere persona, and, furthermore, readers/audiences are as important as the author in the discourse process. The latter point out that the authors assemble, transform and adapt their works from the components of their cultural environment rather than make anew; therefore, the contribution of the public in this process should not be ignored.

C. THE SITUATED RELATIONAL AUTHORS

The existing definition of authorship embraces the presuppositions that individuals live in isolation from one another while ignoring “the individual’s relationship with others within her community, family, ethnic group, religion—the very social relations out of which and for the benefit of whom the individual’s limited monopoly rights are supposed to exist.”²³ Accordingly, copyright as a legal institution based on this definition has “focused primarily on the relationships among those who write works of authorship and disseminate those works to the public.”²⁴

However, the growing public digital literacy and the rise of a “participative web”²⁵ have afforded a world of peer production and an age of mass

21 Severine Dusollier, “Open Source and Copyleft: Authorship Reconsidered?” (2003) 26 *Colum. J.L. & Arts* 281 at 288–89.

22 *Ibid.* at 288.

23 Shelley Wright, “A Feminist Exploration of the Legal Protection of Art” (1994) 7 *C.J.W.L.* 59 at 73.

24 Litman, above note 6 at 111.

25 “The use of the Internet is now characterised by increased participation and interaction of users to create, express themselves and communicate. The ‘participative web’ is the most common term and underlying concept used to describe the more extensive use of the Internet’s capacities to expand creativity and communication. It is based on intelligent web services and new Internet-based software applications that enable users to collaborate and contribute to developing, extending, rating, commenting on and distributing digital and developing and customising Internet

participation.²⁶ The production of artistic and literary works is no longer considered a privilege and “the genius” of a social and cultural elite, but rather a daily engagement for a mass of individuals, which is enjoyable and provides for instance, communication, entertainment, creative play, and self-development.²⁷ In the new context, the creation of literary and artistic works is more than a process of creative expression. It is also a process of communication. The application of interactive information technology and participatory web infrastructure has given rise to an interactive information arena. If it continues to keep authors isolated and users irrelevant, copyright law will be in very real danger of becoming irrelevant. It has been suggested that authorship should be understood “within the context of cultural dialogue and participative processes, and in recognition of its audience and the public as a whole.”²⁸ Carys Craig proposes to “re-imagine authorship as the formation of individual identity and the development of self and community through discourse,”²⁹ and that copyright should aim to “encourage meaningful relations of communication and participation with others.”³⁰ Craig articulates a relational theory of authorship. A *relational author* is “always-already situated within, and constituted by, the communities in which she exists, and the texts and discourses by which she is surrounded.”³¹ Craig posits that “copyright must be understood in relational terms,”³² and it “structures relationships between authors and users, allocating powers and responsibilities amongst members of cultural com-

applications.” Graham Vickery & Sacha Wunsch-Vincent, *Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking* (Paris: Organisation for Economic Co-operation and Development, 2007) at 17.

- 26 “In contrast to the Web 1.0 age, the Internet in the Web 2.0 age (the participatory media age) is not only ‘characterised as a giant copying machine that facilitates widespread and undetectable copyright infringement,’ it also enables a new creativity model and a new way for producing information and knowledge.” See, further, Samsung Xiaoxiang Shi, “Chinese Copyright Law, Peer Production, and the Participatory Media Age” in Brian Fitzgerald *et al.*, eds., *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (Sydney: Sydney University Press, 2008) at 268–69 [Shi, “Chinese Copyright”].
- 27 Shi, “Chinese Copyright Law,” *ibid.* at 262. See also Julie E. Cohen, “The Place of the User in Copyright Law” (2005) 74 *Fordham L. Rev.* 347; Cohen, “Creativity and Culture,” above note 1.
- 28 Craig, above note 1 at 266.
- 29 *Ibid.* at 234.
- 30 *Ibid.*
- 31 *Ibid.* at 261.
- 32 *Ibid.*

munities, and establishing the rules of communication and exchange.”³³ Moreover, “the importance of copyright lies in its capacity to structure relations of communication, and also to establish the power dynamics that will shape these relations. Its purpose is to maximize communication and exchange by putting in place incentives for the creation and dissemination of intellectual works.”³⁴

Instead of seeing authorship as commencing with the act of the individual who puts pen to paper or paint to canvas we should conceptualize authorship as being a product of the ecosystem in which it is born. This chapter furthers the arguments for a relational theory of authorship, looking at creativity “from a systematic perspective.”³⁵ Relational authorship is a descriptive system that talks about cultural contributors rather than the solitary romantic author, and its subject focuses on the relational and multiple contributions. Grounded in the postmodernist social and cultural theory,³⁶ this theory perceives that the creative process and cultural progress is an open-ended and communication-oriented discourse and interpretation.

D. AUTHORIAL CULTURAL CONTRIBUTIONS

If we posit a creative act—let us call it the act of “first contribution” (FC)—as being preceded by culture, associated communication protocols, and markets, then we must somehow incorporate these contributions into our system of knowledge flows, usage, and ownership. This role that the culture plays prior to the FC could be labelled “pre-first contribution” (pre-FC); and the role that the fans/admirers, consumers, and users play following the FC could be “post-first contribution” (post-FC).

Therefore, the contributions to creativity and cultural innovation that raise the evolving culture could be mapped comprehensively by the following chart.

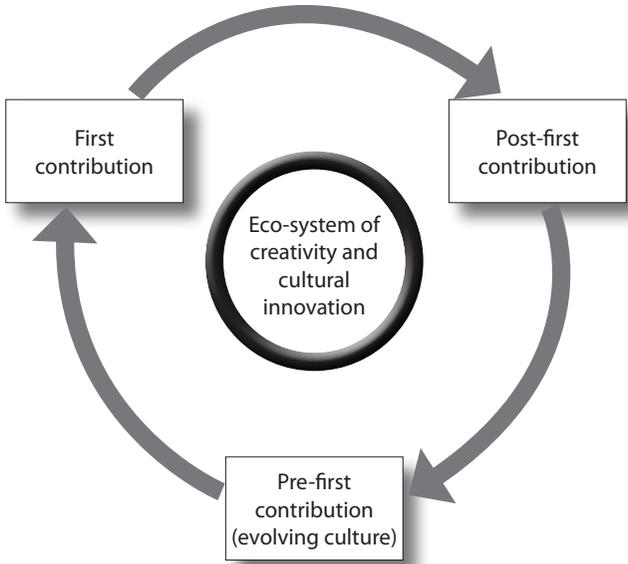
33 *Ibid.*

34 *Ibid.*

35 From a systematic perspective, “artistic and intellectual culture is most usefully understood not as a set of products, but rather as a set of interconnected, relational networks of actors, resources, and emergent creative practices.” Cohen, “Creativity and Culture,” above note 1 at 1183.

36 Social and cultural theories that emphasize the contingent, iterative, and performative development of knowledge are rooted in several philosophical traditions that liberalism has resisted, and of which copyright scholars have remained largely skeptical. *Ibid.* at 1166–67.

Figure 1



1) Pre-FC and the Culture as Pre-FC Contributor

Culture as the pre-FC to creativity generated by the public (individuals and associated social groups and communities) is where the writer and artist are situated. Its role is evidenced in a small way in the limitations or exceptions found in copyright law, but these provisions are expressed and implemented in a manner that defers to the romantic notion of the author.

a) The recognition of culture as a contributor to creativity

In the past few years, the affordance of the participative web has dramatically challenged the copyright regime’s arrogance towards the culture. The contribution of culture and cultural inhabitants to creativity has come to play a more obvious role in the processes of meaning-making and the progress of culture itself.

First of all, the advance of media technology has dramatically facilitated the civic engagement in cultural creation that meanwhile increases the decentralization of creativity. On the other hand, the increasing civic engagement results in the diversity and complexity of relations between individuals and the exuberance of the species and amounts of social groups and communities. As Cohen has described, social groups “play a dual role in creative processes, functioning both as users and as immediate cultural

environments for individual users”;³⁷ and “within copyright law, the relative salience assigned to contributions of individuals and contributions of groups affects the designation of authorship.”³⁸

Additionally, the relatively low barriers to artistic and intellectual expression and civic engagement have increased the demands of intellectual commons as raw materials for individual development. From the perspective of the non-utilitarian, freedom is not simply defined as a function of the absence of restraint, but also depends critically on access to resources and on the availability of a sufficient variety of real opportunities.³⁹ Therefore, the access to extant cultural resources, characterized by Cohen as “cultural landscape,”⁴⁰ is playing a more and more important role in accommodating the fulfillment of human freedom. Moreover, open access to knowledge and information has become a worldwide movement, paving the way for a seamless access to culture and for a profound growth of the cultural landscape. The situated nature of creativity is becoming more and more prominent because of the evolution of cultural context. The relations between individuals, social groups, and the culture are more complicated and multiform. The creative process also becomes a more complex dynamic.

The popular culture paradigm has been undermined and replaced in more and more instances by distributed culture, which is spawned and incubated in a variety of distributed social groups and communities. Consequently, distributed cultural creativity is initiated, communicated, and appreciated within a specified community and particular cultural environment. However, in many cases, the particular distributed culture will not be meaningful outside of the community or the meaning must be understood as associated with its particular cultural context. The creative actors and creative outputs are more situated than when only popular culture prevails.

37 *Ibid.* at 1188.

38 *Ibid.*

39 *Ibid.* at 1159. See also Amartya Sen, *Inequality Reexamined* (Oxford: Clarendon Press, 1992); Amartya Sen, *Development as Freedom* (New York: Oxford University Press, 1999).

40 Cultural landscape is “neither geographically discrete nor composed entirely of resources that are publicly owned; therefore, it does not map neatly to the legal category of public domain expression. It is defined, instead, by the ways in which artistic and intellectual goods are accessible to individuals in the spaces where they live, and by the forms of interaction with preexisting expression that are possible and limited. The cultural landscape is what supplies the elements in culture that are experienced as common, regardless of their ownership status.” *Ibid.* at 1180.

b) The pre-FC contributions

The pre-FC are multi-dimensional. For example, the culture contributes raw materials, context, markets, and environment to creativity. The accumulated cultural elements such as language, knowledge, texts, and conceptions of artistic and intellectual merit are raw materials for creativity. The cultural context within which the author is located and from which the author obtains his experiences, insights, values, education, and skills is another portion of contribution that should be attributed to the culture.

Additionally, individuals located in a given culture are social markets playing crucial roles, particularly in the new value chain approach to cultural production, in consuming, appreciating, and facilitating creativity.⁴¹ Theorists believe that personal decisions about information consumption, under fair competition, will produce results that make sense,⁴² especially in a networked information society of social markets.

Moreover, social groups and communities within which the author and creative practices are situated are immediate cultural environments contributed by the culture. The author is always related to many social groups such as family, ethnic, religion, local culture based communities. Although concrete creativity is always initiated and maintained by particular individual authors, their dynamic and complex interconnections with the groups or communities determine the overall path.

It is notable that such pre-FC are not authorial as it is unrealistic to acknowledge all individuals and associated culture as authors of a given piece of intellectual and artistic work. Copyright, even put in relational terms, could only be resident in individuals despite the fact that the individual contributors are already and always situated in particular relations with other individuals and associated culture. However, the recognition of the culture as a pre-FC to creativity would pave a way for a better, balanced

41 This new value chain approach to cultural production is as follows: (i) agents (who may be individuals or firms) are characterized by choice, decision-making, and learning (origination); (ii) social networks, both real and virtual adopt this choice; and (iii) market-based enterprise, organizations, and coordinating institutions retain these choices. John Hartley, "The Evolution of the Creative Industries—Creative Clusters, Creative Citizens and Social Network Markets" (Paper presented to the Creative Industries Conference, Asia-Pacific Forum, Berlin, 19 September 2007), online: <http://eprints.qut.edu.au/archive/00012647/> at 19–20.

42 "The truest and most beautiful works will be the ones that appeals most strongly to the citizen's deliberative faculty, to the consumer's enlightened self-interest." Cohen, "Creativity and Culture," above note 1 at 1165.

copyright regime that sees the public within the relations of contributors of cultural innovation.

2) FC and the Initiating Contributor — The Initiator of a Dialogue and Communication

a) The process of authorship reconsidered

As has been suggested above, both authors and users are absolutely located within a particular cultural context and creative practice is substantially determined by this context. However, just as Cohen argued, recognizing the “situatedness” of creativity does not “require submerging the individual irretrievably within the social; creativity has ‘internal’ dimensions as well as ‘external’ ones.”⁴³ Accordingly, the relational theory of authorship “recognizes the social dimension of the author, but also her duality: she encapsulates both our connectedness and our capacity for critical reflection.”⁴⁴

The romantic aesthetics saw the creative process as a result of the author’s own genius. Of genius the only proof is “the act of doing well what is worthy to be done, and what was never done before Genius is the introduction of a new element into the intellectual universe.”⁴⁵ This aesthetic view of intellectual creation entered the domain of law through the conceptualization of originality. Although the legal definition of “original” has significantly departed from the literary conception of the term,⁴⁶ the copyright regime built on the romantic conception authorship still primarily focuses on individual author with the perception that authorial process is an isolated individual phenomenon.

Instead of seeing authors as independent and unattached individuals, the relational theory conceptualizes one group of authors as the initiators of relatively new discourses, dialogues, and conversations, and another group of authors as consequential contributors who follow the initiating authors and take part in the discourse processes. In the process of authorship, the dialogues and conversations always begin from the cultural materials at hand. However, these materials of authorship are always both original and

43 *Ibid.* at 1178–79.

44 Craig, above note 1 at 261–62.

45 Zall, above note 3 at 184.

46 In *University of London Press Ltd. v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601 at 608–10, Peterson J. stated: “the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate with the author.”

dependant.⁴⁷ The author creates from the given materials around them. It is a process of reinterpretation, recombination, and transformation.⁴⁸

b) The FC

Through the interpretation and reinterpretation of the culture and experiences, the initiating author opens a new dialogue and starts a new conversation. Such initiating contribution is a breakthrough or spore of the evolving culture and makes it possible to shift the existing cultural conversation to the next level and next dimension.

Accordingly, this initiating contribution could be called the FC to creativity. The contributor is first and foremost an initiator. In retrospect, her creative expression should be seen as an outcome of the entire human culture and should be attributed both to her intellectual labours and to the cultural context in which she is situated. The contribution of the initiating author is not in the sense of inventing an original thing *ex nihilo*, but nonetheless it is in the sense of initiating new directions bringing innovation to culture and society.

2) Post-FC and the Ensuing Contributors

a) The recognition of post-FC

From the perspective of the emergent and complex evolution of the culture, the initiating author's intellectual breakthrough is not an end; instead, it is a beginning. The initiating contribution would only be valuable in the context of attracting and captivating users, admirers, fans, followers, and responders.

The ensuing contributors are those who take part in and continue the conversation and discourse that were initiated by the FC. Such post-FC is also situated in a particular cultural context; however, it is directly and immediately derived from and dependent on the existing initiating contribution (the FC).

The continuous growth of culture is a product of a variety of post-FCs. The ensuing contributors play a key role in shaping meanings and

47 However, these materials are "always, and from the beginning, both given and created. They are given in that they are shaped by forces beyond any individual's control; they are created in that each new repetition of such cultural and personal artifacts is always a reinterpretation rather than merely a replication." Susan H. Williams, "A Feminist Reassessment of Civil Society" (1997) 72(2) *Ind. L.J.* 417 at 430.

48 Craig, above note 1 at 263.

sustaining the dynamic and conversational creative process and cultural progress. The post-FC is a dynamic process of appreciation, adaptation, derivation, translation, recombination, imitation, or transformation of the FCs and other pre-existing cultural materials.

b) Copyright monopoly reconsidered

Once a new discourse is initiated, the existing law awards copyright owners the monopoly power to control the ensuing conversation and dialogue with very limited and narrow exceptions. Copyright owners decide who can speak or take part in this conversation, how the participants should speak, and even what they should speak for. A copyright regime that merely focuses on a set of products without adequate rectification could be problematic, particularly in the networked information society. In the worst instances, it could be employed to depress and attack dissents, dissidences, and opponents.

In contrast, the relational authorship sees copyright in the light of a set of relational networks of actors and contextual culture. The post-FC, especially in the networked information environment, is recognized by the relational copyright as an authorial contribution and the ensuing contributors are relational authors. However, under existing law the creator of the post-FC will incur liability in most instances for engaging in copyright infringement.⁴⁹ We argue that no such liability should occur where the com-

49 It is a fundamental concept that copyright law “does not protect ideas, information or facts but instead protects the form in which those ideas, information or facts are expressed.” Therefore as a general rule, if a creator’s work is built on preexisting copyrighted works without authorization, the creator will incur liability for copyright infringement. Anne Fitzgerald & Brian Fitzgerald, *Intellectual Property in Principle* (Sydney: Lawbook, 2004) at 84. Additionally, the status of works/content unlawfully employing preexisting copyrighted material varies in different jurisdictions. For example, US copyright law refuses to recognize authorship of such works (“compilations” and “derivative works”). 17 U.S.C. § 103 provides that copyright protection does not extend to “any part of the work in which such material has been used unlawfully.” House Report No. 94-1476 explains further that “the bill prevents an infringer from benefiting, through copyright protection, from committing an unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work.” Under Australian law, the creator will obtain authorship and copyright protection, but he will incur liability for unauthorized reproduction and communication. In *A-One Accessory Imports Pty Ltd., Noel Bruce Rogers and Stephen Arthur Bennett v. Off Road Imports Pty Ltd., Ross Bartley King and Julie Robyn King*, [1996] FCA 1353 at para. 46, Drummond J. concluded: “In my opinion, a work can be an original work in which copyright will subsist, even though it is itself an

mercial viability of the FC works is not destroyed. As part of the bargain for this immunity from liability, post-FC contributors should be granted a lower level of authorship and more limited rights and powers in relation to the post-FC work generated from their contribution. Additionally, benefits arising from commercial exploitation of the post-FC content should be shared between the initiating contributor (first author) and the post-FC contributor (ensuing author and secondary initiating author).

E. THEORIZING RELATIONAL AUTHORSHIP

We perceive creativity as a process of dialogue and communication. Copyright should be a legal institution aiming to structure relations of the participants in and contributors to this system.

In contrast to the romantic conception of authorship that focuses on the solitary romantic author and excludes any other cultural participants, relational authorship articulates an approach that includes and internalizes the evolving, emergent, and dynamic relations between the public, authors, and users/consumers. Therefore, this theory argues for an account of contributorship that supports a relational authorship, which in turn aims to “construct relationships of communication between authors, users, and the public by allocating powers and responsibilities.”⁵⁰

The naive acceptance of authorship as a predominantly individual and isolated act may foster authorial rights that are too broad or too powerful for the good of society.⁵¹ A legal institution that was established upon the originality of text and the romantic notion of authorial creations is incapable of regulating how information and knowledge is actually produced in the networked information society. On the contrary, the relational theory of authorship will give rise to a responsive and flexible copyright regime.

infringement of the copyright in an earlier work because it is, in part, a copy of a substantial part of that copyright work. This will be the position provided the later work includes qualitatively significant changes to the copied material.”

50 Craig, above note 1 at 267.

51 See further, Alan L. Durham, “Copyright and Information Theory: Toward an Alternative Model of ‘Authorship’” (2004) 69 B.Y.U.L. Rev. 69.

1) Contributorship and Relational Authorship

a) The reconfigured author

The relational theory of authorship is constituted by the notion of contributorship. “Authors” are those who make contributions of some kind to a work instead of the one who creates the work. This analytical perspective on authorship is also in accordance with the findings of information theory.⁵²

The decentring of creativity has “incorporated multiple contributing factors and made none primary.”⁵³ Therefore, contributions of all sorts should be encouraged and valued. In the networked information society, any contribution including creation of new works, interpretation and re-interpretation of preexisting culture, and even combination and re-combination of copyright materials are crucial to the production of information and knowledge.

b) Contributors and the relational authors

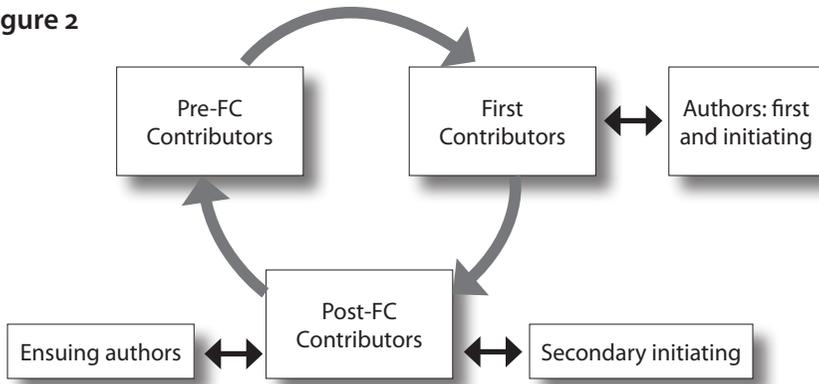
Contributors are those who make contributions to creativity and the progress of culture and take part in the discourse process in whatever manner. Contribution is defined in a very broad way, disregarding its intellectual or artistic merit but emphasizing its substantial functional values for the free flow of information.

However, not all contributions are authorial and meanwhile not all contributors are authors.

52 The potential relationship between “originality” in copyright and “entropy” in information theory suggests at least two alternatives to the romantic model of authorship. The first alternative equates authorship with the addition of noise to a signal. The second proposes that authorship, like the addition of information to a message, reflects “freedom of choice” in the selection of one means of expression from a variety of available means. The second alternative is less disparaging of the talents of authors than the first, yet it is still “unromantic” enough to be more inclusive, and less dependent on the notion of genius or personality, than the traditional model. *Ibid.* at 145–58.

53 Cohen, “Creativity and Culture,” above note 1 at 1177.

Figure 2



i) Pre-FC contributors

In particular, the pre-FC is not authorial. The culture itself could not be attributed as the author, but its contributorship should be acknowledged unless the origin of the involved cultural elements is self-evident. For example, the Hollywood movie *Fa Mulan* should be attributed as “This movie is adapted from an old Chinese story.” The contributorship of a work derived from a particular indigenous culture should be attributed to this indigenous group.

ii) FC contributors = first/initiating author

All FCs are authorial and their contributors should be attributed as “initiating author” or “first author.”

iii) Post-FC contributors = ensuing authors + secondary initiating authors

In the networked information society, perhaps more than ever attention has been placed on the legal standing of the post-FC. Traditional approaches to copyright law have embodied the notion that creators act autonomously and independently, appropriating cultural elements to create works that are regarded as their own property. The role of downstream contributors is not well articulated. Contrast this approach to the practice apparent in networked society in which distributed cultural production and meaning-making are more dependent on each other. For example, creative practices such as fan fiction, remix, and mashup are not only built on but also highly dependent on the prevalence of their underlying works.

We argue that as a default rule post-FC should be encouraged and permitted and the contributorship/authorship of post-FC contributors should be accepted by copyright law. Consequently, we propose that copyright law

should create space for them and treat them as another special kind of author. Such special authorship is different from the first/initiating authorship and will be vested with rights and powers of a different level.

Accordingly, we posit that all post-FCs are authorial but to varying degrees. If the works generated from post-FC are substantially composed of and highly dependent on existing FCs, the contributors would be attributed as “ensuing authors” as opposed to the first/initiating authors. In contrast, if the post-FC is substantially independent enough and it opens a new discourse and starts a new conversation, it would, to some extent, amount to an “initiating authorship” or “first authorship.” In this case, the works generated from the post-FCs should be accepted as works that are independently recognized by copyright law (similar to derivative works under existing laws). This group of post-FC contributors should be attributed as “secondary initiating authors” who have a similar though not necessarily exactly the same status as the first/initiating authors.

2) What Status and Entitlements Should this Sponsor?

Generally speaking, the existing copyright legal framework has adopted a regulatory approach that forbids anyone, except the authors, from doing specific acts such as reproducing the works (making copies), publishing and distributing the copies to the public, performing the works in public, communicating the work to the public via information networks, and making adaptations of the works, unless such acts are expressly approved by the copyright owner or conducted for specific purposes such as personal use, study, research, criticism, review, and parody.

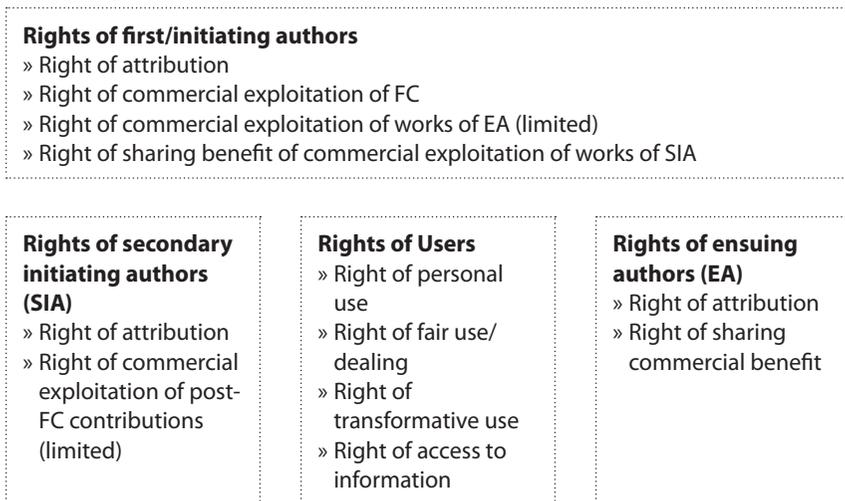
Historically, the acts controlled by the copyright owner were focused on commercial publication. This meant that in practice copyright law was not the focus of everyday life in that personal use, such as reading, was not an infringing act.

However, the advance of media technologies has continuously challenged this deliberate legal arrangement. The emergent information and communication technologies, in particular, afford more possibilities of acts that could be accomplished by individual users; and accordingly copyright law has successfully expanded to cover these possibilities with very few limitations. As a result, copyright has evolved from exceptional rules to general application; and meanwhile few usages could be realized without conducting the forbidden acts.

On the contrary, the relational theory articulates a “benefit sharing” scheme to structure and facilitate the relations of meaning-making among

various contributors of creativity and to reconcile the interests arising from creativity. Therefore, the relational copyright adopts another approach by reversing the existing legal arrangement. In most occasions, the users have rights to conduct any acts in relation to copyright works, such as sharing, modifying, or copying, provided that such action would not unreasonably and immediately prejudice the commercial interests and other vested legal rights of copyright owners. Meanwhile, copyright owners are entitled to any commercial exploitation of copyright works unless the user rights are unreasonably restricted and undermined. To this end this chapter proposes the following scheme of status and entitlements that relational authorship could support to structure the above dynamic relations between authors, users, and the culture.

Figure 3: The Relational Copyright and the Evolving and Emergent Culture



a) The rights of authors

The spectrum of the rights of authors should be in accordance with the varieties of the nature of their authorship. In particular, rights of commercial exploitation of post-FC works/content must be relative to specific authorial contribution. Where the post-First contribution is highly independent from existing FC works, the contributor (secondary initiating author) has the right to commercially exploit the works/content but has to share benefits with FC contributors (first authors). However, where the post-FC is not substantially independent enough, the first author of the underlying work, instead of the post-FC contributor (ensuing author), has the right of com-

mercial exploitation. However, the first author should share benefits with the ensuing author depending on contribution.

i) The rights of first/initiating authors

The first/initiating authors should be awarded the most substantial power to harvest the benefits arising from creativity. However, their rights should not impede the occurrence of the post-FCs.

Therefore, the first/initiating authors should have the following rights: right of attribution of authorship/contributorship and right of commercial exploitation of works produced by them.

Additionally, the first/initiating authors should have the right to commercially exploit the works/content produced by the ensuing authors; however, commercial benefits arising from the commercial exploitation should be shared with the ensuing authors. The post-FCs made by the ensuing authors are the by-product of their creative play in daily life and are not substantially independent enough to initiate new discourses. Moreover, the works/content generated by such contributions is highly dependent on the prevalence of the first/initiating authors' works. The relational copyright does not require permission for the production of such works/content, however, it awards the first/initiating authors (not the ensuing authors) the right of commercial exploitation of such works/content.

Furthermore, the first/initiating authors should be entitled to share the commercial benefits arising from commercial exploitation of works generated by the secondary initiating authors. Although the post-FCs in this case are substantially independent from the underlying FCs, such works are, first and foremost, derivative. The relational copyright does not require permission for the creation of such works, however it would require that commercial benefits arising from the exploitation of such works be shared between the first/initiating authors *and* secondary initiating authors.

ii) The rights of the secondary initiating authors

The secondary initiating authors should enjoy the right of commercial exploitation of works of post-FCs (but commercial benefits generated must be shared with the first/initiating authors). The secondary initiating author should also enjoy the right of attribution.

iii) The rights of the ensuing authors

The only rights that the ensuing authors should enjoy are the right of attribution of their authorship/contributorship and the right to share commercial benefits arising from commercial exploitation of their contributions.

b) The rights of users

All of the individuals and associated social groups or communities of a culture—global or local—should have certain rights regarding the FC and the ensuing post-FCs. One example of how this might work is seen in the current law of limitations: fair use (fair dealing) and personal use. Those limitations are open to anyone who fits within their ambit, not just a selected few. This confirms the argument that individuals (not just a collective whole, such as society or culture) can be seen as bestowing a benefit on the creator of the FC and therefore they should be entitled to a “benefit share” in some defined context.

Personal use is not the same as fair use/dealing for research and study,⁵⁴ but it is notable that not all legislation differentiates between the two.⁵⁵ A personal use is the private use of a copyright work for one’s own learning, enjoyment, or sharing with a colleague or friend—without any motive for profit.⁵⁶ Under current Australian copyright law, personal use includes “space shifting of recorded music, timeshifting television and radio programs and format shifting other types of material such as books, magazines or photographs.”⁵⁷ However, fair use (under Australian copyright law, it is

54 As Patterson & Lindberg posit, it should be noted that “personal use by a consumer and fair use by competitor are two different concepts.” L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of User’s Right* (Athens, GA: University of Georgia Press, 1991) at 193.

55 For example, under Chinese copyright law, the concept of “personal use” is covered by “fair use”; see further, *Copyright Law of China*, art. 22 [adopted at the Fifteenth Session of the Standing Committee of the Seventh National People’s Congress on 7 September 1990, and revised in accordance with the Decision on the Amendment of the Copyright Law of the People’s Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People’s Congress on 27 October 2001]. However, it is arguable that the rationale behind art. 11 is a little bit different from the concept of “fair use” in Western copyright acts. See further, Shi, “Chinese Copyright,” above note 26 at 282.

56 The rule of personal use is: “An individual’s use of a copyrighted work for his or her own private use is a personal use, not subject to fair-use restraints. Such use includes use by copying, provided that the copy is neither for public distribution or sale to others nor a functional substitute for a copyrighted work currently available on the market at a reasonable price.” Patterson & Lindberg, above note 54 at 194.

57 The differences between fair dealing (fair use) and personal use are outlined as follows:

Personal use:

- You must own a copy of the material being reproduced;
- Purpose of copying—for your own private use;
- Works can be copied in full;

called “fair dealing” although the two concepts are not exactly the same) allows limited use of copyrighted material without requiring permission from the copyright owner, and it only applies to certain purposes such as research or study, criticism or review, parody or satire, reporting news, judicial proceedings, or professional advice.

Fair use and personal use unfortunately start from a position of weakness. They are subservient to or supplement the notion of the romantic author and its primary position in copyright law. By seeing the role of culture as bestowed by the individuals in a society as pre-dating authorship we are challenged to reassess such an approach.

This chapter posits that the pre-FC contribution should at very least give rise to certain user rights by the individuals. The user rights may include schemes such as a recalibrated fair use and personal use, and even may extend to transformative use and conductive use.⁵⁸ However, the user rights should not unreasonably prejudice the reconfigured rights of authors. In particular, the commercial value of copyrighted works should not be unreasonably and immediately undermined.

This proposition would provide a market for creativity through consumption, and in particular create possibilities for post-FC creativity through productive, transformative, and conductive use.

F. CONCLUSION

The participatory and collaborative production of knowledge and information is inherent to the very nature of creative process. As this chapter

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- Copies cannot be lent or shared with anyone;
 - The work being copied must be a legal (i.e. non-pirate) copy;
 - Artistic works, sound recordings & films can be copied in full.

Fair dealing for research and study:

- You do not have to own a copy of the material being reproduced. The material can be held in, or borrowed from, a library, for example;
- Purpose of copying—must be for research or study;
- The amount copied is limited to 10 percent or 1 chapter whichever is greater. (More can be copied if it is considered “fair”);
- Copies can be in the same format as the original (e.g. a photocopy of a book);
- The work being copied must be a legal (i.e. non-pirate) copy;
- Artistic works, sound recordings & films can only be copied if they satisfy the five factors for fairness.

See online: www.unimelb.edu.au/copyright/information/fastfind/personaluse.html.

58 See further, Shi, “Chinese Copyright,” above note 26 at 291–93.

has narrated, the creative process is already situated in a particular cultural context and is always undertaken by a set of relational networks of actors, and they are characterized as contributors.

Instead of seeing the author as an isolated solitary genius, this chapter has articulated a relational theory of authorship, situating authors within a network of relations with other contributors, users, and the public. The mission of copyright law is to structure the relations of the contributors of creativity and cultural innovation through the allocation of rights and powers within the dynamics of creative processes that shape these relations.

The set of relational networks of creators and their contributions are summarized as dynamic relations between the pre-FC (pre-FC contributor, the culture), the FC (initiating contributor, the first author), and the post-FC (ensuing author and secondary initiating author).

This relational approach sponsors a more conversational and flexible copyright regime that is conscious of economic value. The public and consumers are entitled to more freedom and rights of using, sharing, and disseminating copyrighted works. Moreover, it allows individuals the freedom to make contributions to human culture and knowledge based on any existing intellectual materials in a more dynamic and accommodating context.