To share is fair: The changing face of China’s fairuse doctrine in the sharing economy and beyond

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To share is fair: The changing face of China’s fair use doctrine in the sharing economy and beyond

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**ABSTRACT**

Copyrighted works are greatly entwined with the concept of the sharing economy because of their status as informational public goods. Unlike commercial sharing models that address tangible goods such as bikes and houses, the sharing of which is limited by their physical nature, sharing models for intangible copyrighted works such as Google Books and live game webcasting must account for the comparatively unfettered ability for these to be shared. Accordingly, these models are more focused on exploiting such works to their full commercial potential. However, these sharing models are to a large extent based on the unauthorised exploitation of copyrighted works and will be unworkable if the related copyright issues cannot be solved. The interest that copyright owners have in exclusivity must thus be balanced with the public’s interest in further exploitation of copyrighted works. Article 22 of the Copyright Law of China outlines an exhaustive list of copyright exceptions; such a restrictive list is incompatible with the sharing economy. The Chinese courts have realised this problem and have gone beyond the law in their judgments, taking a cue from their US counterparts. However, many of these decisions appear to be inconsistent with one another.

To address the aforementioned problems, this paper examines the latest proposed amendment to the Copyright Law of China and proposes several legislative and judicial actions that could help promote the sharing economy. At the legislative level, enacting legislation based on a refined open-ended fair use model is necessary to promote the development of the sharing economy. At the judicial level, Chinese courts should employ the concept of transformative use to correctly interpret legislation based on the proposed open-ended model. With transformative use as the cornerstone of copyright policy, the public gains the freedom to share others’ works, participate in the innovation process, and create works with new value. Moreover, authors would retain an incentive to create works under such a legal regime because market substitution will not occur if a work is used for a different expressive purpose than that for which the work was originally created. Thus, a balance can be achieved between promoting the sharing economy and protecting the exclusivity of copyright in China.

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1. Introduction

A sharing economy, according to the Oxford dictionary, means ‘[a]n economic system in which assets or services are shared between private individuals, either free or for a fee, typically by means of the Internet’. A sharing economy entails collaborative consumption (CC), which is a term that describes the development of information and communication technology (ICT), consumer awareness, the ubiquity of social commerce, and collaborative online communities. The full scope of a sharing economy has yet to be defined and is still evolving, but it can already be described as an ‘umbrella concept that encompasses several ICT developments and technologies, among others CC, which endorses sharing the consumption of goods and services through online platforms’. Such a broad definition enables the concept of a sharing economy to transcend its representative models such as product service systems, redistribution markets, and collaborative lifestyles, and encompass the shared consumption of digital goods such as songs, movies, books, photographs, and even video games.

Unlike the sharing of tangible goods such as bikes and cars, which have typically been considered, and afforded the protection of, private property, shareability is inherent in the nature of copyrightable works, and thus, copyrighted works have been considered a ‘classic public good’. In this sense, the idea of sharing the consumption of copyrighted works is natural and congruent with the sharing economy concept. The sharing models for tangible goods have been focused on sharing the use of an item of property in the traditional way (e.g., a car used for driving) because of the exclusive and rivalrous nature of personal property; however, the sharing models for intangible goods focus more on the exploitation of a work to its full commercial potential (e.g., live game webcasting) because of its status as a public good.

With the development of ICTs and the robustness of collaborative online communities, many new commercial models for utilising works have been discovered. No physical limitations apply to the sharing of digitalised works, and the broadest possible distribution of these works arguably leads to the realisation of the maximum potential of these works. However, copyright grants exclusivity to owners of works. If sharing is unlimited, the authors may suffer when the aggregate value of the unauthorised use eclipses that of the copyrighted use. Copyright owners are entitled to the control of distribution and utilisation of their works, albeit with some exceptions. Balancing the interests of copyright owners and other users is a critical challenge in a sharing economy setting.

Sharing models built on user-generated content (UGC) serve as a good example. Because of the development of new technologies, consumers can use copyrighted materials to create new works and conveniently distribute them. Online platforms such as YouTube enable some of these creators to successfully attract many fans and followers, which in turn provides them with more opportunities to commercialise their UGC. Film review videos and live game webcasting are two notable examples of this phenomenon. According to a report published by Research, in 2017, the market value of live game webcasting reached 8.7 billion yuan in China. However, most of these examples of UGC involved the use of unauthorised copyrighted materials, and thus would be considered copyright infringements under the copyright laws of most countries, unless justified by some copyright exception. Apparently, one spill over effect of the full availability of artistic works is the potential to generate new ways of exploiting said works, with the Google Books Project and Google thumbnails representing two notable examples. Google, as a deep pocket, has been regularly sued for copyright infringement in the global market. It stands to reason that copyright exceptions are likely to be at the heart of the problem.

As noted by Senftleben, the Internet industry depends on robust copyright exceptions. To resolve the conflict between the sharing culture on the Internet and exclusivity of copyright, some solutions have been proposed or implemented. For example, Canada enacted a new copyright exception rule for non-commercial UGC in 2011. Lessig proposed the Creative Commons (CC) licensing mechanism, and Lee proposed The
Non-Profit Internet Copyright Exemption Act. In contrast to these proposals that require either a fundamental revision of current copyright law (Canada is the only country that adopts a UGC exception) or the adoption of a complicated licensing system, this paper examines the fair use model, which is the copyright exception mechanism provided for in the Copyright Law of China (CLC), and discusses how the fair use regime in China can be amended to effectively promote the sharing economy.

Section 2 of this paper explains the fair use regime of the CLC, Sections 3–4 analyse three new sharing models for copyrighted works, namely video-sharing platforms, live game webcasting, and the Google Books Project, and then introduce the critical concept of transformative use and its judicial applications in China. Section 5 describes the future model of a fair use regime in the CLC with a view to promoting the sharing economy, and the paper ends with a conclusion.

2. The fair use regime in the copyright law of China

The CLC includes a chapter entitled ‘Limitations on Copyright’ that details the circumstances in which a work can be used without the copyright holder’s permission. It consists of only two Articles, Article 22 and Article 23. Article 23 addresses the circumstances in which a work can be used without authorisation if the appropriate remuneration is paid to the copyright holder according to the related regulations. By contrast, Article 22 concerns the circumstances in which a copyrighted work can be used without authorisation from, or paying remuneration to, the copyright owner. Unlike the fair use doctrine codified in US copyright law that provides for an open system, Article 22 provides an enumerative and exhaustive list of exceptional circumstances. Nevertheless, because of the profound influence that the principles of US copyright law have had on Chinese law, Chinese scholars usually refer to Article 22 as the ‘fair use clause’ and call Article 23 the ‘statutory license clause’.

Article 22 of the CLC lists 12 fair use exceptions that mainly cover the use of works for purposes that are private and non-commercial, or for use in the context of making a commentary, education, or facilitating the public’s access to information. In addition to the closed list, Article 21 of the 2013 Regulations for the Implementation of the CLC, which is a set of detailed supplementary rules promulgated by the State Council and the National Copyright Administration, provides two further conditions, requiring that the use ‘may not prejudice the normal use of the work’ and ‘may not unreasonably prejudice the lawful rights and interests of the copyright owner’. These two requirements clearly stem from the ‘three-step’ test in the Berne Convention. Article 9(2) of the Berne Convention requires its signatories to limit their copyright exceptions to ‘certain special cases’ and to ensure that a permitted exception ‘does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’. Because Article 22 of the CLC limits the permitted copyright exceptions to 12 special cases and further provides that the author and the title of the work ought to be indicated, and the copyright owner’s other rights should not be infringed, it is evident that the copyright exceptions model of the CLC fully complies with the ‘three-step’ test of the Berne Convention.

The weakness of a closed list model is readily apparent: it is not sufficiently flexible to accommodate new uses of works that are ‘fair’ to the development of technologies. Generally, this weakness could be overcome by using one of two approaches. The first would be to add new copyright exceptions to the closed list. For example, in 2014, the United Kingdom introduced a new exception for parody. Currently, the European Union is also planning to adopt a new exception for text and data mining. The second approach would be to adopt a flexible copyright exception regime. A clear example is § 107 of the US Copyright Act. In light of § 107, adjudication of fair use copyright claims in the US may refer to the following four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The four-factor assessment approach of the US is arguably better suited than the first approach for accommodating new

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16 CLC, Chapter 4.
17 CLC, Article 23.
19 CLC, Article 22.
21 Ibid, Article 21.
22 Berne Convention, Article 9(2).
23 CLC, Article 22.
24 Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.
26 US Copyright Act § 107.
technologies; the first approach requires the intervention of the legislative body, which is ineffective for keeping pace with rapid technological advances.27 Because of the advantageous flexibility of the US approach, the four-factor assessment has been codified in the Copyright Act of Israel28 and Copyright Act of Singapore.29 China, however, has not adopted the US approach. Instead, it has attempted to overcome the inflexibility of the closed list model through judicial activism.30 The following sections discuss how Chinese judges have creatively interpreted Article 22(2) to appropriately adjudicate the challenges of the digital era, even considering the ‘four-factor’ test and the concept of ‘transformative use’ that originated in the US. This judicial activism has profoundly shaped copyright sharing models in China.

3. First model—UGC on online sharing platforms

Online sharing platforms represent a typical sharing economy. By allowing users to upload UGC to their platforms, online sharing platforms provide users a new way to express themselves and potentially commercialise their UGC.31 The top 10 highest paid YouTube stars reportedly made more than US$10 million by sharing their UGC online in 2017.25 However, examination of the UGC that have been uploaded to online sharing platforms such as YouTube (or Youku in China) reveals that many of these works are potentially infringing because they have used parts from pre-existing works without asking for permission. In China, because of infringement concerns,33 the famous Chinese video-sharing platform Bilibili had to remove large quantities of UGC (chiefly, remixes),34 which not only affected the operation of Bilibili but also harmed the UGC creators’ interests. In the following section, this paper examines how UGC is regulated under the present fair use regime.

3.1. Creative statutory interpretation

Among the enumerated exceptions in Article 22, subsection 2 is most relevant to the sharing models discussed in this paper. According to Article 22(2), one may insert an appropriate quotation from a published work into a work for the purpose of introducing or commenting on a work or demonstrating a point.35 On the Internet, many UGC creators incorporate copyrighted materials from others’ works to poke fun at the original works or use them to express their opinions on public figures or social events. However, most examples of UGC do not reference the authors and titles of the original works on which they are based, which raises concerns whether the UGC creators can claim the fair use defence under Article 22(2).

If Article 22(2) were interpreted doctrinally, the UGC creators would be required to provide the authors and titles of the used works to make a successful fair use claim. However, Chinese courts have in practice focused on the purpose of the use and whether a quotation was appropriate, usually excusing the requirement of attribution. For example, in a recent case concerning a movie poster that used two copyrighted cartoon characters,36 the attribution requirement was mentioned but excused by the court. The defendant produced a movie called The Struggle of 80’s.37 To promote the movie, the defendant designed a poster depicting two big photos of the stars in the centre, which were surrounded by many small cartoon figures. The cartoon figures represented some typical items and characters that belonged to the childhood memories of those who were born in the 1980s—two of which were still under copyright protection. Consequently, the plaintiff sued the defendant for copyright infringement. The court determined that the defendant’s use of the two cartoon figures was to illustrate the theme of the movie: people who were born in the 1980s.38 Because the depiction of the copyrighted cartoon figures was quite small on the poster compared with the photos of the movie’s central stars, the court held the use was appropriate.39 With regard to the requirement of Article 22 that ‘the name of the author and the title of the work [be] mentioned’ (apparently a post digital era requirement), the court held that adherence to this provision was unnecessary because it would

27 Senftleben (n 11) 527.
29 Copyright Act of Singapore, Article 35(2). Although Article 35(2) still uses the term ‘fair dealing’, it, in essence, resembles the US fair use model. Further, in addition to directly adopting the four factors from US law, the Copyright Act of Singapore introduced a fifth factor: ‘the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price’.
30 Judicial activism has been a major topic in China for many years, reflecting the fact that the Chinese judges tend to interpret laws creatively and sometimes even make new laws when they feel it necessary rather than merely apply the law. See Wang Chengguang, ‘Law-making functions of the Chinese courts: Judicial activism in a country of rapid social changes’ [2006] 1 Frontiers of Law in China 524–549.
33 Although ‘safe harbor’ provisions have been commonly adopted in many jurisdictions to exempt hosting ISPs like YouTube from liability under certain circumstances, video-sharing platforms still, particularly in China, face a significant legal risk in operation. See generally Jie Wang, Regulating Hosting ISPs’ Responsibilities for Copyright Infringement: The Freedom to Operate in the US, EU and China (Springer Nature Singapore 2018) 73–138.
35 CSC, Article 22(2).
36 Shanghai Animation Film Studios v. Zhejiang Xinying Niandai Culture Ltd. and H. Brothers Shanghai Cinema management Ltd., Shanghai Pu Tu District People’s Court (2014), Decision No. PM(2)CZ 258.
37 In China, ‘the 80’s’ is a specific term representing the people who were born in the 1980s.
38 Shanghai Animation Film Studios v. Zhejiang Xinying Niandai Culture Ltd. (n 36).
39 Ibid.
destroy the integrity of the poster if the authors and titles were to be displayed on it.\textsuperscript{40}

In another case,\textsuperscript{44} the newspaper Global Times published an article discussing the uncertain future of the journal called Popular Movies and used three cover photos from past issues of the journal in the article without permission. These cover photos were copyrighted, and the plaintiff sued Global Times for copyright infringement. In this case, the court found in favour of the defendant’s fair use claim for the following three reasons: first, the cover photos were used to give readers a sense of the journal being discussed in the article;\textsuperscript{42} second, the copies used in the article were much smaller than the original images;\textsuperscript{43} third, because the cover photos were quoted in an article for purposes relating to introduction and comment, it was inappropriate to require the defendant to indicate the authors of the photos depicted in the article.\textsuperscript{44}

Contrary to the court’s opinion, we contend the third reason was rather weak because it would not have been a significant burden to indicate ‘copyrighted by...’ below the photos, and adding the citation as such would not have affected the integrity of the article.

From these two decisions, it can be concluded that citing the names of the authors and titles of original works is not crucial for establishing a fair use defence under Article 22(2). More importantly, the creative interpretations of Article 22(2) in these two cases, which apparently approved of utilising an entire work for commercial purposes, gave broad latitude to UGC creators to claim fair use defences, thereby helping to foster commercial sharing models based on UGC.

3.2. \textit{Parody—calling for a flexible fair use regime}

Although these creative interpretations of Article 22(2) bolstered the ability of UGC creators to wield a fair use defence, it is still risky for Internet users to incorporate others’ works into their UGC because the permissibility of adaptations of works vary and copyright claims are analysed on a case-by-case basis. Although copyright owners’ friendly attitude toward individual infringers may save UGC creators from copyright troubles, the situation in the case of parody is much more complicated. Unlike other forms of UGC, parodies are critical and may potentially harm the reputation of the original works and their author. Consequently, copyright owners tend to take an intolerant stance toward people who criticise their works using parody. Therefore, establishing the legal status of parody is crucial for emerging businesses based on the sharing of UGC.

The very first well-known case of video parody in China was The Bloody Case that Started from a Steamed Bun (hereinafter The Steamed Bun), a 2006 video parody created by the Chinese video blogger Ge Hu.\textsuperscript{45} The author satirised the famous direc-


\textsuperscript{47} Because of the popularity of The Steamed Bun, Ge Hu received the investment to make several other comic videos, and now his primary business is to direct advertising videos. See ‘What Ge Hu is doing now?’ (Zhihu) <www.zhihu.com/question/19893104> accessed 3 August 2018.

\textsuperscript{48} Tianxian He, Copyright and fan productivity in China (Springer 2017) 183.


\textsuperscript{50} Liang Zhiwen, ‘Work is not Taboo—Comments on the Copyright Dispute Caused by The Steamed Bun’ [2007] 1 Journal of Comparative Law 120 (in Chinese).

\textsuperscript{51} The fair use doctrine in the US mainly means the ‘four factors’ test prescribed in 17 U.S.C. §107.

\textsuperscript{52} In this case, the court held that 2 Live Crew’s satirical take on ‘Oh, Pretty Woman’ was fair use because a substantial quantity of copying could be justified by the fact that the effectiveness of parody relied on ‘recognizable allusion to its object through distorted
and argued that Chinese courts should learn from their US counterparts in terms of how to deal with parodies, and find in favour of defendants’ fair use defence in parody cases. Among the reasons to favour the fair use defence, Chinese academics have focused on the concept of ‘transformative use’ that developed in US case law, and have argued that China should introduce the concept of transformative use to its fair use assessment to comport with the realities of the digital era. The Chinese judiciary has responded positively to Chinese legal scholars’ call for a flexible fair use model, referencing the US’s four factor analysis and transformative use in fair use decisions.

Leval contended that a transformative use ‘must be productive and must employ the quoted matter in a different manner or for a different purpose from the origin’. If a quotation of copyrighted materials does not supersede the original, but instead adds value to the original through transforming the quoted materials ‘[to create] new information, new aesthetics, new insights and new understandings’, such use ought to be protected by fair use doctrine for the sake of enriching society. Transformative use helps to enlarge the fair use spectrum, thereby increasing the freedom of the public to create UGC.

3.3 The struggle—live game webcasting

As a variation of online sharing platforms, the sharing model of live game webcasting is another excellent example which demonstrates the copyright risks, and the potential, of a business model based on sharing UGC. According to a survey, the market size for live game webcasting will reach 24.6 billion RMB in 2020. The success of live game webcasting relies on its interactivity and sharing features. By sharing their creative performances with netizens and interacting with them, webcasters have successfully collected a large number of fans, which has led to a prosperous live game webcasting industry in China.

The rapidly rising market value of live game webcasting has also attracted the attention of copyright owners who have argued that the very essence of the industry, which is the sharing of copyrighted video game screens, is a prima facie act of copyright infringement. Copyright owners have thus begun to attempt to use their copyright over games to control the live game webcasting market, which is currently in the hands of independent webcasting platforms. Some copyright owners have begun to sue webcast service providers, asserting copyright infringement claims. However, webcasting platforms have a powerful defence weapon—fair use. Determining whether fair use covers live game webcasting is thus of vital importance to regulate this new market.

The case NetEase v. Guangzhou Huaduo exemplifies the aforementioned conflict. NetEase is a Chinese Internet giant that has operated the famous online game called Fantasy Westward Journey 2 for more than 10 years. After finding out that Guangzhou Huaduo Company, the owner of the major webcasting platform YY.com, had encouraged its contracted webcasters to webcast and rebroadcast the playing of Fantasy Westward Journey 2 in 2012, NetEase sued Huaduo for copyright infringement and unfair competition in 2014. In October 2017, the Guangzhou Intellectual Property Court (hereinafter GZIP Court) denied the defendant’s fair use claim and ruled that Huaduo had infringed NetEase’s copyright in the said game and awarded 20 million RMB in damages.

The rationale behind the judgment is not hard to understand. The game itself is copyright protected software, and the copyright is owned by NetEase. Separately, the graphical characters, scenes, objects as artistic works, the background music as musical works, and the plot and other literary descriptions as literary works are also copyright protected. The GZIP Court thus ruled that in general the game screen was protected as a ‘work created by a process analogous to cinematography’ under Article 3 of the CLC. The court also determined that the involvement of a human player added no creative effort to the gameplay work because the developer had already defined the essential parts of the game; thus, the player was merely following predefined instructions. By webcasting a protected work and exhibiting the game screen to subscribers, Huaduo had infringed NetEase’s copyright over the work. The contentious part of the case was whether live game webcasting could be justified by existing copyright exceptions as claimed by the defendant. The court declined to find fair use, pronouncing that ‘even if the game screen was utilized as a tool to demonstrate the player’s skill, it is just a difference of perspective between player and viewers, and it
The Chinese court in this case referred to the concept of ‘transformative use’ in assessing whether a fair use defence could be established, but asserted that only when the value of the original work vanished into the new work could a transformative use be established. The GZIP Court’s interpretation set a very high standard for successfully claiming transformative use because it is almost impossible for a user to prove that the original work’s value has been completely transformed in the new work. Moreover, in the NetEase case, the GZIP Court also wavered between adopting an open fair use mechanism and confining fair use to the enumerated exceptions in Article 22. In its decision, the GZIP Court asserted that from the perspective of doctrinal analysis, online game webcasting was not covered by any listed exceptions in Article 22, and thus should not be held to be fair use. This decision reflects the struggle of Chinese judges to decide whether to adopt an open fair use mechanism and how to interpret transformative use.

4. The second model—Google books library project

The Google Books Library Project is another great example that illustrates the uniqueness of sharing models of copyrighted works. Information technologies have not only empowered normal people to create UGC but have also facilitated the public discovery of new ways of exploiting existing works. In 2004, Google launched its ambitious book-scanning project called the Google Books Library. So far, Google has scanned more than 20 million books into a database. More importantly, Google made the text available on the Internet. By using ‘snippets’, the public can search through the database using keywords. The Google Books Project has undoubtedly facilitated public access to the knowledge and information contained within the scanned books. However, many of these books are still under copyright protection, and Google did not ask for permission beforehand. Unsurprisingly, Google’s large-scale book digitalisation project came to the attention of copyright owners, and Google was sued for copyright infringement in various jurisdictions. As in the case of online game webcasting, the Google Books Project was also a new sharing model based on the free utilisation of existing works. Because it consisted of the collective sharing of copyrighted works, permission from the copyright owners would thus be required unless fair use could justify it. A verdict would thus decide whether this type of sharing model was sustainable or not.

Both US and Chinese courts have ruled on the Google Books Project. This section examines the judgments of these two jurisdictions, discusses how the US fair use doctrine influenced the Chinese courts, and explains how transformative use became the crucial factor for the Chinese courts to find a valid fair use claim.

4.1. The US courts—transformative use

In the Google Library case, it was an indisputable fact that Google scanned approximately 20 million books from around the world and stored the copies on its servers without asking for permission from their copyright owners. As this clearly constituted prima facie copyright infringement, the critical question was whether Google’s act constituted fair use according to the four-factor test provided by § 107 of the US Copyright Act.

The court emphasised that transformative use, which developed from the first factor of the fair use doctrine, was the key factor in deciding whether fair use could be established. The court concluded that Google’s use of copyrighted works was highly transformative on the basis of the following reasons: first, it was transformative to use the text of books to facilitate searches by displaying snippets of books; second, Google Library transformed book text into data that could be used for further research such as data mining and text mining; third, because the public could not read through the entire books solely by using Google Library, it would not supersede or supplant the books but rather ‘add value to the original’. Fourth, although Google Library was developed for commercial purposes, it also served several relevant educational purposes. Regarding the second factor—the nature of the copyrighted work—and the third factor—the amount and substantiality of the portion used, the court found that these two factors also supported Google’s fair use argument because most of the books scanned by Google were non-fiction titles and Google would only display snippets of text in response to users’ search inquiries. With respect to the fourth factor—effects on the works’ potential market or value, the court concluded that Google’s scanned-in library would not serve as a market substitute for the original books. On the contrary, it would likely promote the sales of books and thereby benefit the copyright owners. Therefore, Google’s fair use defence was successfully established in the district court.

On appeal, the United States Court of Appeals for the Second Circuit affirmed the holding of the district court concerning fair use. First, the court established a rule for evaluating a fair use claim: all four factors should be comprehensively assessed as a whole and courts should refer to the overall objective of copyright law when interpreting the four factors.

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66 NetEase v. Guangzhou Huaduo (n 58).
67 Ibid.
68 This paper will mainly focus on the courts’ application of the fair use doctrine/exceptions in the US and China. For a detailed account of both cases in the US and China, please see Yong Wan, ‘Similar Facts, Different Outcomes: A Comparative Study of the
71 Ibid, para. 66.
72 Ibid, para. 67.
73 Ibid, para. 68.
74 Ibid, para. 69.
75 Ibid, para. 74-75.
76 Ibid, para. 77-78.
Further, the court opined that the four factors were not equally significant in a fair use assessment in light of precedents. In *Harper & Row Publishers, Inc. v. 3 Nation Enterprises*, the United States Supreme Court held that the fourth factor ‘is undoubtedly the single most important element of fair use’. In *Campbell v. Acuff-Rose Music*, the United States Supreme Court also emphasised the predominance of the first factor and held that the more a copyrighted work was used for new and transformative purposes, the more that use may serve the copyright law’s objective of enriching public knowledge and the less that use would amount to a substitution of the original work that could cause market harm to the copyright owner. It is evident from these cases that factor one is closely related to factor four. Further, factor three is also related to factor four because using a significant amount of or a substantial part of a work increases the likelihood that a use amounts to a substitution of the work and thus harms the copyright owner’s interests. Factor two has rarely played a key role in deciding fair use disputes. To return to the case of Google Books, the appellate court held that the Google Library Project constituted a fair use because Google’s act of scanning the books was highly transformative and caused no significant adverse effect to the potential market for or the value of the copyrighted works.

From the discussion of the Google Library case in the US, it can be concluded that both factor one and factor four play significant roles in deciding fair use disputes, particularly with respect to establishing transformative use. Typically, if the use of a copyrighted work is deemed to be transformative and results in no substantial market loss to the copyright owner, such a use will be fair. Further, whether the use is of a commercial nature does not substantially affect a fair use decision. Giving more weight to transformative use in fair use determinations not only encourages more business entities to develop new and transformative ways to exploit existing works without interfering with copyright owners’ normal exploitation of their works, but also serves the goal of copyright protection because it enriches public knowledge while preserving authors’ incentives to create.

4.2. The Chinese courts: transformative but still infringing

Google was also sued by Wang Xin for copyright infringement in China because the Library Project scanned several books authored by her without asking for permission. Here, the copyright owner claimed that Google infringed both the right of reproduction and the right of dissemination on information networks. This case went through two reviews, and both courts held that Google committed copyright infringement; however, the reasoning of the two courts is quite different.

In the first instance, the Beijing First Intermediary People’s Court (hereinafter BJFIP Court) held that the Google Books Library constituted fair use regarding the right of dissemination on information networks but denied Google’s assertion of fair use with respect to the reproduction right. Like the US courts, before analysing whether Google had infringed the copyright owner’s economic rights, the BJFIP Court reviewed the overall objective of copyright law. As stated in the decision, the purpose of having copyright protection is not just about granting authors exclusive rights over the use and transmission of their works, and is also not merely concerned with incentivising authors to create works. Instead, the overall objectives of copyright law ought to be understood as encouraging more people to engage in creating works by granting authors limited exclusive rights, and more importantly, promoting the use and dissemination of good works. Therefore, in specific situations, if the unauthorised use of a work does not conflict with the normal exploitation of the work and causes no unreasonable damage to the copyright owner’s legal interests, such use can usually be considered fair.

Regarding the right of dissemination on information networks, the BJFIP Court found in favour of Google’s fair use defence for two reasons. First, Google only displayed the snippets of works, and this would not substantially affect the market value of the works; second, by displaying snippets of works, Google Books provided users with a valuable service that allowed them to search for information about works, which constituted a transformative use. However, regarding the reproduction right, the BJFIP Court held Google committed copyright infringement. First, Google made copies of entire works, which was an act in conflict with the normal exploitation of the works. Second, the copies of entire works generated potential risks to the market value of the works and could unreasonably damage the copyright owner’s legal interests. The BJFIP Court further seemed to assert that whether Google’s act constituted fair use with respect to the right of dissemination on information networks, this was nevertheless irrelevant to the determination of whether Google’s copying of the entire works constituted fair use. The court also held that whether there existed a follow-on use or transmission of copies would not affect the determination of fair use regarding the copying itself.

In the second instance, the Beijing Higher People’s Court (hereinafter BHP Court) first determined that, in addition to the 12 circumstances of fair use enumerated in Article 22 of
the CLC, other circumstances in which the use of a work may also be fair exist, and that several factors ought to be comprehensively assessed when determining fair use. The factors were quite similar to the US fair use doctrine and included the following: the purpose and character of the use, the nature of the copyrighted work, the character and the amount of the portion used in relation to the copyrighted work as a whole, whether the use affects the normal exploitation of the work, and whether the use unreasonably prejudices the legitimate interests of the copyright owner. The BHP Court stated that in certain instances where copying works pre-conditioned a fair use, the copying activity should be assessed with the follow-on use of works as a whole, and if the follow-on use constituted fair use, the copying activity should also be determined to be fair. Therefore, in the Google Books case, if displaying snippets of works in response to users’ search requests constituted fair use, the copying of those works as a precondition to fulfill the search function also constituted fair use. However, the BHP Court did not discuss whether Google’s display of snippets of work constituted fair use with reference to the factors mentioned above. Instead, it directly denied Google’s fair use defence by claiming that Google had not provided evidence to prove its fair use claim.

From this discussion of the Google Books Library cases, it is evident the Chinese courts have realised the disadvantage of limiting fair use to enumerated circumstances and brought in a more flexible approach for finding fair use by learning from their US counterparts. Although the Google Books Library Project was held to be copyright infringing, this was because Google failed to provide evidence of fair use. If sufficient evidence had been introduced, the Google Books Library would have been highly likely to be held to be a fair use in light of the ‘fair use’ factors expounded by the BHP Court. Through this examination of the Google Books Library decisions in the US and China, it would appear that the fair use criteria employed in these two jurisdictions are converging.

5. Moving into the future

From the cases discussed previously, it is evident that the Chinese courts have tended to cite the concept of transformative use to decide fair use cases in the digital era. This tendency echoes contemporary US judicial practices. As explained by Netanel, since 2005 ‘the transformative use paradigm has come to dominate the fair use case law’. Introducing the concept of transformative use into China has overcome the disadvantages of the closed-list model to a large extent, and the fair use regime in China has seemingly become sufficiently flexible to cover new types of fair use that will arise in the future, which will help to foster a sharing economy based on copyrighted works. Nevertheless, the cases discussed above also demonstrate that the Chinese courts have different understandings of what constitutes transformative use, which may result in legal uncertainty. Further, because the copyright exceptions model that the CLC provides is still an exhaustive list, most Chinese courts still waver between taking a strict doctrinal approach and taking a more flexible approach. These inconsistencies in judicial practice pose a significant threat against the development of future commercial sharing models in this field, and the law should change accordingly to accommodate the changes in the market.

The latest revision draft of the CLC brings in an open-ended provision in the fair use clause. Article 43 (the equivalent of Article 22 in the current CLC) provides a thirteenth exception called “other circumstances” as a “catch-all” provision after the extant twelve fair use exceptions. The draft has also added a subsection that mirrors the three-step test as Art. 43: 2: ‘the use of a published work pursuant to the above provisions, may not prejudice the normal use of the work and may not unreasonably prejudice the lawful rights and interests of the copyright owner.’ After examining the structure of the Ar-
5.1. Whether to institute an open-ended fair use clause: flexibility versus legal certainty

Whether China should introduce an open-ended fair use regime is debatable because of concerns regarding legal certainty. If an open-ended fair use clause is adopted, courts may have too much leeway in determining what constitutes fair use, and their decisions may thus be unable to offer clear guidance concerning acceptable use to either copyright owners or users of copyright works. Such a risk may be a valid concern, but after weighing flexibility against legal certainty, we favour instituting an open-ended fair use clause.

Because of the development of information technologies, new potential uses for works are discovered and developed not only by copyright owners but also by users. To maximise the value of works, it is necessary to enlarge the freedom of users to make use of others’ works. As noted by Jaszi, ‘everyone who makes culture or participates in the innovation economy relies on fair use routinely—whether they recognise it or not’. Further, the transition to a digital economy has caused copyright law to extend to numerous aspects of daily human activity, and now nearly every online communication is potentially subject to the scrutiny of copyright. Most importantly, almost all information technologies are potentially capable of being used for copyright infringing activities. Accordingly, a flexible fair use doctrine is necessary to cover unanticipated new uses and technologies.

An exhaustive list of fair use exceptions may not necessarily enhance legal certainty; to the contrary, it may create legal uncertainty in fair use decisions. As demonstrated in the aforementioned Chinese case decisions, an outdated exhaustive fair use list did not prevent courts from interpreting fair use creatively to cover those uses of works that they believed to be fair but were not listed as exceptions. This practice tends to cause more legal uncertainty than would adopting a flexible fair use regime because courts cannot take any guidance from statutory rules to draw the boundary of fair use. Consequently, they must rely solely on their understandings of ‘fair’ to make decisions, which tends to cause inconsistency between the judgment of different courts. Generally, the Chinese courts have taken one of three approaches to applying the current fair use clause (Article 22). The first is maintaining the status quo and compromising somewhere between adopting an open-ended fair use mechanism and hewing to the doctrinal interpretation of the enumerative list, as the judges did in the case of NetEase v. Guangzhou Huadao, which was discussed in Section 3.3. The second approach uses the US four-factor assessment and concept of transformative use to decide fair use cases, as the judges did in the Google Library case. The third approach assesses fair use claims by referring to the three-step test. The attitude of the Supreme People’s Court (SPC) toward thumbnails is a typical example of that. According to the latest Judicial Interpretation of online copyright disputes, where a network service provider provides thumbnails, if such act neither affects the normal use of the alleged work nor unreasonably damages the right holder’s lawful rights and interests in the work, the court shall support the claim of the network service provider that it has not infringed upon the right of dissemination on information networks of the copyright owners. It is clear that the divergent applications of the fair use clause among Chinese courts results in considerable legal uncertainty.

An open-end fair use regime would be capable of achieving legal certainty. It is generally accepted that the legislative process is time-consuming and always lags behind the development of technologies. This problem has become much more prominent in the digital era because it is infeasible to update the law frequently to keep pace with the rapid development of information technologies. In this context, a flexible fair use regime would allow the law to ‘adapt to changing technologies and uses without the need for legislative intervention’, which would help create legal certainty. As argued by Samuelson, ‘fair use is both more coherent and more predictable than many commentators have perceived once one recognises that fair use cases tend to fall into common patterns’. In China, legal certainty can also be guaranteed to a large extent through the promulgation of Judicial Interpretations and publication of Guiding Cases on fair use. The Chinese courts have long recognised the importance of precedent. In 2015, the SPC set up the first Research Centre on Intellectual Property Case Guidance System (IPCGS) at the Beijing Intellectual Property Court, which aimed to explore

105 Provisions of the Supreme People’s Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks, promulgated by Order No. Fa Shi (2012) 20 of the Supreme People’s Court of December 17, 2012.
106 Ibid. Article 5. According to this Article, if a thumbnail substantially supersedes the original one, the People’s Court shall determine that the network service provider has committed copyright infringement.
110 Peter Feng, Intellectual Property in China (Sweet & Maxwell 2nd ed. 2003) 32-35.
how to unify the application of IP laws through selecting, arranging, and compiling guiding cases. In judicial practice, it is typical for Chinese judges to learn from each other when making decisions. According to a survey, from November 6, 2014 to October 31, 2016, the Beijing Intellectual Property Court had cited precedent in the decisions of 168 cases. With the establishment and further development of IPCGS in China (especially in two other specialised intellectual property (IP) courts in Shanghai and Guangzhou), it can be anticipated that Chinese judges will refer to guiding cases in IP to make decisions, which will undoubtedly contribute to the consistent interpretation of fair use provisions by courts.

5.2. How to formulate an open-ended fair use regime: a three-step test or a four-factor assessment

Upon close inspection of the Revision Draft of Article 43, it appears to only adopt a two-step test because the newly added ‘other circumstances’ exception does not seem to constitute a ‘certain special case’, which is the first step of the Berne three-step test. Article 43 would thus seem to fail to comply with the three-step test enshrined in various international treaties. Some have even argued that the provision for ‘other circumstances’ should be rephrased as ‘other specific occasions’. This is a reasonable proposal, but we contend that the proposed Article 43.2, which provides for a two-step test, would remain problematic even if it was reworded, and should be replaced by the US-style four-factor assessment.

First, unlike the fair use doctrine with relatively abstract criteria, the three-step test restricts existing exceptions, and the newly added ‘other circumstances’ will be restricted greatly by the other listed exceptions. To become an international standard, the three-step test was in essence the result of ‘diplomatic compromise with little intention [of it being applied] other than in a subjective way by nations [according to their own evaluations]’, and its vague wording was an essential part of that compromise. The vague wording of the three-step test promotes openness and flexibility, but makes it difficult for judges to apply it directly in decision-making. In China, the second and the third steps, namely that ‘the allegedly infringing work does not conflict with the normal exploitation of the [copyrighted] work’ and ‘the allegedly infringing work’ causes no unreasonable damage to the copyright owner’s legal interests’, are usually associated with the market effects in the four-factor assessment. For example, in Zhang Haixia v. Yu Jianrong, the BHP Court held that ‘the defendant’s use of the work would not compete with the plaintiff’s interests in his work’. The court believed that the defendant’s use constituted fair use because it did not conflict with the normal exploitation of the work and caused no unreasonable damage to the copyright owner’s legal interests. However, Gervais correctly noted that even the WTO panel essentially conflated the second and third steps, focusing on economic loss suffered by copyright owners. Geiger et al. contended that only the second step, which examines whether an allegedly infringing work conflicts with normal exploitation, parallels the fourth factor of the US fair use doctrine that examines market effects, and that the third step, which examines whether the allegedly infringing work unreasonably prejudices the legitimate interests of the copyright holder, should be defined as a proportionality test. Because of its vagueness and opaqueness, the Chinese courts have rarely referred to the three-step test to decide fair use cases. By contrast, the four-factor assessment has been codified in the US as a general fair use clause since 1976, and the accumulation of precedent has led to a high degree of clarity and refinement, making it superior to the three-step test with respect to clarifying standards. In China, courts also favour the four-factor test for deciding fair use cases.

Both US and Chinese copyright laws are based on the concept of utilitarianism, which provides the theoretical basis for China’s adoption of the US’s fair use regime. According to Senftleben, the fair use approach can be traced back to the utilitarian foundation of US copyright law. The foundation principle of US copyright law was to incentivise the creation of works, and copyright protection was the tool for promoting overall social welfare through ensuring a sufficient supply of creative works. Within this theoretical framework a four-factor test was formulated to advance these policy goals because it offers flexibility in assessing fair use. The CLC clearly states its policy goal in its Article 1: the Law is enacted for the purposes of ‘protecting the copyright of authors in their literary, artistic[,] and scientific works and [their] rights related to copyright, […] encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and […] promoting the development and flourishing of socialist culture.

115 Zhang Haixia v. Yu Jianrong, Beijing Higher People’s Court (2012), Decision No. GMZZ 3452.
118 Shi (n 34) 88.
121 Senftleben (n 11) 529.
and sciences. At the judicial level, the concept of utility has been frequently evident in China’s case decisions. For instance, in the Google Library case discussed earlier, the BJ-FIP Court opined that the overall objective of copyright law is to encourage more people to engage in the creation of works by granting authors limited exclusive rights, and more importantly, to promote the use and dissemination of good works. The SPC also asserted that under exceptional circumstances where it is necessary to promote technological innovation and business development, the use of a work may be determined to be fair use if four conditions are met—this generally echoes the US four-factor test. Therefore, the CLC embodies a similar utilitarian rationale as its US counterpart and ultimately aims to stimulate creativity for the general public good. Thus, it is indeed reasonable for the CLC to adopt the US four-factor assessment, which has been continually refined and developed by the US courts with an eye toward social utility.

Chinese courts have accumulated useful judicial experience applying the US four-factor assessment. As discussed in Section 3.2, since the first parody case was litigated in China, Chinese academics have advocated using the US four-factor assessment in China and have asserted that the US approach could best accommodate digital technologies. These voices have successfully influenced judicial practice, and Chinese judges have begun to work around the confines of the CLC’s enumerative copyright exception list and refer to the four-factor assessment when deciding fair use cases. Explicitly, the SPC officially endorsed the idea of incorporating the US four-factor fair use assessment in judicial practice in 2009. In light of a document published by the SPC, under exceptional circumstances in which it is necessary to promote technological innovation and business development, the use of works may be determined to be fair use after considering the nature and purposes of the use, the nature of the work(s) used, the quantity and quality of the parts of works used, the effects of the use on potential markets or values, and other factors provided that such use neither conflicts with the normal use of the works nor results in unreasonable damage to the lawful interests of the author. With the SPC’s endorsement of the US four-factor fair use test, more Chinese courts began to use the test for deciding fair use cases, particularly cases related to new digital technologies and sharing models—for example, the Google Library case and live game webcasting discussed earlier. Admittedly, as observed in some civil law jurisdictions that introduced the fair use test, adopting the four-factor test in the CLC will undoubtedly cause difficulties during the transition period as judges learn to apply the test and cause some inconsistency in judicial practice. However, we contend that even if the inconsistency problem cannot be solved completely, it can at least be mitigated to a large extent in China. To begin, as mentioned in Section 5.1, China is currently developing an Intellectual Property Case Guidance System that aims to unify the manner of application of IP laws in China. This system will certainly help to improve the consistency of the interpretation and application of the four-factor test. Next, the SPC can promote consistency through the promulgation of judicial interpretations concerning fair use. In China, because legal provisions are usually quite general and nonspecific, judicial interpretations play an essential role in unifying the application of law and providing guidance to the various levels of courts. The SPC can collect and scrutinise the detailed elements and conditions that have emerged from judgments that applied the four-factor test and incorporate reasonable ones into its judicial interpretations. Additionally, China has consolidated jurisdiction over IP cases, which has helped to resolve inconsistent applications of IP law. Since 2014, China has established three courts specialised in IP in Beijing, Shanghai, and Guangzhou and established 15 IP-specific tribunals in Wuhan, Nanjing, Chongqing, and other large cities; the jurisdiction of these IP-specific courts and tribunals covers the areas in which most IP cases arise in China. The consolidation of jurisdiction ensures that IP cases are heard by knowledgeable and professional judges, which should positively contribute to unifying the application of the law.

The four-factor assessment could provide a better legal climate in which a sharing economy can develop. First, an open-ended fair use clause makes fair use a living tool that can adapt to new circumstances and new technologies. It also allows fair use to serve as an innovation driver for content industries because it provides more space for the public to identify and extract the potential of existing works; this can generate complementary technologies that could increase the value of the original works. Moreover, transformative use—a core element of the four-factor test—encourages productive uses of work and the addition of value to the original work, which frees the public to make use of others’ works. Last, transformative use can also prevent copyright owners from unreasonably expanding the scope of their exclusivity to works in unexpected markets. In the NetEase case discussed

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123 CLC, Article 1.
127 The US Congress pointed out, ‘The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings ... but upon the grounds that the welfare of the public will be served ... Not primarily for the benefit of the author, but primarily for the benefit of the public.’ See H. R. Rep. No. 2222, 60th Cong., 2d, Sess. 7 (1909).
128 Several Opinions of the Supreme People’s Court on Some Issues in Fully Giving Rein to the Function of Intellectual Property Rights Adjudication in Promoting the Great Development and Flourishing of Socialist Culture and Stimulating the Indigenous and Coordinated Development of Economy (n 125).
129 Zhang (n 113) 82.
130 Feng (n 110) 33.
earlier, the plaintiff NetEase aimed to extend its copyright to the game and attain the power to control the live webcasting market of the game—it succeeded. However, under a fair use regime, the plaintiff would probably have lost this case. Live game webcasting is likely to be deemed transformative because it is a platform for exhibiting the webcaster’s skill and interactions with others, which is different from the original purpose for which the game was developed. Moreover, the experiences of watching a live game webcast and playing a game are entirely different; thus, it would not amount to a substitution. On the contrary, it would complement the original market because the viewers of webcasts are likely to be future subscribers to the game. Moreover, it would not undermine a new or potential market for the copyrighted work because the live webcast/broadcast of game playing was never initially intended to be a market for the copyright owner.133

Finally, the four-factor fair use test is compatible with the three-step test put forward in either the drafting history of the Berne Convention or the WTO panel’s decision on §110(5) of the US Copyright Act.134 Thus, replacing the two-step test with the US four-factor assessment would not conflict with the three-step test.

5.3 How to assess fair use in the digital era: sharing versus exclusivity

Copyright is concerned with exclusivity, and fair use sets limitations on exclusivity to define a ‘free use zone’ for the public.135 The fair use test essentially aims to strike a proper balance between the interests of copyright owners and users of works. With respect to how to strike the balance, it is necessary to examine the purpose of copyright law from a policy perspective. Because the CLC embodies the same utilitarian rationale as the US Copyright Act, it is useful to examine how the US courts deal with fair use today.

In current US judicial practice, transformative use plays a major role in deciding fair use cases136 and it is asserted that ‘the utilitarian goal of copyright law, to promote [...] art and science, is generally furthered by the creation of transformative works’.137 Transformative use is correlated with the four-factor fair use test described in § 107 of the US Copyright Act, especially factors one and four. According to US case law, transformative use developed from factor one—the purpose and character of the use.138 The more a copyrighted work is used for transformative purposes, the less that use would lead to market harm to the copyright owner (factor four).139 The crucial part of interpreting transformative use is defining ‘transformative’. Since the leading case on transformative use, Campbell, US courts have consistently emphasised that whether a use is transformative depends on whether that use is ‘for a different expressive purpose than that for which the copyright work was created’;140 examples of this include copying literary works to facilitate information search,141 quoting a work in a parody to criticise its author,142 reproducing a fashion photo in a painting to comment on the mass media,143 and replicating artistic works to illustrate a biography.144 Such an interpretation of transformative use helps to encourage productive uses of works that add value to original works, which serves the copyright law’s overall goal of enriching public interests.

Transformative use requires a restricted assessment under factor four and the confinement of market effects analysis to market substitution. According to Gordon, fair use can only be successfully claimed in cases where a market failure in copyright licensing exists. A defendant must prove that a copyright licensing agreement cannot be reached because of a high transaction cost.145 The market failure criterion is favoured by the US Supreme Court to use for demarcating the potential market for copyrighted works.146 Nevertheless, it is inappropriate to employ this criterion to assess the potential market of copyrighted works in the digital era because the development of information technologies has considerably lowered transaction costs. If such a criterion is enforced, nearly any use of a work, including transformative uses described in the last paragraph, would require permission from copyright owners, effectively prohibiting all existing sharing models related to copyrighted works. Therefore, to make ‘transformative use’ workable, factor four should not be determined by market failure. As stated earlier, transformative use requires the use of copyrighted works to be for different expressive purposes than those for which the works were originally created. Consequently, works generated by transformative use usually would not be in direct competition with the original ones in the market. Thus, it is necessary to confine the interpretation of ‘market effects’ to market substitution to accommodate transformative use. This is justifiable because copyright owners ‘should not be entitled to all conceivable value that might be taken from their materials’,147 and the monopoly of copyright should be confined to the markets that the copyright

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133 When discussing the case of Blizzard, the author stated that: ‘If, yet, Blizzard cannot demonstrate that it suffered any economic harm from the broadcasting industry. Can it be said that rewarding an author for the use of a copyrighted work in a manner that the author had never intended furthered the purported goal of encouraging the creation of arts and science?’ See Jacob Rogers, ‘Crafting an Industry: An Analysis of Korean StarCraft and Intellectual Properties Law’ (JOLT digest, 24 August 2012) <http://jolt.law.harvard.edu/digest/copyright/crafting-an-industry-an-analysis-of-korean-starcraft-and-intellectual-properties-law> accessed 28 April 2018.
134 Geiger et al. (n 118) 612-613.
136 Netanel (n 100) 736.
138 The Authors Guild, Inc. v. Google Inc. (n 77), 34.
140 Netanel (n 100) 768.
141 The Authors Guild, Inc. v. Google Inc. (n 77), 66.
143 Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006).
147 Australian Law Reform Commission (n 107) 132.
holders have real interests in exploiting\textsuperscript{48} such as those in which they trade on ‘the underlying creative and expressive purpose which traditional right holders in music, publishing, film and television rely on’.\textsuperscript{49} Such an interpretation also serves the utilitarian goal of the CLC because the incentive to create works is not undermined by unauthorised but transformative uses and users can have more freedom to make use of others’ works, which can further stimulate creativity and innovation.

Overall, defining fair use with reference to transformative use serves the objective of the CLC and encourages the creative use of others’ works, which is of crucial importance for the development of the sharing economy. The Chinese courts should learn from their US counterparts and accept the dominant role of transformative use in determining fair use.

6. Conclusion

As witnessed over the past few decades, the Internet era is characterised by openness and sharing. The Internet has enabled the sharing of copyrighted works and given rise to new models for sharing copyrighted works such as UGC, the Google Books Library Project, Google Thumbnail, live game webcasting, and others. Through these new sharing models, the potential values of works can be exploited on an unprecedented scale. Determining how to distribute the values uncovered through the new models will have a major effect on the development of the sharing economy. Copyright owners want to claim exclusivity over these additional fruits because they are generated on the basis of their original works. However, if given too much protection, the new potential values of works might never be generated because copyright owners tend to be conservative toward new ‘things’ and tend to seek to preserve the status quo.\textsuperscript{50} To exploit additional new values of works, a limitation should be set on the exclusivity of copyright—the long-existing fair use regime can serve to fulfil this purpose. Enumerating fair use exceptions in an exhaustive list in the CLC is a workable but antiquated approach. A more flexible fair use provision is necessary. We contend that the drafting of the third revision of the CLC offers a timely chance to make the change. To promote a sharing economy, the model two-step test proposed in Article 43.2 of the third revision draft should be replaced by the four-factor test to codify an open-ended fair use clause. Further, Chinese courts should consider whether a use is transformative when interpreting the proposed open-ended clause. If the use of a work is for a different expressive purpose than that for which the work was created, it should be concluded that such a use neither affects the copyright owner’s normal exploitation of the work nor unreasonably damages the copyright owner’s legal interests because the user has exploited a different market than that which the copyright owner relied on; thus, market substitution is not a problem in play. By applying this fair use criterion, users can be encouraged to utilise existing works to create new content or discover new methods to exploit original works and the authors’ incentive to create can also be well preserved. This new approach not only conforms to the overall objective of the CLC but also promotes the core value of the sharing economy. Society as a whole benefits from the abundance of new works and new services generated by new sharing models.

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\textsuperscript{48} Ibid, 23.
