REFORM OF CHINA’S COPYRIGHT LEGISLATION

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ABSTRACT

China’s copyright system has attracted intensive attention throughout the world. It is difficult for Westerners to understand the reason for the historically sluggish evolution of China’s copyright legislation and the current strong desire to reform the copyright system. At the beginning of the twenty-first century, China’s strong desire to join the World Trade Organization (WTO) resulted in a comprehensive amendment of the copyright law. Now China’s great ambition to become a leading country in the cultural and information industries is pushing China to implement legislation reform to respond to information technology developments, rampant piracy, and the public’s need for access to information. This article describes China’s reforms of copyright legislation, examines its motivations, and discusses challenges in the future.

I. THE HISTORICAL DEVELOPMENT OF CHINA’S COPYRIGHT LAW

A. Embryonic Forms of China’s Copyright Protection

The origin of copyright protection is generally deemed to derive from the development of typography. Although the first known movable type system was invented in China,1 widespread implementation of copyright systems all over the country did not begin until the modern age. After the establishment of the People’s Republic of China in 1949, the government took some measures to develop publishing and protect some authors’ rights. For example, a document entitled “Decisions on the Fundamental Principles of Developing People’s Publishing Work” was prepared to emphasize the importance of the publishing industry;2 the “Draft of Tempo-

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1 This type made of baked clay was invented around 1040 A.D. by Sheng Bi. This momentous event was recorded by Kuo Shen, a famous scholar in Chinese history, in his work Meng Xi Bi Tan.

rary Regulations on Remuneration of Literary and Social Science Books” was issued to ensure authors’ remuneration and promote the quality of literary works; and so on. Nevertheless, these measures were invalidated by continuous political campaigns, such as the Anti-Rightist Movement, the Great Leap Forward, and the Cultural Revolution. As a result, a large number of scholars and writers were imprisoned, tortured and even killed due to their offences against the leader’s thought. In such an atmosphere of fear and inhibition, authors’ rights were trampled and “copyright protection in any real form ceased to exist.”

The death of Chairman Mao and the end of the Cultural Revolution allowed the resumption of attention to copyright protection, even though it was quite limited. Shortly after China’s reopening, an agreement regarding reciprocal protection for copyright between China and the U.S. was entered into, which stated that “each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party.” In 1980, China joined the World Intellectual Property Organization (WIPO). Notwithstanding some attempts to prepare a protection regime for copyright, China seemed reluctant to offer comprehensive protection for intellectual creations. For example, instead of creating specific rights for intellectual works, the General Principles of the Civil Law of 1986 classified the intellectual property right “as a kind of civil right, independent of property rights and personal rights.”

B. Reasons for the Sluggish Evolution

A discussion of the slow development of the copyright system in China cannot be isolated from some contributing factors, such as culture, the level of economic development, the political system, and so on. Liter-

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6 Agreement on Trade Relations Between the United States of America and the People’s Republic of China, July 7, 1979, U.S-P.R.C., art. VI(5), 31 U.S.T. 4658.

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ature regarding the relationship between copyright and local culture indicates that the latter not only affects the emergence and development of copyright laws, but also greatly influences copyright enforcement. Professor Peter Yu explains why copyright doctrine struggled with the millennia-old views of the Confucianists that challenged the necessity and expediency of laws.\(^8\) “In a Confucian society, people learn to adjust their views and demands to accommodate other people’s needs and desires, to avoid confrontation and conflict, and to preserve harmony. Litigation, therefore, is unnecessary.”\(^9\) Furthermore, the conception of copyright is not compatible with some crucial moral standards. Traditionally, Chinese people regarded literary and artistic works as a collective benefit; consequently, it was difficult for them to accept the exclusive right of exploitation of important materials needed by other members of society. In addition, contempt for commerce, a popular value in Confucian society,\(^10\) hindered the development of commercial activities and the dissemination of literary and artistic works. In this regard, the overall cultural environment for a long time was not good for the growth of the copyright system in China.

Copyright protection is also relevant to the economic system of a country because of copyright’s heavy dependence on respect for private property. However, essential characteristics of Asian society, including dominance of the state over property and the self-sufficiency of villages, were not conducive to respect for private property. As described by Marx, in parts of Asia, there is no private property, but only individual possession, and the real proprietor is the community.\(^11\) This value judgment controlled Chinese ideology from the monarchical and feudalistic age until the initial stages of the “Reform and Opening Up Policies.”\(^12\) Therefore, it is unsurprising that there was no foundation for accepting the Western concept that “property is a sacred and inviolable right.”\(^13\) When protection of individual property has not been a dominant value in a community, it cannot be expected to successfully develop and implement the copyright system.\(^14\)

There is also an inherent relationship between copyright protection and freedom of speech. Copyright law provides protection for authors’


\(^9\) Id. at 970.


\(^12\) After the end of the Cultural Revolution in China (1966–76), the reform and opening up policies were launched in 1978.

\(^13\) This statement was addressed in Article 17 of the “Declaration of the Rights of Man” of 1789.

\(^14\) Greenberg, *supra* note 5.
creations by endowing them with exclusive rights to use their works, aiming to encourage creation and information dissemination. To some extent, potential economic remuneration serves as an engine of free speech. Even though the copyright system “encroaches upon freedom of speech, . . . this is justified by the greater public good in the copyright encouragement of creative works.”\textsuperscript{15} Therefore, whether a copyright system could be successfully established largely depends on the degree of need for encouraging free expression. It can also be deduced that, in an authoritarian society, there is little pressure to create a copyright system in light of the very limited need for flourishing literary and artistic works. The strict control exercised by the central government over the expression and dissemination of information, both in the imperial age and in the early years of the People’s Republic of China, could hardly allow a copyright system to bloom. As William Alford notes, historically, the motivation for controlling published works was driven by the need for ensuring that their contents would not challenge the social order or express views improperly, rather than for protecting an author’s property rights.\textsuperscript{16}

\section*{II. THE IMPROVEMENT OF CHINA’S COPYRIGHT SYSTEM IN THE PAST TWENTY YEARS}

\subsection*{A. Two Stages of China’s Modern Copyright Regime}

The recent improvement in China’s copyright regime can be divided into two stages: the initial establishment stage, and the rapid growth stage. The first stage lasted from 1990 to 2000, when the initial copyright system was established. The first copyright law, regarded as a milestone,\textsuperscript{17} set up a basic legal framework for copyright protection. Only one year later, the State Council promulgated the Regulations for the Implementation of the Copyright Law of the People’s Republic of China,\textsuperscript{18} which provided detailed explanations for the implementation of the Copyright Law. At almost the same time, the Regulations for the Protection of Computer Software were issued,\textsuperscript{19} presenting China’s attitudes towards fighting

\begin{footnotesize}
\begin{enumerate}
\item[17] The first copyright law was adopted at the Fifteenth Session of the Standing Committee of the Seventh National People’s Congress on September 7, 1990, and entered into force on June 1, 1991.
\item[18] Regulations for the Implementation of the Copyright Law of the People’s Republic of China was issued on May, 30, 1991, and entered into force on June 1, 1991.
\item[19] Regulations for the Protection of Computer Software were issued on June 4, 1991, and entered into force on October 1, 1991.
\end{enumerate}
\end{footnotesize}
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software piracy. These policies, as a useful adjunct to the Copyright Law, provided more details for the application of the law. In addition, China ratified a series of international treaties to keep coordination with other countries. For example, China acceded to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in 1992, the Universal Copyright Convention (UCC) in 1992, and the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms in 1993.

The second stage started around 2001, when China substantially amended the Copyright Law to increase copyright protection. In order to improve the implementation of the copyright law, the central government promulgated the new Regulation on the Implementation of the Copyright Law of the People’s Republic of China, Collective Management of Copyright Regulations, and the Regulations on the Protection of the Right to Network Dissemination of Information (RNDI). In addition, the National Copyright Administration released the Measures for the Implementation of Copyright Administrative Punishment, and the Measures for the Administrative Protection of Internet Copyright jointly with the Ministry of Information Industry. More importantly, China revised its Copyright Law again in 2010. Even though this amendment only involved few modifications, it at least suggested the positive attitude of China toward the need for increasing copyright protection. Moreover, at

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27 The Measures for the Implementation of Copyright Administrative Punishment, adopted at the first executive meeting of the National Copyright Administration on April 21, 2009, promulgated on May 7, 2009, and came into force on June 15, 2009.

the international level, China ratified the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in December 2006, taking a further step towards compliance with the international copyright regime. Currently, China has launched a new round of amendments to the Copyright Law.

B. Overview of the Recent Revisions of China’s Copyright Law

The second amendment to the Copyright Law, made in 2010, made only two changes: providing copyright for censored works and clarifying the procedure for the pledge of copyright. The first and most important change removed the provision denying copyright protection to works that are not approved for publication or distribution. This modification can be regarded as China’s response to the decision of the WTO panel concerning the old Article 4, which provided that works cannot be protected by the Copyright Law if their publication and distribution are prohibited in China.

The U.S. filed a complaint against China because of worries that U.S. copyright holders whose works were published in other countries, but which did not satisfy China’s content review, could do nothing to act against piracy. The U.S. asserted that Article 4 of China’s Copyright Law was inconsistent with the provisions of the Berne Convention because works whose publication or distribution was not approved by China’s competent authority did not “enjoy the minimum rights that are ‘specially granted’ by the Berne Convention.” Article 5(1) of the Berne Convention states that “authors shall enjoy, in respect of the works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted under this Convention.” On this point, the panel agreed with the U.S., basing its findings on the violation of old Article 4 to the Berne Convention, and determined that “China has an international obligation to protect copyright in such works in accordance with Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPs Agree-

30 Id. art. 4.
32 Berne Convention, art. 5(1).
As a result, the Standing Committee deleted the provision denying protection for prohibited works and revised this article as follows: “Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or infringe upon the public interests. The publication and dissemination of works shall be subject to the administration and supervision of the state.”

The other change is related to the copyright mortgage. Article 26 provides that in case of copyright mortgage, the mortgagor and the mortgagee shall jointly apply to the State Copyright Office under the State Council to record the mortgage. Thus, the record procedure becomes a precondition of an effective mortgage and copyright holders must go through it provided that they exercise their copyright ownership as security. Nowadays, the copyright mortgage is an essential means for obtaining loans for supporting future creation. Meanwhile, the cultural industry involving substantial investment is indeed in urgent need of boosting copyright mortgage in the financial market. This provision may be beneficial by increasing the efficiency and security of the mortgage, because the recording proceeding sets up a mechanism by which the public can access the comprehensive information regarding the copyright mortgage.

C. The Dynamics of High-Speed Development

The cause of these changes originated from both China’s serious desire for participation in globalization and the domestic needs of the industrial, social, and cultural sectors. China has made great efforts to amend laws and regulations consistent with the WTO’s regulations, preparing for accession to this most influential organization in the world trade regime. China’s rapid growth in international trade and investment after its entrance into the WTO has partly illustrated the impressive achievement of these attempts.

In addition, the U.S., as an important representative of the West, has urged China to improve legislation, enforcement, and international cooperation in the copyright regime through multiple approaches, including negotiation, launching Section 337 investigations, publishing annual investigation reports on intellectual property rights (IPRs), filing complaints to the WTO, etc. Since the end of 2004, issues regarding IPR protection have inevitably become the hot topic in discussions during each

33 Panel Report, supra note 31, para. 7.119.
34 2010 Copyright Law of P. R., China art. 4.
35 Id.
visit of the U.S. International Trade Commission (USITC) to China. In addition, the U.S. has carried out more than 100 Section 337 investigations at the USITC over the past decade. A Section 337 investigation is always regarded as a powerful weapon in battling against infringing products from other countries in view of its efficient process and the serious consequences if the USITC finds a violation of Section 337.

The annual Special 301 Report on IPRs produced by the Office of the United States Trade Representative (USTR) is another means of presenting the concerns of the U.S. about IP protection overseas, and also attracts global attention. It reviews IP enforcement by America’s trading partners, which may be a basis for the U.S. to take further action against IPR theft and violations of obligations under the WTO. One possible result is that the violating country would be faced with litigation before the WTO Dispute Settlement Body, and even trade sanctions. During recent years, the Special 301 Reports listed China on the priority watch list and seriously criticized rampant piracy and inadequate enforcement, undeniably exerting considerable pressure on China. In addition, the latest WTO litigation between the U.S. and China with respect to China’s IP protection was launched by the U.S. in 2007. The U.S. claimed that there were three aspects of Chinese law and practice that were not compliant with the TRIPs Agreement, namely, “the denial of copyright protection of censored works; the disposal by donation and auctions of seized counterfeit goods; and the unavailability of criminal sanctions for piracy and counterfeiting of copyright and trademark rights below certain thresholds.” Although in the end, the panel only accepted the first argument and rejected the others, the final decision of the panel directly resulted in the revision of relevant articles of the Copyright Law.

On the other hand, the internal dynamic of the lawmaking process, which is a strong motivation behind the comprehensive revolution in the

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38 Either a general or limited exclusion order would be issued if a violation of Section 337 is determined. A general exclusion order means importation of all infringing products into the U.S. will be forbidden, regardless of their source. “A Section 337 investigation is typically completed in less than 15 months from the date of institution of the investigation. The actual hearing (or trial) generally occurs seven months from the date of institution.” Tom M. Schaumberg et al., *Advantages of a Section 337 Investigation at the US International Trade Commission*, 12 IP Litigator 32, 35-38 (2006).


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Copyright regime, cannot be ignored. Important changes driven by China’s socialist market economy pushed China to reform the legal system to create a healthy environment to respond to domestic needs. During the past several years, the industries of computer software, film production, television program production, animation, and music, have become important elements of the Chinese economy.

As for the computer software industry, at the beginning of the twenty-first century, China formulated a long-term plan for developing this industry. Soon after, a series of policies were successively released for implementing such a scheme. For example, “Policies for Encouraging the Development of Software Industry and Integrated Circuit” was released in June 2000, stating that it was hoped that the domestic production of computer software would satisfy the majority of the needs of the domestic market and be exported on a large scale after the following five to ten years. This document also provides a policy of concessions and rewards for software firms, showing China’s great determination to develop this industry. Meanwhile, the “Action Plan for the Rejuvenation of the Software Industry” was formulated, aiming to create a good environment for developing the software industry from the perspectives of technological research and development, investment, financial business, international trade, revenue distribution, and so on. Likewise, the Guidelines of the Tenth Five-Year Plan and the Guidelines of the Eleventh Five-Year Plan highlighted the significance of the software industry for the national economy. Fortunately, with these numerous efforts, the computer software industry in China has experienced tremendous growth. As shown in Table 4.1, the gross revenue of the software industry in 2009 has reached 997 billion RMB, ten times the amount in 2001; and the profit created by this industry also reached 134 billion RMB, which is also nearly ten times the amount in 2001.

In addition, the thriving markets for films and phonograms generated an internal dynamic for improving copyright protection in China. The annual production of fiction films increased from 88 in 2001 to 406 in 2008, and the box office gross revenue from the domestic market has risen steadily in the past several years. The achievements of the film industry,

42 Id.
Table 4.1. Gross revenue and profit of China’s computer software industry

<table>
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<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
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<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross revenue</td>
<td>75.06</td>
<td>110.0</td>
<td>163.3</td>
<td>240.4</td>
<td>390.6</td>
<td>480.1</td>
<td>583.4</td>
<td>757.3</td>
<td>997.0</td>
</tr>
<tr>
<td>Profit</td>
<td>14.0</td>
<td>2.62</td>
<td>5.95</td>
<td>11.62</td>
<td>28.37</td>
<td>42.23</td>
<td>58.4</td>
<td>91.2</td>
<td>134.07</td>
</tr>
</tbody>
</table>


as shown in Table 4.2, have boosted the confidence of producers and investors in more film production. Recently, the Plan to Adjust and Reinvigorate the Culture Industry, released by the State Council, provides a comprehensive guideline for developing this industry and identifies IP protection as a safeguarding condition.45 Additionally, during the Fifth Plenum of the Seventeenth Central Committee of the Communist Party of P. R. China, it was proposed that the cultural industry should be built into a pillar of China’s national economy, and the government should offer strong support by formulating favorable macro policies.46

Table 4.2. General revenue of China’s film industry

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<tr>
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<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Box office revenue of domestic films</td>
<td>8.3</td>
<td>11.0</td>
<td>14.4</td>
<td>18.01</td>
<td>26.89</td>
</tr>
<tr>
<td>Box office revenue of imported films</td>
<td>6.7</td>
<td>9.0</td>
<td>11.8</td>
<td>15.26</td>
<td>16.52</td>
</tr>
<tr>
<td>Box office revenue overseas</td>
<td>11.0</td>
<td>16.5</td>
<td>19.1</td>
<td>20.20</td>
<td>25.28</td>
</tr>
<tr>
<td>Advertising revenue from cinema channels</td>
<td>10.0</td>
<td>11.5</td>
<td>12.0</td>
<td>13.79</td>
<td>15.64</td>
</tr>
<tr>
<td>Total revenue</td>
<td>36.0</td>
<td>48.0</td>
<td>57.3</td>
<td>67.26</td>
<td>84.33</td>
</tr>
</tbody>
</table>


During the past several years, China has experienced satisfactory development in the animation industry, including the successful creation of many popular domestic animation products.47 Domestic animation dra-
matically increased from 4,689 minutes in 2000 to 82,326 minutes in 2006.\textsuperscript{48} Correspondingly, the Chinese government devoted great attention to developing the animation industry, even though this industry is merely at the initial stage in China. An important official document, “Opinions on Promoting Chinese Animation Industrial Development,” made the policy of supporting the animation industry part of the national strategy, put forward the strategic goal of becoming a leading country in the animation industry, and released an incentive system and tax concession policies.\textsuperscript{49} According to this document, the Cultural Ministry issues Opinions of the Cultural Ministry on Supporting Chinese Animation Industrial Development,\textsuperscript{50} indicating that the government would take effective measures to increase the capability of independent development of the animation industry. Meanwhile, it points out that the animation industry, consisting of books, periodicals, films, television programmers, videos, internet animation, and mobile animation, should be well established.\textsuperscript{51}

However, the severe problem of copyright piracy would be a barrier to achieving China’s strategic goal of becoming one of the world’s leading nations in the computer software and cultural industries. The Business Software Alliance (BSA), the leading advocate for the global software industry, critically reviewed the piracy situation in China and suggested that the U.S. government adopt a new strategy based on research findings “that 79 percent of applications installed on personal computers in China last year were pirated instead of being legally purchased. The commercial value of that pirated software was $7.6 billion in 2009 — a figure that has nearly doubled from $3.9 billion in 2005.”\textsuperscript{52} Similarly, the problem of


\textsuperscript{49} Opinions on Promoting Chinese Animation Industrial development, GBF (2006) No. 32.

\textsuperscript{50} Opinions of the Cultural Ministry on Supporting Chinese Animation Industrial Development, WSF (2008) No. 33.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{BSA Proposes New Strategy for US Trade Relations with China}, BSA: THE SOFTWARE ALLIANCE (Dec. 1, 2010), http://www.bsa.org/country/News%20and%20Events/News%20Archives/en/2010/en-12012010-china.aspx; the data published by BSA is different from that released by Chinese authorities. According to the “Investigation Report of Piracy Rate of Chinese Industry of Computer Software” conducted by China’s Internet Laboratory and issued by the State Intellectual Property Office, the software piracy rate in China fell from 47% in 2008 to 45% in 2009. The difference in the research results between BSA and China’s Internet Laboratory are perhaps caused by the use of differential statistical methods. \textit{See 2009 NIAN ZHONG-GUO RUANJIAN DAOBANLV XIAJIANG ZHI [THE SOFTWARE PIRATE RATE IN CHINA WAS REDUCED TO 45 PERCENT IN 2009], available at http://
piracy troubles the Chinese cultural industry. The piracy rate for domestic films during recent years always exceeds 50%. Many domestic blockbusters involving substantial investment, such as Tang Shan Da Di Zhen, Di Ren Jie, Zhao Shi Gu Er, Xi Feng Lie, and Da Xiao Jiang Hu, were pirated only a few days after they were first screened in theaters. In addition, the phonogram industry has suffered from a depression since 2008, because people can gain unauthorized access to musical products by more methods rather than buying the phonogram record alone. Piracy is a crucial reason for this recession, in view of a piracy rate of approximately 90% for digital sound recordings. In short, it is actually necessary for China to increase copyright protection to fight against piracy to advance the relevant industries.

III. THE ONGOING THIRD ROUND OF AMENDMENT OF CHINA’S COPYRIGHT LAW

China’s ambition of becoming a leading country in the cultural and information industry motivates its strong desire to reform the copyright system. Above all, inconsistency with international treaties has attracted considerable attention. For example, the “three-step test” required by the Berne Convention as a threshold for limitations to copyright is not included in the Copyright Law, even though it is stipulated in the hierarchically inferior regulations. Furthermore, the existing copyright regime was established in an analog environment and has lagged behind the needs of the digital world. It provides few words on sensitive issues concerning limitations to liability of information service providers, limitations and exceptions to copyright in computer programs, anti-circumvention provisions, etc. Thus, the original balance between the interests of the public and the copyright holder/copyright owner is disrupted, and the cost of the creation of cultural products is increased. The reform of the Chinese Copyright Law is important to facilitate the development of relevant industries.
interests of the rights holders achieved in an analog environment has been
lost in an era of information technology. In addition, it is hard to expect
that high efficiency in copyright collective management and effectiveness
in copyright enforcement can be achieved under the current law.

This ongoing third round of amendment of China’s Copyright Law
began in July 2007. Two drafts of the revision of the Copyright Law were
recently released by the National Copyright Administration of the Peo-
ple’s Republic of China in order to seek public feedback. The changes
respond to the defects of the existing system and the need for technologi-
cal development by incorporating several provisions that are only present
in the administrative regulations, making the law compatible with the in-
ternational treaties to which China has acceded. They enhance the role of
collective copyright management organizations, add provisions concerning
the exploitations of rights in the digital environment, and strengthen copy-
right enforcement. This section will not examine the revisions one by one,
but only provide comments on the remarkable achievements of the last
draft (the Draft).

A. Three-Step Test

The Draft introduces the “three-step test” as a yardstick to determine
whether the use of a copyrighted work falls into the category of limitations
to copyright. Article 42 of the Draft provides a general principle for the
limitations as follows:

Under the following circumstances, it shall be permissible to use any pub-
lished work without the permission from, nor payment of remunera-
tion to, the copyright owner, provided that the name of the author and the
title of the work are mentioned, and such use should not affect the nor-
mal exploitation of the work, or unreasonably impair the legitimate rights
enjoyed by the copyright holder.

This revision is sensible because it may reduce the uncertainty gener-
ated by an unclear logical relationship between the enumerative list of lim-
itations and the “three-step test.” The “three-step test” is derived from
the Berne Convention, which has been embedded in Article 21 of Regula-

58 The first revision draft was released on March 31, 2012, and is available at
months later, the second revision draft was released on July 6, 2012, and is
59 Id. art. 40.
60 Regulation on the Implementation of the Copyright Law of the People’s Re-
public of China, art. 21.
with the normal use of the work or unreasonably prejudice the legitimate interests of the copyright holder.\textsuperscript{61} In other words, the Berne Convention permits implementation of limitations, but in the application thereof, the “three-step test,” must be met. Only if the use of the copyrighted work complies with the requirements under both the “three-step test” and the enumerative list, may such use constitute a limitation. However, in Chinese judicial precedents, the “three-step test” has been used as a tool to go beyond the exhaustive list, which causes confusion as to the relationship between the two.\textsuperscript{62} The judicial opinions in this context vary from strict application of the closed limitation system to a considerably more liberal approach of allowing an open-ended list of allowed uses based on examination as seen in the U.S. model. Moreover, the Regulation is hierarchically inferior to the Copyright Law, and is not beneficial for clarifying this relationship. Therefore, elevating the hierarchy of this provision offers a better foundation for implementing the limitation rule. Thus, the relationship between the list of limitations and the “three-step test” would be clearer.

It should be noted that the new Draft provides an open-ended system of limitation. Article 42 not only enumerates the particular cases of limitations, but also uses a sub-article “other situation” to include potential cases. Obviously, this open-ended system imitates the U.S. model, which provides a series of general illustrative factors that a court should consider when applying fair use doctrine.\textsuperscript{63} The U.S. model is based on the common law system, which allows courts wide latitude when interpreting the fair use doctrine. This renders the doctrine more flexible and effective, especially in the era of rapid technological development. However, it results in unpredictability in the outcome. As the U.S. Congress stated in its House Report on the 1976 Act, the fair use doctrine does not provide a real definition, but merely a “set of criteria, which although in no case definitive or determinative, provides some gauge for balancing the equities.”\textsuperscript{64} Even though statutory factors direct the courts to analyze the fair use defense, it is still not easy to determine whether the alleged use serves

\textsuperscript{61} Berne Convention, art. 9(2).
\textsuperscript{63} The statutory factors include: (1) purpose and character of alleged infringing use, (2) nature of copyrighted work, (3) amount and substantiality of portion used, and (4) effect on market for copyrighted work. See 17 U.S.C. § 107 (2006).
\textsuperscript{64} H. REP. NO. 94-1476, at 65 (1976).
the objectives of copyright and its justification outweighs the factors favoring the copyright holders. The case-by-case determination of the historical application of the fair use doctrine provides little predictability for secondary users. Furthermore, this open-ended system also raises a question concerning Berne Convention compatibility.\textsuperscript{65} Since the fair use doctrine has developed based on equitable principles, it is not limited to a particular circumstance, but is broadly applicable to all uses of copyright, which seems inconsistent with the first requirement of the “three-step test” set by the Berne Convention. From this point of view, the open-ended system would challenge Chinese courts to ensure legal certainty.

B. Technological Protection Measures (TPMs)

The Draft provides a definition of technological protection measures, and delineates the scope of the exceptions to the anti-circumvention regime. Under Article 64, TPMs are defined as any technology, device or component that, in the normal course of its operation, is adopted by the right holders to effectively prevent or limit reproduction, browsing, appreciation, operation, or dissemination online of their works, performances, phonograms, or computer programs without their consent.\textsuperscript{66} The term “in the normal course of its operation” indicates that “effectively” should be analyzed based from the standpoint of an average end-user. In detail, a technological measure shall be deemed to be “effective” where in the normal course of its operation, the use of a protected work or other subject matter is controlled by the right holders through application of an access control or protection process – such as encryption, scrambling or other transformation of the work – or other subject-matter or a copy control mechanism, which achieves the protection objective. TPMs would be ineffective where they no longer work for an average end-user who merely has normal knowledge, experience and ability in the relevant regime.

Article 67 of the Draft defining the scope of exceptions to the anti-circumvention provision is derived from the related provision of the RNDI.\textsuperscript{67} Four cases of circumvention are legitimate under the new Draft.\textsuperscript{68} Progress may be observed in that the exceptions allowed in the


\textsuperscript{66} The Draft art. 64.

\textsuperscript{67} RNDI art. 12.

\textsuperscript{68} Article 67 of the Draft provides that the circumvention of TPMs shall not be deemed as illegal if any technology, device, or component used for such circumvention is not provided to other persons, and such circumvention does not impair other legitimate interests of the right holders under the following circumstances:


\textsuperscript{66} The Draft art. 64.

\textsuperscript{67} RNDI art. 12.

\textsuperscript{68} Article 67 of the Draft provides that the circumvention of TPMs shall not be deemed as illegal if any technology, device, or component used for such circumvention is not provided to other persons, and such circumvention does not impair other legitimate interests of the right holders under the following circumstances:
online world under the RNDI are extended into the non-networked environment. Under the RNDI, the exceptions to anti-circumvention favoring education, research, and the blind may be applicable merely in circumstances where the copyrighted content at issue is provided to the eligible entity through the Internet. Different from the RNDI, the Draft allows the content that can be accessed or used through legally bypassing the TPMs to be provided in an analog environment.

However, this exception scheme seems a bit conservative. At least, it is feasible to grant not-for-profit libraries the right to circumvent the TPMs to make a small number of copies of their collections for the sole purpose of conservation, on the condition that the original copy is unavailable at a reasonable price in the market. Under the provision concerning limitation to copyright, the libraries are allowed to make copies of their collection for the sole purpose of conservation. However, in the absence of the related stipulations permitting libraries to circumvent the TPMs, the provision concerning the libraries' fair use would be pointless if the collection exists in digital form and is under the protection of the TPMs. Furthermore, the foregoing exception will not affect the normal exploitation of the work, or unreasonably impair the legitimate rights enjoyed by the copyright holder.

C. Copyright Collective Management

Adopting an extended copyright collective management system is an important revision of the Draft. At present, Chinese collective management organizations (CMOs) acquire the rights from the right holders by voluntary licensing.\textsuperscript{69} In other words, authorization of right holders constitutes the legal basis of the activities of CMOs. The scope of the CMO’s business depends on the assignment contract, other than for the case of non-voluntary licensing. However, the legislature has observed the predicaments of users who are willing to lawfully use works, but have limited ability to contact the rights holder and ordinary users for whom the negoti-

\begin{quote}
(1) providing a small number of teachers or researchers with the published work, performance, or phonogram that cannot be acquired in a normal way for the purpose of classroom teaching or scientific research;

(2) providing the blind with the published work in a manner that may be perceived by them for not-for-profit purpose if that work cannot be acquired in a normal way;

(3) the state organs implementing official duties subject to the administrative or judicial procedures;

(4) testing the security of the computer, computer system, or network.
\end{quote}

\textsuperscript{69} Copyright Law of 2010 art. 8, Regulation on Collective Administration of Copyright, No. 429 of the State Council, 2005, arts. 4, 9.
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ation cost is too expensive. In order to resolve this problem and facilitate the right acquisition process, the Draft imitates the approach of Nordic countries, and introduces an extended collective management system. Thus, the State Council Administrative Copyright Management Department may permit collective copyright management organizations with broad representativeness to represent non-members, except that the right holder may reserve its copyright by written statement.

Compared with the first draft amendment, the second draft limits the applicable scope of the extended collective management system. The extended management system only can be used in two circumstances. First, radio stations and television stations could broadcast text, music, art or photographic works that have been published. Second, operators of video on demand (self-VOD) systems could disseminate music or audiovisual works that have been published to the public through self-VOD systems. These specific requirements make the application scope more clear.

The extended collective licensing is of major significance because this model appropriately balances efficiency and justice. Its comprehensive mechanism combines a legal extension and freedom-of-opting-out system. On the one hand, this system makes it possible that CMOs may extend their services for their member to non-member rights holders. On the other hand, it also respects the basic principle of private autonomy by allowing rights owners to opt out. This system has been implemented successfully in Iceland, Denmark and Norway.

The necessary condition for implementing this system should also not be overlooked. The success achieved by the Nordic countries cannot be discussed separately from the fact that in these countries, the rights holders are well organized, and the CMOs are the major representatives of rights holders and have strong management and coordination abilities. Nevertheless, the story seems different in China. Many music creators are dissatisfied with Music Copyright Society of China (MCSC) because they believe that it seems immature in the aspects of its business scale, cost


71 The Draft art. 60.


control, application of modern technology, and management measures.\textsuperscript{74} For example, according to the distribution report released by the MCSC, the cumulative royalty revenue collected from 2007 to 2010 is RMB 170 million, but only 60 million was distributed to the right holders, with the balance used for administration and maintenance expenses.\textsuperscript{75} The rights holders of musical work complain that the MCSC rarely distributes the royalty to them on time.\textsuperscript{76} In this regard, if China intends to implement the extended collective management system, reform or improvement of the CMOs' own organization and management abilities is the first priority.

\textbf{D. Statutory License of Sound Recordings of Musical Works}

A statutory license means that a user can use a work without the consent or authorization of the copyright holder on condition that remuneration is paid. The first draft of the amendment proposes a new rule in the context of statutory licensing of sound recordings of music works. Article 46 of the first draft provides that other recording producers could use a sound recording of a musical work after three months from its first publication under certain statutory circumstances.\textsuperscript{77} In addition, Article 48 of the first draft sets forth the conditions for such a statutory license: the user should file records of the use of the work before the actual use; the user should provide information regarding the name of the original author and the work and the source of the work; and, the user should pay remuneration to the State Council Administrative Copyright Management Department after one month from the use.\textsuperscript{78} Obviously, the legislature aims to prevent big companies from monopolizing the recording market because it worries that big companies can hold a monopoly by signing exclusive license agreements with creators of musical works. However, a few famous artists and big music companies gave negative feedback on the first draft. They argued that the period of “three months” is too short compared with the lifecycle of music recording products.\textsuperscript{79}


\textsuperscript{76} \textit{Id}.

\textsuperscript{77} Article 46 of the first draft.

\textsuperscript{78} Article 48 of the first draft.

works and encourage piracy. Furthermore, they claim that although it is theoretically possible that the interests of copyright holders will not be damaged as long as the legislation could be enforced effectively, the enforcement ability of the relevant authorities undermines the confidence of the music industry in this context.

Based on comprehensive consideration on these opinions, the second draft of amendment of the Copyright Law finally deletes the aforementioned provisions.

E. Remedies

Article 72 of the Draft describes the measurement of damages. It has three sub-articles:

In the case of infringement of copyright or related rights, the victim shall be awarded compensation for the actual loss that he/she has suffered. If it is hard to calculate the actual loss, the compensation may be awarded referring to the illegal income. If both the actual loss of the right holders and illegal income of the infringer are hard to determine, the compensation shall be calculated referring to the reasonable times of ordinary transaction cost. The compensation should include the reasonable expenses that are used to stop the infringement.

In cases where none of the actual loss of the right holders, the illegal income of the infringer, or the ordinary transaction cost can be easily determined, the People’s Courts may award the right holder the compensation less than RMB 1 million according to the infringement fact, provided that the copyright, the related right, the contract of exclusive licensing, or the contract of copyright transfer has been recorded in the relevant authorities.

In cases where the infringement of the copyright or the related right is conducted consciously and repeatedly, one to three times of the amount of compensation that is determined subject to the foregoing two sub-articles should be entitled.

Two points of this article are worth noting. One is that the ceiling on the statutory damage is raised from the current RMB 0.5 million to RMB 1 million. The other is that the provision concerning punitive damages is embedded. Both of these provisions demonstrate the legislature’s determination to strengthen copyright enforcement. Punitive damages, a new creature in Chinese intellectual property laws, are especially expected to achieve the goals of retribution and deterrence. It cannot be said that this approach is isolated from the influence of the academic ideology and legislation of the U.S. Numerous Chinese scholars have discussed the punitive damage system of the U.S, and its implications for Chinese tort law. See Yi Yu, Cheng Fa Xi Pei Chang Ze Ren De Cheng Li Ji Shu Er Liang Ding [On The Establishment Of Liability For Compensation About Exemplary Damages & The Amount
widely discussed based on moral philosophy. One justification for punitive damages is found in its function of preventing the unjust impoverishment of the victim and unjust enrichment of the wrongdoer. Another justification for punitive damages is the notion of utility. The principle of utility is to examine the future effects of a rule on general welfare in society. Based on the utility theory, the punitive damages system may make the victims more secure by making them believe that the loss they suffered will be compensated by wrongdoers. Furthermore, punishment may have the merit of educating people to keep a proper sense of moral responsibility and preventing future misconduct. On the other hand, punitive damages cannot be generally integrated into the legal system. In particular, punitive damages are assessed only in cases where the misconduct is conscious or reckless, which constitutes an extreme departure from lawful conduct. The “extreme departure” prong precludes misconduct that is deliberate but petty, because punitive damages will be too expensive for such a case. Based on such consideration, the new embedded provision regarding punitive damages in China’s copyright law requires two necessary factors in its application: conscious and repeated acts. It provides breathing space for persons who conduct infringement only once or in good faith.

However, the Draft does not offer a guide on how to measure punitive damages. It may be imagined that courts will encounter difficulties in determining punitive damages. Even though the U.S. has had a long history of developing its punitive damages system, the issue concerning the appropriate punitive multiple is still debatable. In the U.S., the traditional approach to measurement is established through three factors: (1) the nature and degree of the defendant’s wrongdoing; (2) the nature and degree

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85 *Id.* at 730.
of the plaintiff’s harm; and (3) the defendant’s wealth. More recently, the standard of measurement was set up by the Supreme Court: (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio between the punitive damages awarded and the actual or potential loss suffered by the plaintiff; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. In this regard, once this new copyright law enters into force, the court should make considerable efforts to develop a principle for the measurement of punitive damages.

CONCLUSION

The development and reform of copyright legislation depends on culture, economic level, and the political system of countries. China has undergone a sluggish evolution in the copyright regime before the Reform and Opening Up policies. The external pressure from advanced countries and China’s strong desire to enter into the WTO pushed China to make legal reforms around 2001. As a result, the copyright law was made generally consistent with the international framework. In comparison, the dynamic of the recent legislation reform was mainly generated by the needs of national information and cultural industries. The revisions embedded in the Draft make the copyright law more compatible with the digital environment, more efficient for copyright management, and more powerful for battling against copyright infringement.

86 RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).