

# The Copyright Balancing Mechanism and Related Legislative Trends – From the Perspective of Network Environment Analysis

ZHANG Chu<sup>1</sup>, WANG Xuan<sup>2</sup>

## Abstract

*The revisions of China's Copyright Law are always closely related to the development of technology. Before the first revision of China's Copyright Law 1991, the rise and extensive use of the internet has made copying and transferring data easier and easier, but problems stemming from private copying have also provoked a number of debates in China on issues related to the interpretation of fair use. As a result, in 2001, the right of network communication, provisions of technological measures and copyright collective management organizations were introduced into the amended Copyright Law. However, after a decade of practice, the previous provisions cannot meet the new situations in the network environment, thus many legal systems in the Copyright Law need to be reconsidered in order to rebalance the interest of each party. This paper attempts to discuss the balance of interests among creators, disseminators and users under revisions of Copyright Law in China and analyze the legislative trend of China's Copyright Law from the perspective of the network environment.*

## I. Introduction

The development of copyright systems is closely related to the progress of technology. As the rise of the printing industry made easier the copying of written materials, copyright was created in order to encourage authors to continue writing, and the right of reproduction became one of the most important rights in Copyright Law. The purpose of Copyright

Law is to encourage authors to create while promoting the dissemination of their works. In this way the public gains access to new works, thus achieving a balance of interests between creators and the public. Balancing interests is an important principle of Copyright Law and of civil law in general. Traditionally speaking, Copyright Laws pursue a balance of interests among content creators, disseminators and consumers. With technological developments upsetting the balance previously achieved by the copyright system, the Copyright Law is pressured to advance at the same constant pace as technology. This paper attempts to discuss the balance of interests among creators, disseminators and users under the ongoing revision of Copyright Law in China.

## II. The first revision of Copyright Law and its copyright balance issue

China's first version of Copyright Law came into effect in 1991. A decade after its implementation, however, a number of provisions in Chinese Copyright Law lagged behind the social, political and economic realities. Even more importantly, in 2001, when China joined the World Trade Organization, the Chinese government committed itself to bringing its copyright system in line with the International Conventions on Intellectual Property laws. In this context, the Copyright Law of China was revised for the first time.

### 1. The right of network communication

In Article 10 of the revised Copyright Law, the exclusive right of communication of information on networks was added. Copyright holders were explicitly assigned the right to communicate to the public their works by wired or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them, and the right to exclude others from doing so. Articles 37 and 41 extend this right to performers and producers of music and video.

<sup>1</sup> Professor of law and Ph.D. supervisor of the China University of Political Science & Law, director of the Center for Intellectual Property Rights Studies and the Office of Science and Technology at CUPL. LL.M. 1989, LL.D. 2000, China University of Political Science and Law, Visiting Scholar 1998, Columbia University. Many thanks to Prof. Frank A. Hammel of NNU for his very insightful comments and careful revision of an early draft of this paper and for his longtime support for the work of the Center for Intellectual Property Rights Studies of China University of Political Science & Law. This paper was initially presented in Seoul in 2013, and revised later.

<sup>2</sup> LL.M, China University of Political Science and Law.

The internet has made it very convenient for the public to upload and download information, accelerating the dissemination of creative works. As a result, it is quite necessary to grant the right of network communication to authors and neighboring rights holders. Nonetheless, there comes a point at which rights must be limited to some extent. Such was the case in 2006 when the State Council formulated the "Regulation on Protection of the Right to Network Dissemination of Information" (hereinafter referred to as "Regulations"), which clearly defined fair use and statutory licenses in Article 6 and Article 7.

Article 6 of the "Regulations" defines eight different kinds of fair use. Unlike the Copyright Law, "personal use"<sup>3</sup>, "free performance"<sup>4</sup> and "use of the work on display in public places"<sup>5</sup> were omitted on the basis that these three cases do not exist in the network context.

Article 7 of the "Regulations" provides that fair use on the networks is also applicable for libraries, archives and other institutions. During the commentary period before the "Regulations" were enacted, scholars in the field of library sciences called for statutory licenses for libraries to provide works to readers outside the library via networks, so that, after paying the corresponding royalty, the libraries could provide works without the consent of the copyright owner. Many people opposed this proposal because it would have had a negative impact on the market for newly published works, thus affecting the interests of publishers. As a result, after weighing the interests of all parties and considering the results of similar legislation abroad, the "Regulations" were published with a more limited range of acceptable use in libraries and comparable institutions<sup>6</sup>.

## 2. Protection of technological measures and rights management information

Article 47 of the revised Copyright Law provides that the destruction of technological measures and rights management information on copyright works and audio recordings is a violation of copyright. It is a revision based on the "WIPO Copyright Treaty" (WCT) and the "WIPO Performances and Phonograms Treaty" (WPPT).

<sup>3</sup> Use of a published work for the purposes of the user's own private study, research or personal entertainment.

<sup>4</sup> Free-of-charge live performance of a published work in which the organizers neither collect any fees from the members of the public nor pays remuneration to the performers.

<sup>5</sup> Copying, drawing, photographing or video recording of an artistic work located or on display in an outdoor public place.

<sup>6</sup> ZHANG Jianhua (张建华), Interpretation on the Ordinance of Information Network Transmission Right Protection (信息网络传播权保护条例释义), Beijing 2006 2006, pp. 33-34.

The use of technological measures are a kind of self-protection by authors on their copyright works, and include measures restricting others from appreciating and reading copyrighted works as well as measures preventing others from copying and disseminating such works. The destruction of technological measures preventing others from copying and disseminating works is legally considered a direct infringement on the copyright holder's exclusive right of reproduction, indicated that there is a basis in Copyright Law for measures to prevent others from copying and disseminating works. The protective measures restricting others to appreciate and read works were nonetheless disputed, and many believed that the protection limited fair use. Chinese Professor Wang Qian disputed this, saying that "protective measures restricting others to appreciate and read works are legitimate for the reason that the interests they protect are legitimate,"<sup>7</sup> a convincing argument.

## 3. Provisions for copyright collective management organizations

Article 8 of the revised Copyright Law establishes the legal status of copyright collective management organizations, though the article is principally a provisional measure, with the specific implementation to be decided on independently by the State Council. Nonetheless, it provided a legal basis for collective copyright management organizations that in practice already existed in China. The purpose of the establishment of copyright collective management organizations is to help the disadvantaged copyright owners to negotiate with publishers, thereby balancing the interests of copyright holders and disseminators and increasing the convenience of licensing copyrighted works.

China's copyright collective management organizations started very late. In 1992, the Music Copyright Society of China was founded as the first copyright collective management organization in China. At present there are five established copyright collective management organizations in China, which were all set by the government. In 2005 the State Council promulgated the "Copyright Collective Management Regulations", clearly defining the specific provisions of collective management organizations.

A number of problems exist in the current system. The copyright management organizations function as a monopoly, making it difficult for them to truly represent the interests of copyright hold-

<sup>7</sup> WANG Qian (王迁), The legitimacy of Technological measures in Copyright Protection (版权法保护技术措施的正当性), FaxueYanjiu 2011, No. 4, pp. 86-103.

ers. A number of copyright holders do not join the collective copyright management organizations because they do not trust the organizations on issues such as the pricing of license fees, making it difficult for these organizations to expand.

The internet has changed how works are created and transmitted. The authors can find more source materials on the internet, at the same time, more and more people who are not members of copyright collective management organization create and publish their works on the internet, which greatly limits a traditional copyright collective management organization's ability to fulfill its functions.<sup>8</sup> In addition, the traditional model of copyright collective management makes it difficult for copyright owners to have a clear understanding of how their works are used. These factors have prompted the reconsideration of the collective management organization through the lens of "network environment" as a way of balancing the interests of all parties.

### III. The third revision of the Copyright Law and its related issues

In the second revision of Copyright Law in 2010, only two parts were revised. The first part is Article 4, and the second is an increase of provision about copyright pledges. The revision was mainly due to the final WTO panel on Sino-US intellectual property disputes ruling that Article 4 of China's Copyright Law did not satisfy Article 5 of the Berne Convention and Article 9 of the TRIPs Agreement. As a result, the changes are minor and will not be discussed here.

More recently, the third revision of the Copyright Law has been initiated. Unlike the previous two revisions, which were driven by external forces, this revision is driven by practical experience with Copyright Law over the past twenty years, and is based on the sum of previous experiences and the identification of deficiencies in the current system. One of the major objectives of this revision is to reshape the previous balance of interests. While the revision has many different aspects, this paper will focus on analysis of a few key changes.

#### 1. Secondary use of phonograms

Narrowly speaking, secondary use of so-called "phonograms" refers to live performances in commercial places, or made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a

time individually chosen by them after the phonogram has been published or sold.<sup>9</sup> There has been debate on the issue of secondary remuneration of the producers and performers of phonograms during the distribution process, which is also a heatedly discussed issue in the "Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations" (hereafter referred to as "the Rome Convention"). Article 12 of the "Rome Convention" provides performers and producers of phonograms' the right to remuneration for the secondary use of phonograms. The "WIPO Performances and Phonograms Treaty" (hereinafter referred to as WPPT) has similar provisions. Both treaties allow parties to submit reservations, however, and China submitted a reservation on this provision.

The debate on this issue is heated for the reason that it involves the interests of many parties. Today, the development of networks has changed the speed and methods of disseminating works. People prefer to listen to music online, rather than buy CDs, with dismal effects on the traditional recording industry. Some scholars believe that the increased value of works during the dissemination process is contributed to by performers and producers of phonograms, such that they should get paid for the secondary use.<sup>10</sup> However, some scholars hold the opposite views that we cannot add the right to remuneration for secondary use solely for the reason of saving the record industry. Such scholars think that the main reason for the dismal state of the recording industry lies in the widespread illegal use of their copyrighted works on the internet, and the recording companies should take active steps to safeguard their rights, rather than pressing for an expansion of their rights in order to increase revenue.

This revision provided for the right of secondary remuneration to performers and producers of phonograms in both its first and second drafts. In the final manuscript, however, the right of secondary remuneration was only kept for producers. Manuscript Article 40 provides that "the producers of phonograms shall enjoy the right to remuneration for the following actions: (a) broadcast or rebroadcast of phonograms publicly by wireless or wired means, as well as the making available of phonogram broadcasts to the public through technical equipment; (b) the making available of phonograms to the public through technical equipment". This shows that China also learned

<sup>8</sup> CAO Shihua (曹世华), On the Interaction of Technological Innovation and Copyright Collective Management System in Digital Era (论数字时代技术创新与著作权集体管理制度的互动), Faxue Pinglun 2006, No.1, pp. 38-46.

<sup>9</sup> YAO Hongbing (姚泓冰), Improvement of Phonograms Producers Rights and Revitalization of the Music Industry - In the Perspective of "Secondary Use" (录音制作权的完善与音乐产业的振兴——以“二次使用”入法为视角), Zhongguo Zhengfa Xueyuan Xuebao, 2012, No.4, pp. 45-48.

<sup>10</sup> WANG Chaozheng (王超政), On the right of Equitable Remuneration of Secondary Use of Phonograms (论录音制品二次使用中的合理报酬权), Faxue Pinglun 2013, No. 1, pp. 131-135.

from the regulations in other countries, and was consistent with international conventions during its revision. Some countries defined the right of secondary remuneration as an exclusive right capable under the right circumstances of preventing other parties from unauthorized use. Other countries identify it solely as a right to receive remuneration, as is the case in the Chinese manuscript.

This paper supports the view that legislators should remain neutral, and that the setting for intellectual property rights must be compatible with the legislative purpose of Copyright Law. Secondary use relates to phonogram producers and performers, both of which are the subject of “related rights” provisions. Copyright Law protects related rights because producers and performers contribute to the dissemination of works, even though their effort does not constitute the sort of originality associated with authorship. Considering the particularities of the digital network environment, granting performers and the producers of phonograms the right of secondary remuneration is in compliance with the principle of balancing interests. From the manuscript, we can see that legislators defined phonogram producers as subjects of the right of secondary remuneration, and defined that right as non-exclusive. The provisions of the manuscript are, however, mere principles, and there is neither clearly described category of phonograms, nor is the allocation of remuneration defined. Both of these points will need to be refined through further legislation.

## 2. The limitation of rights in the network environment

In a narrow sense, limitation of intellectual property rights refers to fair use, statutory licenses and compulsory licenses. In a broader sense, the limitation of rights also includes the nature of copyright itself, such as temporality, regionality and so on. The limitation of rights is important in the copyright system. It ensures the rights of authors while meeting the public’s need to use works freely. The civil law countries, including China, clearly and specifically enumerate the situations in which rights are so limited. This system is incapable of taking into account special cases in judicial practice, however, and will lag behind developments occurring in society. In contrast, U.S. Copyright Law does not list all specific circumstances of fair use, but instead provides a set of criteria.

### a. Fair use

Section 1 of article 22 of China’s current Copyright Law defines “use of another’s published work for the user’s own private study, research or personal entertainment” as constituting fair use. However,

private copying under the network environment is becoming easier and easier, making free uploads and downloads more convenient. This raises a question worth pondering: is private copying a kind of fair use or of copyright infringement? If we understand the statute literally, as long as private copying is for the purpose of private study, research or appreciation, it is fair use. Since the vast majority of private copying from the network is for one of the above purposes, this will inevitably affect the copyright owner’s income in the long run. Over time, the creative passion of authors will certainly be affected, which is contrary to the purpose of Copyright Law. Fair use should therefore be confined to the purpose of learning, not of entertainment.<sup>11</sup> For this reason, the third revision of Copyright Law changes this section to read “use of published fragments of work for the user’s own private study and research”. The words “for the purpose of personal entertainment” were deleted. This legislative change brings China’s Copyright Law in line with the reality of the network environment.

### b. Statutory licenses

The revision draft also made changes in statutory licenses. The manuscript on statutory licenses is illustrated in the following diagram:

Current Copyright Law	Manuscript
<b>Suitable situation</b> (a) Publishing textbooks for implementing the nine-year compulsory education and the national educational program (b) A newspaper or periodical publisher making editorial modifications and abridgements in a work (c) A producer of sound recordings or video recording making use of a work created by another person (d) A radio station or television station broadcasting a published work	<b>Suitable situation</b> (a) Publishing textbooks for implementing the nine-year compulsory education and the national educational program (with the addition of visual materials) (b) A newspaper or periodical publisher making editorial modifications and abridgements in a work (with certain exceptions) (c) A radio station or television station broadcasting a published work
	Use must be recorded with the copyright collective management organization prior to the first use
	Sources must be specified
Remuneration must be paid	Royalties must be paid
Responsibility 1. Civil responsibility	Responsibility 1. Civil responsibility 2. Administrative responsibility (violation of Article 50)

<sup>11</sup> ZHANG Jin/DU Jing (张今/杜晶), Fair use in the Digital Environment (数字环境下的合理使用制度论要), Zhishi Chanquan Yanjiu 2005, No. 3, pp. 14-23.

	<p>Article 51 Before the expiration of the copyright protection of the published works, users who try to find their rights holders to no avail can, under one of the following conditions, apply and deposit royalties in digital form to the copyright administration department designated by the State Council:</p> <p>(A) the copyright owner is unidentified; (B) the copyright owner can not be contacted</p>
--	---

As we can see from the above comparison, the revisions in the manuscript on statutory licenses are as follows: (a) removal of the statutory license for phonograms; (b) new focus on the functional role of copyright collective management organizations in statutory licenses; (c) increased provisions for orphan works. The statutory license for network reproduction that had been the topic of heated discussion was not reflected in the manuscript. That is because in practice, even the statutory license for reproduction by newspapers has met difficulties in determining the appropriate rights holders and paying remuneration, even without the complications inherent to the network environment.

### c. Orphan works

The term “orphan works” refers to works whose copyright owner cannot be determined. Generally speaking, if someone wants to make use of a work, they must obtain authorization beforehand. Since users are unable to contact the rights holders of orphan works, they cannot use the work if legislative provisions are not made for such. This situation has a negative influence on the dissemination of works, and eventually damages the interests of copyright holders. What’s more, in the network environment it is very common that the rights holders cannot be reached, so adding provisions for orphan works into Copyright Law is currently a worldwide legislative trend. The Chinese manuscript on orphan works is designed according to Canada’s “quasi-statutory license plus escrow” mode.<sup>12</sup> It only allows the use of digital forms of orphan works. Specific provisions on escrow are to be provided in the future.

### 3. Extended collective management

In the first draft of the revised Copyright Law, general provisions for copyright collective management organizations were added, leaving the specific implementation of the content to the State Council

separately. In the current manuscript, a whole section was dedicated to the provisions for collective management organizations. There are many clear improvements, the most noteworthy of which are the efforts made regarding the extended collective management organizations.

The Copyright Collective Management System is an important symbol for measuring a country or region’s level of copyright protection, and it makes it more convenient for the public to use copyright works legally. Also an important way of addressing the issue of legitimate use of copyrighted works by the majority of users. Since many authors have not joined the corresponding collective management organizations, however, even though many users are willing to pay they are often unable find the copyright holder. To solve this problem, the legislators learned from the Nordic countries’ collective management of copyrights and created the general principles of an extended collective management system, that is, for a broadly representative copyright collective management organization which the copyright administration department allows to carry out non-members copyright collective management business.<sup>13</sup>

From the absence of restrictions on the types of works affected to the final manuscript’s “using self-VOD system to disseminate to the public a published musical or audiovisual works”,<sup>14</sup> the scope of provisions about extended collective management has shrunken in each of the several drafts. The main reason for the change is that once the first draft came out, the right holders thought that the terms of extended collective management forced representation upon them, a proposition which seemed dubious in light of the poor performance of the current copyright collective management organizations. Taking this situation into consideration, a gradual application of extended collective management seems more suitable.

## IV. Legislative trends reflected in the Copyright Law revision

### 1. The revision of Copyright Law is forward-looking

The copyright system is closely interrelated with the development of technology. Clearly many revisions of Copyright Law have directly resulted from changes in the use of digital technology. Such revisions serve many purposes, including re-balancing

<sup>12</sup> WANG Qian (王迁), On the Design of Orphan Work (“孤儿作品”制度设计简论), *Zhongguo Banquan* 2013, No. 1, pp. 30-33.

<sup>13</sup> Regarding the “PRC Copyright Law”(amendment draft) public request for comment. (关于《中华人民共和国著作权法》(修改草案)公开征求意见的通知), <<http://www.ncac.gov.cn/chinacopyright/contents/483/17745.html>> (visited April 21, 2014).

<sup>14</sup> Ibid.

the interests of each parties, better achieving the primary goals of Copyright Law, and protecting legal bodies. The law operates with a lag, however, and even once it has overcome one problem, it has already fallen behind social reality in another area. This demands that legislators be forward-looking. Even though legislators may not be able to implement a mature system in a timely manner, they are more than capable of first designing a principle and then allowing the specific implementation to be formulated by the State Council according to future circumstances.

## 2. Legislators should remain neutral

Technology inevitably leads to some copyright holders' or disseminators' interests being damaged in the network environment. In the face of this, Copyright Law is able to maintain technological neutrality and then try to balance the interests of each party. In doing so, however, Copyright Law must avoid overcorrecting and deliberately favoring one party over another. In the third revision of the Copyright Law, for example, many people believe that the provision of secondary remuneration rights to phonogram producers was included to prevent the decline of the music industry. This view is biased, as has been explained above, but such voices of doubt show that legislators cannot take for granted their ability to provide special protection. Its use must be limited and well-founded.

Not all copyright issues should be addressed through Copyright Law. Changes in technology will certainly eliminate some industries, and what comes next should be innovation and the exploration of new business models, rather than the obstinacy of increased copyright protection. On this point, our legislators have taken a cautious stance.

## 3. Learning from foreign legislative design

Twenty years after the enactment of China's Copyright Law, there remains a large gap between China and other countries in the areas of effective implementation, public concepts of copyright and copyright systems. It is therefore quite necessary for us to learn from foreign legal systems in this regard. Such concepts as orphan works and punitive damages are positive examples of what can be learned from other countries' legislative systems.

## V. Conclusion

Throughout the three revisions of Copyright Law and regardless of the specific reasons for the revisions, the goals of revision have been based on the basic principles of Copyright Law: to protect the interests of copyright holders, to encourage the cre-

ation of new works, to promote such works subsequent dissemination, to realize cultural prosperity among users, and to achieve a balance of interests among creators, disseminators and users alike. A well designed legal system is not enough. Related regulations are also necessary to ensure the smooth implementation of these systems so as to achieve the desired effect.