

A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law

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Abstract. *Chinese Copyright Law is going to be revised for the third time. A Draft of the 3rd Revision was released for public consultation. As a critical reading of the Draft, the paper points out a variety of defects of the Draft, including restricting fair use, unreasonably expanding the scope of copyright and neighbouring rights, strengthening copyright enforcement and collective management, and stretching legal protection for technological measures and right management information. Although China has enacted the national strategy of indigenous intellectual property and the 3rd Revision is not under imminent trade pressure, the Draft fails to correct the misconceptions, such as “the more the better” (more copyright protection and enforcement, the better economic growth and social development), “one size fits all” and “modelling on US law” and misses the opportunities to revamp its Copyright Law in the new century.*

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1. Introduction

Chinese Copyright Law, in its 21-year history, has only been revised twice in 2001 and 2010 respectively. From its initial enactment to two revisions, foreign trade had always been an important consideration. In 1980s, several rounds of Sino-US intellectual property negotiation in the ambit of bilateral trade negotiation was the pushing force for the promulgation of the Copyright Law in 1990. In 2001, the Copyright Law was completely revised to be complied with the TRIPS Agreement before China's accession to the WTO. In 2010, the Copyright Law was revised for the 2nd time to be complied with the WTO DSB Panel Report regarding US-China intellectual property dispute. Since the 2nd revision merely covered the limited provisions addressed in the WTO dispute, 2001 Copyright Law was largely kept intact.

The 3rd Revision, against the background of Chinese national strategy of indigenous innovation and arising economic power, will be a comprehensive revision. After 2 years' preparation, a Draft of 3rd Revision was officially released by the National Copyright Administration of China (NCAC) for public consultation on March 31, 2012.

The Draft made efforts to improve the coherency of the Chinese copyright legal system, which consists of Copyright Law and a patchwork of Regulations for implementation or interpretation of the Copyright Law, such as “Implementing Regulations”, “Software Regulations”, “Regulations on Right of Communication via Information Network” and “Collective Management Regulations.” The Draft that integrates the contents of the existing Regulations is almost one third longer than the Copyright Law. The Draft also contains a few designs that may facilitate people's access to knowledge, such as a quasi-compulsory licensing for “orphan works”, although the ambiguity and restriction in these designs may substantively affect their effectiveness.¹

Notwithstanding the positive side, the Draft fails to review several misconceptions, such as “the more the better” (more copyright protection and enforcement, the better economic growth and social development), “one

¹ According to the Draft, a work author of which cannot be identified or found after diligent search may be used provided that licensing fees are submitted to the NCAC. The Draft calls for a new set of regulations to define the new system.

size fits all” and “modeling on US law” (on draconic enforcement rather than general and robust limitations and exceptions). It is unfortunately that China, the largest country by both population and Internet users, despite its fast-growing economy, seems keeping on the old track and missing the opportunities to revamp its Copyright Law in the new century. The Draft is particularly disappointing in following aspects:

a) Shrinking Limitations and Exceptions

Limitations and exceptions are not only important to balance the public interest and private interests of right holders but essential to achieve the fundamental purpose of copyright protection. The Draft, however, either fails to remove the existing unreasonable restrictions on limitations and exceptions, or subjects them to new conditions that further restrict their implementation.

Chinese Copyright Law incorporates the 3-step test from Berne Convention and TRIPS Agreement. But the 3-step test has always functioned as the “ceiling” of all the limitations and exceptions, rather than a general clause to enable more limitations and exceptions. A policy document published by the Supreme People’s Court of China at the end of 2011, however, stated that in the definitely necessary circumstances to stimulate technical innovation and commercial development, an act that would neither conflict with the normal use of the work nor unreasonably prejudice the legitimate interest of the author may be deemed “fair use”[“合理使用”], provided that the purpose and character of the use of work, nature of the work, amount and substantiality of the portion taken, and effect of the use upon the potential market and value have been taken into account.² The Supreme People’s Court’s Opinion could enable Chinese “fair use”. Even if using a work is not among those specified circumstances under the Copyright Law, it may still be available for use without the permission of the right-holder. The Draft, unfortunately, comes back to the old track by limiting 3-step test to circumstances permitted by the Copyright Law and excludes the possibility of an open-ended list of limitations and exceptions.

The Draft maintains two close lists of limitations and exceptions, i.e. unpaid use and compulsory (statutory) licensing. With respect to unpaid use, although all existing circumstances specified in the Copyright Law and Software Regulations are kept³, new restrictions are added. The most significant one is on the “private use.” According to the Copyright Law, anyone may use a work for personal study, research and appreciation. The Draft, however, restrict the scope of private use to “making one copy of a work for personal study and research.” It is annoying to exclude from the private use personal “appreciation”, which is inherently hard to distinct from personal study and research, particularly on the Internet. It is even more worrisome to restrict private use to reproduction of a work. Under the Copyright Law, use of a work may include reproduction, translation, adaptation (such as remix or sampling), as far as the use is private. The Draft, however, only allows for reproduction and restricts to one copy. It is hard to understand why copyright protection that should address public use of works interferes so harshly the private sphere. While adding new restrictions, the Draft is willing to keep the old ones. The use of works for classroom education and scientific research has always been very restrictive. Only translation or reproduction in limited copies is allowed. Most unacceptably, the translated or reproduced copies can only be used by teachers or researchers, rather than students. So, under the Chinese Law, all the “distributed materials” (DMs) to students who receive classroom education must be subject to both copyright license and payment. The Draft does not make the least effort to correct the unreasonableness for educational use.

Pursuant to compulsory licenses, a protected work may be used without the permission of the right-holder, but subject to the payment of remuneration. The Draft maintains the existing categories of statutory licensing but makes the implementation more restrictive. All statutory licensees shall register with the NCAC before use of the works and pay remunerations to pertinent collecting society within 1 month after use. It is unknown whether the procedural complicatedness would defer the people from using the works under statutory licensing. In addition,

² Opinions on Several Issues on Sufficient Exercise of Intellectual Property Judicial Function to Promote Socialist Cultural Development and Prosperity and to Stimulate Economic Autonomous and Harmonious Development, published by the Supreme People’s Court on December 16, 2011.

³ The only new unpaid use introduced by the Draft allows for copying interoperable information of a computer program to create new program.

the Draft subjects the existing categories of statutory licensing to more conditions. For example, the Copyright Law, pursuant to the Berne Convention, allows making new sound recordings for the music work that has been incorporated in sounding recordings without permission of copyright holder. The Draft, however, adds a time limit of 3 months. New sound recording cannot be made unless the existing recording has been published for 3 months. Interestingly, Chinese musician community strongly criticizes this provision in the Draft for fear that their music work could be put to any use after 3 months of first release of sound recordings.

b) Expansive Rights

While restricting the limitations and exceptions, the Draft expands or strengthens the scope and substance of rights. Most strikingly, the Draft adds *droit de suite* to the list of exclusive rights for copyright owners. It is unknown why such a right that has no tradition in China and is not required by any international law has to be introduced into Chinese copyright law. It seems the new exclusive right can only increase the costs of enforcement.

Additionally, the Draft allows for phonogram producers, along with performers, to be reasonably remunerated for broadcasting or diffusing the sound recordings in other means. Phonogram producers and performers have no broadcasting or diffusion right under the Copyright Law. It is not clear whether the new right granted to phonogram industry is an exclusive right or merely remuneration right.

The Draft redefines the scope of rights of broadcasting organizations and grants them the exclusive to control the “signals with contents.” The Draft, therefore, implies that broadcasting organizations may control both the signals and contents therein.

The Draft also prevents the property rights in a work author of which has no legitimate successor from entering into public domain. In such a case, the property rights in the term of protection shall be granted to the State.

c) Technological Measures and Right Management Information

The Draft significantly strengthens the protection for technological measures and right management information.⁴ Although China has joined the WIPO Internet Treaties, the legal protection available is much more than what’s required by the Treaties but comparable to US DMCA. Under the Draft, technologies measures are the effective technology, device or component deployed by right holder to prevent or restrict its work from being copied, browsed, appreciated, operated or communicated via information network. The Draft clearly grants the right holders to deploy technological measures to protect their rights. In addition, the Draft closely models on US DMCA by banning the devices or services that may be used for circumvention and the provision of the works RMI of which is tampered. Only fewer than 4 very restrictive circumstances, can technological measures be legitimately circumvented, provide that no technology, device or component for circumvention is provided to any others. Under the Draft, violations against the protection for technological measures and RMI are subject to not only civil liabilities but severe administrative and criminal punishments.

The biggest defect in this regard is that the Draft fails to address whether technological measures may be circumvented for the specified circumstances of limitations and exceptions to rights. For example, it is unclear under the Draft whether a user may circumvent a copy-protection measure on a work so as to make a single copy of work for personal study or research. During the process of drafting, I have been persistently suggesting that copyright limitations and exceptions must be taken into account to prevent right holders from “locking up” legitimate use of the works. Unfortunately, my voice was bounced back by the sound of silence.

⁴ The Draft largely incorporates the pertinent provisions from 2006 Regulations on Protection of Right of Communication via Information Network. But these copy-and-paste provisions are inherently unbalanced and unreasonably. For detailed analysis, please refer to “Les Fleurs du Mal-A Critique of the Legal Transplant in Chinese Internet Copyright Protection”, Rutgers Computer and Technology Law Journal, Vol. 34, Issue 1, 2007.

According to the Draft, the technological measures adopted by neighboring right holders (particularly media industry) as well as authors are subject to legal protection. However, growing use of technological measures by media industry could also exclude open licensing. Even where a work is made available by its author under Creative Commons, users still may not circumvent the Technological Protection Measures attached on the copies of the work by Publishers or phonogram industry.

d) Reinforcing Collective Management

The Draft substantially reinforces the status and power of collecting societies, which can represent not only their members but any other Chinese right holders who did not object their representation in written. Once a user paid to a collecting society, it is exempted from the liability of compensating the right holders. Reinforcement of collecting societies would inevitably curb the development of open licensing, such as creative commons, in China.

Reinforcement of collective management, particularly sort of "extended (default) collective management" would make many creators' rights non-waivable. Even if a creator is willing to adopt open licensing for his/her work, the remuneration rights are still at the collecting society. The Draft is obviously moving to this direction. It's said China is modeling to Nordic model. But how Nordic model reconciles with open licensing is unlearned.

e) Enhancing Enforcement

Copyright enforcement is tremendously enhanced under the Draft. Regarding civil remedies, damages could be several times of licensing fees if right holder's actual loss and infringer's illegal gains cannot be determined. The Draft also introduces a semi-statutory damage of up to RMB 1 million where copyright is registered with the NCAC. Repeated infringers may be required to pay seemingly punitive damages. With respect to administrative enforcement, the Draft expands the scope of administrative punishments and grants copyright authorities the investigation right, including detention and seizure of suspected goods.

2. Conclusion

Unlike the first two Revisions to the Copyright Law, the Draft for the 3rd Revision was not made under imminent trade pressure, such as from any bilateral or multilateral trade agreement. Instead, the Draft is like a test stone of Chinese national strategy of indigenous innovation. The national strategy seeks to promote China's development into an innovative, IP-intensive economy primarily through stimulating more intellectual property rights developed and owned by Chinese. The Draft, therefore, tends to upgrade the level of protection and enforcement for copyright to implement the national strategy. In addition, the Draft shows the belief that the legal protection should keep pace with the economic development—since China has become the second largest economy in the world and the business models are moving from imitation to independent creation, copyright protection should become comparable with that in the developed countries. However, the presumptions that the Draft was built on may well be wrong. Firstly, it may wrongly estimate Chinese economic development stage. Despite its huge size, Chinese economy is still largely at the imitation stage. Incommensurate protection and severe enforcement for copyright can only curb, rather than stimulate, creations and innovations. Secondly, even if copyright maximalist approach might have worked in industrial society, it has hardly been successful in the information society and network environment. Following the old track of copyright protection cannot be fitting in the new communication environment.

The Draft is actually the first step in the long process of legal revision. After public consultation, the improved draft will be submitted to the Standing Committee of the National People's Congress, the highest legislature, for examination and approval. It will take quite a few years. The 3rd Revision of China's Trademark Law has been going on for more than 5 years but is still under construction. The Copyright Law revision is unlikely to take less time than that. The Draft could be modified or improved after public consultation. The author, alone with the other scholars home and abroad, is currently campaigning for a general exception clause

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plus non-exhaustive illustrative list as well as the other new exceptions, such as format shifting, that are important for network environment.

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