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One Step Ahead Two Steps Back: Reverse Engineering 2nd Draft for 3rd Revision of the Chinese Copyright Law

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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 1990.¹ In 2001, the Copyright Law was completely revised to be complied with the TRIPS Agreement before China's accession to the World Trade Organization (WTO).² In 2010, the Copyright Law was revised for the 2nd time to be complied with the WTO Dispute Settlement Board Panel Report regarding US-China intellectual property dispute.³ 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. One of primary purpose of the 3rd revision is 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."

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, 2012.⁴ The Draft immediately attracted the public attention and became the media focus. The NCAC received more than 1,600 comments within 2 months. Although collecting societies, musicians and Internet industry and many other stakeholder groups all keenly presented their propositions, the people at large who actually use the works

¹ Hong Xue, "Between the Hammer and the Block: China's Intellectual Property Rights in the Network Age", *University of Ottawa Law and Technology Journal*, Vol. 2, Iss.2, 2005.

² Muzhu Shen, *WTO and Chinese Legislation*, China Law Press, 2002.

³ Hong Xue, "An Anatomical Study of the United States versus China at the World Trade Organisation on Intellectual Property Enforcement", *European Intellectual Property Review*, Iss.6, 2009.

⁴ NCAC's Circular on Solicitation of Public Comments on the Draft of 3rd Revision of Copyright Law, March 31, 2012, at < <http://www.ncac.gov.cn/cms/html/309/3502/201203/740608.html>>.

were the silent majority for lack of knowledge, channel or awareness.⁵ So what was missing from loud voices is the candid and critical review for the public interest and from the perspective of the people's access to knowledge.

On July 6, 2012, the NCAC released the 2nd Draft, in which 81 provisions were changed from the 1st Draft⁶, does contain a few improvements, but more are the compromises and even steps backward under the pressure of interest groups. It is unfortunately that China, the largest country by both population and Internet users, despite its fast-growing economy, seems missing the opportunities to craft a 21st-Century Copyright Law, but instead follows the old path of "the more the better" (more copyright protection and enforcement, the better economic growth and social development), "one size fits all" and "modeling on US law" (on draconic enforcement rather than general and robust limitations and exceptions). The paper will try to look into the inner design of the 2nd Draft and analyze both its improvements and setbacks from the following aspects.

1. Exclusive or Remunerative Rights

The 2nd Draft, consistent with the 1st Draft, expands or strengthens the scope and substance of rights. The 2nd Draft degrades the *droit de suite* that was added by the 1st Draft from a exclusive right of copyright owners to a right of remuneration.⁷ But it is unproven 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. More worrisome, such right can neither be transferred nor waived. It is indeed questionable whether such design would prevent the relevant works from entering into public domain and whether the new remuneration right can increase the costs of enforcement.

Given that the phonogram industry is almost losing the revenue from reproduction and distribution of hard copies, the 1st Draft allowed for phonogram producers, along with performers, to be reasonably remunerated for broadcasting or diffusing the sound recordings in other means.⁸ Phonogram producers and performers have no broadcasting or diffusion right under the current Copyright Law. It was not clear, under the 1st Draft, whether the new right granted to phonogram industry is an exclusive right or merely remuneration right. The 2nd Draft clarifies that such right is remuneration right and

⁵ "The Draft of the Revision of Copyright Law Questioned and Suspected", at <<http://topic.t.sina.com.cn/blog/zzqf/index.shtml>>; "I Must Protect You: The Draft of The Revision of Copyright Law in the Middle of Contention", at <<http://www.infzm.com/content/74392>>.

⁶ NCAC's Circular on Solicitation of Public Comments on the 2nd Draft of 3rd Revision of Copyright Law, July 6, 2012, at <<http://www.ncac.gov.cn/cms/html/309/3517/201207/759867.html>>.

⁷ Article 12 of the 2nd Draft: copyright owners or their successors, after the first sale of the originals of artistic or photographic works or manuscripts of the literary or music works, enjoy the right to share the benefit from the re-sales in the form of auction of the originals or manuscripts; the right cannot be transfer or waived.

⁸ NCAC's Explanations on the Draft of 3rd Revision of Copyright Law, March 31, 2012, at <<http://www.ncac.gov.cn/cms/html/309/3502/201203/740608.html>>.

reduces the scope of the right to certain means of diffusion.⁹ The clarification and reduction should be welcome, but it still tends to sustain the outdated business model of the phonogram industry.

The 1st Draft redefines the scope of rights of broadcasting organizations and grants them the exclusive to control the “signals with contents”,¹⁰ which implied that broadcasting organizations may control both the signals and contents therein. The 2nd Draft, however, paraphrases that broadcasting organizations’ right is only on the signals that carry sounds or graphs.¹¹

Like the 1st Draft, the 2nd Drafts prevents the property rights in a work author of which is an entity that 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.¹²

2. Limitations and Exceptions to Rights

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 1st Draft, however, either fails to remove the unreasonable restrictions on limitations and exceptions in the current Copyright Law, or subjects them to new conditions that further restrict their implementation. The 2nd Draft makes improvements to some extent but meanwhile tightens the scope of limitations and exceptions.

Chinese Copyright Law incorporates the 3-step test from Berne Convention and TRIPS Agreement. But 3-step test has always been functioning as the “ceiling” of all the limitations and exceptions, rather than a general clause to enable more limitations and exceptions.¹³ 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

⁹ Article 39 of the 2nd Draft: sound recording producers and performers, enjoys the right of remuneration where the sound record is used in the following means: a) public diffusion or re-diffusion of the sound recording by wire or wireless means, or communication to the public of the diffusion of the sound recording via technical equipments; b) public diffusion of sound recording via technical equipments.

¹⁰ Article 37 of the 1st Draft.

¹¹ Article 40 of the 2nd Draft: broadcasting programs are the signals that carry sounds or graphs and first diffused by radio and television stations. Article 41 of the 2nd Draft: radio and television stations enjoy right over broadcasting programs.

¹² Article 23 of the 2nd Draft.

¹³ Chengsi Zheng, *Copyright Law*, Chinese People’s University Press, 1997 (2nd Edition).

into account.¹⁴ 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 1st 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.¹⁵ The 2nd Draft, however, enhances flexibility of the specified circumstances by an open-ended clause, i.e. "other circumstances" provided that they are consistent with 3-step test.¹⁶ This is very positive action. It means legitimately-exempted use is no longer constrained to the exhausted list but become more open and flexible.

The open-ended clause in the 2nd Draft, however, does not solve all the problems in limitations and exceptions. The current Copyright Law 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 kept¹⁷, the 2nd Draft, like the 1st Draft, adds new restrictions on certain specified unpaid use. 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.¹⁸ The 1st Draft, however, restrict the scope of private use to "making one copy of a work for personal study and research."¹⁹ The 2nd Draft further restricts the scope to "reproduction of fragments of a literary work for personal study and research."²⁰ 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 literary work. Under the Copyright Law, any category of works may be used in the form of reproduction, translation, adaptation (such as remix or sampling), etc., as far as the use is private. The 2nd Draft, however, only allows for reproduction and restricts to literary. It is hard to understand why copyright protection that should primarily address public use of works interferes so harshly the private sphere. While adding new restrictions, the 2nd Draft is willing to keep the old ones. The use of works for classroom education and scientific research has always been very restrictive.²¹ Only translation or reproduction in limited copies are 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 2nd Draft, like the 1st Draft, does

¹⁴ 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.

¹⁵ Article 39 of the 1st Draft.

¹⁶ Article 42 of the 2nd Draft.

¹⁷ The only new unpaid use introduced by Article 45 of the 2nd Draft is to allow copying interoperable information of a computer program to create new program.

¹⁸ Article 22(1) of the Copyright Law.

¹⁹ Article 40 of the 1st Draft.

²⁰ Article 42(1) of the 2nd Draft.

²¹ Article 22(6) of the Copyright Law.

not make the least effort to correct the unreasonableness for educational use.

Pursuant to compulsory licenses, a protected work may be used under the Copyright Law without the permission of the right-holder, but subject to the payment of remuneration.²² The 1st Draft maintains the existing categories of statutory licensing but makes the implementation more restrictive. For example, the Copyright Law, pursuant to the Berne Convention, allows to make new sound recordings for the music work that has been incorporated in sounding recordings without permission of copyright holder. The 1st Draft, however, adds a time limit of 3 months.²³ 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 1st Draft for fear that their music work could be put to any use after 3 months of first release of sound recordings. In response, the 2nd Draft completely eliminates the compulsory licenses for making sound recordings and broadcasting.²⁴ The 2nd Draft also shifts the power to the collecting societies. Under the 2nd Draft, anyone, before the first use of the works, shall register with the pertinent collecting society and pay remunerations to then within 1 month after use.²⁵ It is unknown whether the procedural complicatedness would defer the people from using the works under the limited circumstances of compulsory licensing.

3. Technological Measures and Right Management Information

The Draft significantly strengthens the protection for technological measures and right management information.²⁶ 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 United States Digital Millennium Copyright Act (DMCA). Under the 2nd Draft, technological measures are the effective technology, device or component deployed by right holder to prevent or restrict its work, performance, sound recording or broadcasting program from being copied, browsed, appreciated, operated or communicated via information network.²⁷ The 2nd Draft clearly extends the legal protection to technological measures to protect broadcasting programs, which has not been ratified in any international treaty and may have negative impact. 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

²² Article 23, 33, 40, 43, 44 of the Copyright Law.

²³ Article 48 of 2nd Draft.

²⁴ NCAC's Explanations on the 2nd Draft of 3rd Revision of Copyright Law, July 6, 2012, at <<http://www.ncac.gov.cn/cms/html/309/3517/201207/759867.html>>. Article 46, 47 of the 2nd Draft.

²⁵ Article 46 of 1st Draft.

²⁶ The 1st 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.

²⁷ Article 64 of 2nd Draft.

circumvent the Technological Protection Measures attached on the copies of the work by Publishers or phonogram industry.

The legal protection for technological measures and right management information offered by the 2nd Draft closely models on the DMCA by banning the devices or services that may be used for circumvention and the provision of the works Right Management Information of which is tampered.²⁸ With respect to the former, there is no requirement for double intents. As far as circumvention of technological measures is intentional, the circumventor shall be punished, irrespective whether the circumventor intend to infringe the right protected by the technological measure.²⁹ With respect to the latter, negligent as well as intentional acts of deletion or alteration of right management information shall be punished.³⁰

Under the 2nd Draft, only under 4 very restrictive circumstances, can technological measures be legitimately circumvented, provide that no technology, device or component for circumvention is provided to any others.³¹ Violations against the protection for technological measures and Right Management Information are subject to not only civil liabilities but severe administrative and criminal punishments.³²

The biggest defect in this regard is that the 2nd 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 2nd 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, the author of this paper had 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, the voice was bounced back by the sound of silence.

4. Management of Rights

The 1st Draft created a *de facto* collective management for “orphan works”, although the ambiguity and restriction in these designs may substantively affect their effectiveness.³³ The 2nd Draft, although retains the design for orphan works, limits the scope of its application. Under the 2nd Draft, copyright in a work author of which cannot be identified, except for the right of attribution, may be exercised by the owner of the original of the work; where a newspaper or journal publisher digitize the works that

²⁸ Article 65, 66 of 2nd Draft.

²⁹ Article 65 of 2nd Draft.

³⁰ Article 66 of 2nd Draft.

³¹ Article 67 of 2nd Draft.

³² Article 74 of 2nd Draft.

³³ According to Article 25 of the 1st 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 1st Draft calls for a new set of regulations to define the new system.

have been published on the newspaper or journal, or where other users digitize or communicate works via information network, they may apply with and pay fees to the organization designated by the NCAC, provided that neither the author or the owner of the original of the work can be identified or contacted.³⁴

The 1st Draft had substantially reinforced the status and power of collecting societies, which can represent not only their members but any other Chinese right holders who did not, in advance, object their representation in written; once a user paid to a collecting society, it is exempted from the liability of compensating the right holders.³⁵ These provisions were strongly opposed by the right holders who have barely any trust in the officially-designated collecting societies. As a result, the provisions on collective management were revamped considerably in the 2nd Draft. Under the 2nd Draft, the much-debated "extended (default) collective management" is now only be applied in two circumstances, i.e. broadcast of published literary, music, artistic or photographic works by radio or television station; and, public communication of music or audiovisual works via karaoke systems by operators.³⁶ Extended collective management, under the 2nd Draft, also does not exempt the users from compensating the right holders, even if it had paid to the collecting society.³⁷ In addition, if a user knows that the right holders is not a member of a collecting society, it cannot rely on the fee schedules set out by the collecting society if sued by the right holder for unauthorized use, even though it had paid to the collecting society.³⁸

Reinforcement of collecting societies would inevitably curb the development of open licensing, such as creative commons, in China. Collective management, particularly the "extended (default) collective management" makes 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 1st and 2nd Draft are moving to this direction. It's said Chinese approach follows Nordic model. But how Nordic model reconciles with open licensing is unlearned.³⁹

5. Enforcement Measures

Copyright enforcement is tremendously enhanced under the 1st and 2nd 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.⁴⁰ The 2nd Draft also introduces a semi-statutory damages of up to RMB 1 million (US\$ 156,799.39) where

³⁴ Article 25, 26 of 2nd Draft.

³⁵ Article 60, 70 of 1st Draft.

³⁶ Article 60 of 2nd Draft.

³⁷ Article 70 of 2nd Draft.

³⁸ Article 70 of 2nd Draft.

³⁹ NCAC's Explanations on the Draft of 3rd Revision of Copyright Law, March 31, 2012, at <<http://www.ncac.gov.cn/cms/html/309/3502/201203/740608.html>>.

⁴⁰ Article 72 of 2nd Draft.

the right holder's actual loss, infringer's illegal gains or usual right transaction fees cannot be determined, however, unlike the 1st Draft, removes the prerequisite that captioned copyright shall be registered with the NCAC.⁴¹ Determination of the damages is now solely in the discretion of the court. 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.⁴²

Internet is a big challenge to copyright enforcement. The 2nd Draft specifically addresses this issue. Under the 2nd Draft, network service providers that provide "pure network technical services" such as storage, search or linking are not obliged to examine relevant copyright or related right.⁴³ This provision exempts the service providers' general obligation of monitoring their system or network and importantly differentiates from the service providers' general obligation of content censorship.⁴⁴

Unfortunately, 2nd Draft fails to address whether the service providers shall provide their users/subscribers' personal information once being approached by the right holders, which may be a loophole for privacy and personal data protection on the Internet. According to the Supreme People's Court's judicial guidelines, service providers that refused, without justifiable reason, to provide the users' personal information at the request of copyright holder, shall be liable to the copyright holder.⁴⁵ These guidelines that is applied in Chinese judicial practices hardly provide any safeguard against the abuse of Internet users' personal information. On the other hand, the Ministry of Industry and Information Technology enacted at the end of 2011 a set of stipulations, which specifically require the network service provider not provide the users' personal information to any third party without the consent of the users.⁴⁶ The 2nd Draft's silence on the critical issue of privacy protection would result in discrepancies in the enforcement.

Conclusion

Unlike the first two Revisions to the Copyright Law, the 3rd Revision was not made under imminent trade pressure, such as from any bilateral or multilateral trade

⁴¹ Article 72 of 2nd Draft.

⁴² Article 73-76 of 2nd Draft.

⁴³ Article 69 of 2nd Draft.

⁴⁴ Under the State Council's Regulations on Internet Information Service (September 25, 2000), all the service providers shall censor the contents in their network or system according to legal requirements.

⁴⁵ Interpretation of Several Issues Relating to the Adjudication of, and the Application of Law to, Cases of Copyright Disputes regarding Computer Networks, adopted at the 1144th session of the Judicial Committee of the Supreme People's Court on Nov. 22, 2000, revised at the 1302nd session of the Judicial Committee of the Supreme People's Court on Dec. 23, 2003, effective Jan. 7, 2004, and revised in accordance with the Regulations for the Protection of the Right of Communication via the Information Network, adopted at the 1406th session of the Judicial Committee of the Supreme People's Court on Nov. 20, 2006, effective as of Dec. 8, 2006.

⁴⁶ Article 11, 12 of the Several Stipulations on Regulations of the Market Order of Information Services.

agreements. Instead, the Revision 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(s), therefore, tends to upgrade the level of protection and enforcement for copyright to implement the national strategy. In addition, the Draft(s) 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 on which the Draft(s) was built may be untenable. 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 maximalism approach might have worked in industrial society, it has hardly been successful in the information society and network environment. The old path of copyright protection can hardly be fitting in the new communication environment.

The 1st and 2nd Draft are actually the first few steps 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 approved. 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 much less time than that. The Draft could be modified or improved after public consultation. The author, along with the other scholars home and abroad, is currently campaigning for a general exception clause plus non-exhaustive illustrative list as well as the other new exceptions, such as format shifting, that are important for network environment.