

The Copyright Limitations of the 2020 Copyright Law of China: A Satisfactory Compromise?

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Structure

Tianxiang He, *Transplanting Fair Use in China? History, Impediments and the Future*, 2020 U. ILL. J.L. TECH. & POL'Y 359 (2020).

This paper focuses on the new copyright limitation setting of the 2020 Copyright Law of China.

- 1.Changes made
- 2.Critical assessment and recommendation
- 3.Conclusion

The Current Copyright Limitation Model

A modest revision

the copyright limitations set by the CLC can be divided into two types:

1. copyright exceptions as provided in Article 24 of the CLC
2. statutory license clauses as provided in Article 25 (related to textbook adoption), Article 35(2) (related to newspaper and journals), Article 42(2) (related to sound and video recordings producers), Article 46(2) (related to TV and broadcasting stations).

There are no mandatory license clauses provided in the CLC.

Changes made to the copyright exceptions

Two major changes

The former Article 22 (equivalent to the current Article 24) provided a list of 12 exceptions whereas the current Article 24 provided a list of 13 exceptions.

1. the 2020 CLC inserted a two-step test in the first paragraph of Article 24, requiring that “the normal use of the work shall not be affected, and the lawful rights and interests of the copyright owner will not be unreasonably damaged.”
2. the 2020 CLC added a thirteenth exception, which covers “other circumstances prescribed by laws and administrative regulations”.

Changes made to the copyright exceptions

Minor changes:

“designation of the author” is added to the first paragraph so that legal persons and other organizations can be covered.

More permitted acts, such as **“adaptation, compilation, and playing”** of published works are provided for teaching and research staffs in Article 24(6).

For free performances as provided in Article 24(9), the requirement of that the performance is not **“for commercial purposes”** is added to make clear that performances that didn't charge on the public and no remuneration is paid to the performers can still infringe, if the performance itself is of commercial nature.

In addition, the **“outdoor”** requirement is removed from the exception related to artistic works located or on display in a public place provided in Article 24(10). This has raised concerns about potential conflicts between the public and museums and art galleries that host indoor exhibitions.

Changes made to the copyright exceptions

Minor changes:

exception (12) related to print disabled people: “Providing published works in an accessible fashion that can be perceived by people with print disabilities;”

“Braille” as the designated accessible format of the published work is changed to **“an accessible fashion that can be perceived by people with print disabilities”**.

“providing” is a much broader term than “translation” and “publication” with regard to the economic rights covered.

Changes made to the statutory license clauses

Notable changes were made to the statutory license of TV and broadcasting stations:

Article 44 of the 2010 CLC that stipulated “[a] **radio station or television station that broadcasts a published sound recording, does not need a permission from, but shall pay remuneration to, the copyright owner, except that the interested parties have agreed otherwise. The specific procedures for treating the matter shall be established by the State Council**” was deleted from the 2020 CLC.

Article 43(2) of the 2010 CLC (now Article 46(2)) already provided that “[a] **radio station or television station that broadcasts a published work created by another does not need a permission from, but shall pay remuneration to, the copyright owner according to the provisions**”, it is understandable that the deletion is to avoid repetition as the neighboring rights of sound recording provided by the CLC does not include broadcasting rights ab initio. The function of the deleted Article 44 can be properly covered by the Article 46(2) of the 2020 CLC.

Impact Assessment, Problems and Recommendations

The limited impact and problems of the new copyright exceptions model

nothing much is changed about the copyright exception model of the 2020 CLC as the newly added two-step test of the first paragraph of Article 24 is merely a restatement of Article 21 of the 2013 RICL

the new thirteenth exception is **not an instant functioning one** as “it merely opens the possibility of new exceptions set by future laws and administrative regulations”.

the role of the two-step test is to serve as a complement to the listed exceptions rather than a general clause that can be applied independently

Compared with previous drafts, the 2020 final version is a big **step back** in terms of flexibility.

Impact Assessment, Problems and Recommendations

the new thirteenth exception

put the power to create new exceptions to the legislature rather than the courts

this model is extremely inflexible in the face of new technological challenges:

1. US fair use model

2. Japanese semi-open model

empowered the courts to decide whether a specific case should be considered fair

This normative constrain has perplexed the Chinese judges in difficult copyright cases (such as the Google Books case) for long, and even forced the Chinese courts to deviate from the doctrinal interpretation of the law in their judgements and the Supreme People's Court of China (SPC) to issue a judicial interpretation that advocates the US four-factor fair use test.

Impact Assessment, Problems and Recommendations

The problematic two-step test

The three-step test is not designed for direct application, the purpose is to provide a standard for signatories to evaluate their domestic copyright laws.

the three-step test shall “apply cumulatively”

the understanding of the function and application of the two-step test among courts were often diverse and even contradictory

1. As an overarching principle
2. As an additional check on the listed exceptions

Impact Assessment, Problems and Recommendations

The problematic two-step test

the interpretation of the two steps by the Chinese courts were often confusing and problematic:

1. the two-step test and the US four-factor fair use test were used interchangeably
2. for those judgements that interpreted the two steps without referencing the four-factor fair use test, the reasoning parts are either overly simplified or purely economic, focusing solely on finding market substitution and financial damages.

Reasons:

1. the wording of the two steps are **ambiguous** and “leaning towards a strictly economic approach due to the WTO forum”
2. the Chinese judges often **find it very hard to balance between a variety of interests at stake** with the test alone.
3. **precedents are rather scarce** and their interpretation varies widely from country to country thus cannot provide much guidance.

Impact Assessment, Problems and Recommendations

Recommendations

Several Opinions of the Supreme People's Court on Some Issues in Fully Giving Rein to the Function of Intellectual Property Rights Adjudication in Promoting the Great Development and Flourishing of Socialist Culture and Stimulating the Indigenous and Coordinated Development of Economy

Combining the two-step test with four factors?

1. the four-factor fair use test is well received by the Chinese courts.
2. But the relationship between the two steps provided by the Article 24 of the CLC and the four factors provided by the said SPC judicial interpretation is unclear:

"...under special circumstances necessary for promoting technological innovation and business development, a use of a work may be determined fair use after consideration of the nature and purposes of the use, the nature of the work used, the quantity and quality of the portion of the work used, the potential impact of the use on markets or values, and other factors, provided that such use neither contravenes the normal use of the work nor results in unreasonable damage to the lawful interests of the author."

Impact Assessment, Problems and Recommendations

Recommendations

This paper suggests that the Chinese courts should merge the four factors with the two-step test without following the instructions of the SPC judicial interpretation.

1. instead of applying the ambiguous test of a potentially unconstitutional judicial document, it will be wiser to consider to blend the factors in the two-step test and use them concurrently in adjudicating fair use cases.
2. the interpretation of the two-step test of the Article 24 of the CLC shall not strictly follow the WTO predominantly economic interpretation and should be more flexible
3. It will provide greater legal certainty if the CLC can include a similar mechanism into its copyright exception model via a fourth revision in the future. But seemingly the Chinese courts will have to act proactively, sometimes in an unconstitutional way for a long period of time, in order to protect certain interests that are of great importance to the society.

Impact Assessment, Problems and Recommendations

Providing more exceptions for moral rights?

Unlike the economic rights, the moral rights provided by Article 10 of the CLC are not with clear exceptions. Specifically, only a few articles provide exceptions to a certain type of moral rights, and they are scattered in the CLC and the RICL. However, seemingly the right of integrity is under minimal restriction in China, and this has caused many problems in practice.



Impact Assessment, Problems and Recommendations

Providing more exceptions for moral rights?

张牧野等与乐视影业（北京）有限公司等著作权权属、侵权纠纷 [Zhang Muye v China Film Co, Ltd]:

the plaintiff had a contractual relationship with the defendant to make a film of the plaintiff's book, but the defendant had made some substantial changes to the story. The Beijing Intellectual Property Court has opined that even if an alteration is deemed "necessary" according to Article 10 of the RICL, it could still infringe the right of integrity of the author if it has distorted the author's ideas and emotions expressed in the work. This kind of broad interpretation will greatly restrict the creative freedom of filmmakers and is detrimental to the film industry. If such an approach is advocated widely, authors of literary works will be put in a position to abuse their moral rights as they can always raise objections to alterations of their literary works when converted to movies – which is inevitable – in the face of an established contractual relationship.

Article 10 RICL: Where a copyright owner authorizes another person to make, based on his works, cinematographic works or works created by a process analogous to cinematography, it is deemed that he has permitted him to make necessary alteration of his works, insofar as such alteration does not distort or mutilate the original works.

Impact Assessment, Problems and Recommendations

Providing more exceptions for moral rights?

Similarly, when cases related to parody arise and provided that it can be justified by Article 24(2) of the CLC that concerns quotation and criticism, there is obviously a risk of infringement of the right of integrity.

A parallel exception for the right of integrity will then make sure that the protection of the social and economic values behind parody are not disturbed.

Recommendation: the exceptions related to moral rights shall be introduced with prudence: unless there is great public interest in curbing the moral rights and it is practical to do so, no exceptions shall be added. In terms of the form, China could choose to introduce a close-list model of moral rights exceptions, or adopt an open-ended model such as the reasonableness defence in the Copyright Act of Australia to the right of integrity.

Conclusion

a satisfactory compromise

nothing much is changed, and the changed parts only have limited impact on specific exceptions but not on the general design.

But technological challenges and social demands will not perish and will force the Chinese judiciary to respond in a pragmatic way.

the CLC should absorb some of the good practices and internalize them as good laws, thereby providing legal certainty. Until then, the Chinese courts should breathe the four factors into the two-step analysis when used as a general clause in deciding difficult fair use cases that cannot be properly covered by the listed exceptions of Article 24 of the CLC.