12. INDUSTRY-FRIENDLY REGULATION FOR THE DEVELOPMENT OF A SHARING ECONOMY - FROM THE PERSPECTIVE OF CHINESE COPYRIGHT LAW

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ABSTRACT

The accelerating pace of technological innovation has important implications for the regulation of the copyright sharing economy, since a number of new business models amass a good portion of their value by depending on an increasing number of consumers' utilization of copyrighted goods. The Chinese government learns from the experience of the United States, which recognizes the important role that the 'innovate first, regulate later' model has played in the innovation policy. It may seem surprising to find that Chinese judiciary and legislature adopt contradictory approaches to interpret the law or introduce new provisions in different times. However, the logic underlying them is coherent: to adopt industry-friendly copyright regulation policy.

***Keywords**: Copyright Law; Copyright Exceptions; Safe Harbors; Sharing Economy; Innovation Policy*

1. INTRODUCTION

Historically, copyright law and technological innovation have been closely related. New technology may result in legislative amendments to recognize a new right, thus continuously extending the boundary of the copyright law. This is evidenced by two new rights available to copyright owners: the technology-broadcasting right and the internet transmission technology-making available right. As the Preamble of the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) emphasizes, 'the development and convergence of information and communication technologies' has a profound impact on the evolution of the overall environment of the copyright system.

In an analogue environment, there would be no Videocassette Recorder if the United States Supreme Court in *Sony* did not rule that the making of individual copies of complete television shows for purposes of time shifting does not constitute copyright infringement, but is instead fair use.[1] In the digital environment, iPods would not have appeared if Apple could not count on copyright law to permit consumers to copy their existing CD collections.[2] Similarly, there would be no video sharing websites if the U.S. Congress did not introduce the safe harbour system for online storage in the Digital Millennium Copyright Act (DMCA).[3] In contrast, the file-sharing technology pioneers Napster and Groskster were shut down because they were held liable for copyright infringement.[4] In light of technological developments, the fair use doctrine and safe harbour system appears to play an important role as part of U.S. innovation policy.

If we compare the technological innovation between the United States and Europe, we may conclude that Europe lags behind the United States. This conclusion likely

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[1] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[2] Fred von Lohmann, 'Fair Use as Innovation Policy' (2008) 23 Berkeley Tech. L. J. 1, 8.

[3] *See* Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

[4] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

stems from the fact that Europe has neither the world's largest internet companies nor the world's largest leading digital technology. Perhaps it is because its innovation spirit is not as good as the United States. Two different European directives illustrate how Europeans treat copyrights and developing technology. The first is the European Information Society Directive, which leaves a rather narrow scope of exceptions that is usually subject to restrictive interpretation.[5] Additionally, the European E-Commerce Directive lacks the safe harbour for information location tools.[6]

In the so-called 'new era of sharing economy,' copyright law will play an increasingly critical role in the innovation industry, since a number of new business models amass a good portion of their value by depending on more consumers' utilization of copyrighted goods. In this regard, policy-makers and courts must strive to balance the interests of copyright holders, the Network Service Providers (NSPs) and the public, in order to give innovators a bit of breathing room without unreasonably prejudicing the legitimate interests of the copyright holders.

The Chinese government views Internet technology as a general purpose technology affecting almost every aspect of the economy and society and recognizes China may be able to use to achieve the so-called 'corner-overtaking.' In the last decade, the Chinese government has developed many industry-specific development policies, which has caused a spate of outstanding internet firms such as Baidu, Alibaba and Tencent.[7] In the era of the sharing economy, what is the appropriate regulation strategy for China to adopt in order to achieve greater development? This article suggests China should continue to adopt the approach of industry-friendly regulation for innovation, as before.

2. COPYRIGHT EXCEPTIONS SYSTEM: REFORMING FOR NEW TECHNOLOGIES INDUSTRY

Traditionally, the approach to copyright exceptions and limitations[8] differs significantly between the civil law system and the common law system: the former provides for a closed category of carefully-defined exceptions, whereas the latter allows for an open-ended fair use system.[9] Both approaches have specific merits: the advantage of the former approach is legal certainty and the latter is flexibility.[10]

A. STATUTORY COPYRIGHT EXCEPTIONS SYSTEM IN CHINA AND THE UNITED STATES

Chinese lawyers take for granted that China belongs to the civil law system and follows the *droit d'auteur* tradition.[11] Consequently, Chinese Copyright Law must

[5] Directive (EC) 2001/29 of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (hereinafter Information Society Directive).

[6] Directive (EC) 2000/31 of 8 June 2000 on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market (hereinafter E-Commerce Directive).

[7] Robert D. Atkinson, 'ICT Innovation Policy in China: A Review' (2014) Information and Technology & Innovation Foundation <http://www2.itif.org/2014-china-ict.pdf> accessed 17 October 2018.

[8] In this article, unless expressly specified otherwise, 'an exception' means an unremunerated permitted use: a synonym for 'free use', and a limitation means a remunerated permitted use: a synonym for 'non-voluntary license.'

[9] Martin Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation' (2010) J Intell. Prop., Info. Tech. and E-Commerce L 67.

[10] ibid 68-69.

[11] Kangsheng Hu et al., *Zhonghua Renmin Gongheguo Zhuzuoquanfa Shiyi (Interpretations on the Copyright Law of the P. R. China)* (Law Press 2002) 41.

For a detailed analysis of the transplants of intellectual property laws in China, *see* Peter K. Yu, 'The Transplant and Transformation of Intellectual Property Laws in China', in Nari Lee et al., (eds), *Governance of Intellectual Property Rights in China and Europe* (Edward Elgar Publishing 2016).

balance the purpose of copyright law, 'encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization,' and 'promoting the development and prosperity of the socialist culture and science,'[12] with the exhaustive list of exceptions allowed under copyright law.[13]

Chinese Copyright Law uses the term 'limitations' in a broad sense to cover both free use and statutory licenses. Free use means that 'a work may be exploited without the consent of, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned if they are available and the other rights enjoyed by the copyright owner by virtue of the copyright law shall not be prejudiced.'[14] Statutory license means the 'user can use certain kinds of works without the consent of the author, on the conditions that the user will pay remuneration.'[15]

Article 22 of the Chinese Copyright Law lists 12 types of free uses. In order to provide solutions to the questions raised by Internet technology, the Regulations for the Protection of the Right of Communication through Information Network (RPRCIN) appropriately extend the free uses in Article 22 of the Copyright Law into the digital environment.[16]

In addition, Article 21 of Implementing Regulations of the Copyright Law introduces a 'quasi' three-step test, which states the use of published works 'in accordance with the relevant provisions of the Copyright Law' should neither 'conflict with normal exploitation of the work' (the second step) nor 'unreasonably prejudice the legitimate interests of the author' (the third step). It is understood that 'the relevant provisions of the Copyright Law' means Art. 22 of the Copyright Law.[17] The cases covered by the relevant provisions can be regarded as 'certain special cases' in the sense of the three-step test.

Under the literal interpretation of Article 21 of the Implementing Regulations, if an unauthorized use of copyrighted work is permissible, it will not only need to fall under the specific categories of copyright exceptions in Article 22 of the Copyright Law, but also to pass the three-step test. In other words, although copyright exceptions are already defined precisely, their application still depends on compliance with the open-ended three-step test. Consequentially, the attainable degree of legal certainty is reduced. On the other hand, the limited flexibility of the system of precisely defined exceptions is further restricted.[18] In this regard, the current Chinese statutory copyright law offers neither legal certainty nor flexibility.

A prominent example of the common law approach to copyright exceptions is the fair use doctrine in the United States.[19] The fair use doctrine has been developed

[12] Copyright Law of the People's Republic of China, art. 1 (2010) [hereinafter Chinese Copyright Law].

[13] ibid art. 22.

[14] ibid.

[15] Qian Wang, *Zhuzuoquan Fa* [*Copyright Law*] (RUC Press 2015) 370.

[16] See Regulations for the Protection of the Right of Communication through Information Network, 1198 St. Council Gaz. 13 (2006) art. 6 & 7, translated in 86 China Patents & Trademarks 90 (2006) (detailed analysis of the articles of RPRCIN); see Yong Wan, 'China's Regulations on the Right of Communication through Information Network' (2007) 54 J. Copyright Soc'y U.S.A. 525, 534-36.

[17] Chengsi Zheng, *Banquan Fa* [*Copyright Law*] 261 (2d edn, RUC Press, 1997); Haochen Sun, 'Overcoming the Achilles Heel of Copyright Law' (2007) 5 NW. J. Tech. & Intell. Prop. 265, 281.

[18] The French Copyright system has the similar problem. *See* Martin Senftleben, 'Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law' in Graeme B. Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property* (Edward Elgar Publishing, 2013) 71.

[19] ibid, 32.

through case law and is codified in Section 107 of the 1976 Copyright Act.[20] Section 107 lists four factors for courts to weigh in determining fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

The central advantage of the fair use doctrine is flexibility. Within a flexible framework, the courts can adapt the copyright exception infrastructure to new circumstances. There is no need for constant amendments to legislation that may have difficulty keeping pace with the speed of technological development.[21] Consequently, courts and legal scholars have long sung the praises of the fair use doctrine, which is understood to allow creators to build on the works of their predecessors by permitting a framework for the authorized use of copyrighted works that would otherwise be unlawful.[22]

B. CHINESE COURTS LEARN FROM THE U.S.'S FLEXIBLE FAIR USE DOCTRINE: THE GOOGLE CASE AS AN EXAMPLE

In 2004, Google announced the Google Books Project to scan books under agreements with several major research libraries throughout the United States and other countries. Google has provided digital copies to participating libraries, created an electronic database of books and made 'snippets' of these books available through their search engine. However, millions of the books scanned by Google were still under copyright protection, nor did Google obtain permission from the copyright holders. Since the Google Books Project is a global project, they could be subject to litigation around the world.[23]

In the United States, the Supreme Court in 2016 denied the Authors Guild's petition without explanation, meaning that the Second Circuit Court's decision stands.[24] The latter affirmed the judgment of the District Court for the Southern District of New York, and concluded that Google's copying is highly transformative and satisfies U.S. Copyright Law Section 107's test for fair use.[25]

Despite Google's victory in the United States, Google lost in China. However, the Chinese decisions did not close the door for Google to develop its Books Project in China.[26]

As mentioned above, the current Chinese statutory law model on exceptions to copyright law provides a rather narrow catalogue of specific and exhaustive exemptions. Due to its narrow scope, the Chinese Copyright Law is often not capable of dealing with new technologies, even though the defense of an infringement claim seems reasonable. Obviously, the technologies and activities of Google Books Project was not imagined by the Chinese legislators in 1990,[27] and indeed any of the existing free

[20] 17 U.S.C. § 101 (2006).

[21] Pamela Samuelson, 'Justifications for Copyright Limitations & Exceptions' in Ruth Okediji (ed.), *Copyright Law in an Age of Limitations and Exceptions* (2015) <http://ssrn.com/abstract=2476669> accessed 17 October 2018.

[22] von Lohmann (n 2) 1.

[23] *Authors Guild v. Google Inc.*, 954 F. Supp.2d 282, 285 (S.D.N.Y. 2013).

[24] See Supreme Court Order List, 578 U.S. 15-849 (2016) <http://www.supremecourt.gov/orders/courtorders/041816zor_2co3.pdf> accessed 17 October 2018.

[25] *Authors Guild v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015).

[26] In the first instance, Google lost because the First Intermediate Court of Beijing erred in its finding of fact; in the second instance, Google lost because it had not carried the burden of persuasion to support the free use defence. For a detailed analysis of Google case in China, *see* Yong Wan, 'Similar Facts, Different Outcomes: A Comparative Study of the Google Books Project Case in China and the United States' (2016) 63 J. Copyright Society U.S.A 573.

[27] The free use provisions in 1990 Copyright Law did not change substantially.

uses listed in copyright law cannot exempt Google's activities.

In ordinary interpretation of the text of the copyright law, Google would fail, since copyright infringement is the use of copyrighted works without copyright holder's permission, infringing certain exclusive rights.[28] However, both the court of first instance and the appeal court did not stop here: they introduced innovative tests to discuss whether an activity is free use or not.

The First Intermediate Court of Beijing introduced a new reading of the three step test: 'in special cases, use of a copyrighted work without permission from the copyright holder may be considered to be free use, if such a use neither conflicts with a normal exploitation of the work, nor unreasonably prejudices the legitimate interests of the copyright holder.'[29] It means there are three conditions to be satisfied before a new exception (not provided for in Article 22 of the Copyright Law) is permissible: (1) it is confined to in special cases; (2) it does not conflict with a normal exploitation of the work; and (3) it does not unreasonably prejudice the legitimate interests of the right holder.

The Chief Judge who wrote the trial court opinion emphasized in an article that: in certain circumstances, when the activities in issue concern public interest, even if they do not fall under any specific category of copyright exceptions in the copyright law, the courts may conclude that they constitute free use. The Google Books project is considered to be such a circumstance.[30]

It is also interesting to find that the First Intermediate Court of Beijing used the term 'transformative use,' which is a concept in U.S. case law.[31] In the court of first instance's view, if a use does not replace the function of the original work and serves a different function from the original work, it is a transformative use.[32] If a use was transformative, it would 'neither conflict with a normal exploitation of the plaintiff's work, nor unreasonably prejudice the legitimate interests of the plaintiff'; in other words, if a use is considered to be transformative, that would be dispositive.[33]

Google appealed to the Beijing Higher Court, which made the same conclusion as the first instance court, that Google's use was not a 'free use,' but based on different reasoning than the first instance court's analysis.

The Beijing Higher Court found that use of a copyrighted work may be considered to be free use in exceptional circumstances, even if such use does not fall within any enumerative catalogue of exceptions in Article 22 of the Copyright Law. In assessing whether such exceptional circumstances exist, Beijing Higher Court introduced multi-factor test, in which three of the four factors in U.S. fair use provisions and two of three elements in the three step test are covered in a somewhat modified version: (1) the purpose and the character of the use; (2) the nature

[28] Qian Wang, *Zhuzuoquan Fa* [*Copyright Law*] (RUC Press, 2015) 370.

[29] *Shen Wang v. Guxiang Info. Tech., Ltd. & Google, Inc.*, No. 1321 Yizhongminchuzi (Beijing 1st Interm. Ct. 2011).

[30] Songyan Rui, 'Wangzhan Quanwen Fuzhi Taren Zuopin Goucheng Qinquan' ('Copying the Entirety of Copyrighted Works by Websites Constitutes Infringement'), (2014) 20 Renmin Sifa 4, 6.

[31] The concept of transformative use was introduced by Judge Pierre N. Leval in his article, 'Toward A Fair Use Standard' 103 Harvard L R 1105 (1990); the Supreme Court of the United States adopted later in its fair use decision in *Campbell v. Acuff-Rose*:

> '[t]he central purpose … is to see … whether the new work merely supersedes the objects of the original creation … or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."'

See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[32] *Shen Wang* (n 30).

[33] *Shen Wang* (n 30).

of the copyrighted work; (3) the character and the amount of the portion used in relation to the copyrighted work as a whole; (4) whether the use has effect on the normal exploitation of the work; (5) whether the use unreasonably prejudice the legitimate interests of the copyright owners.[34] The user shall carry the burden of proof as to whether such exceptional circumstances exist. However, in this case, Google failed to provide sufficient evidence to prove that its use constituted exceptional circumstances.[35]

The Google Books decisions in the United States are based upon the doctrine of fair use. In contrast, such a flexible doctrine does not exist in Chinese statutory copyright law. However, the First Intermediate Court of Beijing and Beijing Higher Court broke out of the usual framework of statutory provisions, introducing innovatory test to determine free use, and Google lost because it had not carried the burden of persuasion to support the free use defense.

C. LEGISLATIVE DEVELOPMENT

It should be noted that the Supreme Court of China, in a policy document, even mentioned the four factors of Section 107 of the U.S. Copyright Act as factors to determine free use:

> In the definitely necessary circumstances to stimulate technical innovation and commercial development, an act that would neither conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author, may be considered as free use, provided that the purpose and character of the use of the 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.[36] (Emphasis added)

In addition to the court cases, the Chinese government has attempted to develop relevant legal solutions. The Latest Draft Amendment of the Chinese Copyright Law (hereinafter the Latest Draft) adopted an open-ended approach, and the Latest Draft currently sits with the State Council Legislative Affairs Office (SCLAO).[37] It added 'other situations' as subparagraph 13 after the list of 12 categories of exceptions.[38] In addition, it introduced a new reading of the three-step test in paragraph 2: '[t]he use of the work in the above situations should neither affect the normal exploitation of that work, nor unreasonably prejudice the legitimate interests of the copyright owners.'[39]

The copyright exceptions system is an important part of copyright's innovation policy.[40] From the discussion above, it is clear the Chinese government is serious about attracting high technology investments to encouraging innovation. This is evidenced by the Chinese judiciary and legislature reforming the current copyright exceptions system that currently includes an exhaustive list of very specific exceptions, discouraging businesses from investing in new technologies.

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[34] *Google, Inc. v. Shen Wang*, No. 1221 Gaominzhongzi (Beijing Higher Ct. 2013).

[35] ibid.

[36] The Supreme Court of China, 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 (Supreme People's Court, 16 December 2011).

[37] State Council Legislative Affairs Office, 'Circular on Solicitation of Public Comments on the Draft Amendment of the Copyright Law' <http://www.chinalaw.gov.cn/article/cazjgg/201406/20140600396188.shtml> accessed 17 October 2018.

[38] Art. 43(i) (13) of the Latest Draft.

[39] Art. 43 (ii) of the Latest Draft.

[40] Fred von Lohmann, 'Fair Use as Innovation Policy' (2008) 23 Berkeley Tech. L. J. 1, 8.

3. SAFE HARBORS SYSTEM: ADOPTING THE U.S. MODEL TO PROMOTE THE DEVELOPMENT OF SEARCH ENGINE INDUSTRY

NSPs provide critical infrastructure support to the Internet allowing millions of people to access online content and communicate with each other. The potential for users to infringe copyright using the Internet could expose NSP to claims of secondary liability, which would deter the NSP from making the necessary investment in the expansion of the speed and capacity of the Internet.[41] In order to attract the substantial investments, the NSP should receive liability protections.

A. SAFE HARBOR PROVISIONS UNDER THE U.S. DMCA AND EUROPEAN E-COMMERCE DIRECTIVE

In 1998, the American Congress enacted the DMCA to update copyright law to keep pace with the internet. The DMCA added 'safe harbor' provisions (codified at 17 U.S.C. § 512) that protect qualifying NSPs from monetary liability in an effort to balance the interests of copyright holders and NSPs in a way that will foster the growth of the internet.

Two years after the enactment of the DMCA, the European E-Commerce Directive was approved. The E-Commerce Directive aims to remove obstacles to cross-border provision of online services in the European Union and to provide legal certainty to businesses.[42] Although largely inspired by the DMCA safe harbors, the approach of the E-Commerce Directive differs from the DMCA in a number of significant ways.[43] The eminent difference is that the DMCA protects four categories of online activity whereas the E-Commerce Directive protects only three categories. The DMCA protects: transitory digital network communications; system caching; residing information at the direction of users; and the use of information location tools.[44] The E-Commerce Directive excludes the last category, the use of information location tools. Additionally, there are no notice and take-down procedures in the E-Commerce Directive, since at the time when the Directive was adopted, the European Union determined such procedures should not be regulated in the Directive itself.[45]

B. CHINESE CHOICE

Although the Chinese Copyright Law was amended in 2001, when the American DMCA and the European E-Commerce Directive had been passed, it did not focus on the digital copyright since the primary aim of that amendment was to pave the way for China's accession to the WTO and implementation of the TRIPS Agreement.[45] It wasn't until May 18, 2006 that the Regulations for the Protection of the Right of Communication through the Information Network (hereinafter referred to as RPRCIN) were adopted by the State Council of the People's Republic of China. The RPRCIN was adopted to respond to the digital technology challenge and to strike a balance between the liability of NSPs and the protection of copyright over the network. The drafters of the RPRCIN absorbed experiences both from the DMCA and E-Commerce Directive on the safe harbor provisions. In general, the Chinese safe harbors system is more like a US-style, instead of an EU-style, since the RPRCIN incorporates all the four safe harbors under the DMCA.[46]

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[41] S. Rep. No. 105-190, at 8 (1998) (US).

[42] Thibault Verbiest *et al*., 'Study on the Liability of Internet Intermediaries' in *EU Internet Law: Regulation and Enforcement* < https://tinyurl.com/y49bgubo> accessed 24 May 2019.

[43] Miquel Peguera, 'The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems' (2009) 32 Colum. J. L. & Arts 481, 481.

[44] 17 U.S.C. § 512(a)-(d).

[45] Verbiest (n 42).

[45] Qian Wang, *Zhishichanquan Fa Jiaocheng* [*Intellectual Property Law*] (3rd edn, RUC Press 2011).

[46] See Regulation for the Protection of the Right of Communication through Information Network (RPRCIN), China Patents and Trademarks No. 3, 2006, arts. 20-23; Qian Wang, *Wangluo Huanjing Zhongde Zhuzuoquan Baohu Yanjiu*

It is understood the safe harbor provisions encourage Internet Service Providers (hereinafter referred to as ISPs) to cooperate with copyright holders in enforcing their copyright and provide the ISPs with more certainty in order to attract investments to continue the expansion of the Internet. Consequently, the United States has a world-leading search engine company (Google) and China also has a giant search engine company (Baidu), but the EU does not.

Under the DMCA, before a NSP can take advantage of any safe harbor, it must meet the two requirements of Section 512(i). The first is that a NSP must 'adopt and reasonably implement, and inform subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers.'[48] The second is that the NSP must 'accommodate and not interfere with standard technical measures… used by copyright owners to identify or protect copyrighted works.'[49] In contrast, there are no such conditions under the RPRCIN for a NSP to meet before it can enjoy the privileges. In this regard, it is easier for an NSP to enjoy the privileges of the safe harbors in China than in the United States. This might be the reason that China's Internet industry has developed rapidly, although it started later.

4. VIDEO SHARING INDUSTRY: DISPARATE TREATMENT IN DIFFERENT DEVELOPMENT PERIOD

Most of Chinese video sharing websites started around 2005[50] when the RPRCIN was promulgated and the safe harbor for the video sharing industry's benefit was introduced.[51] In the early stages of development (2006-2009), Chinese courts preferred to interpret the requirements of the safe harbor broadly, giving the ISPs easier access to the safe harbor. After the video sharing industry developed (after 2009), Chinese courts changed attitudes and adopted a stricter interpretation.

Chinese courts have also changed their attitudes towards deep-linking. Several years ago, there was nearly no online copyrighted content industry in China, and most of the linked content in video-sharing websites was pirated content. However, in recent years, leading video-sharing websites in China have invested a large amount of money to obtain copyright. For example, the largest Chinese video-sharing website, Youku.com, prepared to invest 18 billion RMB (2.3 billion Euro) in 2018 to obtain copyright.[52] The greatest challenges the video-sharing websites face are deep-linking technologies, especially video aggregation websites, which collect and organize online videos from various popular video hosting sites. In order to protect the content industry, Chinese courts have begun to reconsider the regulation method for deep-linking.

A. INTERPRETATIONS OF NOTICE AND TAKE-DOWN PROCEDURE

Notice and take-down procedures are required to take advantage of the hosting safe harbor. Notice and take down procedures require the NSP to disable access to the material claimed to be infringing upon receiving notification of the claimed infringement.

[*Copyright Protection in the Network Environment*] (Law Press, 2011) 208.

[48] 17 U.S.C. § 512(i)(1)(A).

[49] 17 U.S.C. § 512(i)(1)(B).

[50] The Research Group on Development of the Video-sharing Websites in China, 'Zhongguo Shipin Wangzhan Fazhan Yanjiu Baogao' ['Development of the Video-sharing Websites in China'], (2014) 6 Chuanmei 8. The following division of development periods of video sharing industry is also originated from this article.

[51] RPRCIN (n 46) art. 22.

[52] Xiaoman Jiang, 'The Budget of Youku.com to Obtain Copyright in 2018 is 18 Billion' (Beijing, 5 March 2018) <http://www.sohu.com/a/224918888_668372> accessed 17 October 2018.

RPRCIN Article 14 stipulates in great detail the elements that a notification of claimed infringement must contain to be effective. To be effective, a notification must be in writing[53] and include a statement of certification of the notification's accuracy.[54] In addition, the notification must include: (1) the name (appellation), means of contact and address of the right owner; (2) the title and network address of the infringing material which is requested to be removed or to which the link is requested to be disconnected; and (3) the prima facie proofs of the infringement.[55] Under the literal interpretation, lack of any one of the elements will result in the notification nonbinding, since the RPRCIN does not use the term 'substantially.'[56]

Early on, courts found such a defective notification shall not be considered in determining a NSP has actual knowledge or apparent knowledge.[57] However, later court decisions found that a noncompliant notice may be a 'red flag'[58] if the notice includes necessary information to permit the NSP to locate the infringing material.[59] This interpretation is confirmed by the Guiding Opinions of Beijing Higher Court.[60]

What if the allegation of infringement relates to several works? Generally, early court decisions were of the view that the notification must clearly state each work.[47] In contrast, more recent court decisions held that one notification may apply to multiple copyrighted works at a single online site so long as the notification includes a representative list of such works at that site.[48]

B. THE LEGAL REGULATION OF DEEP-LINKING

The term 'deep linking,' used by most Chinese courts is a broader term that includes embedded link and framed link and excludes a simple link.[49] As simple linking

[53] RPRCIN provides no clear guidance on the meaning of a written notification. However, in accordance with the Contract Law, a written notification includes telegram, telex, facsimile, electronic data exchange and electronic mail, etc. which is capable of expressing its contents in a tangible form. *See* Contract Law of P. R. China art. 11.

[54] The last sentence of RPRCIN Art. 14.

[55] RPRCIN art.14. The prima facie proofs of the infringement are the proofs that may prove that the right holder's copyright is prejudiced. Such proofs include the proofs of ownership of a valid copyright, the proofs of unauthorized use or the proofs of breach of contract. "The work papers concerning copyrights provided by the parties in question, originals, and legitimate publications, registration certificate of the copyrights, certificates issued by the authentication institution and the contracts obtained may be taken as" such proofs. *See* Jianhua Zhang et al., *Xinxi Wangluo Chuanbo Quan Baohu Tiaoli Shiyi* [*Interpretations of the RPRCIN*] (China Legal Publishing House, 2006) 56; *Ningbo Success Multimedia Communication Co. Ltd., v. Beijing Shi Yue Network Technology Co. Ltd.*, No. 5314 Erzhongminzhongzi (Beijing 2nd Interm. Ct. 2008).

[56] RPRCIN (n 46), arts. 14, 15.

[57] Shuwen Mei & Bo Wen, 'Tanxi Bifenggang Guize Zhuguan Yaojian' ['Analysis on Subjective Requirements of Safe Harbors'] (2009) 219 Dianzi Zhishichanquan 18, 20.

[58] The "red flag" test is a concept originated from the DMCA. It has both a subjective and an objective element. The subjective element tests the service provider's subjective awareness of the facts or circumstances of infringing activity. The objective element tests whether "infringing activity would have been apparent to a reasonable person under the same or similar circumstances". See S. Rept 105-190, 105th Cong., 2d Sess. (1998) 44.

[59] See *e.g., Beijing Wangle Technology Co. Ltd., v. Beijing 56.com Information Technology Co. Ltd.*, No. 14734 Chaominchuzi (Beijing Chaoyang Dist. Ct. 2009).

[60] Point 28 of Notice of the Higher People's Court of Beijing on Issuing the Guiding Opinions (I) on Several Issues Concerning the Trial of Cases Involving Copyright Disputes in Cyberspace (for Trial Implementation).

[47] See *e.g., Warner Music Hong Kong Ltd.v. Aliababa Information Technology Co. Ltd.*, No. 02630 Erzhongminchuzi (Beijing 2nd Interm. Ct. 2007).

[48] See *e.g., Universal Music Group v. Baidu, Inc.*, No. 1694 Gaominzhongzi (Beijing Higher Ct. 2010).

[49] In the view of most Chinese courts, there are two forms of linking: simple linking, which delivers the public to the linked website's homepage and deep linking, which delivers the public

contributes to a growth in both traffic and popularity, websites usually do not object to simple linking, and there are no disputes related to simple linking before Chinese courts.[50] On the other hand, deep linking has involved an ongoing debate, because it circumvents the advertising-rich homepage and may lead to lost revenue.[51]

In the EU, the legal regulation of deep-linking is relevant to the interpretation of the right to communicate the work to the public.[52] China and the EU are contracting parties of the WIPO Internet Treaties[53]: the WCT and the WIPO Performances and Phonograms Treaty (WPPT). The EU adopted the Information Society Directive to implement, *inter alia*, making available right. Article 3 (1) of the Directive includes language identical to Article 8 of the WCT, requiring member states to protect the right of communication to the public, including the making available right; Article 3 (2) of the Directive aims at implementing Article 10 and 14 of the WPPT with regard to the making available right for related rights holders.[68] In contrast, China opted for a different statutory implementation approach, using a standalone right: right of communication through information network.

The WCT was adopted in order to address the challenges of digital technological developments, in addition to filling in some of the gaps in the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).[69] In the Berne Convention, the right of communication to the public is regulated in a fragmented manner, leaving gaps both as to subject matter covered by the right, and as to the exclusive rights conferred.[54] In order to complement the fragmentary set of provisions on the right of communication to the public under the Berne Convention and thereby to fill certain gaps,[55] and also to cover interactive on-demand acts of communication,[56] Article 8 of the WCT provides:

> authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

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to a specific piece of web content on a website, rather than the website's home page. See *e.g, e-linkway Technology Co. Ltd., v. Tencent, Inc.*, No. 143 Jingzhiminzhongzi (Beijing IP Ct. 2016). For a detailed explanation of simple link, deep link, embedded link and framed link, *see* Alain Strowel & Nicolas Ide, 'Liability with Regard to Hyperlinks' (2000-2001) 24 Columbia-VLA J. of L. & Arts 403, 407-409.

[50] *See* Qian Wang, 'Lun Tigong Shenceng Lianjie Xingwei De Falv Dingxing Ji Qi Guizhi' ['The Legal Nature and Regulation of Communication through Information Network'] (2016) 10 Faxue 23, 24.

[51] ibid.

[52] *See e.g*., *Nils Svensson, Sten Sj gren, Madel Sahlman, Pia Gadd v Retriever Sverige AB* (Case C-466/12); *BestWater International GmbH v. Michael Mebes and Stefan Potsch* (Case C-348/13); *GS Media BV v. Sanoma Media Netherlands BV and Others* (Case C-160/15).

[53] Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (OUP 2002) ix.

[68] Michel M Water & Silke von Lewinski, *European Copyright Law: A Commentary* (OUP, 2010) 980.

[69] Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond* (2nd edn, OUP 2006) 583.

[54] ibid 717-718; Ficsor (n 67) 494-495.

[55] Jörg Reinbothe & Silke von Lewinski, *The WIPO Treaties 1996: The WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty: Commentary and Legal Analysis* (Butterworths 2002) 104.

[56] WIPO, Basic Proposal for The Substantive Provisions of The Treaty on Certain Questions concerning The Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference (hereinafter Basic Proposal) (WIPO Doc. CRNR/DC/4, Aug. 1996), note 10.11.

From the adopted text, it is clear that Article 8 includes two parts. The first part (before 'including') is aimed to supplement the existing provisions of the Berne Convention with respect to the traditional right of communication to the public[57] and the second part (after 'including') is intended to cover interactive digital transmissions which became an important means of exploitation of copyrighted material only after the negotiation of the TRIPS Agreement.[74] In the framework of the WCT, making available is one of the sub-rights of the right of communication to the public. However, since the WIPO 'Internet Treaties' adopt the so-called 'umbrella solution,' the making available right's relation to the right of communication to the public under the Internet Treaties has no bearing on the choice of its systematic classification under national law.[75] In other words, the contracting parties are free to implement the exclusive right to authorize interactive transmissions into the national law, either as a subset of the right of communication to the public, as a stand-alone making available right, or through the combination of different rights. [76]

The 2001 Copyright Law introduced a concept of 'right of communication through the information network' as one of exclusive rights enjoyed by authors.[77] Article 10 (12) of the Copyright law reads as: 'right of communication through the information network, that is, the right of making available to the public of the works, by wire or by wireless means, in such a way that the public may access the works at a time and from a place individually chosen by them.' Comparing Article 10 (12) of the 2001 Copyright Law with the Article 8 of the WCT, we can conclude that although Chinese Copyright Law uses the term 'right of communication through information network,' instead as making available right, the content of them is *de facto* the same.[78]

In early cases regarding the deep linking, Chinese courts usually adopted the server test, which originated from the judgment of the District Court for the Central District of California in *Perfect 10 v. Google*.[79] However, Chinese courts over-emphasized the importance of the server holding that what counts is the initial uploading of the work into the server. An act of information network communication involves a series of acts of transmissions as well as acts of reproductions (for instance, storage of a work, uploading, caching). The initial uploading is the basis and origin of the other acts. Without initial uploading, other acts are like 'water without a source,' and there is no communication. Since there is no uploading of works into the server, deep-linking does not constitute an information network communication/a making available and consequently a direct infringement.[80]

[57] ibid, 107.

[74] ibid, 104.

[75] Silke von Lewinski, *International Copyright Law and Policy* (OUP 2008) 458.

[76] United States Copyright Office, 'The Making Available Right in the United States: A Report of the Register of Copyrights' (Feb. 2016) 12 <https://www.copyright.gov/docs/making_available/making-available-right.pdf> accessed 17 October 2018.

[77] Yuping Duan, 'Xin Zhuzuoquanfa Guangyu Xinxi Wangluo Chuanbo Quan De Guiding Yiji Yu Liangge Xin Tiaoyue Zhi Bijiao' [The Provisions under the New Copyright Law on the Right of Communication through the Information Network and the Comparison with the Internet Treaties] (2001) 48 Zhuzuoquan 51, 51-52; Hong Xue, *Shuzhi Jishu De Zhishi Chanquan Baohu* [*Digital Technology and Intellectual Property Protection*] (IP Press 2002) 100.

[78] Yuping Duan, 'Brief Introduction to the New Chinese Copyright Law' in Frank Gotzen (ed), *The Future of Intellectual Property in The Global Market of The Information Society: Who Is Going to Shape the IPR System in The New Millennium*? (Bruylant 2003) 46.

[79] *Perfect 10, Inc. v. Google, Inc.*, 416 F.Supp.2d 828 (C.D. Cal. 2006).

[80] See *e.g., Zhejiang Flyasia E-Business Co. Ltd., v. Baidu, Inc.*, No. 1201 Gaominchuzi (Beijing Higher Ct. 2007).

However, recently, more and more courts refused such a test and held that 'making available' is not limited to uploading the copyrighted material into the server. With the advent of technological development, activities making copyrighted works available may take many forms. The right of communication through information network ought to protect any independent economic exploitation for financial profit; in other words, copyright holders should be given control over each separate market in which their works are being used. Since the deep-linking plays a *de facto* role in 'making available' the videos to the public with a substantial substitution effect and a linker does not pay the license fee to the copyright holder, the deep-linking shall be covered by the right of communication through information network.[81]

B. AMOUNT OF DAMAGES

Chinese courts have been criticized for being too conservative and arbitrary when awarding damages.[82] A report in 2009 revealed the median copyright damages in video sharing cases awarded by Chinese courts is about 21,800 RMB (currently about 2,480 GBP), and the judgments are generally not transparent as to how the damages are actually calculated.[83] Although the transparency problem has not been solved, the amount of damages has been increasing.

Article 48 of the Chinese Copyright Law introduces three measures to determine the damages: (1) the copyright holder's actual losses; (2) the infringer's unlawful gains; and (3) the statutory damages.[84] More than 90% court decisions adopted the measure of statutory damages, which is an approach to avoid the difficulties of a precise assessment of actual losses or illegal gains. The Copyright Law allows an award of statutory damages less than 500,000 (RMB). Within that range, the court has discretion to award an amount considered 'just.' It is ambiguous from the text whether the maximum level of statutory damages applies to each case or work/episode. In early years, the Chinese courts usually found the maximum limits apply to each case. In consideration of this, many copyright holders chose to bring multiple actions with respect to each infringed work to maximize the potential damages that can be recovered.[85] The situation has changed recently. For example, a court found the maximum level of statutory damages applied to each episode; the statutory damages are RMB 495,000 per episode and the total damages are RMB 4950,000.[86]

In its early development period, the video-sharing industry was young and lacked funds. In such circumstance, if the amount of damages were too high, it would impede or even stifle the development of this industry. However, currently, the video-sharing industry has developed well, which has attracted a lot of

[81] *Tencent, Inc. v. e-linkway Technology Co. Ltd.*, No. 40920 Haiminzhichuzi (Beijing Haidian Dist. Ct. 2015).

[82] Kristina Sepetys & Alan Cox, 'Intellectual Property Rights Protection in China: Litigation, Economic Damages and Case Strategies' in Gregory K. Leonard & Lauren J. Stiroh (ed.) *Economic Approaches to Intellectual Property: Policy, Litigation and Management* (NERA Economic Consulting 2005) 11.407.

[83] Zhenhua Nie, *Shipin Fenxiang Wangzhan Zhuzuoquan Qinquan Wenti Chengan Yanjiu* [*The Research of Resolved Cases about the Copyright Infringement in the Video-Sharing Websites*] (Law Press 2012) 64-65.

[84] art. 48 of the Copyright Law states: "Anyone who infringes upon the copyright or a right related to the copyright shall compensate for the actual losses suffered by the right holder, or where the actual losses are difficult to calculate, pay damages on the basis of the unlawful gains of the infringer. The damages shall include the reasonable expenses paid by the right holders for stopping infringement activities. Where the actual losses of the right owner or the unlawful gains of the infringer cannot be determined, a court shall, in light of the circumstances of the infringement, award damages not exceeding RMB 500,000."

[85] Wenjie Tang, 'Banquan Qinquan Sunhai Peichang Erti' ['Two Issues in Copyright Damages'] <http://www.chinalawedu.com/news/20800/213/2005/12/li76262340441922150021133 05_180995.htm> accessed 17 October 2018.

[86] *Zhejiang Radio & Television Group v. MIGU Co., Ltd.* (Hangzhou Internet Ct. 2017).

investment, and accordingly it may bear a high amount of damages.

5. CONCLUSION

The American legislative and jurisprudential experiences recognize the important role the 'innovate first, regulate later' model has played in U.S. innovation policy. Copyright holders, the NSPs, and the public have all enjoyed the benefits of this policy, despite the fact that it has not been expressly articulated by the courts or legislators.[87]

At first glance, it seems surprising to find that Chinese judiciary and legislature, on the one hand, introduced a flexible and open-ended copyright exceptions system and, on the other hand, interpret the exclusive right of communication through information network broadly. In addition, in different times, similar cases may yield different results. On its face, it appears to be contradictory or uncertain; however, the logic underlying it is coherent: to adopt industry-friendly copyright regulation policy, instead of simple de-regulation or regulation policy.

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[87] von Lohmann (n 2) 32.

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