

TRANSPLANTING FAIR USE IN CHINA? HISTORY, IMPEDIMENTS AND THE FUTURE

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Abstract

The history of the Copyright Law of China (CLC) is a history of “legal transplant.” Since its enactment in 1990, the CLC has been continually shaped by factors such as legal traditions, international norms, legal developments in advanced countries, and technological challenges. This hybrid legislative model has provided an extremely useful tool for transitional China to readily establish an operative copyright legal framework and demonstrate its compliance with various international treaties. However, after almost 30 years of development, China has developed to a stage that necessitates a customized, demand-driven, and internally coherent CLC. The evolution of its copyright exceptions model that concerns the balance between the interests of the copyright owner and public interests, such as access to knowledge and freedom of speech, is a pivotal part of the new search. It will also further our understanding of the global paradigm shift related to copyright exception models.

The nature of a future copyright exception models in China has been intensely debated since 2011, when the Chinese government launched a public consultation regarding the third-round amendment of the CLC. In the revised 2014 draft, an open-ended general clause of copyright exceptions was proposed; however, this was criticized by academics for its imprecision and several internal inconsistencies. However, over the past few years, many new forms and

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ways to utilize copyright works have emerged, during which the existing closed-list copyright exceptions model was heavily challenged due to its inflexibility in the face of these new cases. Although Chinese judiciaries have already employed the U.S. four-factor fair use model or its elements in deciding difficult copyright cases, whether the U.S. approach will eventually be transplanted to the CLC remains unclear, making it a “must-solve” problem in the upcoming round of revisions.

To demonstrate the complexity of the evolutionary process and the search for a solution, the first section of this article explores the historical constraints of the current model of copyright exceptions adopted by the CLC and the new challenges it is facing. The second section explores why the current approach taken by Chinese courts is meant to be an interim one. The third section critically assesses the latest published revised draft and addresses why China will not transplant the U.S. fair use model directly. The concluding section identifies a possible model of copyright exceptions for China. This model should be flexible enough to cover future needs and better reflect local realities and priorities by learning from civil law jurisdictions, such as Japan and Taiwan, that have transplanted or planned to transplant an exotic model like fair use.

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INTRODUCTION

The history of the Copyright Law of China (CLC) provides a perfect example of a “legal transplant,”¹ as China’s pursuit of a modern copyright law has never been voluntary.² To quote William Alford, China accepted the idea of copyright “at gunpoint.”³ In the late 1800s, the exotic concept of copyright came with gunboats and opium.⁴ However, due to incessant wars, famines, and revolutions, it never arrived properly in China until the founding of the People’s Republic of China.⁵ Even the 1990 CLC—deemed the first enforceable modern copyright law in the history of China—and its subsequent revisions in 2001 and 2010⁶ are considered the end products of external pressures primarily relating to Sino-US trade negotiations and disputes.⁷ Furthermore, the U.S. Special 301 report has seemingly played,⁸ and continues to play, a crucial role in reshaping China’s intellectual property (IP) laws.⁹

1. See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) (describing voluntary transplants); Michele Graziadei, *Comparative Law As the Study of Transplants and Receptions*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (Mathias Reimann & Reinhard Zimmerman eds., 2006) (detailing the history of the spread of German law to China).

2. Graziadei, *supra* note 1, at 7.

3. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 30 (1995).

4. *Id.* at 32.

5. PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 3 (2d ed. 2003).

6. *Zhonghua Renmin Gonghe Guo Zhuzuo Quan Fa* (中华人民共和国著作权法) [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Feb. 26, 2010, amendments effective Apr. 1, 2010), 2009 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., at 159, translated at WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/text.jsp?file_id=186569 [hereinafter CLC].

7. See generally, Peter K. Yu, *From Pirates To Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 141 (2000) (describing how the United States gained leverage in trade negotiations by placing China on “Priority Watch List”) [hereinafter *Pirates*]; Hong Xue, *A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law*, 7 J. INT’L COM. L. & TECH. 350, 350 (2012) (“In [the] 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”); FENG, *supra* note 5, at 65 (“the drafting of a copyright law. . . was directly prompted by a 1979 trade agreement with the US”); Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, in *GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE* 22 (Nari Lee, et al. eds., 2016) (“At the turn of the 20th century, China introduced its first set of modern intellectual property laws, after much pressure from colonial powers and its foreign trading partners.”) [hereinafter *Transplant*].

8. ANDREW MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 37-76 (2005).

9. See OFF. OF U.S. TRADE REPRESENTATIVE, *FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER Section 301 OF THE TRADE ACT OF 1974* (2018) (launching President Trump’s Section 301 investigation

Even though pressure is mainly from the United States, the detailed design of the CLC does not necessarily need to follow the U.S. model. In general, four factors have together shaped the CLC design:

- (1) the civil law tradition of the Chinese legal system;
- (2) the norms and standards set by international copyright treaties;
- (3) countries and regions with influential and robust IP systems such as the United States and EU; and
- (4) domestic needs, such as the challenges raised by new technologies.¹⁰

All these factors play different roles at different stages of the CLC, making it a battleground for the norm-setting power of the forces behind the aforementioned factors, resulting in inconsistencies in the legal text and incongruent doctrinal interpretation and application of the transplanted articles by Chinese courts.¹¹ The evolving history of the copyright exception articles of the CLC serves as a perfect example for illustrating this struggle.¹²

In recent years, an increasingly complicated modern lifestyle and advancements in technology have presented substantial challenges to the CLC.¹³ The ongoing third revision of the CLC is believed to be the first voluntary move that will echo China's national IP strategy to promote indigenous innovation and build an "innovative country."¹⁴ The first draft was made officially available for public consultation by the National Copyright Administration of China (NCAC) on March 31, 2012.¹⁵ NCAC subsequently published the second draft on July 2, 2012¹⁶ and the third draft on June 6, 2014.¹⁷ It was then sequestered due to

into China's acts, policies, and practices related to technology transfer, intellectual property, and innovation in March of 2018).

10. MERTHA, *supra* note 8, at 35–76; *Transplant*, *supra* note 7, at 22; Matt Murphy, *Chinese Inventiveness Shows the Weakness of the Law*, THE ECONOMIST (Jan. 2, 2020), <https://www.economist.com/technology-quarterly/2020/01/02/chinese-inventiveness-shows-the-weakness-of-the-law> (explaining the weakness in Chinese copyright law as more inventions are being made).

11. MERTHA, *supra* note 8, at 118–163.

12. *See Pirates*, *supra* note 7, at 179 (explaining that exceptions are just as important as the right itself).

13. *Transplant*, *supra* note 7, at 16.

14. Guanyu Zhonghua Renmin Gongheguo Zhuzuoquan Fa Xiudingan Songshengao De Shuoming (关于《中华人民共和国著作权法》(修订草案送审稿)的说明) [*Explanations on the Copyright Law of the People's Republic of China (Draft Revision for Review) for Public Consultation*], NAT'L COPYRIGHT ADMIN. OF CHINA (June 6, 2014), <http://www.gov.cn/xinwen/site1/20140610/73841402364850364.doc>; *see also* Li Luo, *Chinese Copyright Law: the Third Revision*, 18 CLJP/JDCPJ. 49, 50 (2012) ("In order to improve the copyright law, to promote innovation, and to respond to the economic changes and the technological development, the NCAC announced the inauguration of the third revision of the Copyright Law and in July 2011 designated three expert groups independently to propose amendments.")

15. Guanyu Zhonghua Renmin Gongheguo Zhuzuoquan Fa Xiugai Caoan Gongkai Zhengqiu Yijian De Tongzhi (关于《中华人民共和国著作权法》(修改草案)公开征求意见的通知) [*Notice on Promulgating the Copyright Law of the People's Republic of China (Draft Revision) for Public Consultation*], NAT'L COPYRIGHT ADMIN. OF CHINA (Mar. 31, 2012), <http://www.gapp.gov.cn/govinteract/1081/84479.html>.

16. Banquan Ju Jiu Zhuzuoquan Fa Xiugai Caoan Di Er Gao Gongkai Zhengqiu Yijian (版权局就著作权法(修改草案第二稿)公开征求意见) [NCAC *On Promulgating the Copyright Law of the People's Republic of China (Second Draft Revision) for Public Consultation*], NAT'L COPYRIGHT ADMIN. OF CHINA (July 2, 2012), http://www.gov.cn/gzdt/2012-07/10/content_2180033.htm.

17. Guowuyuan Fazhi Bangongshi Guanyu Gongbu Zhonghua Renmin Gongheguo Zhuzuoquan Fa Xiudingan Songshengao Gongkai Zhengqiu Yijian De Tongzhi (国务院法制办公室关于公布《中华人民共和国著作权法(修订草案送审稿)》公开征求意见的通知) [*Notice About Circular of the Legislative Affairs Office of the State Council on Promulgating the Copyright Law of the People's Republic of China (Draft*

substantial controversies around several big changes, which included, for example, changes to the clauses related to collective management societies and copyright exceptions/fair use clauses.¹⁸ However, in January 2017, the NCAC released “The Thirteenth 5-Year Plan of Copyright Works,” which listed the third amendment of the CLC as one of its key tasks¹⁹ and promoted the revision of the CLC, which was then incorporated into “The 2018 Legislative Plan” of the Standing Committee of the National People’s Congress (NPC)²⁰ and “The State Council Legislative Work Plan for 2019.”²¹ The fourth and the most recent draft was published for public consultation on August 17, 2020.²² Given that China and the United States have been engaged in a trade war since 2018 and that the topic of IP protection is of great concern,²³ it is foreseeable that under such enormous pressure, the Chinese government will soon need an amended CLC.²⁴ Therefore, there is an urgent need to critically assess the CLC development process and propose changes accordingly. Amongst all the issues identified, the future model of China’s copyright exceptions is the most contentious as it involves the protection of copyright owners’ interests and directly concerns public interests, such as access to knowledge and freedom of expression.²⁵ Thus, it is deeply entwined with the ever-changing balance between the interests of copyright owners and the public.²⁶ As Ploman and Hamilton opined, its model will decide the “free zones” enjoyed by individuals in the future.²⁷

This study aims to not only simply review the CLC draft mentioned previously, but also to ascertain the factors that “determine whether a transplant

Revision for Review) for Public Consultation], FAGUI HUIBIAN (June 6, 2014), http://www.gov.cn/xinwen/2014-06/10/content_2697701.html.

18. For the purpose of this article, the terms “copyright exception” and “fair use” are treated as synonyms, except when used as proper nouns.

19. Guanyu Yinfa Banquan Gongzuo Shi San Wu Guihua De Tongzhi (关于印发《版权工作“十三五”规划》的通知) [*Notice About Circular of the Thirteenth 5-Year Plan of Copyright Works*], NAT’L COPYRIGHT ADMIN. OF CHINA, Jan. 25, 2017, <http://www.ncac.gov.cn/chinacopyright/contents/483/315049.html>.

20. Changhao Wei, *NPC Standing Committee Releases 2018 Legislative Plan*, NPC OBSERVER (Apr. 27, 2018), <https://npcobserver.com/2018/04/27/npc-standing-committee-releases-2018-legislative-plan>.

21. Guowuyuan Bangongting Guanyu Yinfa guowuyuan 2019 Nian Lifa Gongzuo Jihua De Tongzhi (国务院办公厅关于印发国务院 2019 年立法工作计划的通知) [*Notice About Circular of the General Office of the State Council on The State Council Legislative Work Plan for 2019*], ST. COUNCIL (May 1, 2019), http://www.gov.cn/zhengce/content/2019-05/11/content_5390676.htm.

22. Zhuzuoquan Fa Xiuzheng An Caoan Er Ci Shenyi Gao Zhengqiu Yijian (著作权法修正案(草案二次审议稿)征求意见) [*Revision Proposal for the Copyright Law of China (Review Draft of the Second Round) for Public Consultation*], NAT’L PEOPLE’S CONG. (Aug. 17, 2020), <http://www.npc.gov.cn/flcaw/flca/ff808081736ba7420173ec57d96d3b14/attachment.pdf> [hereinafter CLC Revision (Draft) 2020].

23. Karen Yeung & Sidney Leng, *U.S.-China Trade War: Can China Meet U.S. Demands on IP Theft and Forced Technology Transfer?*, S. CHINA MORNING POST (Feb. 25, 2019, 6:00 AM), <https://www.scmp.com/economy/china-economy/article/2187312/us-china-trade-war-can-china-meet-us-demands-ip-theft-and>; see also Jyh-An Lee, *Shifting IP Battlegrounds in the U.S.–China Trade War*, 43 COLUM. J. L. & ARTS 147 (2020) (discussing the legal implications of IP issues in the trade war); Jyh-An Lee, *Forced Technology Transfer in the Case of China*, 26 B. U. J. SCI. & TECH L. 324 (2020) (discussing the legal implications of forced technology transfer in China).

24. Yeung & Leng, *supra* note 23, at 1.

25. Xue, *supra* note 7, at 2.

26. *Id.*

27. EDWARD W. PLOMAN & L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 197 (1980).

occurs”²⁸ and “control the relationship between transplanted rules and the society in which they subsequently operate,”²⁹ thereby identifying possible future trends and determining an ideal model of copyright exceptions that can accommodate the different needs of the government, copyright owners, and public.

For that purpose, the first section of this article explores the historical constraints placed on the current model of copyright exceptions adopted by the CLC and the new challenges it is facing. The second section discerns the reasons why the current approach taken by Chinese courts is meant to be an interim one. The third section critically assesses the published drafts and argues why China will not transplant fair use. The final section then concludes by identifying the possible model of copyright exceptions for China by drawing on lessons from civil law jurisdictions, such as Japan and Taiwan, that have transplanted or have planned to transplant an exotic model like fair use.

I. SHACKLES FROM THE PAST: THE TRANSPLANTED COPYRIGHT EXCEPTIONS MODEL

A. *Why the Closed-List Model?*

The concept of copyright, as previously discussed by William Alford, is not indigenous to China.³⁰ Unsurprisingly, China’s first copyright law, enacted in 1990 in response to external pressures, was modeled after a mature system. Specifically, some scholars believe³¹ that the CLC was modeled after the Berne Convention for the Protection of Literary and Artistic Works.³² Others have pointed to the mixture of several international treaties and various laws enacted by developed nations.³³ Basing a model upon international treaties has at least two advantages.

First, it was impossible at that time for the first copyright law of socialist China to follow the model of copyright law from a single capitalist country. The central government unswervingly pushed its highly controversial plan to “open up” the country after 1992, the year in which the 14th National Congress of the

28. Mindy Chen-Wishart, *Legal Transplant and Undue Influence: Lost in Translation or A Working Misunderstanding?*, 62 INT’L & COMP. L.Q. 1, 3 (2013).

29. *Id.*

30. See generally ALFORD, *supra* note 3, at 30 (claiming no indigenous counterpart to IP law in China); but see Ken Shao, *The Global Debates on Intellectual Property: What If China is Not A Born Pirate?*, 2010 INTELL. PROP. Q. 341, 341 (2010) (criticizing conventional views on China’s IP history); CHENGSI ZHENG & MICHAEL D. PENDLETON, COPYRIGHT LAW IN CHINA 10-20 (1991).

31. See ZHENG & PENDLETON, *supra* note 30, at 66; see also Qi Xiong (熊琦), *Zhongguo Zhuzuoquan Lifa Zhong De Zhidu Chuangxin* (中国著作权立法中的制度创新) [*Institutional Innovation in China’s Copyright Legislation*], 7 ZHONGGUO SHEHUI KEXUE 120 (中国社会科学) [SOCIAL SCIENCES IN CHINA] (2018).

32. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

33. Zhiwen Liang, *Between Freedom of Commerce and Protection of Moral Rights: The Chinese Experience and a Comparative Analysis*, 57 J. COPYRIGHT SOC’Y U.S.A. 107, 110 (2009).

Communist Party of China was held. Borrowing from international treaties would have been much more acceptable to the Chinese public.³⁴

Second, copying directly from international treaties provides a way for China to show that it has fulfilled its treaty obligations.³⁵ As Qian Wang indicated, “copying the provisions of international treaties may be the safest shortcut so that some developed countries that require our legislation to comply with international treaties can keep their mouths shut.”³⁶

Therefore, the content of the 1990 CLC was destined to be hybrid, even though the structure of this CLC was primarily borrowed from the Berne Convention.³⁷ Nevertheless, transplanting clauses directly from international treaties is not ideal: such treaties are often the result of diplomatic compromise and the vague wording of the clauses is an essential part of such an arrangement.³⁸ Thus, the clauses of international treaties are not designed for direct application. Moreover, unlike copyright laws from a specific country, international treaties are not backed by judicial precedents and interpretations.³⁹ This partly explains why the CLC did not copy the Berne Convention verbatim.⁴⁰

The aforementioned statement is exemplified by the copyright exceptions model of the CLC. Due to China’s civil law tradition and the early continental European influence,⁴¹ the CLC chose not to copy directly from the Berne Convention.⁴² Instead, it primarily followed the concept of the European author’s rights (*droit d’auteur*) system,⁴³ which adjudged the structure of China’s copyright exceptions model to be closed-list rather than “open-ended” in style, as is the case for the U.S. fair use test.⁴⁴ This is understandable, as the

34. See Jeanne Schwartz, *China’s Long and Tortured History When It Comes to Intellectual Property Laws*, N.Y.U.J. INTELL. PROP. & ENT. L. (Feb. 4, 2014), <https://blog.jipel.law.nyu.edu/2014/02/chinas-long-and-tortured-history-when-it-comes-to-intellectual-property-laws/> (explaining that early Chinese copyright law drew from international works).

35. Qian Wang (王迁), *Zhuzuoquan Fa Jiejian Guoji Tiaoyue Yu Guowai Lifa Wenti Yu Duice* (著作权法借鉴国际条约与国外立法: 问题与对策) [Copyright Law’s Reference to International Treaties and Foreign Legislations: Problems and Solutions], 3 ZHONGGUO FAXUE 35 (中国法学) [CHINA LEGAL SCIENCE] (2012).

36. *Id.*

37. Xiong, *supra* note 31, at 121.

38. Jie Wang & Tianxiang He, *To Share Is Fair: The Changing Face of China’s Fair Use Doctrine in the Sharing Economy and Beyond*, 35 COMPUT. L. SEC. REV. 15, 25 (2019).

39. See Liang, *supra* note 33, at 143 (stating Berne convention does not define or abide a subjective or objective standard).

40. *Id.* at 139.

41. Yu Xingzhong, *Western Constitutional Ideas and Constitutional Discourse in China, 1978–2005*, in BUILDING CONSTITUTIONALISM IN CHINA 120 (Stephanie Balme & Michael W. Dowdle eds., 2009).

42. CHENGSI ZHENG (郑成思), *Banquan Fa* (版权法) [COPYRIGHT LAW] 251 (2d ed. 1997) (“[T]here are great differences between article 22 of CLC and the Berne convention in the regulations about fair use.”).

43. Chenguo Zhang, *Introducing the Open Clause to Improve Copyright Flexibility in Cyberspace? Analysis and Commentary on The Proposed “Two-Step Test” in the Third Amendment to the Copyright Law of The PRC, in Comparison with the EU and the U.S.*, 33 COMPUT. L. SEC. REV. 73, 74 (2017).

44. 17 U.S.C. § 107. (“Limitations on Exclusive Rights: Fair Use. Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

European author's rights system embraced Locke's labor theory of property rights, which construes works as reflections of authors' personalities.⁴⁵ Following this rationale, authors should have the natural right to control their works. Therefore, it is an "exception" for others to make use of their work without asking for permission.⁴⁶ In Hugenholtz's words, it is an "open rights, closed exemptions" setting.⁴⁷ Conversely, in the United States and U.K., the influence of "natural rights" over their copyright laws faded during the 18th and 19th centuries.⁴⁸ Their copyright laws instead took a utilitarian turn and focused more on balancing the interests of the copyright owners and public.⁴⁹ Consequently, in these jurisdictions, it was deemed "fair" for the public to make "use" of the published works in some special cases.⁵⁰ The different understandings of copyright and its attendant limitations then led to various designs in different jurisdictions.⁵¹ However, in general, civil law jurisdictions were much more conservative than common law jurisdictions in adopting an open-ended model and were more inclined to stick to a closed-list exceptions design.⁵² External pressures and China's own desire to boost its market-oriented economy are believed to have forced China to adopt a closed-list model and inhibit the socialist approach toward designing its copyright exceptions.⁵³ Moreover, the civil law tradition requires a "rule-oriented statutory interpretation of laws,"⁵⁴ in which the role of judges is deemed that of interpreters rather than rule-makers. This is certainly at odds with the concept of fair use.⁵⁵

Specifically, Article 22, which is the exact article that concerns the list, was provided by the 1990 CLC and remained largely unchanged following its 2001 and 2010 amendments.⁵⁶ These exceptions were no less useful than the U.S. fair

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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 fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.").

45. *Pirates*, *supra* note 7, at 184 n. 302.

46. SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY 39 (2008).

47. P. B. HUGENHOLTZ, *Copyright and Freedom of Expression in Europe*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 352 (Rochelle Cooper Dreyfuss, et al. eds., 2001).

48. RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 241 (Westview Press, 1996).

49. *Id.*

50. VON LEWINSKI, *supra* note 46, at 39.

51. *Id.*

52. *Id.* at 56–57.

53. FENG, *supra* note 5, at 127.

54. VON LEWINSKI, *supra* note 46, at 42.

55. *Id.* at 39.

56. See Zhonghua Renmin Gonghe Guo Zhuzuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China 2001 Amendment] [hereinafter CLC 2001 Amendment] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Oct. 27, 2001) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. and Zhonghua Renmin Gonghe Guo Zhuzuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China 2010 Amendment] [hereinafter CLC

use test in the pre-Internet age, given that China's copyright industries were underdeveloped and domestic public awareness of copyright was extremely low.⁵⁷ However, closer scrutiny of the twelve listed exceptions under which a copyrighted work can be used without the permission of or payment of remuneration to the copyright owner⁵⁸ shows that the language used is somewhat obsolete in today's world.⁵⁹ Moreover, a lack of necessary precedents and case law in support of the transplanted and often intrinsically conflicting rules means that Chinese judiciaries could not straighten out difficulties in a multisource copyright law, such as the CLC, until the institutional conflicts were resolved.⁶⁰ As such, the applications of the law in the copyright exceptions part by Chinese courts are often inconsistent and problematic, as the CLC remains an incoherent patchwork of laws. This is especially true when new challenges arise.⁶¹

After entering the digital era, the once stable and useful closed-list was constantly challenged by new ways of utilizing works facilitated by new technologies, leading academics to question whether maintaining a closed-list model of copyright exceptions was reasonable.⁶²

B. The New Challenges and Judicial Responses

Therefore, the twelve listed exceptions provided by Article 22 of the CLC appear to somewhat lack flexibility.⁶³ However, there are other sources of law which could supplement the CLC in China, such as the 2013 Regulations for the Implementation of the CLC (RICL),⁶⁴ and the judicial interpretations issued by

2010 Amendment] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010), 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ (the CLC 2010 Amendment has only made changes to technical terms such as "editorials or commentators articles" in subsection (4) regarding the exception of reprint by newspapers etc., and those narrowing down the scope of some exceptions such as subsection (11) regarding the translation of works published in Chinese into a minority ethnic language. The listed exceptions are largely untouched in the CLC 2010 Amendment).

57. INTELLECTUAL PROPERTY ORGANIZATION, *THE ECONOMIC CONTRIBUTION OF COPYRIGHT-BASED INDUSTRIES IN CHINA* 14 (2009).

58. CLC, *supra* note 6, art. 22.

59. *See id.* (providing limited exceptions that only related to traditional publication sectors).

60. *See* VON LEWINSKI, *supra* note 46, at 42 (explaining that the judiciary in civil law jurisdictions is required to interpret rules, which poses a specific challenge when there are conflicts of rules).

61. *See id.* (describing the inconsistent patchwork of laws).

62. Chen Li (李琛), *Lun Wo Guo Zhuzuoquan Fa Xiuding zhong Heli Shiyong de Lifa Jishu* (论我国著作权法修订中“合理使用”的立法技术) [*On the Legislative Technique of "Fair Use" in the Revision of our Copyright Law*], 1 ZHISHI CHANQUAN 17 (知识产权) [INTELLECTUAL PROPERTY] (2013); Seagull Haiyan Song, *Reevaluating Fair Use in China—A Comparative Copyright Analysis of Chinese Fair Use Legislation, the U.S. Fair Use Doctrine, and the European Fair Dealing Model*, 51 IDEA 453, 453 (2011); *see also* Zhang, *supra* note 43, at 74 ("Maintaining a closed list of copyright exceptions is increasingly problematic in a world of rapid and unpredictable technological development. . .").

63. CLC, *supra* note 6, art. 22.

64. Zhonghua Renmin Gonghe Guo Zhuzuo Quan Fa Shishi Tiaoli (中华人民共和国著作权法实施条例) [Regulations for the Implementation of the Copyright Law of the People's Republic of China] [hereinafter 2013 RICL] (promulgated by the Nat'l Copyright Admin., May 30, 1991, amended Aug. 2, 2002; Jan. 8, 2011; Jan. 30, 2013 respectively by the State Council, amendments effective Mar. 1, 2013), translated in WORLD INTEL. PROP. ORG., WIPO Lex No. CN213, http://www.wipo.int/wipolex/en/text.jsp?file_id=456390.

the Supreme People's Court (hereinafter SPC).⁶⁵ The hierarchy of law in China could be roughly divided into three levels: primary (national laws such as the CLC and the related SPC judicial interpretations),⁶⁶ secondary (national administrative rules and regulations, such as the RICL) and tertiary (local rules).⁶⁷ The RICL is a set of detailed supplementary rules supplied by the State Council and NCAC, which provides in-depth explanations of the article. According to Article 21 of the 2013 RICL:

“The exploitation of a published work which may be exploited without permission from the copyright owner in accordance with the relevant provisions of the Copyright Law shall not impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner.”⁶⁸

Thus, the aforementioned article serves as a complement to the listed exceptions and makes the setting similar to Article L. 122-5 of the French Intellectual Property Code.⁶⁹ Therefore, to activate Article 21, a particular use must first fall into one of the listed exceptions.⁷⁰ Article 21 then serves as an additional control over the list. The wording of Article 21 is also modified from Article 9 of the Berne Convention and subsequent international treaties.⁷¹ Combined with subsection (2) of Article 22 of the CLC, it is clear that the extent of exempted uses should not “impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner.”⁷² As before, the definitions of the terms “normal exploitation” and “legitimate interest” are not provided by the law and are left to the courts to determine.⁷³ This equally applies to the terms used in specific exceptions.⁷⁴

65. Cheng Wang (王成), *Zuigao Fayuan Sifa Jieshi Xiaoli Yanjiu* (最高法院司法解释效力研究) [*On the Efficacy of the Judicial Interpretation of the SPC*], 28 *ZHONGWAI FAXUE* 263 (中外法学) [PEKING U. L.J.] (2016).

66. *Id.* at 278 (explaining that the place of the SPC judicial interpretations in the hierarchy of law in China is highly disputed, but the general understanding is that, when a specific SPC judicial interpretation is about certain articles within a law, it “shall be deemed to have the same legal validity of the law it interpreted”).

67. See JIANFU CHEN, *CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT* 101 (Kluwer Law International ed., 1999) (explaining that the RICL as a source of law is actually a set of national administrative rules issued by the State Council in accordance with the Constitution and laws, which is considered the second level in the hierarchy of law in China).

68. 2013 RICL, *supra* note 64, art. 21.

69. Martin Senftleben, *L'application du triple test-vers un système de fair use européen? [The Application of the Triple Test Towards a European Fair Use System?]*, 25 *PROPRIÉTÉS INTELLECTUELLES* 453, 453 (2007).

70. See 2013 RICL, *supra* note 64, art. 21 (referencing “relevant provisions of the Copyright Law”).

71. Berne Convention art. 9, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 22; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]; WIPO Copyright Treaty art. 10, Dec. 20, 1996, 2186 U.N.T.S. 121, S. Treaty Doc. No. 105-17; 36 I.L.M. 65 [hereinafter WCT]; WIPO Performances and Phonograms Treaty art. 16.2, Dec. 20, 1996, 2186 U.N.T.S. 203, S. Treaty Doc. No. 105-17; 36 I.L.M. 76 [hereinafter WPPT]; Beijing Treaty on Audiovisual Performances art. 13.2, June 24, 2012, WIPO Doc. AVP/DC/20 [hereinafter Beijing Treaty]; Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled art. 11, June 27, 2013, VIP/DC/8 REV. [hereinafter Marrakesh Treaty].

72. 2013 RICL, *supra* note 64, art. 21.

73. See Wang, *supra* note 65, at 278 (explaining that in the absence of clear definitions of certain rules and laws, the SPC's interpretation of the laws has “the same legal validity of the law it interpreted. . .”).

74. *Id.*

With a lack of judicial precedents, Chinese courts have often turned to foreign jurisprudence for reference when applying the exceptions.⁷⁵ For example, among the twelve listed exceptions, subsection (2) of Article 22 of the CLC regarding “quotation” has been constantly challenged in courts.⁷⁶ It reads as follows:

In the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are mentioned and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced:

...

(2) appropriate quotation from another person’s published work in one’s own work for the purpose of introducing or commenting on a certain work, or explaining a certain point;

...⁷⁷

Prima facie, subsection (2) has set the following constraints regarding use: first, there should be a purpose (a quotation introducing or commenting on a certain work or explaining a certain point); second, there is a proportion requirement (that the quotation should be “appropriate”); and third, the extent (again, this may relate to whether the quotation is “appropriate”).⁷⁸ However, the vague terms used by this clause offer no clear guidance on how to solve real-life cases.⁷⁹

In a 2013 case, *Liu Bokui v. ECNU Press*,⁸⁰ the court summarized the elements that needed to be considered in assessing whether a specific use is “appropriate.”⁸¹ These include whether the original work is published or not; the purpose of use; the frequency of quotation and the proportion of the quoted parts; whether the quoted parts are substantial; and whether these will affect the normal use or market sales of the quoted work in a negative manner.⁸² From the

75. See Liu Bokui Su Huadong Shifan Daxue Chubanshe Youxian Gongsu Yu Li Xia Qinfan Zhuzuo Quan An (刘伯奎诉华东师范大学出版社有限公司与李霞侵犯著作权案) [*Liu Bokui v. ECNU Press*] (The Second Intermediate People’s Intermediate Ct. of Shanghai, HEZMWZCZ No.115, Aug. 25, 2013), <http://www.shezhfy.com/view/cpws.html?id=92656> (using foreign jurisdiction to decide a case).

76. See *id.*; Shanghai Meishu Dianying Zhipian Chang Yu Zhejiang Xinying Niandai Wenhua Chuanbo Youxian Gongsu Huayi Xiongdi Shanghai Yingyuan Guanli Youxian Gongsu Qinhai Zhuzuo Quan Jiufen (上海美术电影制片厂与浙江新影年代文化传播有限公司、华谊兄弟上海影院管理有限公司侵害著作权纠纷) [*Shanghai Animation Film Studios v. Zhejiang Xinying Niandai Culture Ltd., et al.*] (Shanghai Putuo District People’s Ct., PM(Z)CZ No. 258, Sept. 8, 2015), <http://ip.pkulaw.cn/ipfplj/jingxuan/1970324852965283.html>; *Id.*; Wen Xiaoyang Su Beijing Alibaba Xinxu Jishu Youxian Gongsu Qinfan Zhuzuo Quan Jiufen An (闻晓阳诉北京阿里巴巴信息技术有限公司侵犯著作权纠纷案) [*Wen Xiaoyang v. Yahoo*] (Beijing Chaoyang District People’s Court, CMCZ No. 13556, 2008, ruled Oct. 15, 2008), http://m.law-lib.com/cpws/cpws_view.asp?id=200401256395 [hereinafter Thumbnail Case].

77. CLC, *supra* note 6, art. 22(2).

78. *Id.*

79. See *id.* (providing vague terms without detailed explanations).

80. Liu Bokui v. ECNU Press, No.115.

81. *Id.*

82. *Id.* For cases that have cited the U.S. four-factors in deciding fair use directly, see, e.g., Zhuliya Banna Yalishanda Yu Beijing Shi Haidian Qu Daier Peixun Xuexiao Beijing Zhouji Wenhua Yishu Jiaoliu Youxian Gongsu Qinfan Zhuzuo Quan Jiufen An (朱莉亚·班纳·亚历山大与北京市海淀区戴尔培训学校、北京洲际文化艺术交流有限公司侵犯著作权纠纷案) [*Julia Banner Alexander v. Beijing Dell School et al.*] (Beijing

listed elements, the court referred to a test that is similar to the U.S. four-factor fair use test rather than the two-step test in Article 21 of the 2013 RICL.⁸³ This practice was later included (reaffirmed) in a 2018 judicial document entitled “Guidelines for the Trial of Copyright Infringement Cases” by the Beijing Higher People’s Court.⁸⁴ In the second instance of the aforementioned case,⁸⁵ the court applied Article 21 of the 2013 RICL when assessing the use and interpreted the terms “normal exploitation” and “legitimate interest” in a systematic manner.⁸⁶ The court stressed that the important point is to check whether the use amounts to a substitution in the market.⁸⁷ The appellee used the appellant’s work directly in compiling their textbook, which was in direct competition with the appellant and in direct conflict with the appellant’s legitimate interest.⁸⁸ Therefore, it impaired the normal exploitation of the work and was not fair use.⁸⁹ In this case, the court in the second instance was making a judgement based on systematic interpretation by relying on the existing rules set by domestic laws and regulations.⁹⁰ Nevertheless, the rationale behind the ruling still seems exogenic.

The aforementioned case, however, remains a conventional case that concerns the literal meaning of a quotation. In the unconventional cases discussed in the following sections, the inflexibility of the closed-list model will become more apparent and Chinese courts will have to seek alternatives if the result of the doctrinal application of the law is deemed detrimental to society.⁹¹ The observation made is that, when confronted with new challenges, Chinese courts tend to go outside the law and borrow foreign concepts to interpret the rules in a “creative” manner.⁹²

Higher People’s Ct., GMZZ No.185, Aug. 29, 2011), https://pkulaw.cn/case/payz_a25051f3312b07f3cca97f1f6704dfb321a61c0363e7d8f6bdfb.html?match=Exact; Tian Xiuhua Yu Anhui Linshui Jiuye Youxian Gongsi Zhuzuo Quan Qinquan Jiufen Shangsu An (田秀华与安徽临水酒业有限公司著作权侵权纠纷上诉案) [Tian Xiuhua v. Anhui Linshui Liquors Co., Ltd.] (The Higher People’s Ct. in Anhui Province, WMSZZ No.0052, 2008), <http://www.fsou.com/html/text/fnl/1176274/117627455.html>.

83. 17 U.S.C. § 107.

84. Beijing Shi Gaoji Renmin Fayuan Qinhai Zhuzuo Quan Anjian Shenli Zhinan (北京市高级人民法院侵害著作权案件审理指南) [Guidelines for the Trial of Copyright Infringement Cases of Beijing Higher People’s Court] art. 7.11, *translated in* ZHICHANLI (Intellectual Prop. Tribunal, Beijing Higher People’s Court, Apr. 20, 2018), <http://www.zhichanli.com/article/6197.html> (“In judging whether an alleged act is “appropriate quotation,” the court shall generally take the following factors into consideration: (i) whether the work quoted has been published; (ii) whether the quotation is for the purpose of introducing and commenting on the work or explaining certain issues; (iii) whether the proportion that the content quoted constitutes in the alleged infringing work is appropriate; and (iv) whether the quotation will affect the normal use of the work quoted or damage the legitimate interest of its right holder.”). As to whether this document is itself legally justifiable or not, *see infra* Section II.B. and accompanying discussions.

85. Liu Bokui Su Huadong Shifan Daxue Chubanshe Youxian Gongsi Li Xia Qinfan Zhuzuo Quan An (刘伯奎与华东师范大学出版社有限公司、李霞侵害著作权纠纷) [Liu Bokui v. ECNU Press] (The Higher People’s Ct. of Shanghai, HGMSZZZ No.42, June 26, 2014), <http://www.426bq.com/susong/1296.html>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Shanghai Animation Film Studios, No.258; Thumbnail Case, No.13556.

92. Shanghai Animation Film Studios, No.258; Thumbnail Case, No.13556.

1. *Decontextualized Images and Literatures*

By decontextualizing the copyrighted images and literatures by placing them in new scenarios serving new purposes, users in China have presented some critical challenges to the closed-list copyright exceptions regime of the CLC.⁹³

a. The Poster Case

In a 2014 case, *Shanghai Animation Film Studios v. Zhejiang Xinying Niandai Culture Ltd., et al.* (hereinafter the *Poster case*),⁹⁴ the defendant produced a movie called *The Struggle of the 80s*.⁹⁵ The defendant designed a promotional poster decorated with small cartoon figures that were deemed to reflect the childhood memories of those who were born in the 1980s.⁹⁶ However, two figures were still under copyright protection; therefore, the plaintiff sued the defendant for copyright infringement.⁹⁷

The court first held that the defendant used the two cartoon figures to explain the theme of the movie, which was a story about people who were born in the 1980s.⁹⁸ Because the role of the cartoon figures was subsidiary in the poster, the court held that the quotation was “appropriate.”⁹⁹ In the second instance, the Shanghai Intellectual Property Court further indicated that the assessment of “appropriate” should be carried out according to the “two-step” test in Article 21 of the 2013 RICL.¹⁰⁰ Because the quoted copyrighted figures were comparatively small in size and would not act as a substitution for the original in the market, and as the poster only served a limited purpose, the court held that it would not “impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner.”¹⁰¹

Regarding the requirement of Article 22 that “the name of the author and the title of the work are mentioned” (an obvious post-digital era requirement), the court of the first instance held that this was unnecessary as it would destroy the integrity of the poster if the authors and titles of the cartoon figures were to be displayed on the poster.¹⁰² This is an unusual move in two respects: first, it showed that even though the whole work is utilized (the picture of the cartoon

93. Shanghai Animation Film Studios, No.258; Thumbnail Case, No.13556.

94. Shanghai Animation Film Studios, No.258.

95. In China, “the 80s” is a specific concept representing people who were born in the 1980s.

96. Shanghai Animation Film Studios, No.258.

97. *Id.*

98. *Id.*

99. *Id.*

100. Shanghai Meishu Dianying Zhipian Chang Yu Zhejiang Xinying Niandai Wenhua Chuanbo Youxian Gongsì Huayi Xiongdi Shanghai Yingyuan Guanli Youxian Gongsì Qinhai Zhuzuo Quan Jiufen (上海美术电影制片厂与浙江新影年代文化传播有限公司、华谊兄弟上海影院管理有限公司侵害著作权纠纷) [*Shanghai Animation Film Studios v. Zhejiang Xinying Niandai Culture Ltd., et al.*] (Shanghai Intellectual Property Court, HZMZZ No.730, Apr. 25, 2016), <http://ip.pkulaw.cn/ippfnl/1970324845300474.html>.

101. *Id.*

102. Shanghai Animation Film Studios, No. 258; *see also* 2013 RICL, *supra* note 64, art. 19 (explaining that anyone who exploits another person’s work shall clearly indicate the name of the author and the title of the work, except where the parties agree otherwise or the indication cannot be made due to the special manner of exploitation of the work).

character is certainly a copyrighted work), a finding of “appropriate quotation” would not be barred if the use serves a different purpose; second, a clear violation of the explicit requirement of the law, specifically “the name of the author and the title of the work are mentioned” requirement, can be deemed reasonable if it is not expected in practice. Article 19 of the RICL and a similar 2012 case echoes this judgement.¹⁰³

b. The Cache Cases

The *Poster case* and its analogs are a manageable challenge for the courts as they still fall within the definition of “quotation.”¹⁰⁴ However, in some Internet-related borderline cases, providing a clear answer is not easy. For example, in *Wen Xiaoyang v. Yahoo* (hereinafter the *Thumbnail case*),¹⁰⁵ Yahoo displayed a thumbnail derived from the plaintiff’s work on its official site, provided a specific search order was placed.¹⁰⁶ By clicking the thumbnail, the user was directed to the source website to download the picture in its original size or download the thumbnail.¹⁰⁷

From a doctrinal perspective, evidently, Yahoo’s act of providing a thumbnail cannot be covered by “quotation,” as it is certainly not for the purpose of “introducing or commenting on a certain work, or explaining a certain point,” which is a statutory requirement of Article 22(2) of the CLC.¹⁰⁸ The court in the first instance held that because the thumbnail was created for facilitating Internet searches, rather than copying or editing the picture itself, Yahoo’s act in providing the thumbnail was not an infringement.¹⁰⁹ This analysis echoes the U.S. *Perfect 10* case¹¹⁰ in which the Ninth Circuit held that, by displaying thumbnails, Google had transformed the function of the images into providing thumbnails (as pointers directing users to the sources of information), which differed from the original function of entertainment or artistic expression.¹¹¹ However, the *Perfect 10* case was ruled according to the United States’ four-factor fair use test, whereas the Chinese court in the first instance of the *Thumbnail case* failed to explain why serving a different purpose (which is not a listed exception in Article 22 of the CLC) can guarantee an exemption.¹¹² The Beijing Second Intermediate People’s Court noted this and replaced it with a more problematic argument: it claimed that the making of a thumbnail is not an

103. 2013 RICL, *supra* note 64, art. 19 (explaining that anyone who exploits another person’s work shall clearly indicate the name of the author and the title of the work, except where the parties agree otherwise or the indication cannot be undertaken due to the special characteristic of the manner of exploiting the work); Zhou Yanming Yu Huanqiu Shibao She Qinfan Zhuzuo Quan Jiufen An (周雁鸣与《环球时报》社侵犯著作权纠纷案) [Zhou Yanming v. Global Times] (Beijing Chaoyang District People’s Court, CMCZ No.26333, 2012, ruled Sep. 5, 2012), <https://www.iphouse.cn/cases/detail/q9rq3nxd0gz78690mve65m12pvew4oyk.html>.

104. Shanghai Animation Film Studios, No.258; Shanghai Animation Film Studios, No.730.

105. Thumbnail Case, No.13556.

106. *Id.*

107. *Id.*

108. CLC, *supra* note 6, art. 22(2).

109. *Id.*; Thumbnail Case, No.13556.

110. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

111. *Id.* at 1165.

112. Thumbnail Case, No.13556.

act of “copy” as thumbnails are only provided for the specific purpose of searching for content, and hence, thumbnails are only a way to present search results.¹¹³ This ruling is clearly influenced by the U.S. case *Gordon Roy Parker v. Google*.¹¹⁴ Nevertheless, the reason for the jarring change is clearly doctrinal.

The judgements of the *Thumbnail case* appear to have reaffirmed the corollary of the *Poster case* that the courts have given a green light to uses that utilize the whole work.¹¹⁵ However, according to the judgement of a 2010 case, *Music Copyright Society of China v. Baidu* (hereinafter *Cache case 1*),¹¹⁶ a case concerning the caches of copyrighted lyrics of musical works, the court ruled that because the cache substitutes the original work (in this case, the lyrics) and thus prejudices the legitimate interests of the copyright owner, it is copyright infringement and therefore is not a search engine service that can be covered by fair use.¹¹⁷ What is of crucial importance is not whether a work as a whole (or a substantial part of it) is utilized by the infringer, but whether that use amounts to a substitution in the market.¹¹⁸

A 2013 case concerning the caches of website pages provided by Sogou’s search engine that contain copyrighted literary works, *Beijing Sogou Information Service Co Ltd v. Wenhui Cong* (hereinafter *Cache case 2*),¹¹⁹ reaffirmed the previous ruling.¹²⁰ The court devoted considerable length of its fair use finding to the market substitution analysis by claiming that web caches provided by Sogou do not substitute for the original webpages that contain copyrighted works, and the web caches are beneficial to the public as they can provide an “irreplaceable and substantial value.”¹²¹ Interestingly, the court also reckoned that web caches cannot be covered by any of the listed exceptions under Article 22 of the CLC. Nevertheless, it pointed out that a rigid application of the law will severely jeopardize the public interest.¹²² As a solution, the court opined that it is permissible for it to go beyond the twelve exceptions listed under Article 22 of the CLC, as long as the act concerned can satisfy the “substantive requirements of fair use” provided by Article 21 of the RICL and is deemed

113. *Id.*

114. *Gordon Roy Parker v. Google*, 242 Fed. Appx. 833, at 836 (3rd Cir, 2007); *Gordon Roy Parker v. Google*, 422 F.Supp.2d 492, 496 (E. D. Pa. 2006).

115. *Thumbnail Case*, No.13556.

116. *Zhongguo Yinyue Zhuzuo Quan Xiehui Yu Beijing Baidu Wangxun Keji Youxian Gongsi Qinhai Zhuzuo Quan Jiufen* (中国音乐著作权协会与北京百度网讯科技有限公司侵害著作权纠纷) [the Music Copyright Society of China v. Baidu] (Beijing Haidian District People’s Court, HMCZ No.7404, 2008), <https://www.iphouse.cn/cases/detail/1zn3op2x8k07g68v4dmlv5drme1w49yq.html>.

117. *Id.*

118. *Id.*

119. *Cong Wenhui Yu Beijing Sogou Xinxu Fuwu Youxian Gongsi Qinfan Xinxu Wangluo Chuanbo Quan Jiufen An* (从文辉与北京搜狗信息服务有限公司侵犯信息网络传播权纠纷案) [Beijing Sogou Information Service Co. Ltd. v. Wenhui Cong] (Beijing First Intermediate People’s Court, YZMZZ No.12533, 2013), http://blog.sina.com.cn/s/blog_49d9bf060101gfjf.html.

120. *Id.*

121. *Id.*

122. *Id.* This is an interesting add-on that triggered discussions about whether public interest should be examined in this type of cases. See Haochen Sun, *Copyright Law as An Engine of Public Interest Protection*, 16 NW. J. TECH. & INTEL. PROP. 123, 171–173 (2019).

beneficial to the society.¹²³ It is believed that this “creative” interpretation was inspired by the U.S. fair use doctrine as well.¹²⁴

c. Concluding Notes

The courts in the above cases do not view thumbnails and caches of works as quotations, and will therefore not be bound by the “appropriate” requirement of Article 22(2) of the CLC.¹²⁵ Neither are they covered under any of the listed exceptions under Article 22. Hence, if the court ruled against service providers based on existing law, it would be counter-intuitive as it is against a national policy that aims to promote Internet-related industries in China.¹²⁶ Consequently, the courts have to go beyond the law and introduce exotic justifications (e.g., the fair use test from the U.S.), and this practice has caused inconsistencies among courts in China.¹²⁷

To address these inconsistencies, the SPC promulgated a judicial interpretation on online copyright disputes in 2012,¹²⁸ specifically providing that the court could support the network service provider’s claim that it has not infringed upon the right of dissemination on information networks held by the copyright owners if such an act (providing “the alleged work for the public by means such as web cache or thumbnail”) neither affects the normal use of the alleged work nor unreasonably damages the right holder’s lawful rights and interests in the work.¹²⁹ Thus, the SPC attempted to end the chaotic application of foreign legal concepts by courts, as demonstrated by the *Thumbnail case* and the *Cache case 1 and 2*, by providing a “two-step” test that mirrors Article 21 of the 2013 RICL with its judicial interpretation. However, whether the SPC judicial interpretations are justifiable is dubious.¹³⁰

2. User-Generated Content

The problem of the closed-list model in relation to fair use is obvious in copyright issues related to user-generated content (UGC).¹³¹ The biggest

123. Beijing Sogou Information Service Co Ltd v. Wenhui Cong, No.12533.

124. Haochen Sun & Johny Xuyang Han, *Requirements for Recognizing a New Type of Fair Use under PRC Copyright Law*, in ANNOTATED LEADING COPYRIGHT CASES IN MAJOR ASIAN JURISDICTIONS 264 (Kung-Chung Liu ed. 2019).

125. CLC, *supra* note 6, art. 22.

126. Qian Wang (王迁), *Sousuo Yinqing Tigong Kuaizhao Fuwu De Zhuzuo Quan Qinquan Wenti Yanjiu* (搜索引擎提供“快照”服务的著作权侵权问题研究) [*On the Copyright Infringement Issues of the Cache Service provided by Search Engines*], 3 DONGFANG FAXUE 139 (东方法学)[ORIENTAL LAW] (2010).

127. *Id.* at 136–139.

128. Zuigao Renmin Fayuan Guanyu Shenli Qin Hai Xinx Wangluo Chuanbo Quan Minshi Jiufen Anjian Shiyong Falü Ruogan Wenti De Guiding (最高人民法院于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定) [Provisions of the Supreme People’s Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks] (promulgated by Order No. Fa Shi (2012) 20 of the Supreme People’s Court of December 17, 2012), translated at PKULAW.CN, <http://en.pkulaw.cn/display.aspx?id=8b309c3ab1e59c89bdfb&lib=law>.

129. *Id.* art. 5.

130. See *infra* Section II.A.

131. See, e.g., Will Clark, *Copyright, Ownership, and Control of User-Generated Content on Social Media Websites*, CHICAGO-KENT COLL. OF L., 1–6 (2009), [http://www.kentlaw.edu/perritt/courses/seminar/papers%202009%20fall/Jerry%20clark%20final%20Copyright%2C%20Ownership%2C%20and%20Control%](http://www.kentlaw.edu/perritt/courses/seminar/papers%202009%20fall/Jerry%20clark%20final%20Copyright%2C%20Ownership%2C%20and%20Control%20)

challenge raised by technological development is the conflict between the increasing creativity of users and the decreasing control by copyright owners. Facilitated by easily accessible tools and distribution channels, consumers are now turning into “prosumers,”¹³² generating unlimited online content. UGC also appears to pose a substantial threat to the closed-list copyright exceptions model.

a. Fan Creations

Fan creations¹³³ represent a type of UGC that is infringing in most cases but has proven difficult to control, as the number of potential infringers is infinite and the cost of enforcement is too high.¹³⁴ Among the different types of fan creations, *fanvids*, *fanfics*, *digital parodies*, and *Doujinshi* are the most problematic. Whereas authors of *fansubs* and *scanlations* are dedicated to reproducing the original (by merely translating the subtitles/dialogues), authors of *fanvids*, *fanfics*, and *Doujinshi* focus on using the original to create something new. In the latter case, the results may vary depending on the portion taken.¹³⁵ For example, in a 2018 case regarding fanfiction of the works of a reputable Chinese writer,¹³⁶ the Chinese court ruled that although the fan author used dozens of character names derived from the plaintiff’s works, their characteristics, relationships, and the background design were deliberately altered.¹³⁷ Therefore, they were not substantially similar to the original and thus did not constitute copyright infringement.¹³⁸ This indicates that the more fanfic departs from the original, the less likely it is to be found a derivative work. In the United States, *Anderson v. Stallone* provided that if the unauthorized fanfiction contains the same character and the same setting, it is infringed on copyright.¹³⁹ Under the current setting of the CLC, when considering the purpose of the use, any unauthorized fanfiction that is deemed a spinoff is likely to be copyright infringement as there is a high probability of “substantial similarity” and it is not covered by the twelve listed exceptions provided by Article 22 of the CLC.¹⁴⁰

20of%20UserGenerated%20Content%20on%20Social%20Media%20Websites.pdf (detailing copyright issues related to user-generated content).

132. ALVIN TOFFLER, *THE THIRD WAVE: THE CLASSIC STUDY OF TOMORROW* 11 (Bantam 1st ed. 1984) (“Third Wave civilization begins to heal the historic breach between producer and consumer, giving rise to the “prosumer” economics of tomorrow.”).

133. In general, typical fan works include *fansubs*, *fanvids*, *fanfics*, *scanlations*, and *doujinshi*. See Tianxiang He, *What Can We Learn from Industries? The Differences Between the Domestic and Oversea Copyright Protection Strategies towards Fan Activities*, 62 AM. J. COMP. L. 1009, 1013 (2014).

134. Tim Wu, *Tolerated Use*, 31 COLUM. J. L. & ARTS 617, 630 (2008).

135. TIANXIANG HE, *COPYRIGHT AND FAN PRODUCTIVITY IN CHINA* 123–195 (Springer Singapore ed. 2017).

136. Jin Yong Su Jiang Nan Deng Qinfan Zhuzuo Quan Jiufen An (金庸诉江南等侵犯著作权纠纷案) [Jin Yong v. Jiang Nan] (Guangzhou Tianhe District People’s Court, Y0106MC No. 12068, 2016, ruled Aug. 16, 2018), <http://n.iphouse.cn/cases/detail/680587.html>.

137. Generally referred to as the “Alternative Universe” fanfiction. See Colin Lankshear & Michele Knobel, *Digital Remix: The Art and Craft of Endless Hybridization*, Keynote presented to the International Reading Association Pre-Conference Institute “Using Technology to Develop and Extend the Boundaries of Literacy,” Toronto, May 13, 2007, 6–7, <http://extendboundariesofliteracy.pbworks.com/f/remix.pdf>.

138. *Jin Yong v. Jiang Nan*, No.12068.

139. *Anderson v. Stallone*, U.S. Dist. LEXIS 11109, at 24–25 (C.D. Cal. Apr. 25, 1989).

140. CLC, *supra* note 6, art. 22.

b. Memes

Copyright issues relating to memes making use of snapshots from copyrighted audiovisual works is also complicated. Chinese netizens are now more inclined to use memes to express themselves when using social networking apps.¹⁴¹ As a typical form of UGC created by netizens, memes contain still or short moving images incorporating the creator's creative interpretations of those images through the addition of words or other artistic elements.¹⁴² However, when the memes netizens use are derived from a copyrighted work, copyright issues will arise. For example, Choi Seong-guk, a famous actor in Korea, is well-known among Chinese netizens due to the wide distribution of a meme taken from the Korean movie *Master KIMS*.¹⁴³ The meme uses a scene from this movie in which he is laughing and is popular with the younger netizens.¹⁴⁴ This raises one critical question: is this a copyright infringement case in China? According to a recent judgement made by a district court of Hangzhou, using snapshots and still photos from a TV series for commercial purposes without permission constitutes copyright infringement.¹⁴⁵ However, the court failed to differentiate still photos (taken by professional photographers at the scene) from screenshots (taken by netizens) in its judgement.¹⁴⁶

In a more recent case, *Dongyang Le Shi Hua Er Co., Ltd. v. Douban.com* (hereinafter *the Douban case*),¹⁴⁷ the defendant, a popular social networking service website called Douban, was sued for copyright infringement for allowing its registered users to upload screenshots, movie posters, and still images from the copyrighted TV series owned by the plaintiff to its website.¹⁴⁸ The court differentiated posters and still images from screenshots.¹⁴⁹ In discussing the copyright issues relating to screenshots, the court indicated that because the number of uploaded frames was limited and they were taken from 40 episodes,

141. See generally, Infographic: 92% of World's Online Population Use Emojis, CMO BY ADOBE (2016) <https://cmo.adobe.com/articles/2016/11/report-emoji-used-by-92-of-worlds-online-population.html#gs.ezkqbv> (showing that emoticon use is prevalent online).

142. See generally Carlos Mauricio Castaño Díaz, *Defining and Characterizing the Concept of Internet Meme*, 6 CES Psicol 82 (2013), <http://www.scielo.org.co/pdf/cesp/v6n2/v6n2a07.pdf> (detailing the prevalence of online memes).

143. *Kim-gwanjang dae* (Taewon Entertainment, Feb. 8, 2007).

144. Lin Li, *Choi Sung-kook: The King of Stickers*, GLOB. TIMES (Jan. 25, 2016), <https://www.globaltimes.cn/content/964973.shtml>.

145. Xinli Dianshi Wenhua Touzi Youxian Gongsi Su Zhejiang Tianmao Wangluo Youxian Gongsi Dongguan Shi Gufeisha Fushi Youxian Gongsi Zhuzuo Quan Qinquan Jiufen (新丽电视文化投资有限公司诉浙江天猫网络有限公司、东莞市古菲莎服饰有限公司著作权侵权纠纷) [Xin Li Television Investment Co. Ltd. v. Zhejiang Tmall Network Co., Ltd. and Dongguan Gu Fei Sha Co. Ltd.] (Hangzhou Yuhang District Peoples' Court, HYZCZ No.611, 2015, ruled Jan. 11, 2016), <https://susong.tianyancha.com/89640708250b4a939cced6f2c9214fa4>.

146. *Id.*

147. *Dongyang Leshi Huaer Yingshi Wenhua Youxian Gongsi Yu Beijing Douwang Keji Youxian Gongsi Xinxi Wangluo Chuanbo Quan Jiufen* (东阳市乐视花儿影视文化有限公司与北京豆网科技有限公司信息网络传播权纠纷) [Dongyang Le Shi Hua Er Co., Ltd. v. Douban.com] (Beijing Chaoyang District Peoples' Court, J0105MC No.10028, 2017, ruled Sept. 15, 2017), <https://susong.tianyancha.com/c5ec84da0a5111e881ec008cfaf870e0>.

148. *Id.*

149. *Id.*

together they failed to reproduce the core idea of the original work.¹⁵⁰ They could not be considered a substantial part of and did not substitute the original work, and therefore there was no infringement.¹⁵¹

According to the classic English case *Spelling Goldberg v. BPC Publishing*,¹⁵² to copy even a single frame of a film is probably an infringement of copyright.¹⁵³ Although the judgement of the *Spelling* case was based on English law, the theory is similar: it is not the quantity but the quality that matters.¹⁵⁴ If a single frame of the copyrighted audiovisual work is taken and can be considered a substantial part of the original work, it still constitutes copyright infringement. In the case of memes, taking one frame or a short can be solid evidence in favor of a finding of infringement.¹⁵⁵ The making and distribution of derivative works or adaptations of that frame or clip, as original as they may be, are still acts of copyright infringement if permission from the original copyright owner is not secured or are clearly not covered by the twelve listed exceptions of the CLC.¹⁵⁶

c. Digital Parody

As one form of UGC, digital parody is certainly a difficult case to address in China. The first well-known case of video parody in China was *The Bloody Case that Started from a Steamed Bun* (hereinafter *The Steamed Bun*), a 2006 video parody created by the Chinese video blogger Ge Hu.¹⁵⁷ The author satirized the famous director Kaige Chen's epic film, *The Promise*, with a twenty minute video parody that consisted almost solely of segments from the movie. Chen threatened to sue but eventually decided against it.¹⁵⁸ Although scholars have predicted that *The Steamed Bun* would not survive if brought to court and that the CLC does not officially recognize parody as a fair use,¹⁵⁹ after more than ten years, there is still no clear answer, as no parody case has ever been brought to court in China. Technically speaking, making a judgement based on Article

150. *Id.*

151. *Id.*

152. *Spelling Goldberg v. B.P.C.BPC Publishing, LTD.* [1981] RPC 225 at 280.

153. *Id.*

154. *Id.*

155. *Id.*

156. CLC, *supra* note 6, art. 22.

157. Xin Xu (徐馨), *Yige Mantou Yinfa De Xuean Yinfa De Fansi* (《一个馒头引发的血案》引发的反思) [*The Reflection of the Steamed Bun Case*], *Renmin Ribao* (人民日报) [PEOPLE'S DAILY] (Feb. 22, 2006), <http://culture.people.com.cn/GB/22219/4129344.html>.

158. Seio Nakajima, *Film as Cultural Politics*, in *RECLAIMING CHINESE SOCIETY: THE NEW SOCIAL ACTIVISM* 178 (You-tien Hsing & Ching Kwan Lee eds., 2010).

159. Robert S. Rogoyski & Kenneth Basin, *The Bloody Case That Started From a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in Modern China*, 16 *UCLA ENT. L. REV.* 237, 241–243 (2009) (“Like most parodies, *The Steamed Bun* relies heavily on the underlying work to convey its message. Though *The Steamed Bun* case ultimately never went to court, under the likely narrow reading of Article 22(2), *The Steamed Bun* appears to be a copyright violation.”); Suli (苏力), *Xifang de Falu Baohu yu Xianzhi Cong Yige Mantou Yinfa de Xuean Qieru* (戏仿的法律保护和限制——从《一个馒头引发的血案》切入) [*Legal Protection of Parodies and its Limits*], 3 *ZHONGGUO FAXUE* 11 (中国法学) [CHINA LEGAL SCIENCE] (2006); Weidong Ji (季卫东), *Wangluohua Shehui de Xifang yu Gongping Jingzheng Guanyu Zhuzuoquan Zhidu Sheji de Bijiao Fenxi* (网络化社会的戏仿与公平竞争——关于著作权制度设计的比较分析) [*Parody and Fair Competition in the Network Society*], 3 *ZHONGGUO FAXUE* 21 (中国法学) [CHINA LEGAL SCIENCE] (2006).

22(2) of the CLC and Article 21 of the 2013 RICL is not difficult as *The Steamed Bun* clearly fails the proportion requirement by taking too much from *The Promise*.¹⁶⁰ Even if one could cite the *Poster case* and argue that the proportion requirement is not decisive, proving that the use serves a certain purpose (e.g., to comment on a certain work, or explain a certain point) and that it will not impede “normal exploitation” and harm the “legitimate interests” of the copyright owner is necessary.¹⁶¹ This clearly indicates that the court would face a challenge in balancing the protected values behind the “quotation” (prevent market failure and protect freedom of speech) against the interests of copyright owners.¹⁶² Without another set of clearly defined rules, whether parody will be protected in China remains unclear.

d. Concluding Notes

Even though the law provides an answer for each type of UGC discussed, such answers appear to be unsatisfactory.¹⁶³ In the case of fan creations and memes, most of these “creations” are derivative works.¹⁶⁴ Thus, distributing them online without asking for permission is an apparent copyright infringement according to the current operation of the CLC.¹⁶⁵ However, that conclusion is sometimes counter-intuitive, as most of these fan creations and memes are already part of the current internet ecosystem and stopping their distribution is impossible.¹⁶⁶ Therefore, many UGC creators choose to ignore the risk of copyright liability not only because the act of copying is usually subtle and hence difficult for copyright owners to discover, but also because the transaction costs are simply too high.¹⁶⁷ Most UGC not only benefits the copyright owners in some way but also helps society in promoting core values such as civic engagement and freedom of speech.¹⁶⁸

Notably, in the *Douban case* mentioned previously, the court also ruled that the upload action by users constitutes fair use by going beyond the twelve listed exceptions of Article 22 of the CLC and relying solely on Article 21 of the 2013 RICL—a “two-step” test.¹⁶⁹ The court held that, due to the rapid development of internet technology, the enumerated twelve exceptions could not satisfy current and future needs.¹⁷⁰ It was therefore logical to take the “two-

160. CLC, *supra* note 6, art. 22; 2013 RICL, *supra* note 64, art. 21.

161. Shanghai Animation Film Studios, No.258.

162. *Id.*

163. HE, *supra* note 135, at 117.

164. *Id.*

165. CLC, *supra* note 6, art. 22.

166. HE, *supra* note 135, at 117.

167. *Id.*

168. *Id.*; Rogoyski & Basin, *supra* note 159; Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 L. & CONTEMP. PROBS. 135 (2007); Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why all the Cartoons My Kid Watches are Japanese Imports?*, 55 RUTGERS L. REV. 155 (2002); HE, *supra* note 135; Matthew P. McAllister, *Consumer Culture and New Media: Commodity Fetishism in the Digital Era*, in MEDIA PERSPECTIVES FOR THE 21ST CENTURY: CONCEPTS, TOPICS AND ISSUES 161–62 (S. Papathanassopoulos ed. 2010); William Hennessey, *Deconstructing Shanzhai-China's Copycat Counterculture: Catch Me If You Can*, 34 CAMPBELL L. REV. 609 (2012).

169. Douban.com, No.10028.

170. *Id.*

step” test enshrined in Article 21 of the 2013 RICL as a general clause and apply it to new cases.¹⁷¹ The court seemed to believe that, for online streaming platforms such as YouTube (or Youku and Iqiyi in China) and social networking apps and software, UGC comprises a significant and indispensable part of their business.¹⁷² Therefore, the question is not whether UGC shall be banned, but how to identify bad actors and retain good ones. If the law is lagging behind, the court will have to interpret the law creatively, even if this is unacceptable from a doctrinal perspective.¹⁷³

Regarding digital parody, the dispute over *The Steamed Bun* did not end up in court; however, it did trigger substantial discussion on parody and fair use among scholars in China.¹⁷⁴ Many academics referred to the U.S. fair use doctrine¹⁷⁵ and the *Campbell v. Acuff-Rose* case¹⁷⁶ for guidance and then asserted that Chinese courts should learn from their American counterparts.¹⁷⁷ A 2011 opinion of the SPC later assimilated these suggestions¹⁷⁸ and provided that 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.¹⁷⁹ In effect, the SPC has proposed an alternative solution combining the U.S. four-factor fair use doctrine with a three-step test, which echoes South Korea’s approach.¹⁸⁰ Nevertheless, the application of the U.S. four-factor fair use doctrine appears to be limited to

171. *Id.*; see also, Zhang Haixia Yu Yu Jianrong Qin Hai Zhuzuo Quan Jiufen Shangsu An (张海峡与于建嵘侵害著作权纠纷上诉案) [Zhang Haixia v. Yu Jianrong] (Beijing Higher Peoples’ Court, GMZZ no. 3452, 2012), <https://www.iphouse.cn/cases/detail/2xdgoy9e5pzw6oy2zxj3rq4vkn81027.html> (approaching the case in a similar fashion to the *Douban* case).

172. Douban.com, No.10028.

173. *Id.*

174. Li Luo (罗莉), *Xiefang De Zhuzuo Quan Fa Bianjie Cong Yige Mantou Yinfa De Xuean Shuoqi* (谐仿的著作权法边界——从《一个馒头引发的血案》说起) [*The Boundary of Parody in Copyright Law – The Steamed Bun*], 3 FAXUE 60–6 (法学) [LAW SCIENCE] (2006).

175. 17 U.S.C. § 107.

176. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994).

177. Luo, *supra* note 174; Qian Wang (王迁), *Lun Rendong Mofang Fengci Zuopin Goucheng Heli Shiyong De Falü Guize Jianping Yige Mantou Yinfa De Xuean Sheji De Zhuzuo Quan Wenti* (论认定“模仿讽刺作品”构成“合理使用”的法律规则——兼评《一个馒头引发的血案》涉及的著作权问题) [*The Legal Principle on Defining Parody Works As Fair Use – Comments on the Copyright Issues in the Case of The Steamed Bun*], 1 KEJI YU FALÜ 18–25 (科技与法律) [J. OF SCI., TECH. AND L.] (2006); Zhiwen Liang (梁志文), *Lun Huaji Mofang Zuopin Zhi Hefa Xing* (论滑稽模仿作品之合法性) [*On the Legality of Parodic Works*], 4 DIANZI ZHISHI CHANQUAN 11–5 (电子知识产权) [ELEC. INTELL. PROP.] (2006).

178. See FENG, *supra* note 5, at 9 (elaborating that the Opinions of the Supreme People’s Court are one form of judicial interpretations in China and are also considered proper legal rules).

179. Zuigao Renmin Fayuan Guanyu Chongfen Fahui Zhishi Chanquan Shenpan Zhineng Zuoyong Tuidong Shehui Zhuyi Wenhua Da Fazhan Da fanrong he Cujin Jingji Zizhu Xietiao Fazhan Ruogan Wenti De Yijian (最高人民法院关于充分发挥知识产权审判职能作用推动社会主义文化大发展大繁荣和促进经济自主协调发展若干问题的意见) [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] (SUP. PEOPLE’S CT., FF No. (2011) 18, Dec. 16, 2011).

180. Peter K. Yu, *Customizing Fair Use Transplants*, 7 LAWS 1, 6 (2018).

special circumstances, and the four-factor plus three-step model is also deemed problematic.¹⁸¹ Moreover, even if we assume that in theory, the digital parody could be covered by Article 22(2) of the CLC, in practice Chinese courts are probably less comfortable with the idea of recognizing parody directly in their judgements, as it tends to open the floodgates for criticism of the government using innuendos and insinuations that censors find unamusing.¹⁸² As suggested, a more flexible copyright exception regime could help solve the copyright problem of UGC, as some fan works deemed beneficial to society could then be exempted.¹⁸³

3. *Transformative Use?*

Discussions in previous sections indicate that the closed-list model of copyright exceptions provided by Article 22 of the CLC has caused and will continue to cause trouble for Chinese courts.¹⁸⁴ As can be seen in the cases below, several new ways to exploit works, spawned by new developments in digital technology and commercial models, have presented substantial challenges to the closed-list model of CCL and forced Chinese courts to further deviate from their set doctrinal interpretation of the CLC in their judgements by introducing a purely American concept—transformative use.¹⁸⁵ This is derived from the first of the four U.S. fair use factors: “the purpose and character of the use, including whether such use is of a commercial nature.”¹⁸⁶

a. Google Books Case

The Google Books Library Project is described by Google as a global project that aims to “make it easier for people to find relevant books.”¹⁸⁷ To achieve that goal, Google scanned millions of books worldwide and stored the copies on its servers without prior permission from their copyright owners.¹⁸⁸ Such an unauthorized “opt-out” model triggered lawsuits in different parts of the world, including the United States and China.¹⁸⁹ In his 2016 paper, Yong Wan

181. *Id.*

182. See Tom Philips, *Chinese censors target Winnie the Pooh and Tigger*, TELEGRAPH (June 14, 2013), <https://www.telegraph.co.uk/news/worldnews/asia/china/10120738/Chinese-censors-target-Winnie-the-Pooh-and-Tigger.html> (reporting on Chinese censors targeting memes of Winnie the Pooh); see also Eli Meixler, *Is Winnie-the-Pooh Unwelcome in China? Christopher Robin Blocked from World's 2nd Biggest Film Market*, TIME (Aug. 6, 2018), <http://time.com/5358437/christopher-robin-film-banned-china/>.

183. HE, *supra* note 135, at 205.

184. Douban.com, No.10028.

185. See *Campbell*, 510 U.S. at 579 (Transformative use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”).

186. *Id.* at 577.

187. *Google Books Library Project – An Enhanced Card Catalog of The World's Books*, GOOGLE, <https://books.google.com/intl/en-GB/googlebooks/library.html> (last visited Oct. 21, 2020).

188. See Robinson Meyer, *After 10 Years, Google Books is Legal*, THE ATLANTIC (Oct. 20, 2015), <https://www.theatlantic.com/technology/archive/2015/10/fair-use-transformative-level-google-books/411058/> (discussing lawsuits surrounding the history of Google Books).

189. See Andrew Jacobs, *Google Apologizes to Chinese Authors*, N.Y. TIMES (Jan. 11, 2010), <https://www.nytimes.com/2010/01/12/technology/companies/12google.html> (reporting on Chinese legal action against Google Books).

gave a detailed and comparative account of two representative cases from in the United States and China, respectively.¹⁹⁰ Although the author of this paper is even more sanguine than Wan was about the role played by Chinese courts in providing a more flexible model of copyright exceptions,¹⁹¹ this paper aims to address the intrinsic conflicts caused by Google Books' approach.

In the *Wang Shen v. Google Inc. et al.*, case (hereinafter the *Google Books case*),¹⁹² Google was sued by Wang Shen for copyright infringement in China as its Library Project scanned several books authored by her without asking for permission.¹⁹³ In this case, the copyright owner claimed that Google infringed both rights of reproduction¹⁹⁴ and the right of communication of information on networks.¹⁹⁵ This case went through two instances, and the courts in both instances held that Google committed copyright infringement, although the reasons given by the courts were quite different.¹⁹⁶

In assessing the fair use claim of Google, both the Beijing First Intermediary People's Court and the Beijing Higher People's Court went beyond the closed-list exceptions model of the CLC and quoted general principles of copyright or external concepts to support their findings.¹⁹⁷ For example, the Beijing First Intermediary People's Courts invoked the ultimate goal of copyright to reinforce its point.¹⁹⁸ As stated in the decision, the purpose of providing authors with exclusive rights is not to grant them a complete monopoly over the distribution and use of their works, nor is it merely to incentivize authors to create works.¹⁹⁹ Instead, the purpose is to ensure that the authors can enjoy a limited monopoly right so that a reasonable economic income can be guaranteed.²⁰⁰ This will encourage and incentivize more people to engage in creative works while also promoting the use and dissemination of high-quality works.²⁰¹ The court concluded that protection for a higher societal

190. Yong Wan, *Similar Facts, Different Outcomes: A Comparative Study of the Google Books Project Case in China and the United States*, 63 J. COPYRIGHT SOC'Y U.S.A. 573, 574 (2016).

191. *Id.* at 594–95.

192. Wang Shen Su Beijing Guxiang Xinxi Jishu Youxian Gongsu Deng Qinfan Zhuzuo Quan Jiufen (王莘诉北京谷翔信息技术有限公司等侵犯著作权纠纷) [Wang Shen v. Google Inc. et al.] (Beijing 1st Intern. People's Ct., YZMCZ No.1321, Dec. 20, 2012), http://pkulaw.cn/case/payz_a25051f3312b07f367503cea0c2c52ed2b4c49dd9d206508bdfb.html?match=Exact.

193. *Id.*

194. CLC, *supra* note 6, art. 10(5).

195. *Id.* art. 10(12). The right of communication of information on networks in China is inspired by Article 8, "Right of Communication to the Public," in the WIPO Copyright Treaty, WCT, *supra* note 71, art. 8, and aims to regulate the interactive communication of works on the Internet. See CLC, *supra* note 6, art. 10(12). According to Article 10(12) of the CLC, copyright owners have the exclusive right to authorize the communication of their works to the public through "wire or wireless means" and to make their works available to members of the public in such a way that "the public may access these works from a place and at a time [of their choice]."

196. Wang Shen v. Google Inc. et al, No.1321; Wang Shen Su Beijing Guxiang Xinxi Jishu Youxian Gongsu Deng Qinfan Zhuzuo Quan Jiufen (王莘诉北京谷翔信息技术有限公司等侵犯著作权纠纷) [Wang Shen v. Google Inc. et al.] (Beijing Higher People's Ct., GMZZ No.1221, Dec. 19, 2013), https://cyber.harvard.edu/people/tfisher/cx/Mian_Appeal_Chinese.pdf.

197. *Id.*

198. Wang Shen v. Google Inc. et al, No.1321.

199. *Id.*

200. *Id.*

201. *Id.*

interest should override the copyright protection granted to copyright owners.²⁰² Indeed, the Beijing First Intermediary People's Court used the ultimate goal of copyright as an anchor for its fair use assessment.²⁰³

Concerning the copyright infringement, the court upheld Google's fair use defense for two reasons. First, Google only displays snippets of works, which would not substantially serve as a substitute for the original work in the market and therefore affect their market value.²⁰⁴ Second, by displaying snippets of works, Google Books is providing users with the more advanced service of searching for information about works.²⁰⁵ This is a "transformative use" that will not cause unreasonable damage to the copyright owner's legal interests.²⁰⁶ In doing so, the court abruptly, but creatively, introduced a purely American concept, "transformative use," to support its argument.²⁰⁷

The Beijing Higher People's Court did not rule on the "transformative" part of the judgment of the first instance,²⁰⁸ although it did clarify that, based on previous judicial practices, special circumstances outside of the twelve exceptions listed in Article 22 of the CLC may also constitute fair use.²⁰⁹ The court further indicated that, in assessing whether a "special circumstance" can be deemed fair use, courts should consider the following factors: the purpose and character of the use, the nature of the copyrighted work, the character and amount of the portion used in relation to the copyrighted work as a whole, whether the use affects the normal exploration of the work, and whether the use unreasonably prejudices the legitimate interests of the copyright owner.²¹⁰

b. Live Game Webcasting

Live game webcasting represents a newly developed market and a novel way to exploit existing works in China²¹¹ that raises substantial challenges to the closed-list exceptions model of the CLC. According to a recent survey, the size of the market for live game webcasting reached 14.1 billion RMB in 2018.²¹² The success of live game webcasting relies on its interactive and shared features.²¹³ By sharing their creative performances with netizens and interacting

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. However, the court ruled against Google by claiming that it infringed the reproduction right (instead of the right of communication of information on networks discussed previously). *Id.* It made the confusing point that whether Google's act constituted fair use regarding the right of dissemination on information networks was irrelevant to the determination of whether Google's copying of the entire works constituted fair use. *Id.* This was later adjusted by the Beijing Higher People's Court in the second instance.

208. However, the Beijing Higher People's Court upheld the verdict by claiming that Google did not provide enough evidence to support its fair use claim. Wang Shen v. Google Inc. et al, No.1221.

209. *Id.*

210. *Id.*

211. IRESEARCH, 2018 年中国游戏直播行业研究报告 [STUDY REPORT ON THE LIVE GAME WEBCASTING INDUSTRY IN CHINA 2018] (Sept. 2018), <https://www.iresearch.com.cn/Detail/report?id=3254&isfree=0>.

212. *Id.*

213. Traci Ruether, *Live Streaming in China, A Look Inside the Multi-Billion Dollar Industry*, WOWZA (Jan. 15, 2020), <https://www.wowza.com/blog/live-streaming-in-china>.

with them, webcasters have successfully accrued a large number of fans, resulting in a prosperous live game webcasting industry in China.²¹⁴

With the market value of live game webcasting rapidly climbing, copyright owners also detected this sector on their radar and noted that the mainstay of this industry, the sharing of copyrighted video game screens, is prima facie an act of copyright infringement.²¹⁵ Some copyright owners began to sue webcast service providers for copyright infringement.²¹⁶ It then becomes crucial to ask whether fair use can cover live game webcasting.

The *NetEase v. Guangzhou Huaduo* case exemplifies the challenges faced by the court (hereinafter *the NetEase case*).²¹⁷ NetEase is a Chinese internet giant that has run the famous online game, *Fantasy Westward Journey 2*, for more than 10 years.²¹⁸ After discovering that the Guangzhou Huaduo Company, the owner of the major webcasting platform YY.com, encouraged its contracted webcasters to webcast and rebroadcast the playing of the said game back in 2012, NetEase sued Huaduo for copyright infringement and unfair competition in 2014.²¹⁹ In October, 2017, the Guangzhou Intellectual Property Court (GZIP Court) denied the defendant's fair use claim and ruled that Huaduo infringed NetEase's copyright in the said game and awarded 20 million RMB in damages.²²⁰

The rationale behind the judgement made in this case is not difficult to understand. The game's software is copyright protected.²²¹ Separately, the graphical characters, scenes, objects as artistic works,²²² the background music as musical works,²²³ and the plot and other literary descriptions as literary works are also copyright protected.²²⁴ Thus, the GZIP Court ruled that, in general, the game screen can be protected as "works created by a process analogous to cinematography" under Article 3 of the CLC.²²⁵ The court also stated that the involvement of a human player adds no creative efforts to the gameplay work as the developer has already defined the essential parts of the game, so the player was merely following predefined instructions.²²⁶ By webcasting a protected

214. *Id.*

215. *Streaming Platforms Lost Game Against Video Game Developers in China*, WILMAP, <https://wilmap.law.stanford.edu/news/streaming-platforms-lost-game-against-video-game-developers-china> (last visited Oct. 21, 2020).

216. *Id.*

217. *Guangzhou Wangyi Jisuanji Xitong Youxian Gongsu Su Guangzhou Huaduo Wangluo Keji Youxian Gongsu Qinhai Zhuzuo Quan Ji Bu Zhengdang Jingzheng Jiufen* (广州网易计算机系统有限公司诉广州华多网络科技有限公司侵害著作权及不正当竞争纠纷) [*NetEase v. Guangzhou Huaduo*] (Guangzhou Intell. Prop. Ct., YZFZMZ No.16, Dec. 24, 2017), <http://www.chinaiplaw.com/index.php?id=4998>.

218. *Streaming Platforms Lost Game Against Video Game Developers in China*, *supra* note 215.

219. *Id.*

220. *Id.*

221. CLC, *supra* note 6, art. 3(8).

222. *Id.* art. 3(3).

223. *Id.*

224. *Id.* art. 3(1).

225. *Guangzhou Huaduo*, No.16; CLC, *supra* note 6, art. 3(6).

226. *Guangzhou Huaduo*, No.16.

work and showing the game screen to the subscribers, Huaduo has infringed NetEase's copyright over the work.²²⁷

The tricky aspect concerns whether live game webcasting can be justified by existing copyright exceptions, as claimed by the defendant.²²⁸ The court was unfavorable to finding fair use, noting that “even if the game screen was utilized as a tool to demonstrate the player's skill, it is just a difference of perspective between player and viewers, and it will not surely obliterate the value of the game screen[;] hence the value was not transformed,” and that “[webcasting] does not fit within any listed exceptions in Article 22 of the CLC,” and was therefore not fair use.²²⁹

In the second instance of the case, the Guangdong Higher People's Court opined that even though webcasting is not an act covered by Article 22 of the CLC, it is justifiable to think outside the box and run the case through a four-factor test (almost the equivalent of the U.S. fair use test) to determine whether it could be deemed fair use, according to the guidance of China's “judicial policy,” “technical development,” and “current industrial patterns.”²³⁰ It also indicated that, although webcasting gameplay as an act is transformative to a degree, “transformative use” is not a statutory exception provided by the CLC.²³¹ Therefore, it is inappropriate to use it as a single standard in deciding fair use cases.²³²

c. Concluding Notes

It is evident from the cases reviewed that the notion of “transformative use” has been widely applied by Chinese courts in deciding difficult cases.²³³ For example, in the second instance of the previously mentioned *Poster case*, the Shanghai Intellectual Property Court introduced the concept to interpret the “explaining a certain point” part of the “quotation” exception in Article 22(2) of the CLC.²³⁴ The court indicated that the explanation requirement concerns using

227. The court ruled that Huaduo infringed NetEase's “other rights to be enjoyed by copyright owners” under Article 10 of the CLC. *Id.* Webcasting is covered by Article 8 of the WIPO Copyright Treaty (WCT), concerning the right of communication to the public, and thus should be covered by the CLC. WCT, *supra* note 71, art. 8. However, the listed rights in the current CLC fail to accommodate webcasting, as it only provides the right of broadcasting and the right of communication through information networks, which is the right of making available to the public. CLC, *supra* note 6, art. 10. The “other rights to be enjoyed by copyright owners” under Article 10 is a miscellaneous provision that could cover it adequately, albeit not perfectly. Qian Wang (王迁), *Dianzi Youxi Zhibo De Zhuzuo Quan Wenti Yanjiu* (电子游戏直播的著作权问题研究) [*On the Copyright Issue of the Live Webcasting of Computer Games*], 2 DIANZI ZHISHI CHANQUAN 11 (电子知识产权) [ELECTRONICS INTEL. PROP.] (2016).

228. Guangzhou Huaduo, No.16.

229. *Id.*

230. Guangzhou Wangyi Jisuanji Xitong Youxian Gongsi Su Guangzhou Huaduo Wangluo Keji Youxian Gongsi Qin Hai Zhuzuo Quan Ji Bu Zhengdang Jingzheng Jiufen (广州网易计算机系统有限公司诉广州华多网络科技有限公司侵害著作权及不正当竞争纠纷) [NetEase v. Guangzhou Huaduo] (Guangdong Higher People's Ct., YMZ No.137, Dec. 10, 2019), <http://yxcpws.court.gov.cn/wsp/sytype/detail?type=sy&wsOid=d3cd6d2f-e102-11ea-be8a-286ed488c78e&pxjd=fp>.

231. *Id.*

232. *Id.*

233. *See infra* Section I.B.3.

234. Shanghai Animation Film Studios, No.730. *See also* Zhongguo Dianying Gufen Youxian Gongsi Deng Yu Leshi Yingye Deng Qin Hai Zhuzuo Quan Jiufen (中国电影股份有限公司等与乐视影业(北京)有限

others' work to explain a different point, not to purely show the aesthetic value of the quoted work.²³⁵ Thus, the aesthetic value and function of the copyrighted cartoon figures quoted by the poster were "transformed" and exhibited a new value, meaning, and function.²³⁶

In addition to complementing the interpretation of the listed exceptions of Article 22(2) of the CLC, the notion of "transformative use" has a role to play in providing shelter for those acts not covered by the list.²³⁷ For example, it is clear from Chinese judgements relating to the Google Books Library Project and online game webcasting that, when challenged by new ways of utilizing works facilitated by new technologies not covered by the enumerative list of Article 22 of the CLC, the approaches taken by Chinese courts were always utilitarian: they tended to interpret the copyright exceptions flexibly by providing additional justifications that favor the public.²³⁸ For example, in both the *Douban case* and the *Google Books case*, the courts indicated that it is a common practice for courts to go beyond Article 22 of the CLC and apply a more flexible assessment model.²³⁹ Nevertheless, their interpretations are different: the former advocated the possibility of using Article 21 of the 2013 RICL as a catch-all clause (although this approach is problematic from a doctrinal perspective, as discussed previously), while the latter suggested consulting a list of five elements that stem directly from judicial practices, in which some are deemed²⁴⁰ to overlap. Notably, the GZIP Court in the *NetEase case* wavered between adopting an open-ended fair use mechanism and confining the fair use to the listed exceptions in Article 22 of the CLC.²⁴¹ In the judgement, the GZIP Court asserted from the perspective of doctrinal interpretation that since online game webcasting is not covered by any listed exceptions in Article 22, it should not be considered fair use.²⁴² These conflicting decisions reflect the struggle of the Chinese judiciary when "interpreting the law creatively," as the current law is lagging behind substantially and provides little guidance over those matters.²⁴³

The GZIP Court in the *NetEase case* also referred to the concept of "transformative use" in assessing whether a fair use defense can be established.²⁴⁴ However, it took a restrictive approach by asserting that transformative use could only be established when the value of the original work vanished within the new work.²⁴⁵ Thus, the GZIP Court's understanding of

公司等侵害著作权纠纷) [China Film Co., Ltd. et al. v. Le Vision Pictures et al.] (Beijing Intell. Prop. Ct., J73MZ No.1428, Nov. 4, 2019), <https://m.qcc.com/wenshuDetail/0938da1d1309e93354ceb9e9fefbeef.html>.

235. Shanghai Animation Film Studios, No.730.

236. *Id.*

237. Wang Shen v. Google Inc. et al, No.1321; Wang Shen v. Google Inc. et al, No.1221; Guangzhou Huaduo, No.16; Guangzhou Huaduo, No.137.

238. Wang Shen v. Google Inc. et al, No.1321; Wang Shen v. Google Inc. et al, No.1221; Guangzhou Huaduo, No.16; Guangzhou Huaduo, No.137.

239. Wang Shen v. Google Inc. et al, No.1321; Wang Shen v. Google Inc. et al, No.1221; Guangzhou Huaduo, No.16; Guangzhou Huaduo, No.137.

240. Wan, *supra* note 190, at 586.

241. Guangzhou Huaduo, No.16.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

transformative use in *the NetEase case* was different from other courts in that it was quite narrow: it is almost impossible for a user to prove that the value of the original work has been completely “transformed” in the new work.²⁴⁶ In the second instance of the case, the Guangdong Higher People’s Court noted that not every use that contains purposive transformative elements can be deemed fair use. The transformative use that can be deemed fair use should be able to divert the focus of the audience from the original work’s literary and artistic values to the new value and function added by the transformative use.²⁴⁷

Additionally, the court stated that “the contribution of the transformative use to the wealth of knowledge of the society should surpass the damage it causes to the copyright owner.”²⁴⁸ As audiences were still by and large focusing on game elements,²⁴⁹ the artistic value and function of the game screen was not transformed.²⁵⁰ Conversely, in the *Google Books case*, the court’s interpretation of “transformative use” was more reasonable and, to a large extent, resonated with its American counterpart *Authors Guild, Inc. v. Google Inc.*²⁵¹

The above summary shows that, in the face of new challenges brought by technological developments, Chinese courts are willing to introduce new concepts to justify certain uses when necessary.²⁵² However, the concept of “transformative use” is rooted in the U.S. four-factor fair use test, which is supported by a myriad of case law in the U.S.²⁵³ If Chinese courts merely introduce the concept without the further context and supporting precedents, be it local or foreign, disorderly interpretation is inevitable, as can be seen in the *NetEase case*.²⁵⁴ However, if a reference point exists (for instance, *Authors Guild, Inc. v. Google Inc.* in the United States to the *Google Books case* in China), the Chinese court will be more confident in delivering a favorable verdict for new technologies and commercial models deemed beneficial to society.²⁵⁵

246. *Id.*

247. Guangzhou Huaduo, No.137.

248. *Id.*

249. *Id.*

250. *Id.*

251. Parker, 242 Fed. Appx. at 839; see *Authors Guild*, 954 F.Supp.2d at 292–93 (concluding that Google’s use of copyrighted works is highly transformative for the following reasons: first, it was transformative to use the text of books to facilitate searches by displaying the snippets of books; second, Google Library transforms book text into data that can be used for further research, including data mining and text mining; third, because the public cannot read through entire books by merely using Google Library, it would not supersede or supplant books but rather “add value to the original;” and fourth, although Google Library was developed for commercial purposes, it also serves several important educational purposes.)

252. See e.g., *Wang Shen v. Google Inc. et al*, No.1321; *Wang Shen v. Google Inc. et al*, No.1221; Guangzhou Huaduo, No.16; Guangzhou Huaduo, No.137.

253. *Authors Guild*, 954 F.Supp.2d at 292–93.

254. Guangzhou Huaduo, No.16; Guangzhou Huaduo, No.137.

255. Parker, 242 Fed. Appx. at 839; *Authors Guild*, 954 F.Supp.2d at 292–93.

II. IMPOSSIBLE TO MAINTAIN THE STATUS QUO: THE PITFALLS OF THE CURRENT MECHANISM

It is clear from the preceding section that the current exhaustive list of copyright exceptions in the CLC is inadequate in the face of new challenges, incompatible with a fast-developing economy, and triggers many corrective measures such as SPC judicial interpretations and creative interpretations by different courts.²⁵⁶ However, although both these corrective measures aim to restore balance to the CLC, they have also caused discrepancies between courts. The following subsections discuss each of these mechanisms in turn.

A. *The Uncertain Nature of SPC Judicial Interpretations*

Admittedly, the judicial interpretations issued by the SPC discussed previously have played an active role in providing practical help in solving novel issues of copyright, as nuanced rules provide more guidance and a higher degree of certainty. However, their uncertain nature within the Chinese legal framework means they do not provide an ideal path toward solving the problems of the closed-list copyright exceptions model of the CLC.²⁵⁷

Historically, authority to interpret the law was given exclusively to the Standing Committee of the NPC, according to Article 67(4) of the Constitution of China since 1982.²⁵⁸ Notably, the Standing Committee issued a resolution in 1955 providing that the SPC could interpret “questions involving the specific application of laws and decrees in court trials”²⁵⁹ and reaffirmed that statement with another resolution in 1981.²⁶⁰ This was later confirmed by the Law of China on the Supervision of Standing Committees of People’s Congresses at

256. See *supra* Section I.B.

257. Wang & He, *supra* note 38, at 17.

258. Xianfa (宪法) [Constitution of the People’s Republic of China] (1982), adopted at the Fifth Session of the Fifth National People’s Congress on December 4, 1982 and adopted at the First Session of the Eighth National People’s Congress on March 29, 1993, Amended in accordance with the Amendments to the Constitution of the People’s Republic of China adopted at the First Session of the Seventh National People’s Congress on April 12, 1988, the First Session of the Eighth National People’s Congress on March 29, 1993, the Second Session of the Ninth National People’s Congress on March 15, 1999, the Second Session of the Tenth National People’s Congress on March 14, 2004, and the First Session of the Thirteenth National People’s Congress on March 11, 2018, art. 67, sec. 4, *translated at* PKULAW.CN, *at* <http://en.pkulaw.cn/display.aspx?cgid=311950&lib=law> [hereinafter the Constitution of China](The Standing Committee of the National People’s Congress exercises the following functions and powers:...(4) to interpret laws;...).

259. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jieshi Falv Wenti de Jueyi (全国人民代表大会常务委员会关于解释法律问题的决议)[Resolution of the Standing Committee of the National People’s Congress on the Matter of Interpretation of the Law], adopted at the 17th Meeting of the Standing Committee of the National People’s Congress on June 23, 1955, Article 2.

260. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falv Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议)[Resolution of the Standing Committee of the National People’s Congress Providing an Improved Interpretation of the Law], adopted at the 19th Meeting of the Standing Committee of the Fifth National People’s Congress on June 10, 1981, Article 2, *translated at* PKULAW.CN, *at* <http://en.pkulaw.cn/display.aspx?cgid=1006&lib=law> (“Interpretation of questions involving the specific application of laws and decrees in court trials shall be provided by the Supreme People’s Court. . .”).

Various Levels²⁶¹ and the Organic Law of the People's Courts of China.²⁶² The 2015 revision of the Legislation Law of China made it even clearer, stipulating that “the interpretations on specific applications of the law [at] trial. . . as developed by the Supreme People's Court. . . shall primarily involve the specific clauses of laws and conform to the objectives, principles, and original meaning of the legislation.”²⁶³ Accordingly, the interpretative documents issued by the Standing Committee are “legislative interpretations,” whereas those issued by the SPC are “judicial interpretations.”²⁶⁴ In theory, the court's interpretive power is limited to “clarifying and strengthening the laws without changing their original meaning.”²⁶⁵ This means that judicial interpretations cannot go beyond the original meaning of the law being interpreted, let alone create new laws, as those would contravene the power of the Standing Committee of the NPC.²⁶⁶

However, as observed by many scholars, the SPC has played a far more active role than expected. The SPC has quite often gone beyond its remit by issuing law-making judicial interpretations regarding issues from different fields of law,²⁶⁷ which is deemed unconstitutional.²⁶⁸ This is echoed by the fact that

261. Zhonghua Renmin Gonghe Guo Geji Renmin Daibiao Dahui Changwu Weiyuanhui Jiandu Fa (中华人民共和国各级人民代表大会常务委会员监督法) [Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels] (2007), Adopted at the 23rd meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on August 27, 2006, Article 31, translated at LAWINFOCHINA, at <http://www.lawinfochina.com/display.aspx?id=196d03c043dde472bdfb&lib=law> (“Any interpretation of the Supreme People's Court or the Supreme People's Procuratorate regarding the specific application of laws in the judicial and procuratorial work shall be reported to the Standing Committee of the National People's Congress for archival filing within 30 days upon promulgation. . .”).

262. Zhonghua Renmin Gonghe Guo Renmin Fayuan Zuzhi Fa (中华人民共和国人民法院组织法) [Organic Law of the People's Courts of the People's Republic of China] (2018), Adopted at the 2nd session of the Fifth National People's Congress on July 1, 1979, amended for the first time according to the Decision of the 2nd Session of the Standing Committee of the Sixth National People's Congress on Amending the Organic Law of the People's Courts of the People's Republic of China on September 2, 1983; amended for the second time according to the Decision of the 18th Session of the Standing Committee of the Sixth National People's Congress on Amending the Organic Law of the Local People's Congresses at All Levels and Local People's Governments at All Levels of the People's Republic of China on December 2, 1986; amended for the third time according to the Decision of the 24th Session of the Standing Committee of the Tenth National People's Congress on Amending the Organic Law of the People's Courts of the People's Republic of China on October 31, 2006; and revised at the 6th session of the Standing Committee of the Thirteenth National People's Congress on October 26, 2018, Article 18, translated at PKULAW.CN, at <http://en.pkulaw.cn/display.aspx?id=bdefcbf0c152294bdfb&lib=law> (“The SPC may explain the issues on the specific application of the law in the trial work. . .”).

263. Zhonghua Renmin Gonghe Guo Lifa Fa (中华人民共和国立法法) [Legislation Law of the People's Republic of China] (2015), Adopted at the Third Session of the Ninth National People's Congress on March 15, 2000, and amended in accordance with the Decision on Amending the Legislation Law of the People's Republic of China adopted at the 3rd Session of the Twelfth National People's Congress on March 15, 2015, Article 104, translated at PKULAW.CN, at <http://en.pkulaw.cn/display.aspx?id=f114cc1b1de00de0bdfb&lib=law>.

264. Li Wei, *Judicial Interpretation in China*, 5 WILLIAMETTE J. INT'L L. & DISP. RESOL. 87, 100–03 (1997).

265. NANPING LIU, *OPINIONS OF THE SUPREME PEOPLE'S COURT - JUDICIAL INTERPRETATION IN CHINA* 30 (Sweet & Maxwell Asia eds., 1997).

266. *Id.* at 77; Daoluan Zhou (周道鸾), *Lun Sifa Jieshi Jiqi Guifan Hua* (论司法解释及其规范化) [*On the Judicial Interpretation and its Regulatory Path*], 1 ZHONGGUO FAXUE 94 (中国法学) [CHINESE LEGAL SCIENCE] (1994); Wang, *supra* note 65, at 276–77.

267. LIU, *supra* note 265, at 78–91; Wei, *supra* note 264; RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 317 (Cambridge University Press ed. 2002).

268. Feng Lin & Shucheng Wang, *Protection of Labour Rights through Judicial Legislation in China - An Analysis of its Constitutionality and Possible Solution*, in *SOCIO-ECONOMIC RIGHTS IN EMERGING FREE*

the two copyright-related SPC judicial interpretations discussed previously also go beyond interpreting the existing law.²⁶⁹ For example, the SPC judicial interpretation on online copyright disputes²⁷⁰ provides that the court could support the network service provider's claim of no copyright infringement if such an act (viz. providing "the alleged work for the public by means such as web cache or thumbnail") neither affects the normal use of the alleged work nor unreasonably damages the right holder's lawful rights and interests in the work.²⁷¹ However, as discussed previously, the structural design of the copyright exceptions model of the CLC is a closed-list provided by Article 22 of the CLC, plus the "two-step" test provided by Article 21 of the RICL in addition to all the listed exceptions.²⁷² Thus, if cache and thumbnail cannot be covered by one of the twelve exceptions, they are undeniably copyright infringements. Through the said judicial interpretation on online copyright disputes, the SPC has actually created a new copyright exception. Similarly, the 2011 Opinion of the SPC,²⁷³ which provides that under special circumstances the courts could use a four-factor test resembling the U.S. fair use doctrine in finding copyright exceptions, also created new law by providing Chinese courts with a set of parallel rules to solve fair use cases.²⁷⁴

The legal status of the judicial interpretations discussed previously is no doubt uncertain, as their *ultra vires* nature is obvious, and the Standing Committee of the NPC will have the final say over their validity. Since China is a one-party state,²⁷⁵ the party tends not to formally recognize the SPC's practice in interpreting the law to avoid further fragmentation of its power, given the Standing Committee's inability to exercise its interpretive power fully,²⁷⁶ and

MARKETS: COMPARATIVE INSIGHTS FROM INDIA AND CHINA 176 (Surya Deva ed. 2015); Zhang, *supra* note 43, at 85 ("The proposed China-specific fair use catch-all clause in the Third Amendment. . . is to avoid forcing the courts to seek solutions outside the proper legislation, thereby causing constitutional concerns over the challenge posed to the national legislature by the interference of the self-expanded, judicial, discretionary power.").

269. Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Network, *supra* note 128.

270. *Id.*

271. *Id.*

272. *See supra* Section I.A.

273. *See* 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, *supra* note 179 (providing that the court may use a four-factor test resembling the U.S. fair use doctrine).

274. *Id.*

275. LIU, *supra* note 265, at 59–60 ("The main reason the Court (SPC) is able to ignore constitutional limitations is that it never considers itself to have a different institutional function from that of any other state organ. The Court treats itself as a unit or subordinate branch of the Communist Party, involved like any other in implementing Party policy.").

276. Wei, *supra* note 264, at 103–04 ("[A]n ambitious, overworked, and inexperienced Congress effectively has encouraged the SPC toward expansive interpretations."); LIU, *supra* note 265, at 122–24 ("[P]art of the problem is that the Standing Committee might be short on legal experts who can fully exercise the power of interpreting laws. . . the Chinese legislature cannot fully and effectively play a role in interpreting laws, because it was never intended to function as a supreme body. . . in interpreting statutes. . . despite Constitutional provisions."); Robert Slate, *Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance*, 31 N.C. J. INT'L L. & COM. REG. 665, 683 (2005) ("Comprehensive IPR legal knowledge and experience are required to interpret IPR laws, therefore making it difficult for the NPCSC to answer inquiries

the fact there is no substantive difference between the SPC and the Standing Committee of the NPC in interpreting laws for the purpose of carrying out the policies of the party.²⁷⁷ Considering that the 2015 revision of the Legislation Law of China has once again made the SPC's role clear in interpreting the laws and the power of the Standing Committee to invalidate an SPC judicial interpretation, not relying on judicial interpretations to solve the problem of the closed-list exceptions model of the CLC would appear to be a good idea.²⁷⁸

B. *The Pragmatic Courts and Their Problems*

It is noticeable from the preceding discussions that levels of Chinese courts other than the SPC have also taken a pragmatic approach to the challenges raised by new technologies. For instance, the two aforementioned SPC judicial interpretations were promulgated because the lower courts in many cases deviated from the doctrinal path in their judgements, yet they unwittingly did the same.²⁷⁹ For instance, in both the *Douban case* and the *Google Books case*, the courts clearly indicated that it is common practice for courts to go beyond the listed exceptions provided by Article 22 of the CLC; however, in the *NetEase case*, the *Poster case*, and the *Google Books case*, the purely American concept of “transformative use” was introduced by the courts to add more flexibility to the copyright exception regime of the CLC.²⁸⁰ These initiatives are voluntary and no doubt helped Chinese courts to solve some of the intricate cases.²⁸¹ Notwithstanding the positive impact, the courts in the aforementioned cases have gone beyond the scope of their legal authority by creating new law, even without the doubtful “permission” from the SPC's judicial interpretations. To be more precise, this is an unsustainable practice that was criticized by many scholars²⁸² and led to discrepancies between courts²⁸³ regarding the

dealing with interpretation of contentious, complicated, and time-sensitive issues—such as online copyright protection—when it only meets for one week every two months.”)

277. Wei, *supra* note 264, at 108 (“For the Party, which controls both the Congress and the SPC, it is irrelevant which body exercises the necessary powers in carrying out the Party’s policies. . . .”); LIU, *supra* note 265, at 123 (“[T]he Court (SPC) itself understands that the Chinese legislature is not actually supreme over the Court, despite Constitutional provisions.”).

278. Guangzhou Huaduo, No.16; Guangzhou Huaduo, No.137; Shanghai Animation Film Studios, No.258; Shanghai Animation Film Studios, No.730; Google Inc. et al, No.1321; Google Inc. et al, No.1221; Douban.com, No.10028.

279. Guangzhou Huaduo, No.16; Guangzhou Huaduo, No.137; Shanghai Animation Film Studios, No.258; Shanghai Animation Film Studios, No.730; Google Inc. et al, No.1321; Google Inc. et al, No.1221; Douban.com, No.10028.

280. Guangzhou Huaduo, No.16; Guangzhou Huaduo, No.137; Shanghai Animation Film Studios, No.258; Shanghai Animation Film Studios, No.730; Google Inc. et al, No.1321; Google Inc. et al, No.1221; Douban.com, No.10028.

281. Guangzhou Huaduo, No.16; Guangzhou Huaduo, No.137; Shanghai Animation Film Studios, No.258; Shanghai Animation Film Studios, No.730; Google Inc. et al, No.1321; Google Inc. et al, No.1221; Douban.com, No.10028.

282. See e.g., Guobin Cui (崔国斌), *Zhishi Chanquan Faguan Zaofa Pipan* (知识产权法官造法批判) [A Critique on the Law-making Intellectual Property Judges], 1 ZHONGGUO FAXUE 153-9 (中国法学) [CHINESE LEGAL SCI.] (2006); Zhihao Du (杜志浩), *Fading Zhuyi Doudi Tiaokuan Yu Faguan Zaofa* (法定主义、兜底条款与法官造法) [Numerus Clausus, Save Clause and the Judge-made Law], 1 CAIJING FAXUE 120-1 (财经法学) [L. AND ECON.] (2018).

283. Chenguang Wang, *Law-Making Functions of The Chinese Courts: Judicial Activism in A Country of Rapid Social Changes*, 1 FRONT. L. CHINA 524, 548 (2006).

interpretation of copyright exceptions, as witnessed in the *NetEase case* and the *Google Books case*.²⁸⁴

Another dubious practice is the so-called judicial legislation issued by local courts.²⁸⁵ For example, the Beijing Higher People's Court has issued "Guidelines for the Trial of Copyright Infringement Cases," which provide further details on the interpretation of the CLC provisions.²⁸⁶ They not only provide courts with a clear standard to follow in adjudicating copyright cases but also have a "general binding force and are implemented by the local courts at all levels in practice."²⁸⁷ Despite the positive social effects engendered by these types of judicial documents under the umbrella of the "judicial activism" policy promoted by Justice Shengjun Wang, the former President of the SPC,²⁸⁸ they are intrinsically flawed for the same reason discussed previously in relation to the SPC's judicial interpretations.²⁸⁹

III. THE SHIFTING SANDS OF CHINA'S COPYRIGHT EXCEPTIONS MODEL

It is clear from the preceding discussion that, unless the challenges to the constitutional grounds can be overcome, the SPC judicial interpretations and the "judicial legislation" initiatives of the lower courts are not ideal solutions to the problems of the copyright exceptions model of the CLC in China.²⁹⁰ Furthermore, without *stare decisis*, any judgements that aim to create new law will be ineffective.²⁹¹ Hence, the solution must come from the CLC, and a change toward a more flexible regime is desperately needed.²⁹² Fortunately, as previously indicated, a third revision of the CLC is pending, the NCAC has proposed four drafts, and the fourth draft has already been submitted to the Standing Committee of the NPC for review and is now published for public consultation. However, the following discussions are based on the proposed copyright exceptions model of the third draft for review of the CLC published

284. Guangzhou Huaduo, No.16; Guangzhou Huaduo, No.137; Wang Shen v. Google Inc. et al, No.1321; Wang Shen v. Google Inc. et al, No.1221.

285. Lin & Wang, *supra* note 268, at 168 ("The so-called 'judicial legislation' . . . refers to the judicial formulation of guiding opinions or other normative documents in the nature of legislation. . . . Chinese courts in many localities. . . have already formulated such 'judicial legislation.'").

286. Guidelines for the Trial of Copyright Infringement Cases of Beijing Higher People's Court, *supra* note 84. There are a dozen more Guidelines related to IP trial issues published by the same court, at <http://www.bjcourt.gov.cn/splc/wjindex.htm;jsessionid=98C58A91791A4EB59BEEB9229B04E6E0?c=100014003>.

287. Lin & Wang, *supra* note 268, at 169.

288. See generally Su Li (苏力), *Guanyu Nengdong Sifa Yu Da Tiaojie* (关于能动司法与大调解) [*On the Judicial Activism and Big Mediation*], 1 ZHONGGUO FAXUE 5-16 (中国法学) [CHINESE LEGAL SCIENCE] (2010) (giving a more detailed account of "judicial activism").

289. Lin & Wang, *supra* note 268, at 175 ("[E]ven the abstract judicial interpretation power currently enjoyed by the SPC is unconstitutional, let alone judicial legislation by lower courts. . . .").

290. *Id.*

291. Zhang, *supra* note 43, at 85 ("[I]n the Chinese judicial systems, which do not traditionally follow the principle of *stare decisis*, unspecific open clauses could cause more unpredictability. . . .").

292. See Martin Senftleben, *Bridging the Differences Between Copyright's Legal Traditions—The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y U.S.A. 521, 526–27 (2009) (discussing the inadequacy of the closed system in the face of technological development).

by the NCAC in 2014,²⁹³ rather than the most recent draft proposed in 2020.²⁹⁴ The third draft is more ambitious than the fourth draft, in that it proposes an open-ended copyright exception model which is discussed below.²⁹⁵ Surprisingly, the 2020 revision draft of the CLC has taken a big step back by replacing the sentence “the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced” of the first paragraph of Article 22 with the following: “the normal use of the work is not prejudiced and the lawful rights and interests of the copyright owner are not unreasonably prejudiced,”²⁹⁶ which basically absorbed Article 21 of the RICL into the first paragraph of Article 22. In effect, nothing will be changed about the copyright exception model if the 2020 draft passes, as the added part will serve no more than the original function of Article 21 of the RICL.²⁹⁷

A. *The 2014 Proposal and Its Problems*

The third draft of the CLC has proposed an amendment to its copyright exception part, termed Article 43 (the equivalent of Article 22 in the current CLC).²⁹⁸

Table 1 Comparison Between the Old Article 22 and the New Article 43

2010 CLC Article 22	2014 Revision Draft of CLC Article 43
<p>In the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are mentioned and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced:</p> <p>(1) use of another person’s published work for purposes of the user’s own personal study, research or appreciation;</p>	<p>In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name or appellation of the author, and the source and title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced:</p> <p>(1) copy portions from another person’s published work for purposes of the user’s own personal study, research.</p>

293. CLC (Draft Revision for Review), *supra* note 17.

294. CLC Revision (Draft) 2020, *supra* note 22.

295. *See id.* (discussing the exception model in the third draft).

296. *Id.* art. 22 (“In the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are mentioned and the normal use of the work is not prejudiced and the lawful rights and interests of the copyright owner are not unreasonably prejudiced: (1) use of another person’s published work for purposes of the user’s own personal study, research or appreciation. . . .”).

297. *Id.*

298. CLC (Draft Revision for Review), *supra* note 17, art. 43.

<p>(2) appropriate quotations from another person's published work in one's own work for the purpose of introducing or commenting on a certain work, or explaining a certain point;</p> <p>(3) unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical, and radio or television program, for the purpose of reporting current events;</p> <p>(4) publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station, and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc. on current political, economic, or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted;</p> <p>(5) publishing or broadcasting by the media, such as a newspaper, periodical, radio station, and television station, of a speech delivered at a public gathering, except where the author declares that such publishing or broadcasting is not permitted;</p> <p>(6) translation, or reproduction in a small quantity of copies of a published work by teachers or scientific researchers for use in classroom teaching or scientific research, provided that the translation or the reproductions are not published for distribution;</p> <p>(7) use of a published work by a State organization to a justifiable extent for the purpose of fulfilling its official duties;</p> <p>(8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc. for the purpose of display, or preservation of a copy, of the work;</p> <p>(9) gratuitous live performance of a published work, for which no fees are charged to the public, nor payments are made to the performers;</p>	<p>(2) appropriate quotations from another person's published work in one's own work for the purpose of introducing or commenting on a certain work, or explaining a certain point, but the quoted part should not constitute a major or substantial part of the original work.</p> <p>(3) unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical, radio, television program, and on the internet for the purpose of reporting news;</p> <p>(4) publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station, television station, and an internet website, of an article published online or by another newspaper or periodical, or broadcast by another radio station or television station, on current political, economic, or religious topics, except where the author declares that such use is not permitted;</p> <p>(5) publishing or broadcasting by the media, such as a newspaper, periodical, radio station, television station, and internet website, of a speech delivered at a public gathering, except where the author declares that such use is not permitted;</p> <p>(6) translation, or reproduction in a small quantity of copies of a published work by teachers or scientific researchers for use in classroom teaching or scientific research, provided that the translation or the reproductions are not published;</p> <p>(7) use of a published work by a State organization to a justifiable extent for the purpose of fulfilling its official duties;</p> <p>(8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc. for the purpose of display, or preservation of a copy, of the work;</p> <p>(9) gratuitous live performance of a published work, for which no fees are</p>
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<p>(10) copying, drawing, photographing, or video-recording of a work of art put up or displayed in an outdoor public place;</p> <p>(11) translation of a published work of a Chinese citizen, legal entity, or other organization from Han language into minority nationality languages for publication and distribution in the country; and</p> <p>(12) transliteration of a published work into braille for publication.²⁹⁹</p>	<p>charged to the public, nor payments are made to the performers, and no economic benefits are gained in any other way;</p> <p>(10) reproducing, drawing, photographing or video-recording, copying, distributing, and making available to the public of a work of art displayed in an outdoor public place, provided that it is not reproduced, displayed, or publicly distributed in the same manner as the work of art;</p> <p>(11) translation of a published work of a Chinese natural person, legal entity, or other organization from Han language into minority nationality languages for publication in the country; and</p> <p>(12) transliteration of a published work into braille for publication;</p> <p>(13) Other circumstances.</p> <p>The use of a published work pursuant to the above provisions, may not prejudice the normal use of the work and may not unreasonably prejudice the lawful rights and interests of the copyright owner.³⁰⁰</p>
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Notably, an additional requirement has been added to Article 43.1(2), which reads that the quoted part “should not constitute a major or substantial part of the original work.”³⁰¹ This requirement was provided in the 1991 RICL as Article 27 but was subsequently removed in its 2002 revision.³⁰² Nevertheless, it was one of the critical considerations used by the courts in assessing the “appropriateness” requirement of the quotation exception.³⁰³ However, as discussed in the *Thumbnail case*, whether a whole work or a substantial part of it was lifted is not of crucial importance in the fair use assessment. Therefore, the newly added requirement in Article 43.1(2) is redundant, as it has the potential to render the thumbnails unlawful.³⁰⁴

More importantly, the third draft also added an open-ended provision: it inserted “other circumstances” in Article 43 as a “catch-all” exception as Article

299. CLC, *supra* note 6, art. 22.

300. CLC (Draft Revision for Review), *supra* note 17, art. 43.

301. *Id.* art. 43(2).

302. RICL, *supra* note 64 (omitting the 1991 article 27 in 2002 revision).

303. CLC, *supra* note 6, art. 22.

304. Thumbnail Case, No.13556; CLC (Draft Revision for Review), *supra* note 17, art. 43.

43.1(13).³⁰⁵ In addition, the draft included a subsection as Article 43.2: “the use of a published work pursuant to the above provisions, may not prejudice the normal use of the work and may not unreasonably prejudice the lawful rights and interests of the copyright owner.”³⁰⁶ This subsection replicates the wording of Article 21 of the 2013 RICL.³⁰⁷ The addition of these parts is essential, as it will turn the closed-list model into an open one.³⁰⁸ Ideally, one could combine Article 43.1(13) and subsection 2 and claim that paragraph (13) was inserted to cover all possible exceptions in the future.³⁰⁹ The “two-step” test in subsection 2 will then always function as the “ceiling” for all the limitations and exceptions.³¹⁰

However, if the law is interpreted in a systematic manner, there is a clear indication that certain new types of uses (such as digital parody) are potentially covered by a specific type of exception (for example, paragraph (2) regarding quotation) of the CLC, then it probably will not be covered by paragraph (13) regarding “other circumstances.”³¹¹ As a result, the court has to preclude application of all twelve listed circumstances before relying on paragraph (13) to assess fair use cases. Furthermore, even if the other exceptional cases discussed previously, such as Google’s thumbnails and live game webcasting, can be covered by the newly added “other circumstances” exception, it is still too broad to be deemed a “certain special case,” which is required by the first step of the Berne three-step test.³¹² This raises a concern about the Berne-compliance of the proposed Article 43, causing some to suggest that the newly added “other circumstances” should be rephrased as “other specific occasions.”³¹³

B. *Transplanting the U.S. Model?*

The proposal was not entirely satisfactory and attracted criticism from many academics concerning the points mentioned previously.³¹⁴ It is also *prima facie* unclear why the U.S. four-factor fair use model was not selected as the model for the proposed Article 43.2 as it was extensively referred to by Chinese

305. CLC (Draft Revision for Review), *supra* note 17, art. 43(13).

306. *Id.*

307. RICL, *supra* note 64, art. 21.

308. Yu, *supra* note 180, at 10.

309. CLC (Draft Revision for Review), *supra* note 17, art. 43. *See also* Berne Convention, *supra* note 32 (explaining the provisions “does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”).

310. CLC (Draft Revision for Review), *supra* note 17, art. 43.

311. *Id.*

312. Berne Convention, *supra* note 32, art 9.

313. Zhang, *supra* note 43, at 86.

314. *See generally*, Xue, *supra* note 7; Hong Xue, *One Step Ahead, Two Steps Back: Reverse Engineering The Second Draft For The Third Revision of The Chinese Copyright Law*, 28 AM. U. INT’L L. REV. 295 (2012) (critiquing the proposal of Article 43); Luo, *supra* note 14, at 65; Li, *supra* note 62; Wang & He, *supra* note 38, at 25.

courts and academics.³¹⁵ The following subsections explore the question in more detail.

1. *The Beneficial Aspects of The Fair Use Model*

The discussion thus far shows that the proposed amendment of the CLC plans to take the so-called intermediate approach in designing its copyright exceptions model, which provides a flexible model without making substantial changes. However, in addition to the general problems mentioned previously, the proposed flexibility involving the introduction of a “two-step” test as in Article 43.2 is inferior to the U.S. four-factor fair use model in the following ways:

First, the Berne “three-step” test is not suitable for direct transplant. The proposed “two-step” test is derived from the Berne “three-step” test.³¹⁶ As an international standard, the three-step test is, in essence, a result of the “diplomatic compromise with little intention to be applied other than in a subjective way by nations to evaluate themselves,”³¹⁷ and its ambiguous wording is an essential part of that compromise. According to Daniel Gervais, the WTO panel conflated the second and third steps of the three-step test.³¹⁸ In other words, it was designed to guide further implementation by signatories rather than be applied directly. Therefore, although the vague wording of the three-step test helps provide flexibility, it is too abstract for Chinese judges to apply in court.³¹⁹

Second, Chinese courts are more familiar with the U.S. four-factor fair use test. For example, even though the court of the first instance in the *Poster case* quoted and recognized the importance of the “two-step” test of Article 21 of the 2013 RICL in its fair use assessment, it eventually turned to the four-factor fair use test,³²⁰ an approach that was reaffirmed in the second instance.³²¹ It is also apparent from the *Google Books case* and the 2011 Opinion of the SPC that the four-factor fair use test—especially the concept of “transformative use” derived

315. See Zhiwen Liang, *Beyond The Copyright Act: The Fair Use Doctrine Under Chinese Judicial Opinions*, 56 J. COPYRIGHT SOC'Y U.S.A. 695, 716 (2008) (discussing the influence of the four-factor model in the U.S. Fair Use Doctrine on Chinese courts).

316. Berne Convention, *supra* note 32, art. 9(2). (“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”).

317. Edward L. Carter, *Harmonization of Copyright Law in Response to Technological Change: Lessons from Europe about Fair Use and Free Expression*, 30 U. LA VERNE L. REV. 312, 338 (2008).

318. Daniel J. Gervais, *Towards A New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 19 (2005).

319. Li, *supra* note 62, at 17.

320. Shanghai Animation Film Studios, No.258.

321. Shanghai Animation Film Studios, No.730.

from the first factor—has been widely applied.³²² As noted by many scholars, the “factors” and “steps” are confusingly similar when interpreted by courts.³²³

Third, the U.S. model is more flexible in accommodating new challenges. As the WTO panel explained in its report, the three-step test:

“ . . . appl[ies] on a cumulative basis, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed.”³²⁴

On the contrary, the U.S. four-factor test does not require all four factors to be met in order to find a fair use.³²⁵ In the case of *Harper & Row Publishers, Inc. v. 3 Nation Enterprises*, the U.S. Supreme Court held that the fourth factor “is undoubtedly the single most important element of fair use.”³²⁶ However, in the case of *Campbell v. Acuff-Rose Music*, the U.S. Supreme Court also emphasized the significance of the first factor,³²⁷ describing the purpose of the transformative inquiry as the “heart of the fair use” doctrine.³²⁸ Even though the second factor was deemed to rarely play an important role in deciding fair use disputes,³²⁹ the final judgement is an overall assessment based on an equitable rule of reason and the failure of one or even two factors will not bar a finding of fair use.³³⁰ Even if it is assumed that the interpretation made by Chinese courts’ of the introduced “three-step” test does not have to follow that of the WTO panel—as they serve different purposes—the fact that the four-factor assessment has been codified in the United States as a general fair use clause since 1976 means it is indeed superior to the three-step test regarding the clarity of norms.

2. *Why the CLC Never Adopts the U.S. Fair Use Model*

Based on the preceding discussions, it seems logical that Chinese legislators should propose an Article 43.1(2) with a U.S. four-factor model rather than a “three-step” test model.³³¹ Unfortunately, this was not included in the draft and may not be included in the future for the following reasons:

322. See Wang Shen v. Google Inc. et al, No.1321; Wang Shen v. Google Inc. et al, No.1221; 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, *supra* note 179.

323. Christophe Geiger, et al., *The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law*, 29 AM. U. INT’L L. REV. 581, 604–05 (2013).

324. Panel Report, United States Section 110(5) of U.S. Copyright Act, WTO Doc. WT/DS160/R (adopted June 15, 2000).

325. Liang, *supra* note 315, at 716.

326. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).

327. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 591 (1994).

328. *Id.* at 579.

329. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015).

330. *Id.* at 223.

331. Wang & He, *supra* note 38, at 28.

a. The U.S. Fair Use Doctrine Is Not Without Flaws

As Peter Yu indicated, “legal transplants, especially those involving controversial laws and policies, could bring to the recipient countries problems from the source countries.”³³² In terms of fair use, Lawrence Lessig argues that it “costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim.”³³³ In some cases, the flexibility/ambiguity of the fair use doctrine is itself the problem. Barton Beebe found that “courts tend to apply the [fair use] factors mechanically and they sometimes make opportunistic uses of the conflicting precedent available to them.”³³⁴ Furthermore, it is not only judges who have criticized it openly,³³⁵ but academics have also found it capricious and problematic,³³⁶ and it possibly violates the three-step test provided by Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement.³³⁷ Specifically, the very notion of “transformative use,” which was widely cited by Chinese courts in their judgements, was an ambiguous concept introduced by Judge Leval into the U.S. fair use test in 1990³³⁸ and is deemed controversial in the United States.³³⁹ Moreover, although some scholars hold positive views about “transformative

332. *Transplant*, *supra* note 7, at 31.

333. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (Penguin Press ed. 2004).

334. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 622 (2008).

335. *See* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (quoting *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968)) (“Fair use is one of the most unsettled areas of the law . . . so flexible as virtually to defy definition.”); *see also* *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (Hand, J.) (“[T]he issue of fair use, which alone is decided, is the most troublesome in the whole law of copyright. . . .”).

336. *See* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 165 (2019) (“As a doctrine that defines the outer boundary of copyright exclusivity, fair use has been surprisingly ambiguous and controversial.”); *see also* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1106 (2006) (“leading courts and commentators generally acknowledge that the four-factor test as interpreted provides very little guidance for predicting whether a particular use will be deemed fair.”); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, VA. L. REV. 1483, 1486 (2007) (“[T]he ambiguity of the fair use doctrine works as a one-way ratchet that will in many cases lead to the underuse of copyrighted work. . . .”); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech And How Copying Serves It*, YALE L. J. 535, 587 (2004) (discussing “the copyright/First Amendment clash.”).

337. Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75, 114–35 (2000). *But cf.* Tyler G. Newby, *What’s Fair Here Is not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633, 1636 (1999).

338. *See*, Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (discussing transformative use as a factor in fair use analysis).

339. *See, e.g.*, Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 625–626 (2016) (“In the realm of the arts . . . the transformative test has become an obstacle to creativity.”); Liu, *supra* note 336, at 240 (“Courts diverge widely on the meaning of transformative use.”); Jane C. Ginsburg, *Letter from the U.S.: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms—Part II (Fair Use)* 21 (Columbia L. & Econ., Working Paper No. 503, 2014), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2898&context=faculty_scholarship (“When the ‘transformative’ character of the use sweeps all before it, judicial application of the fair use doctrine not only becomes unmoored from the statute, but also makes fair use even more indeterminate and unpredictable than before (some level of indeterminacy and unpredictability being inherent to the flexibility that is the hallmark of fair use), because ‘transformativeness’ may be entirely in the eye of the judicial beholder.”).

use” in the fair use setting,³⁴⁰ there is no reason for Chinese legislators to bear the risk of transplanting a not-so-perfect U.S. copyright law doctrine directly, as the top priority for China is to establish an “open” model rather than a “US” model of copyright exceptions. They can always design a flexible but unique exceptions model around the US fair use doctrine, as exemplified by the latest revised draft of the CLC.³⁴¹

b. The U.S. Fair Use Doctrine Does Not Fit the Chinese Context

It is important to note that the continental-European civil law tradition of the CLC is not a critical reason that prevents China from introducing the U.S. four-factor fair use test directly, as other civil law jurisdictions such as South Korea and Taiwan have managed to introduce fair use.³⁴² According to research conducted by Peter Yu, only a few of the jurisdictions investigated have introduced the U.S. fair use model verbatim or substantially verbatim.³⁴³ Moreover, of all the jurisdictions that have changed their closed-list model to an open one, most chose to avoid a marked changes by retaining “a considerable part of the status quo, including preexisting fair dealing provisions.”³⁴⁴ The causes underlying this “conscious choice to retain a considerable part of the status quo”³⁴⁵ range “from economic to social and from legal to technological.”³⁴⁶

Legislators of China, who face repeated pressure from the United States in relation to IP issues and have no historical connection with the old British fair dealing paradigm, will be more inclined to build from their current setting and establish a customized regime based on local conditions.³⁴⁷ To be more precise, Chinese legislators continually check the message underlying the foreign regime when considering legal transplants to see if it accords with China’s copyright policies.³⁴⁸ Twenty-five years have passed since William Alford asserted that “protection for intellectual property remains closer to rhetoric than reality on the Chinese mainland.”³⁴⁹ Little has changed regarding the aim of the CLC: it is a

340. See Rebecca Tushnet, *Content, Purpose, or Both*, 90 WASH. L. REV. 869, 891 (2015) (“Transformativeness, despite its potential ambiguities, has the capacity to recognize the uses that we find valuable and that we believe copyright owners shouldn’t control. When high-protectionists argue that fair use is too broad, and that uses that should be controlled by copyright owners are escaping control, transformativeness provides ways to respond. When copyright owners make incentive and moral rights claims based on authorial labor, transformativeness has incentive-based and desert-based responses.”); Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 865 (“However, the decisions built on the *Sony* and *Campbell* foundations have become the new normal. . . . [s]o I predict that the status of fair use under *Campbell* and its progeny will and should prevail.”).

341. CLC Revision (Draft) 2020, *supra* note 22.

342. Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111, 134 (2019).

343. Yu, *supra* note 180, at 11.

344. *Id.*

345. Yu, *supra* note 342, at 141.

346. *Id.* at 155.

347. *Id.* at 147.

348. *Id.*

349. ALFORD, *supra* note 3, at 1.

useful tool for social governance and functions well in promoting creativity³⁵⁰ based on its premise of controlling the content distributed. Therefore, if the “transformative turn” of the fair use doctrine has consolidated its role in facilitating free speech,³⁵¹ then this overemphasized role might be a big hurdle for China to overcome in transplanting the U.S. fair use model directly. For example, as previously discussed, parody as an exception is not officially recognized by the CLC and Article 22(2) of the CLC can only offer limited help.³⁵² That is partly because parody, along with its variants such as satire and caricature (which are also potentially covered by fair use), can often be critical of government. In the United States, the parody exception is backed by the First Amendment, which stipulates that Congress will “make no law... abridging the freedom of speech,”³⁵³ while China has no equally strong constitutional protection of freedom of speech.³⁵⁴ Therefore, it is not a priority for the Chinese government, which views any subtle criticism as a potential threat,³⁵⁵ to introduce a U.S. fair use regime that clearly condones any “unpleasant” underlying message in fair use.

As the author of this article indicated in an earlier article, “the protection of copyright and free expression means less for the Chinese government than content control.”³⁵⁶ The 2018 reforms of several Party and State institutions seem to corroborate this point: the duties of supervising sectors related to news, publications, and movies, as well as the NCAC, were transferred from the State Administration of Press, Publication, Radio, Films and Television of China (SAPPRFT, now known as the National Radio and Television Administration (NRTA) after the 2018 reform) to the Central Publicity Department of the CPC (CPD).³⁵⁷ Moreover, the newly established China Film Administration (CFA) was also placed under the auspices of the CPD.³⁵⁸ Such moves represent a transition of power from the State Council to the Party and signify the expansion

350. *But cf.* L. Ray Patterson, *Free Speech, Copyright, And Fair Use*, 40 VAND. L. REV. 1, 8 (1987) (“Copyright, therefore, originally functioned to encourage not creation, but distribution.”).

351. Leval, *supra* note 338, at 1130 (“American law. . . maintains a powerful constitutional policy that sharply disfavors muzzling speech. Serious distortions will occur if we permit our copyright law to be twisted into the service of privacy interests.”); *see also* Patterson, *supra* note 350, at 36–48 (discussing the built-in free speech safeguards of fair use).

352. *See supra* Section I.B.2.c. (stating that parody is not recognized by the CLC.).

353. U.S. Const. amend. I. *See also* David Tan, *The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the “Transformative Use” Doctrine Twenty-Five Years On*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 311, 378 (2016) (“The freedom to transformatively appropriate an original work in the service of creativity is not only compatible with the objectives of the Copyright Clause, but also advances the goals of the First Amendment.”).

354. Constitution of China, *supra* note 258, art. 35.

355. HE, *supra* note 135, at 223.

356. Tianxiang He, *Control or Promote? China’s Cultural Censorship System and Its Influence on Copyright Protection*, 7 QUEEN MARY J. INTELL. PROP. 74, 98 (2017).

357. Shenhua Dang He Guojia Jigou Gaige Fangan (深化党和国家机构改革方案) [*Plan on Deepening the Reform of the Party and State Institutions*], CPC CENTRAL COMMITTEE (Mar. 21, 2018), http://www.gov.cn/zhengce/2018-03/21/content_5276191.htm#1 (stating that the reasons behind the changes as explained by the plan are “to strengthen the Party’s centralized and unified leadership in works related to news and public opinion, to reinforce management of publication activities, to impart the socialist publishing industry with Chinese characteristics. . . [.]to better develop the special and important role of film in propagating ideology, culture, and entertainment, and to develop the film industry.”) [hereinafter *CPD Reform Plan*].

358. *Id.*

of the CPD's authority to the press, media, and publication. It is thus expected that "China will have more control over content."³⁵⁹

As discussed above, the CLC has evolved to meet China's treaty obligations and a broader responsibility to China's creative and high-tech industries, communities, and administrative bodies. It is also evident from the evolutionary process of the CLC, via its previous versions (1990, 2001 and 2010), that the text of the CLC has been gradually updated from an "imposed" law in which the concepts and rules were not well received by the Chinese public at that time to one that generally reflects the needs of the country. Of course, the civil law tradition and the need for China to be part of the international trading order require the internal logic and interpretation of the CLC to be consistent with China's treaty obligations. However, when its market matures, China's internal needs for a higher level of intellectual property protection will increase and grow as a strong force reshaping current Chinese intellectual property law, including the CLC. Furthermore, when China's IP system has "moved away from utilizing legal transplants to modernize its intellectual property system,"³⁶⁰ China will need to "start exploring models that would best suit its needs, interests, conditions and priorities while figuring out how to improve these models to maximize their benefits."³⁶¹

From a broader perspective, the American approach is not a panacea for developing countries such as China because legal transplants are not always desirable.³⁶² By contrast, as a group, developing countries might take the lead in determining future intellectual property standards.³⁶³ Further, China may act as a "norm maker" if its economic and technological developments ask for an indigenous approach,³⁶⁴ one that "builds upon their historical traditions and cultural backgrounds and that takes account of their drastically different socioeconomic conditions,"³⁶⁵ and even more so with the choice of copyright exception models.

IV. RECOMMENDATIONS AND CONCLUSION

What will the future model of China's copyright exceptions look like? Currently, no definitive answer can be provided. Nevertheless, one thing is

359. Frank Ka-Ho Wong, *Intellectual Property in China: Laws and Registration Procedures*, CHINA BRIEFING (Nov. 14, 2019), <https://www.china-briefing.com/news/intellectual-property-protection-china-laws-registration-procedures/>.

360. Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1137 (2018).

361. Peter K. Yu, *When the Chinese Intellectual Property System Hits 35*, 8 QUEEN MARY J. INTELL. PROP. 3, 6 (2018).

362. Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 889 (2007).

363. Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115, 1184 (2009).

364. Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209, 259-260 (2011).

365. Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 13 (2009).

clear: the CLC needs copyright exceptions designed to be flexible enough to keep pace with any technological changes in the future.³⁶⁶

A. Recommendations

From a practical point of view, although Chinese courts have been using the U.S. fair use doctrine to solve intractable copyright cases, it is improbable that the U.S. fair use model will be transplanted in the upcoming third amendment of the CLC. Since the State Council released the Outline of the National Intellectual Property Strategy in June, 2008,³⁶⁷ China has been issuing promotion plans for its annual implementation and “promoting the third amendment of the CLC” as almost a foregone conclusion.³⁶⁸ Starting with the 2016 Promotion Plan, it clearly provided that the NCAC and the Legislative Affairs Office of the State Council “shall, according to their duties, be respectively responsible” for the promotion of the third amendment of the CLC.³⁶⁹ The responsible organizations were changed to NCAC and the Ministry of Justice in the 2018 Promotion Plan,³⁷⁰ and CPD and NRTA in the 2019 Promotion Plan,³⁷¹ partly due to the changes made by the 2018 Plan on Expanding the Reform of Party and State Institutions (2018 Reform).³⁷² The responsible organs were changed frequently, which may result in a “rip-and-

366. *Id.* at 15.

367. Guowuyuan Guanyu Yinfa Guojia Zhishi Chanquan Zhanlue Gangyao De Tongzhi (国务院关于印发国家知识产权战略纲要的通知) [*Notice of the State Council on Issuing the Outline of the National Intellectual Property Strategy*], No. 18 [2008] of the State Council, STATE COUNCIL (June 5, 2008), <http://en.pkulaw.cn/display.aspx?cgid=32daab9c79d18d1bbdfb&lib=law>.

368. One exception is the Promotion Plan released in 2015, the year that the draft revision for review of the CLC was heavily criticized following public consultation in 2014. For the first time, the item “promoting the third amendment of CLC” was not a listed goal. See 2015 Nian Guojia Zhishi Chanquan Zhanlue Shishi Tuijin Jihua (2015 年国家知识产权战略实施推进计划) [*Promotion Plan for the Implementation of the National Intellectual Property Right Strategies in 2015*], STATE INTELLECTUAL PROPERTY OFFICE (Apr. 10, 2015), <http://en.pkulaw.cn/display.aspx?cgid=43bfeb8139eeb604bdfb&lib=law>.

369. 2016 Nian Shenru Shishi Guojia Zhishi Chanquan Zhanlue Jiakuai Jianshe Zhishi Chanquan Qiangguo Tuijin Jihua (2016 年深入实施国家知识产权战略加快建设知识产权强国推进计划) [*Promotion Plan for the in-Depth Implementation of the National Intellectual Property Strategy and the Acceleration of the Building of a Powerful Intellectual Property Nation in 2016*], OFFICE OF THE STATE COUNCIL INTER-MINISTERIAL JOINT MEETING FOR IMPLEMENTING THE INTELLECTUAL PROPERTY STRATEGY (June, 2016), <http://en.pkulaw.cn/display.aspx?cgid=fa8fc0e100ed29cebd9bdfb&lib=law>.

370. 2018 Nian Shenru Shishi Guojia Zhishi Chanquan Zhanlue Jiakuai Jianshe Zhishi Chanquan Qiangguo Tuijin Jihua (2018 年深入实施国家知识产权战略加快建设知识产权强国推进计划) [*Promotion Plan for the in-Depth Implementation of the National Intellectual Property Strategy and the Acceleration of the Building of a Powerful Intellectual Property Nation in 2018*], OFFICE OF THE STATE COUNCIL INTER-MINISTERIAL JOINT MEETING FOR IMPLEMENTING THE INTELLECTUAL PROPERTY STRATEGY (Nov. 9, 2018), http://pkulaw.cn/%28S%28pvglx45wuwnm5555df4e55%29%29/fulltext_form.aspx?Db=chl&Gid=08b7cb-c889f09979bdfb.

371. 2019 Nian Shenru Shishi Guojia Zhishi Chanquan Zhanlue Jiakuai Jianshe Zhishi Chanquan Qiangguo Tuijin Jihua (2019 年深入实施国家知识产权战略加快建设知识产权强国推进计划) [*Promotion Plan for the in-Depth Implementation of the National Intellectual Property Strategy and the Acceleration of the Building of a Powerful Intellectual Property Nation in 2019*], OFFICE OF THE STATE COUNCIL INTER-MINISTERIAL JOINT MEETING FOR IMPLEMENTING THE INTELL. PROP. STRATEGY (June 19, 2019), http://www.cnipa.gov.cn/gwyzscqzllsgzsjlxkybgs/gzdt_zlbg/1139877.htm. [hereinafter *China Promotion Plan*].

372. *CPD Reform Plan*, *supra* note 357 (the Ministry of Justice and CPD became involved because the Legislative Affairs Office of the State Council was absorbed by the former, and the NCAC is now under the CPD, according to the 2018 Plan on Expanding the Reform of Party and State Institutions.).

replace” situation. For example, the former Legislative Affairs Office proposed another draft for closed-door review by invited Chinese IP experts in late 2017 (hereinafter Closed-door Review Draft).³⁷³ The Closed-door Review Draft reduced the number of articles from 90 to 66.³⁷⁴ More importantly, many of the innovative parts of the previous proposal, such as the open-ended copyright exceptions design, were restored to their original form. In addition to the institutional reform, the government chose to reverse course on the copyright exceptions model, partly because the draft proposal was criticized heavily by the public and the new open-ended copyright exceptions design was poorly defended as the interests of user groups were not well represented in the legislative process.³⁷⁵ Moreover, the Explanation Note of the CLC Revision (Draft) 2020 clearly states that the latest version was originally drafted by the NCAC in December 2017, and was subsequently revised by the then Legislative Affairs Office of the State Council before the 2018 Reform and the Ministry of Justice and CPD after.³⁷⁶ Because the CPD has now taken over the new amendment, it is implausible that a U.S. fair use model that comes with precedents praising “western ideologies” such as free speech and free press will be transplanted, which is evident from the latest CLC Revision (Draft) 2020.³⁷⁷

From a theoretical point of view, China should adhere to the proposed flexible model and develop its own precedents. In terms of structure, the setting should be flexible enough to leave ample room for Chinese courts to elaborate, but at the same time, it should not be so flexible that it allows courts to import the fair use model’s problems.³⁷⁸ In short, the new model must sacrifice some

373. Hongbo Zhang (张洪波), *Zhuzuoquan Fa Xiuding Ying Jiejue Naxie Yingshang* (著作权法修订应解决哪些“硬伤”) [*What Difficult Problems be Solved by the Copyright Amendment*], NAT’L COPYRIGHT ADMIN. OF CHINA (Mar. 1, 2018), <http://www.ncac.gov.cn/chinacopyright/contents/555/359813.html>.

374. *Id.*

375. See Guanyu Zhonghua Renmin Gongheguo Zhuzuoquan Fa Xiugai Caoan De Jianyao Shuoming (关于《中华人民共和国著作权法》(修改草案)的简要说明) [*Brief Explanations on the Copyright Law of the People’s Republic of China (Draft Revision) for Public Consultation*], NAT’L COPYRIGHT ADMIN. OF CHINA (March 31, 2012), http://pkulaw.cn/%28S%28pvglx45wuwnwm555df4e55%29%29/fulltext_form.aspx?Db=protocol&Gid=6a95021ad3f9070e1f3ec77297da51bafdbf (referencing how “The Leading Group for the Revision of the CLC of the NCAC” (Leading Group) consists of officials from the former General Administration of Press and Publication; NCAC; CPD; Education, Science, Culture and Public Health Committee of the NPC; SPC; Ministry of Industry and Information Technology; Ministry of Culture; SAPPRFT; State Council Information Office; China Writers Association; and so on. “The Expert Committee for the Revision of the CLC of the NCAC” consists of members from related government departments, associations of rights owners, the industrial sector, practitioners, societies, and research institutions. The parties involved are pro-copyright, and therefore, the interests of users do not appear to be well represented. The Leading Group consulted three expert CLC proposals from three prestigious law schools, and the suggestion of an open-ended copyright exceptions design was adopted in the draft. However, when opposition against the whole draft arose, users lacked a representative to defend the design); see also Jian Hou (侯健), *Liyi Jituan Canyu Lifa* (利益集团参与立法) [*Participation of Interest Groups in Process Legislation Process*], 4 FAXUEJIA 120 (法学家) [THE JURIST] (2009), <http://www.faxuejia.org.cn/CN/Y2009/V0/I4/118> (“No interest groups representing the public interest has ever played a crucial role in the legislative process of laws related to citizen’s fundamental rights, democracy, and environment protection [in China].”).

376. Guanyu Zhonghua Renmin Gonghe Guo Zhuzuoquan Fa Xiuzheng An Caoan de Shuoming (关于《中华人民共和国著作权法修正案(草案)》的说明) [*Explanation on “Amendment to the Copyright Law of the People’s Republic of China (Draft)”*], NAT’L PEOPLE’S CONGRESS (Feb. 24, 2010), http://www.npc.gov.cn/wxzl/gongbao/2010-05/10/content_1580444.htm.

377. CLC Revision (Draft) 2020, *supra* note 22, art. 22.

378. Zhang, *supra* note 43, at 85 (“[I]n the Chinese judicial system, which does not traditionally follow the principle of *stare decisis*, unspecific open clauses could cause more unpredictability. . . .”); see also Hualing Fu,

flexibility for more certainty. The open-ended copyright exception of the draft proposal is a good attempt to achieve this as it is an effective way for civil law jurisdictions to open up their copyright exceptions model.³⁷⁹ However, the proposal is not perfect and should not be adopted until Chinese legislators fix the existing problems discussed earlier.³⁸⁰

Experiences from other civil law jurisdictions in East Asia, such as Taiwan and Japan, can be used as a reference point.³⁸¹ As a jurisdiction that transplanted fair use to its copyright law in 1992, Taiwan has adopted a new approach in the 2014 revision of its copyright law: the copyright exceptions model was changed from one with a general fair use clause that covers all the listed exceptions to a quasi-“fair dealing” model, in which “exceptions and limitations should be applied independently of the four-factor test for fair use, unless the wording of the provisions includes ‘a reasonable scope.’”³⁸² In effect, with regard to Article 44 to 63 of its Copyright Act, Taiwan has limited the application of its fair use test provided in Article 65(2) to check whether the requirement of “a reasonable scope” in certain exceptions is satisfied.³⁸³ As such, it has stopped serving as “the general principle for determination of (the listed) exceptions and limitations after the revision.”³⁸⁴ Other than those exceptions listed in Articles 44 to 63, the four factors in Article 65(2) comprise an independent and open-ended clause for courts to use to determine fair use.³⁸⁵

Japan once considered transplanting fair use directly into its copyright law according to its 2009 national IP strategic plan.³⁸⁶ However, in its 2016 national IP strategic plan, Japan decided to opt for a different approach.³⁸⁷ In May 2018, Japan amended its copyright law and changed the structure of its closed-list

Building Judicial Integrity in China, 39 HASTINGS INT'L & COMP. L.REV. 167, 181 (“Within this authoritarian context, even in the best-case scenario, the courts will continue to be submissive to the CCP and compliant to its political demand. Courts will still defer to the CPP in political or otherwise ‘sensitive’ cases, and the judiciary will not be able to make public policy, strike down unconstitutional legislation, or rule independently on politically controversial matters. The court will continue to play a limited role in supervising the party-state.”).

379. See Chung-lun Shen, *The Interplay Between Fair Use and Statutory Exceptions under the Taiwan Copyright Act and Article 13 of the TRIPS Agreement*, UNITED DAILY NEWS (May 2, 2018), http://en.naipo.com/Portals/0/web_en/Knowledge_Center/Feature/IPNE_180430_0701.htm. (noting that Taiwan introduced the U.S. fair use model directly in their “hybrid model” governed through “judicially based fair use and statutory exceptions and limitations,” whereas China proposes to introduce a two-step test.).

380. See *supra* Section III.A.

381. See Shen, *supra* note 379 (discussing the Taiwanese system); see also *Chiteki Zaisan Suishin Keikaku 2016* (知的財産推進計画 2016) [*Intellectual Property Strategic Plan 2016*], JAPAN INTELL. PROP. STRATEGY HEADQUARTERS (May, 2016), <https://www.kantei.go.jp/jp/singi/titeki2/kettei/chizaikaku20160509.pdf> (providing a framework for the Japanese system) [hereinafter *Japan Plan 2016*].

382. Shen, *supra* note 379.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Chiteki Zaisan Suishin Keikaku 2009* (知的財産推進計画 2009) [*Intellectual Property Strategic Plan 2009*], JAPAN INTELL. PROP. STRATEGY HEADQUARTERS (June 24, 2009), <https://www.kantei.go.jp/jp/singi/titeki2/090624/2009keikaku.pdf> (“To introduce general rules for rights restrictions (Japanese Fair Use Rules). . .”).

387. *Japan Plan 2016*, *supra* note 381 (“[I]n light of the need to respond to the use of copyrighted works in the digital network era from the viewpoint of flexible response to new innovation and the continuous creation of attractive content originating from Japan. . . to establish flexible rights restriction provisions. . .”).

copyright exceptions model to a semi-open model.³⁸⁸ Specifically, it made the following changes:

First, it compartmentalized copyright exceptions into three types, according to the purposes they served and market considerations:

- (a) Harmless uses, which refers to uses that do not fall under the originally intended uses of a copyrighted work and can be evaluated as not normally harming the interests of the rights holder;
- (b) Minor harm uses, which refers to uses that do not fall under the originally intended uses of a copyrighted work but will cause a minor degree of damage to the rights holder;
- (c) Public policy uses, which refers to uses that fall under the originally intended uses of a copyrighted work but are permitted to promote public policy objectives such as cultural development.³⁸⁹

Second, the once scattered exceptions were consolidated under specific general categories according to the above compartmentalization.³⁹⁰ Specifically, some of the listed exceptions were reconstructed into a multilayered (general clause—list—catch-all) style.³⁹¹ Article 30-4 of the Japanese Copyright Law provides an example of this:

Table 2 Comparison Between the Old and the New Article 30-4

Before the 2018 amendment	After the 2018 amendment
(Exploitation for the development or practical use of technology)	(Exploitations not for enjoying the ideas or emotions expressed in a work)
<p>Article 30-4 It shall be permissible to exploit a work already made public, to the extent deemed necessary, in the case of an offer to use it for the development, or practical use of technology required for audio or visual recording, or other exploitations of that work.³⁹²</p>	<p>Article 30-4 It is permissible to exploit work, in any way and to the extent considered necessary, in any of the following cases or other cases where such exploitation is not for enjoying or causing another person to enjoy the ideas or emotions expressed in such work; provided, that this does not apply if the exploitation</p>

388. Chosakukenho (著作権法) [Japanese Copyright Law], Law No. 48 of 1970, amended by Act No. 30 of 2018, art. 30–50 (2018), translated in (Japanese Law Translation, [JLT DS], <http://www.japaneselawtranslation.go.jp/>) [hereinafter Japan Copyright Law 2018].

389. AGENCY FOR CULTURAL AFFAIRS, Bunka Shingi Kai Chosaku-Ken Bunka Kai Hōsei Kihon Mondai Shō Iin Kai Chūkan Matome (文化審議会著作権分科会 法制基本問題小委員会中間まとめ) [Cultural Council Copyright Subcommittee Legal Basic Issues Subcommittee Interim Summary] (Feb. 2017), http://www.bunka.go.jp/seisaku/bunkashingikai/chosakuken/pdf/h2902_chukanmatome.pdf [hereinafter Interim Summary].

390. See Japan Copyright Law 2018, *supra* note 388 (defining each permissible item generally, followed by a list of examples and an exclusionary statement of items that do not apply).

391. *Id.*

392. Chosakukenho (著作権法) [Japanese Copyright Law], Law No. 48 of 1970, amended by Law No. 46 of 2015, art. 30–4 (2015), Copyright Rsch. and Info. Ctr. [CRIC] (Yukifusa Oyama et al. trans., 2016), http://www.cric.or.jp/english/clj/doc/20161018_October,2016_Copyright_Law_of_Japan.pdf [hereinafter Japan Copyright Law 2015].

<p>(Reproduction for information analysis)</p> <p>Article 47-7 For the purpose of information analysis (“information analysis” means to extract information concerning languages, sounds, images, or other elements constituting such information, from many works, and to make a comparison, classification, or other statistical analysis of such information; the same shall apply hereinafter in this Article) by using a computer, it shall be permissible to make recording on a memory device, or to make adaptation (including a recording of a derivative work created by such adaptation), of a work, to the extent deemed necessary. However, an exception is made for database works created for the use by a person who conducts information analysis.³⁹³</p>	<p>would unreasonably prejudice the interests of the copyright owner in light of the nature and purposes of such work, as well as the circumstances of such exploitation:</p> <p>(i) exploitation for using the work in experiments for the development or practical realization of technologies concerning the recording of sounds and visuals or other exploitations of such work;</p> <p>(ii) exploitation for using the work in information analysis (meaning the extraction, comparison, classification, or other statistical analysis of language, sound, image data, or other elements of which a large number of works or a large volume of information is composed; the same applies in Article 47-5, paragraph (1), item (ii));</p> <p>(iii) in addition to the cases set forth above, exploitation for using the work in the course of computer data processing or otherwise that does not involve perceiving the expressions in such work through human senses (in regards to works of computer programming, the execution of such work on a computer shall be excluded).³⁹⁴</p>
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The newly amended article contains the following changes:

The first paragraph of Article 30-4 added a general rule that consists of a purpose element (i.e., “exploitation is not for enjoying or causing another person to enjoy the ideas or emotions expressed in such work”) and a market element (i.e., “this does not apply if the exploitation would unreasonably prejudice the interests of the copyright owner in light of the nature and purposes of such work, as well as the circumstances of such exploitation”).³⁹⁵

393. *Id.*

394. Japan Copyright Law 2018, *supra* note 388, art. 30-4.

395. *Id.*

Two listed examples were then provided: subparagraph (i) is derived from the old Article 30–4, and subparagraph (ii) is clearly taken from the old Article 47–7.³⁹⁶

Finally, a catch-all circumstance was inserted as subparagraph (iii) to cover any other “exploitation for using the work in the course of computer data processing or otherwise that does not involve perceiving the expressions in such work through human senses.”³⁹⁷

This article was apparently categorized as a “harmless use.”³⁹⁸ Japan’s approach was to place certain specific exceptions under a more abstract category, such as “exploitations not for enjoying the ideas or emotions expressed in a work,” and then provide a flexible general rule.³⁹⁹ Examples, however, can provide a degree of certainty to the article.⁴⁰⁰ The catch-all circumstance will then provide space for future technological developments such as Artificial Intelligence (AI) and deep learning.⁴⁰¹

What China can learn from Taiwan and Japan is simple: instead of transplanting an exotic model verbatim, China should tinker its current model according to its needs by providing more flexibility and, at the same time, maintain a degree of certainty.⁴⁰² Nevertheless, the pitfalls that China needs to avoid are equally plain: first, it must try not to create unnecessary path dependence within Chinese courts and an incoherence of laws;⁴⁰³ second, it must try not to be too conservative, as China has different local needs and may face fewer institutional constraints than Taiwan and Japan.⁴⁰⁴

396. Compare Japanese Copyright Law 2015, *supra* note 392, arts. 30–4, 47–7, with Japan Copyright Law 2018, *supra* note 388, arts. 30–4.

397. Japan Copyright Law 2018, *supra* note 388, art. 30–4.

398. Interim Summary, *supra* note 389.

399. Japan Copyright Law 2015, *supra* note 392, art. 30–4.

400. See Japan Copyright Law 2018, *supra* note 388 (providing a “general clause – list – catch-all” frameworks for each protected work including textbooks, speeches, and other materials).

401. Naoki Okumura, *The Copyright Act Revised in 2018 will Further Improve the Machine Learning Environment in Japan*, NAKAMURA & PARTNERS (May 23, 2019), http://www.nakapat.gr.jp/en/legal_updates_eng/the-copyright-act-revised-in-2018-will-further-improve-the-machine-learning-environment-in-japan.

402. See Shen, *supra* note 379 (describing the features of a “hybrid model” that allow for flexibility in the Taiwanese system despite having certain standards for guidance); see also *Japan Plan 2016*, *supra* note 381 (emphasizing the need for flexibility in conjunction with a degree of certainty when codifying copyright law).

403. See Zhihui Caichan Fayuan (智慧財產法院) [Intellectual Property Ct.] 2015, Mingguo 103 (Zhisu) No. 2 Civil Judgement (智慧財產法院 103 年度民著上更(一)字第 2 號判決) [Taiwan Intellectual Property Court, MZSG(1) no. 2, 2014] (demonstrating that the Intellectual Property Court still applied the four-factor test in deciding a case that concerned an exception that included the wording of “necessary scope” rather than “reasonable scope;” likewise, highlighting how the judges appeared to be greatly affected by path dependence as they were unable to find an assessment method that was an alternative to the four factors).

404. Interim Summary, *supra* note 389, at 38 (“[I]n Japan, there is no ground to bring lawsuits as aggressively as the United States and promote the formation of case law, and it is not easy to generate this environment in the policy level. It is also necessary to pay attention to the current situation that the possibility of judicial norm making is limited.”); see also Qingchuan Xie (谢晴川) & Tianxiang He (何天翔), Lun Zhuzuoquan Heli Shiyong De Kaifanghua Lujing Yi Zhongjian Cengci Yiban Tiaokuan De Yinru Wei Zhongxin (论著作权合理使用制度的开放化路径——以“中间层次”一般条款的引入为中心) [*On the Open Path of Copyright Fair Use Model*], 5 *Zhishi Chanquan* 66–67 (知识产权) [INTELL. PROP.] (“Japan has limited the application of the new open general clause greatly. . . limited it to certain areas. . . one of the reasons is that the Japanese government did not want to step in too much the interest structure controlled by traditional copyright industries.”).

To refine the current model, Chinese legislators could, based on the priorities of the country,⁴⁰⁵ nominate new exceptions and then consolidate cognate ones under a broader theme, creating a “general clause—list—catch-all” model.⁴⁰⁶

Furthermore, an open-ended general clause is required. Unlike their counterparts in Japan and Taiwan, Chinese judges have to play a more active role “in concretizing legal rules of general nature and in substantiating such rules with more detailed and precise specifications in the process of adjudicating individual cases and making legal rules compatible with social development.”⁴⁰⁷ In an era of rapid social and economic changes, an open-ended general clause will provide Chinese courts with the flexibility they need. Nevertheless, the application of the general clause must be independent from the listed exceptions, which will allow Chinese courts to continue to develop their own jurisprudence regarding the listed exceptions.⁴⁰⁸

The Chinese legislators should refrain from directly adopting the Berne three-step test or the fair use test as the general clause.⁴⁰⁹ China has already moved past the era of adopting terms from international treaties hastily in order to prove international compliance, and is more competent in adapting foreign concepts to local needs.⁴¹⁰ Furthermore, as Peter Yu indicated, “the debate fixated on labels” is simply not helpful.⁴¹¹ A discussion about legal transplanting should not be started if only some of the elements from a specific model are taken. After all, no country can monopolize concepts from copyright jurisprudence such as quantity, quality, and market substitution. Chinese legislators should intermingle these concepts with the design of copyright exceptions, thereby institutionalizing them so that the courts can refrain from citing exotic concepts that are directly linked to foreign copyright exception models and are not found in the Chinese legal system.⁴¹²

B. Conclusion

This article demonstrates in detail China’s long-term effort and struggle in building its copyright exceptions model. It shows that, although the court’s effort to apply the U.S. fair use model may not work, the elements of fair use

405. See, e.g., *China Promotion Plan*, *supra* note 371 (listing examples including intellectual property reform specific to the areas of target areas like health as well as other new fields); The Marrakesh Treaty, *supra* note 71 (listing examples including China’s obligations to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled). See also Tianxiang He, *China*, in *INTERNATIONAL PERSPECTIVES ON DISABILITY EXCEPTIONS IN COPYRIGHT AND THE VISUAL ARTS: FEELING ART 192–206* (Jani McCutcheon & Ana Ramalho eds., 2020).

406. Xie & He, *supra* note 404.

407. Wang, *supra* note 283, at 526.

408. See RICL, *supra* note 64 (providing courts guidance as to how to enforce copyright law); see also Wang, *supra* note 65 (emphasizing the judicial power to comment on law in a flexible manner).

409. See Berne Convention, *supra* note 32 (outlining the three-step test set forth at the Berne Convention suggested to Chinese legislators to allow copywritten works to be used without license); see also 17 U.S.C. § 107 (describing fair use exceptions to copyright infringement in the American system that has been suggested to Chinese legislators).

410. RICL, *supra* note 64.

411. Yu, *supra* note 342, at 156.

412. Yu, *supra* note 361, at 6.

and the justifications behind it will inevitably become a substantial part of China's future copyright exceptions model.⁴¹³ As Alan Watson stated, "a time of transplant is often a moment when reforms can be introduced."⁴¹⁴ Therefore, it may be the time for China to look for indigenous innovation. However, the need for globalization and rapid responses to new challenges raised by technological development will force China to consistently learn from the best. Most importantly, after almost 30 years of trial-and-error following the promulgation of the first CLC in 1990, China is now in a more comfortable and confident position to decide its future model of copyright exceptions. A thoughtful and deliberate refinement of its copyright exceptions model will also serve as an excellent example to demonstrate the complexity and feasibility of legal transplants between civil law and common law jurisdictions.

413. See MERTHA, *supra* note 8 (commenting on the American influence on developing Chinese copyright policy); see also Wang & He, *supra* note 38 (recognizing the pitfalls of Chinese incorporation of foreign and international copyright policies).

414. WATSON, *supra* note 1, at 35.