CHINESE COPYRIGHT LAW: THE THIRD REVISION

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On 31 March 2012 the National Copyright Administration of China (NCAC) put draft amendments[1] *(the Draft) to the Copyright Law*[2] *on its website and solicited comments till 30 April 2012. This Draft attracted much attention and aroused much discussion. This paper is an edited version of the presentation to the New Zealand Association for Comparative Law on 29 May 2012. It analyses the Draft, points out several loopholes in it and provides possible solutions.*

Le 31 mars 2012, le National Copyright Administration of China (NCAC) soumettait aux internautes via son site Internet, le projet de réforme du Chinese Copyright Law leur permettant jusqu'au 30 avril 2012, de faire part de leurs observations et suggestions. Le nombre de réponses reçues démontrait l'immense intérêt que cette réforme suscite. Cet article rédigé par le Prof. Luo qui fut étroitement associée à la préparation de ce projet de réforme représente la version mise en forme et enrichie du contenu de la conférence qu'elle a donnée le 29 mai 2012, sous l'égide de la New Zealand Association for Comparative Law à la faculté de droit de Victoria University of Wellington. Dans ses développements, l'auteur analyse principalement les points passés sous silence dans le projet de réforme et offre quelques solutions pour y remédier.

I INTRODUCTION

This article is divided into 7 parts. The first part gives a brief introduction of the background to the third revision of Chinese Copyright Law; the second part highlights the main areas of progress of the Draft in comparison with the current law,

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1 Available at <www.ncac.gov.cn/cms/cms/upload/info/201203/740608/133317987342298209.doc> (last visited on 4 June 2012).

2 An English version of the Chinese Copyright Law can be found at: <www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm> (last visited on 4 June 2012).

such as better structure, higher protection for right holders, fewer barriers to copyright trade; the third part argues the copyrightability of folklore; the fourth part welcomes the establishment of a right of pursuit, but questions the justification for writers and composers to enjoy such right; the fifth part analyses the inconsistences of the anti-circumvention rules with other rules in the law and points out that both the definition of technological protection measures and the exceptions to the anti-circumvention rules need to be amended; the sixth part argues the necessity of having provisions like art 5 of the Draft in the law; the conclusion proposes that the loopholes be fixed and the yet unregulated issues be regulated.

II THE THIRD REVISION OF THE CHINESE COPYRIGHT LAW

A The Background

The current Chinese Copyright Law was promulgated in 1990 when 'copyright' was a word unknown not only to common people but also to most of the legal professionals. Hence it is no wonder that this law has many flaws both in form and content. Although it has been revised twice - the first revision in 2001 to bring the Copyright Law into line with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the second revision in 2010 revision to enforce the WTO panel decision of DS362,[3] it still bears many signs of the transition from a planned economy to a market economy and lags well behind the tremendous technological developments.

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 experts groups independently to propose amendments.[4] On 31 March 2012 the NCAC put the Draft, which is based on the opinions submitted by the three experts groups at the end of 2011, on its website for comments.[5]

B Highlights of the Draft

The Draft overhauls the current Copyright Law. It not only provides solutions to close some existing loopholes and introduces some new concepts, but it also

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3 China – Measures affecting the Protection and Enforcement of Intellectual Property Rights, Report of the Panel, World Trade Organization, WT/DS362/R, 26 January 2009 (09-0240).

4 Related news report is widely seen in media, for example:《著作权法》第三次修订启动会议暨专家聘任仪式举办 available at: <www.wenming.cn/xwcb_pd/cbxydt/201107/t20110714_246240_1.shtml> (last visited on June 4, 2012)

5 NCAC《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》available at: <www.ncac.gov.cn/cms/html/309/3502/201203/740608.html> (last visited: June 4, 2012).

restructures the Copyright Law. As result, the Draft improves the structure of the Copyright Law, provides higher protection for right holders, and facilitates copyright trade.

The Draft integrates the current copyright regulations. Besides the Copyright Law, currently there are six bylaws regulating specific copyright issues: Regulations for the Implementation of International Copyright Treaties; Regulations for the protection of computer software (Software Regulations); Implementing Rules of the Copyright Law (Implementing Rules); Regulations for the Protection of the Right of Communication through Information Network; Regulations for Collective Management of Copyright; Interim Measures for Payment of Remuneration by Radio and Television Stations for Broadcasting Sound Recordings. The Draft integrates the main content of the first four bylaws into the Copyright Law and it is expected that by this means the copyright law system will be simplified.

Some fundamental definitions and principles are lifted from bylaws to the Draft. While the Copyright Law enumerates the most common types of works, "work" itself - as a core concept of copyright law – is currently defined in the Implementing Rules.[6] This definition is now to be found in art 3 of the Draft. Article 39 of the Draft copies art 21 of the Implementing Rules, which enshrines the three-step test – the principle guiding all limitations and exceptions to copyright.

The Draft establishes a right of pursuit.[7] This right is given to authors or their heirs and legatees of the original works of fine art or photographic works, or the original manuscripts of writers or composers. The Draft also recognizes the right of rental for right holders whose works are included in phonograms[8] and performers;[9] whereas under the current Copyright Law only right holders of film works and computer programs enjoy the right of rental.[10]

The Draft does not only raise the maximum statutory damage from 500,000 *yuan* to 1,000,000 *yuan*, but also explicitly allows punitive damages.[11] The Chinese civil law system generally does not support punitive damages. The rationale underlying is

6 Article 2 of the Implementing Rules.

7 Article 11 s 3 (13) of the Draft.

8 Article 11 s 3 (3) of the Draft.

9 Article 32 Sec. 1 (5) of the Draft.

10 Article 10 s 1 (7) Copyright Law.

11 Article 72 of the Draft.

that nobody – neither the infringers nor the right holders – should benefit from the infringements. The compensation is awarded with the aim of making up the right holders' losses and taking away the infringers' unlawful gains. Where the actual losses of the right holders or the unlawful gains of the infringers cannot be determined, which is often the case in copyright infringements, the court is given a statutory discretion to decide on compensation (statutory compensation). It is arguable that punitive damages are allowed under the current Copyright Law. Evidence to support that view is that either the actual losses or the unlawful gains are often over-calculated. The court uses the prices of authorized copies to calculate the value of the pirated goods.[12] The amount calculated by this way is higher than the unlawful gains of the infringers, because in the reality the infringers usually sell infringing copies at a lower, or even much lower prices than that of the authorized copies; it is also higher than the actual losses of the right holders because the right holders could not have sold out so many copies. Further proof lies in the way in which the court decides the statutory compensation. According to the law, the court may decide a statutory compensation in the light of the circumstances of the infringement. As to the "circumstances of the infringement", courts consider not only facts which have impact on the losses of the right holders, such as the time period, the geographical area of the infringement, but often also facts which have no effect on the right holders' losses, such as how many times the infringer has violated copyright law, whether the infringer committed the infringement intentionally or not. The Draft takes a clear stand on the punitive damages issue by legalising the common practice of taking the subjective fault of the infringer into account in deciding statutory compensation and allows up to three multiples of that statutory compensation to be imposed in the case of a repeat infringers.[13]

C Copyright Protection for Folklore?

Folklore is copyrightable under the current Chinese Copyright Law. Article 6 of the Copyright Law provides: Measures for the protection of copyright in works of folk literature and art shall be formulated separately by the State Council. However, no such measures have been published to date. So far only one case[14] about folklore has been litigated in China. Article 8 of the Draft adopts art 6 of the current law but

12 For instance, article 7 the Guideline of determining copyright infringement compensation by the Beijing People's Higher Court provides: "…"actual losses of right holders" can be calculated in the following ways: (5) the product of the numbers the pirated copies by the defendant multiplying the unit profit of each copy by the plaintiff". 京高法发[2005]12 号 2005 年 1 月 11 日.

13 Article 72 s. 3 of the Draft.

14 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (1982), s 1.

replaces the word "work" with "expression". This change reflects the changing attitude to the legal nature of "folklore". However, this provision raises the question: what protection does the Draft provide to "folklore"?

Copyright Law protects two types of rights: copyright and related rights. Copyright is bestowed on authors of "works", namely expression which demonstrates originality. If "folklore" meets the demand of originality which copyright protection requires, it should be called "work" instead of "expression". "Expressions" which do not constitute "works" do not reach the copyright threshold, and are hence not eligible for copyright protection. By calling folklore "expression", the creator of the Draft seems to take the stand that "folklore" does not constitute work or that "folklore" enjoys copyright protection whether it is qualified as a work or not.

It is the author's view that folklore is not eligible for copyright protection. Folklore is generally created by many people and formed over time, which leads to some absolute barriers to copyright protection: it is impossible to ascertain the creators and their contribution to a particular folk expression; hence it is difficult to decide who the right holder of a particular folklore expression is. Many folklore expressions are too old to be protected by copyright law which provides protection for works within a time limit after their completion. Many folklore expressions are still evolving and have many versions, which raises the question that which versions or which parts of a folklore expression should be copyrighted. The answer is none of them is eligible for copyright protection. For instance, *the Epic of King Gesar,*[15] has been a popular folk epic in west China since 12th century and has many versions in different areas inhabited by various ethnic groups. In fact, the epic even varies from singer to singer so that there is a saying that every singer has his/her own Epic of King Gesar. Since each version is merely a slightly different variant of others, none of these versions demonstrates enough originality for copyright protection. The main body of the epic or the so called "*scènes à faire*" of all the versions of the epic is not copyrightable for two reasons: first, it is impossible to ascertain the creators of the main body of the epic; second, copyright protection only for the main body of the epic contradicts the fact that the epic is evolving and the amendments made by each singer should be regarded as part of the epic. The amendments by each singer cannot be protected by copyright law, because they cannot be separated from the epic to

15 A brief introduction of *the Epic of King Gesar* can be found at: <http://en.wikipedia.org/wiki/Epic_of_King_Gesar> (lasted visited on 25 June 2012).

constitute an independent work, even though they can be credited to a specific singer in some cases.

Although some countries do incorporate "folklore" in their copyright law, it does not necessarily mean that they provide copyright protection for folklore. As an example, "folklore" protected under British copyright law is a type of unpublished anonymous work, and enjoys copyright protection only when it constitutes a work and its author is a qualified individual.[16] Therefore, the term "folklore" in British copyright law has a completely different meaning from that in Chinese copyright law. Tunisian copyright law provides certain protection for folklore with the same meaning as in Chinese copyright law. However, the protection is achieved through authorization from the Ministry responsible for culture for transcriptions of folklore with a view to exploitation for profit against payment of a fee for the benefit of the welfare fund of the Copyright Protection Agency.[17] This kind of protection is in fact based on administrative interference not copyright which together with related rights and sui generis rights, is a private right.

The term "related rights" sounds to have a very big connotation. However, according to the Draft, "related rights" refer to "a publisher's right to the typographical design of the book or the periodical (s)he publishes, a performer's right to his/her performance, producer's right to his/her sound recordings, the right of a radio station and a television station to the programs they broadcast".[18] Any rights other than these four are not related rights under the Draft. Therefore, "folklore" is not protected under related rights. In fact, the Draft blocks the way to protecting "folklore" under either copyright or related rights. Thus, by replacing the word "work" in the Copyright Law with "expression", the creator of the Draft raises the doubt about copyright protection for folklore, but does not promote the preservation and protection of folklore.

If the creator of the Draft insists on establishing a legal frame for the protection for folklore within the copyright law scheme, the definition of "related rights" should be modified and some room left for development in the future. More specifically, the scope of "related rights" should be left with open connotation, and the words "include but not limited to the following rights" should be put before the enumeration. In this way, the definition of "related rights" is flexible enough to include other rights which are related or similar to copyright. Another solution, which is also preferred by the author, is to delete the definition of related rights. The

16 See s 169 of Copyright, Designs and Patents Act 1988 (UK).

17 See s. 7 of Law No 94-36 of 24 February, 1994, on Literary and Artistic Property.

18 Article 4 s. 1 of the Draft.

term "related rights" as such has a very vague meaning; it refers to a group of rights which are related to or similar to copyright and difficult to define. With the development of technology and business models, it is imaginable that the scope of "related rights" will be broadened. Leaving the term "related rights" open would give the legislator room to include new rights without having to overhaul the Copyright Law, which are related to or similar to copyright. For example, it is because the German Copyright Law[19] contains no definition of related rights that the legislator could easily add a section of sui generis protection for database producers[20] under the chapter on "related rights" when implementing the European Database Directive.[21]

What the copyright law can do for the protection for folklore is to prevent and inhibit "illicit exploitation and other prejudicial actions".[22] This is also recognized in the only case in China related to "work of folklore".[23] However, copyrightability is not a precondition for folklore, as well as any other material, to be protected from being illicitly exploited and otherwise prejudiced. Although the creators of folklore are unclear in most cases, it is indubitable that the creators were/are members of a specific folk community. Therefore folklore carries a distinctive folk community character and is recognised in relation to a particular community. To appropriate some folklore as one's own creation, as was the case in the Sailors' Song of Wusuli River case, violates the public order and good moral and is not acceptable, regardless of whether or not it is under copyright protection. Any work, including works which have never been protected or are not anymore protected under copyright law, are protected from distortion and the false claim of authorship. Just as any person may raise an objection to a trademark that has undergone preliminary examination within three months from the date of

19 Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz – UrhG), BGBl. I 1965 S. 1273.

20 Namely "Abschnitt 6 Schutz des Datenbankherstellers".

21 Directive 96/9/EC of the European Parliament of the Council of 11 March 1996 on the Legal Protection of Databases, Official Journal L 077, 27/03/1996 P. 0020-0028.

22 This is also the principle of protection of the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (1982). See s 1 of the Model Provisions.

23 The Sailors' Song of Wusuli River case. The first trial, the Second Intermediate People's Court of Beijing, (2001)二中知初字第 223 号; the second trial, the Higher People's Court of Beijing, (2003) 高民终字第 246 号。

announcement of publication,[24] for the illicit exploitation and other prejudicial actions, the folk community to which the folk expression is recognized or its members are entitled to take actions,[25] but also any individual may report the matter to the relevant administrative body or bring a lawsuit; the relevant administration has the authority to deal with such actions. This is particularly important for the preservation and protection of folklore, because folklore expressions which deserve special preservation and protection normally belong to the folk communities which are economically undeveloped and not well-informed. Members of the community are generally not well educated and may not be aware of the illicit exploitation or other prejudicial actions to their folklore expressions.

A possible measure to protect folklore from illicit exploitation and other prejudicial action would be for the Draft to add a provision requiring authors to give information about the source of their works which are inspired by folklore, just as the Chinese Patent Law requires the patent applicant whose invention-creation has been accomplished by relying on genetic resources.[26] Of course, unlike patent and trademark, which are granted to applicants only after application and approval, copyright exists when the work is completed. Without indication of the source of the inspiration, the author can still enjoy and exercise copyright. It is therefore suggested that the Draft be amended as follows: 1. To allow any individual to report the illicit exploitation and other prejudicial actions to folklore to the copyright administrative department, or file a lawsuit in the court; 2. To authorize the copyright administrative department and the court to force the person who made the illicit exploitation and took other prejudicial actions to eliminate the ill effect by publishing an announcement covering the geographic area where the illicit exploitation and other prejudicial actions took effect; 3. To impose a monetary punishment on the person who made the illicit exploitation or took other actions prejudicial to folklore. The fine shall be paid to a public foundation or an administrative organ set up for the preservation and protection of folklore.

Copyright protection, as well as protection under related rights and sui generis rights, cannot stimulate the creation of folklore. Since it is impossible to ascertain the creators and hence the right holders of folklore, no individual benefits from

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24 Article 30 of the Trademark Law.

25 The Second Intermediate People's Court of Beijing in the Sailors' Song of Wusuli River case held: "they [the folklore expressions involved] do not belong to any individual of Hezhe ethnic group, but they are of interest to every member of Hezhe ethnic group. Therefore, any group, any individual member of Hezhe ethnic group is entitled to take action to protect their folklore from being infringed." （2001）二中知初字第 223 号。

26 Article 26 s 5 of the Patent Law.

copyright protection directly and no individual creates folklore for the sake of copyright. On the contrary, folklore is created by the mass spontaneously. Copyright protection is neither possible nor useful. As a matter of fact, it is not because of commercial exploitation but endangerment that folklore needs special protection. Just as endangered species cannot survive through natural reproduction, the preservation and development of folklore cannot rely on copyright protection and needs affirmative action by the public authority.

D Right of Pursuit for Writers and Composers?

Article 11 s 3 No. 13 of the Draft introduces the right of pursuit and provides: Right of pursuit, that is, authors or their heirs, and legatees have the right to share the profits from each transaction of the original work of fine art or photographic works, or original manuscripts of writers or composers after their first sale; right of pursuit cannot be assigned or waived.

Works of fine art will increase in value with time. It often happens that works of fine art are sold at prices which are much higher than the prices at which the artists sold their works originally. Without the right of pursuit, artists are not able to profit from the big value increase of their own works. This is certainly unfair. Therefore, many continental European countries established the right of pursuit.[27] The copyright law of the United States does not recognise the right of pursuit, but California Resale Royalty Act which was passed in 1977 provides a right of pursuit for the artist of fine art whose work is sold and the sellers reside in California or the sale takes place in California.[28]

With the rapid economic development in China, not only the domestic art market grows very quickly, but also Chinese artists' works are in great demand in the international market. The establishment of the right of pursuit will enable Chinese artists to benefit from the value increase of their works, and undoubtedly provides higher protection for artists.

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27 For instance, France (Article L122-8 Intellectual Property Code, an English version of the law is available at: http://portal.unesco.org/culture/en/files/30289/11419173013it_copyright_2003_en.pdf/it_copyright_2003_en.pdf, last visited on 4 June, 2012), Germany (§26 Urheberrechtsgesetz), Austria (§16b Urheberrechtsgesetz), Italy (Part III ch II s VI of the Italian Copyright Statute , an English version of the law is available at: <http://portal.unesco.org/culture/en/files/30289/11419173013it_copyright_2003_en.pdf/it_copyright_2003_en.pdf>, last visited on 4 June, 2012).

28 California Resale Royalty Act of 1976, CAL CIV CODE § 986.

This provision comes apparently from art 14ter of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), which entitles not only the authors of art works, but also writers and composers the right of pursuit. It is submitted however that the right of pursuit should only be granted to authors of art works, but not to writers and composers.

Works of fine art are very different than literary and music works in the sense that the latter are for mental appreciation whereas the former are for visual appreciation, first and foremost. The building blocks of the literary and music works namely the words and notes are meaning-based signs. The words and notes in the manuscripts of writers and composers convey certain meaning which is pre-defined no matter how they are written. Put in another way, the look of the words and notes does not affect the meaning of these words and notes, nor does it change the creativity of the work. Whereas the building blocks of the works of art, namely the colours, shapes, lines and etc. are the direct expression of the artist's aesthetics, ideas, and affect the value of the work and its copyrightablity. For instance, the meaning of the word "literary" does not change, no matter it is printed, handwritten, engraved or even read. And hence the value of the work is not affected. Whereas in a calligraphy work, the structure of a character, the length and the width of the strokes, the distance between the characters and lines, the strength of writing, they all embody the author's idea, style and skill and affect the work's value. Because of this difference between the fine art works and literary and music works, the ways that the authors of these works exercise their copyright are completely different. Since the look of the words and notes have nothing to do with the value of the work, to reproduce the literary and music works in all kinds of ways, whether by photocopying, reprinting or digitalising the manuscript, does not affect the consumption of work. Authors of literary and music works hence do not exercise their copyright by selling their manuscripts. Publishers rarely disseminate literary and music works by photocopying their manuscripts. Whereas the look of the fine art works is the expression form of the work, it is essential to keep the original look of the fine art works in dissemination of the work. Even to date, when the technology of reproduction is highly developed, noticeable differences still exist between originals and copies. The originals of works of fine art are so closely connected to the works themselves that to some extent they are identical. For authors of fine art works, to sell the original copies is the most important manner to exercise their copyright, no matter in analogue era or digital times. The originals are rare and unique, and therefore have the potential of value increase. This gives the artists the need and possibility of enforcing the right of pursuit. Manuscripts of literary and music works sometimes are also sold at very high prices, however, this is because of facts such as the fame of the authors and has nothing to do with the copyright in the works.

Because of the above reason, countries which recognize the right of pursuit all give this right to authors of art works but not to writers or composers. The French Intellectual Property Code gives the right of pursuit to authors of graphic and three-dimensional works;[29] the German Copyright Law gives the right of pursuit to authors of fine art works and photographic works;[30] the Austrian Copyright Law entitles only authors of fine art works, but under Austrian Copyright Law, fine art works include not only drawings, paintings, sculptures, graphics, carvings, but also photographic works, architectural works and works of applied art;[31] the Italian Copyright Law provides the right of pursuit to authors of figurative art in the form of paintings, sculptures, drawings and prints;[32] California Resale Royalty Act defines "artists" as authors of fine art, which means an original painting, sculpture, or drawing, or an original work of art in glass.[33]

As to photographic work, the reproduced copies can be the same as the original ones. However, under the analogue environment, the reproduction is not very precise and there is quality loss during the reproduction process. From one film only certain number copies of high quality can be developed. The right of pursuit is thus important for authors of photographic works under the analogue environment. However, this is changing because in the digital environment there is no difference between originals and copies. With the development of information technology, digital cameras are more and more sensitive, accurate and widely used, and the right of pursuit means less and less to authors of photographic works.

The Draft only introduces a right of pursuit. The drafting of enforcing measures is left to the State Council.[34] Hence artists cannot yet exercise their right of pursuit in either domestic or international art markets, because art 14ter Sec. 2 of the Berne Convention provides that, the right of pursuit can be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed. It is thus foreseeable that countries which recognise the right of pursuit will not allow Chinese artists to enjoy this right until their citizens can exercise this right in China.

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29 Article L122-8 Intellectual Property Code.

30 §26 Urheberrechtsgesetz.

31 §16b i. V. m. §3 (1) Urheberrechtsgesetz.

32 Article 144 of the Copyright Statute.

33 Section 986 (c) (1) (2) of the California Civil Code.

34 Article 11 s. 4 of the Draft.

E Improvement of the Anti-circumvention Rules

In the 2001 revision, the Copyright Law adopted a short provision imposing civil and criminal liability on circumvention of technological measures. Prior to this anti-circumvention rule, the Tentative Administrative Measures on Software Products issued by the then Ministry of Electronic Industry in 1998, which was repealed in 2000, included an anti-decryption rule. The anti-circumvention rules in the Regulations on Protection of the Right of Communication through the Information Network of 2006 are much more detailed and allow some exceptions to the prohibition of circumventing technological measures. Nevertheless, these anti-circumvention rules provide protection only for the technological measures taken to protect the right of communication to the public through the information network.[35] The Draft integrates these anti-circumvention rules into "Chapter VI Technological Protection Measures and Right Management Information", which regulates a more detailed list of acts of breaking anti-circumvention rules and the related legal liabilities.

Article 64 of the Draft gives a definition of technological protection measure (TPM), fixes the loophole in the current copyright law that TPM is legally protected without being defined. However, the definition is far from rigorous. Article 64 of the Draft provides: Technological protection measure in this law refers to effective technology, device or component, which is taken by right holders to prevent or inhibit their works, performances, sound recordings or computer programs from being reproduced, browsed, appreciated, operated or transmitted through the information network. First, this definition is wrong in listing the protected objects of TPM. The definition lists computer programs together with works, performances and sound recordings as the objects which are protected by TPM. This raises the question: are computer programs not works or are computer programs which do not constitute works also included? TPM is legally protected because it protects the objects which are protected by the copyright law. TPM which protects the interests which are not recognised by the copyright law, for instance, computer programs which do not constitute works, is not protected by the anti-circumvention rules. Thus, it is not correct to list computer programs together with works. Whereas some related rights, namely the publisher's right to the typographical design of the book or the periodical and the right of radio stations and television stations to their programmes are not included in the definition. This obviously contradicts art 65 of the Draft which provides "In order to protect copyright and related rights, right holders can take technological protection measures". Instead of listing all the types

35 Article 4 s 1 of the Regulations on Protection of the Right of Communication through the Information Network.

of protected subject-matter under copyright law, art 6 s 3 of the European Copyright Directive[36] uses "works or other subject-matter" which are under exclusive rights of right holders to define the objects that TPM protects. Second, this definition is wrong in defining the acts which are prevented or inhibited by TPM. "Browse" and "appreciate"[37] are vague and not legal terms; they should be replaced by "visit". More important is that the ways of exploiting works and related subject-matter cannot be covered by "reproduction, browsing, appreciation, operation and transmission through the information network". To display, to broadcast, to communicate by video or audio recordings, are all subject to the authorisation of right holders of copyright and related rights. These rights should be protected in the same way as the rights "to reproduce, to browse, to appreciate, to operate or to transmit through the information network". The demand to protect these rights through TPM should also be protected by copyright law. The Draft improperly restricts the copyright and the related rights protected by TPM, hence it improperly narrows the scope of TPM. As a contrast, the European Copyright Directive does not restrict TPM to a technology, device or component which protects only certain copyright and related rights. Any technology, device or component which is designed to prevent or restrict acts which are subject to the authorisation of the right holder of any copyright or related rights or the sui generis right of database producers, constitutes TPM under the anti-circumvention rules. Section 226 of New Zealand's Copyright Act defines TPM as "any process, treatment, mechanism, device, or system that in the normal course of its operation prevents or inhibits the infringement of copyright in a TPM work", which means the purpose of TPM is to prevent or inhibit copyright infringement. Both these definitions clearly define the purpose and function of the TPM, and cover all TPMs which deserve protection, whereas New Zealander's definition is more concise and to be preferred.

Article 67 of the Draft incorporates art 12 of the Regulations on Protection of the Right of Communication through Information Network and regulates exceptions to anti-circumvention rules. Circumvention of TPM in the following circumstances does not constitute copyright infringement: (1) when a published work, performance or sound or video recording is made available to a small number of teachers or scientific researchers through the information network for the purpose of classroom

36 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Official Journal, L 167, 22/06/2001 P. 0010-0019.

37 Article 40 (1) of the Draft, which is transformed from art 22 (1) of the Copyright Law, deletes the word "appreciation" used in the current Copyright Law.

teaching or scientific research, and the said work, performance or sound or video recording cannot be gain through normal channels; (2) when a published written work is made available to blind persons through the information network for a non-profit purpose in such particular way that it is perceptible to them, and the said work cannot gain through normal channels; (3) when a State organ fulfills its official duties in accordance with the administrative or judicial procedure; or (4) when a safety test is carried out on a computer and its system or on such network. These four exceptions cannot cover all the circumstances, where circumvention of TPM should be justified. For instance, with the expeditious development of technology, TPMs become obsolete very quickly. It is not rare that consumers have to circumvent the obsolete TPMs in order to visit works for which they have lawful authorization. In this case, to prohibit circumvention of TPM does not only harm the interests of the consumers, but also those of the right holders. Furthermore, art 67 of the Draft does not allow circumventing TPM for legitimate reverse engineering. Reverse engineering is allowed for production of compatible products both under current Software Regulation[38] and the Draft.[39] If the right holder takes TPMs for her copyrighted computer program, the competitors will not be able to produce compatible products because to gain compatible information through circumvention of TPMs violates anti-circumvention rules. With the wide use of digital technology, more and more products are operated or controlled by computer programs one way or another. It is very common that right holders use TPMs to protect their computer programs. Not allowing circumventing TPMs for the purpose of developing compatible products will harm the free competition in the market, as shown in many cases[40]. Therefore, the author suggests that art 67 of the Draft shall be amended with clause allowing circumvention of TPM for legitimate purposes.

F Is art 4 of the Copyright Law/art 5 of the Draft Worth of Retaining?

Article 5 of the Draft is a copy of art 4 of the current Copyright Law. An earlier version of art 4 of the Copyright Law was one of the three triggers of DS362 in

38 Article 17 of the Software Regulations.

39 Article 43 sec. 1 of the Draft provides: In order to gain information necessary for producing compatible products which cannot be gained through normal means, the legitimate user of a computer program can reproduce and translate the relevant content of the computer program.

40 In one copyright dispute case the court held: The spirit of the copyright law only provides protection for the interests that the right holder shall enjoy in respect of her copyrighted computer program. The court does not support the expansion of such interests to other product which is bound with copyrighted works by TPM. See（2006）沪高民三(知)终字第 110 号。

which the USA argued that some IP enforcement measures in China violated international treaties to which China was a party[41].

That earlier version of art 4 s 1 of the Copyright Law provided "works which are prohibited from being published and from being disseminated by law, are not protected by this law". This provision was regarded by the US as the denial of copyright and related rights protection and enforcement to creative works of authorship, sound recordings and performances that had not been authorised for publication or distribution within China, which violated art 5 (1) of the Berne Convention and art 41 s 1 of TRIPS. After the 2010 revision art 4 s 1 of the Copyright Law was deleted; Article 4 of the Copyright Law now reads: Copyright holders may not violate the Constitution or laws or harm the public interests when exercising their copyright. The State will exercise supervision and management over the publication and dissemination of works in accordance to the law. Although art 4 of the Copyright Law does not violate any international treaties which China has ratified, the author doubts the necessity of its existence.

First, art 5 s 1 of the Draft does not have any substantive meaning. It is not art 5 s 1 of the Draft but the Constitution or other law which prohibits copyright holders from violating laws or jeopardising public interest. If a right holder violates the Constitution and other law while exercising the copyright or related rights, individuals whose interests are harmed or relevant administrative department can take action according to the relevant provisions of the Constitution or other law which the right holder violates, regardless of whether art 5 s 1 of the Draft exists or not. Furthermore, art 5 Sec. 1 of the Draft does not, but the relevant provisions of constitutional law or other laws do provide the legal basis for the individual or related administrative department to take action in such a case. On the other hand, the existence of the provision will cause confusion, for right holders of copyright and related rights, especially for foreign right holders, about what laws may affect the exercise of the rights under the copyright law. Based on this consideration, the American Bar Association Section of Intellectual Property Law and Section of International Law (ABA Sections) suggest that art 5 of the Draft be expanded to provide some indication of these laws.[42] It is not wise to give such indication.

41 See China – Measures affecting the Protection and Enforcement of Intellectual Property Rights, Report of the Panel, World Trade Organization, WT/DS362/R, 26 January 2009 (09-0240).

42 See Joint Comments on the American Bar Association Section of Intellectual Property Law and Section of International Law on the Draft Amendments to China's Copyright Law, available at: <www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives.html> (last visited on 14 June, 2012).

Exercise of rights under copyright law can affect many other interests, just as does the exercise of any other rights. Right holders of copyright and related rights should abide by any relevant law when exercising their rights under the copyright law. For instance, they are not allowed to disseminate any information of religious discrimination, racial discrimination, ethnic discrimination, sexual discrimination, obscenity, so on and so forth. It is neither possible nor necessary to give such indications in the Copyright Law.

Regarding the process and standards in the supervision and management of the dissemination of works by the State, which is governed by Art 5 s 2 of the Draft, the ABA Sections urge greater transparency and clarity, including a possibility for appeal.[43] If this suggestion is accepted, the Copyright Law would become extremely complicated with content which should not be included in copyright law, because it is according to the Constitution not the copyright law, that the relevant administrative department has authority over the supervision and management of publication and dissemination of works. Although the Berne Convention also mentioned the right of the Government of a member state to permit, to control, or to prohibit the circulation, presentation, or exhibition of any work or production, it is merely a clarification that the Berne Convention does not affect the rights of the governments of member states.[44] Furthermore, the wording of art 5 s 2 of the Draft is plausible, because it governs the supervision and management of publication and dissemination of works. If this provision is regarded as the legal basis for the supervision and management of publication and dissemination of works, then the conclusion can be drawn that the publication and dissemination of performance, sound recordings, and broadcast programmes are not subject to state supervision and management, which would be absurd.

In a word, art 5 of the Draft does not facilitate right holders exercising their rights under the copyright law lawfully, nor does it provide a legal basis for the state supervision and management of the publication and dissemination of works and related subject-matter. On the contrary, it causes some unnecessary confusion and controversy. Therefore, art 5 of the Draft should be deleted. The same applies to art 81 of the Draft, which relates to matters falling within the scope of other laws and hence is superfluous.[45]

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43 See Joint Comments on the American Bar Association Section of Intellectual Property Law and Section of International Law on the Draft Amendments to China's Copyright Law.

44 Article 17 of the Berne Convention.

45 Article 81 of the Draft provides: the party who does not fulfil its contractual obligation or fulfil its contractual obligation not conformity with agreement, is liable according to General Principles

III CONCLUSION

The Draft reorganises the Copyright Law, integrates and amends many provisions, and improves the copyright law to a great extent. The Draft does well in promoting the protection of right holders of copyright and related rights, facilitating copyright trade. Nevertheless, the Draft still has many flaws including those mentioned above, and is far from rigorous and mature. In addition, the Draft leaves many important issues pending by authorising the State Council to regulate for instance the right of communication through the information network, the exploitation of works whose authors are not identified. As mentioned by the NCAC in the Brief Report to the Draft of the Copyright Law of People's Republic of China, this revision is "active and comprehensive",[46] because this revision is not under time pressure as the first two revisions were, the Draft should be amended based on further investigation and research.

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of Civil Law of the People's Republic of China, Contract Law of People's Republic of China and other related laws.

46 Available at: <www.ncac.gov.cn/cms/cms/upload/info/201203/740608/133325053296183838.doc> (last visited on June 4, 2012).