

# Difficult to Formulate and Amend Law:

Thoughts on Launched Third Amendment to the Copyright Law



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The Copyright Law of the People's Republic of China (the Copyright Law), promulgated on 7 September 1990 and entering into force as of 1 June 1991, was amended twice respectively in October 2001 and February 2010. The meeting held on 13 July 2011 for launching the third amendment to the Copyright Law marks the beginning of the arduous work. Work on the study and drafting of the amendment to the Copyright Law has been underway for a decade<sup>1</sup>, going through quite a lot of twists and turns; it is no easy job formulating the Law. The Copyright Law regulates complicated legal relations, but technological developments have overturned the former balance of interests. For this reason, the work on the amendment of the Law is going to be a very tough one. At the initiation of the third amendment to the Copyright Law, the following issues have drawn this writer's attention.

## I. Objective evaluation of the Copyright Law

For 20 years, the Copyright Law has been playing an irreplaceable role in protecting the legitimate rights and interests of copyright owners and in disseminating knowledge and information. However, it is no denying that amendment and improvement of the current Copyright Law is urgently needed as it has lagged behind the development of digital technology. When the Copyright Law is about to be amended, some say that many provisions of the Copyright Law conflict with the principles underlying it; others say that the

Copyright Law has become an obstacle to the development of the cultural industry. For this writer, these comments are unfair. This writer supports the overall evaluation of the Copyright Law made by the leading officials of the copyright administration of China, that is, the Copyright Law has legally ensured the development, use and protection of the resources of knowledge, promoted the economic, cultural, scientific, technological and social developments, built up the soft strength of the Chinese culture, and sharpened the core competitiveness of the nation<sup>2</sup>. A senior judge who has been hearing copyright cases for years has pointed out that the current Copyright Law has set up the basic framework for the copyright law regime, with well-established basic principles and system, providing the basic legal regulations and grounds under or on which the legal relations of copyright could be regulated<sup>3</sup>. This comment is relatively objective and fair. Only when law practitioners stand in awe of laws, show respect for the legislative work done by their predecessors, make law in a scientific and democratic spirit and with an attitude embracing criticism and inheritance is it possible for the amended Copyright Law to better play the role to keep the balance of the public interests.

Objective evaluation of the current Copyright Law is fundamental to the successful amendment to be made to the Copyright Law

## II. Objectives of Copyright Law amendment to be underway

The objectives of amendment of any law are to address issues arising from the social, economic and technological developments and to redistribute and divide the interests among various interest groups. For the launched amendment to Copyright Law in particular, the main issues we are now faced with from the development and use of digital technology, for example, the issue of being "easy to infringe and hard to enforce a right" as a result of the changes in the way

works are used and communicated. However, the new copyright-related issue arising from the digital technology is one to be addressed in the amendment to be made to the Copyright Law, and it is not the basis on which the amendment is to be made. Under the digital technology environment, the cornerstone and basic framework of the copyright system have remained intact. What the legislators should consider are matters of how to protect the interests of creators and distributors of works, further the communication or dissemination of works and information, and spread knowledge for the purpose to improve the welfare of the public at large.

Technically, since only the basic, not the specific, provisions have been set forth with respect to many matters in the Copyright Law, people sometimes are at loss what to do when applying the Law. For this reason, when amendment is to be made to the Copyright Law, work should be done to enhance its operability<sup>4</sup>, make it more predictable, so more effective to resolve disputes and maintain the stability of social relations. All these, seen from the perspective of enforcement, should be the goal to be achieved in the Copyright Law amendment to be underway. However, many have great expectations of the Copyright Law amendment this time. For example, some say that all matters of network infringement are expected to be addressed in the third amendment to the Copyright Law<sup>5</sup>. This may not be the case. It can be expected that the Copyright Law amendment will offer more explicit and detailed legal guidelines in treating network infringement disputes, but it is impossible for all matter to be resolved through the legislation. Some say that the current Copyright Law is to blame for the recession of some industries, such as the declining records industry, arguing that it does not accord producers of sound recordings or video recordings sufficient right and hoping the launched Copyright Law amendment would radically change the situation. This, too, may not be done completely. Generally, some industry declines for many reasons, and the amendment of a law lagging behind the time is just one of them. Factors of technology and enforcement are matters of equal importance.

The objectives of the Copyright Law amendment will follow the guidelines and orientation underlying the amendment.

### III. Several relationship to be addressed in the Copyright Law amendment

To achieve the above objectives of the Copyright Law amendment, following relationship should be fully studied and properly addressed during the amendment to the Law.

The first is the relationship between the Copyright Law and relevant international treaties. China has acceded to the Bern Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention, and fully performed its international obligations to protect the copyright of the nationals of the contracting parties, having met the basic requirements of the international treaties. When amending the Copyright Law, legislators should carefully review the provisions of international treaties, including the mandatory norms and alternative norms thereof, and examine whether the expressions or meanings of relevant terms are not consistent with those of the international treaties to further improve the Copyright Law.

The second is the relationship between the Copyright Law and the fundamental civil laws. Copyright is a civil right; the principle for exercise of the right, elements of infringement and remedies available to the right should all follow the fundamental civil laws, such as the General Principles of the Civil Law and the Tort Law. For that matter, in the course of the Copyright Law amendment, it is difficult for the proposed faultless doctrine for all copyright infringement and application of punitive damages to be accepted by the legislative body as they depart from the fundamental principles of the civil law of China. But copyright has some characteristics of its own; works under protection of the same copyright law have different characteristics as they are of different types. Computer software is such an example. Generally speaking, due to the high costs in its development and its vulnerability to infringement, software should be accorded special protection. It is for this reason that the Chinese Government have formulated and promulgated the Regulations for the Protection of Computer Software. Under this circumstance, regarding the specific characteristics of computer software, to some types of infringement, such as those of commercialisation and infringement in large scale, should apply the doctrine of punitive damages to curb rampant infringement, and meanwhile, experience may be accumulated in grant of sufficient remedies to other types of works.

The third is the relationship between the Copyright Law and the Antitrust Law.

The relationship between enforcement of the IP right and monopoly has been made clear in the Antitrust Law. Article 55 thereof provides: "this Law shall not apply to businesses'

enforcement of their IP rights under the IP laws and administrative regulations, but apply to abuse of the IP rights and acts removing or restricting competition.” The Antitrust Law does not set forth any provisions concerning consequences of abuse of the IP rights that constitutes acts of monopoly or remedies available to businesses suffering from monopoly. However, the Chinese Patent Law has spelt out provisions regarding the matter. Article 48 thereof provides that where the exercise of the patent right by the patentee has been legally determined as an act of monopoly, to eliminate or to reduce the adverse impact of the act on competition, the patent administration department under the State Council may, at the request of an entity or individual that has the condition to exploit a patent, grant it or him a compulsory license to exploit the patent for invention or utility model. A copyright owner’s act or unfair exercise of the copyright, eliminating or limiting competition, may also constitute an act of monopoly. To undo the harm done by such act to market competition, it is necessary to grant compulsory license for exploitation of the work. The EU also have the practice in suppression of acts of monopoly relating to copyright<sup>6</sup>. Considering the relevant provisions of the Chinese Patent Law and EU’s practice, in the amendment to be made to the Chinese Copyright Law should be left room for prevention of monopoly resulting from abuse of the copyright in an effort to maintain the order of market competition. For this reason, it is proposed that a provision be added that the copyright may be compulsorily licensed where abuse of the copyright constitutes monopoly<sup>7</sup> in order to keep a balanced relationship between the Copyright Law and Antitrust Law.

The forth is the relationship between democracy in Copyright Law amendment and addressing of practical issues. To amend, in a democratic way, the Copyright Law, namely by bringing people from all walks of life into full play during the Copyright Law amendment is important to achieve the desired quality of the law amendment. In the course of the third amendment to the Copyright Law, the relevant competent authorities have attached great importance to democracy, and adopted positive measures. The State Copyright Administration have prepared questionnaires and issued them to over 200 institutions, and invited three experts groups to prepare the draft Copyright Law amendment, work that is expected to be done by the end of this year<sup>8</sup>. Practicing democracy in law amendment would make it possible to find, on the one hand, issues to be addressed immediately in the current law, and on the other, gather ideas

and plans to address issues that are likely to come up. However, law amendment done in a democratic manner cannot completely guarantee a satisfactory result thereof because of limitations by various factors. Some practical issues that have drawn most people’s attention and need to be addressed urgently will possibly remain unresolved after the amendment. For example, during the third amendment to the Chinese Patent Law, the matter of “circular lawsuits” in the patent right affirmation procedure<sup>9</sup> was presented by the public to be addressed, and people from different circles proposed that the way of civil litigation, not the current administrative litigation, be used. But, unfortunately, the matter was not resolved in the end in the third amendment to the Patent Law. Therefore, democratic practice in law amendment is important to addressing practical matters; the “centralism” practiced in law amendment, that is, in policy-making, seems even more essential for legislators to truly listen to what people have to say.

The fifth is the relationship between enhanced protection of the copyright and the practical situations in China. Protection of the legitimate rights and interests of copyright owners is one of the aims of the legislation. But the level of protection is a relative concept, which should be assessed by taking account of the concrete practical situations of a country or region. The amount of damages is generally taken as one of the elements showing the level of protection made available. Taking the statutory damages for example, the provision on the maximum amount of statutory damages is set forth in the current Chinese Patent Law, but without specifying the minimum amount thereof. For that matter, some writers have proposed fixing a start point (minimum amount) for damages by setting the minimum amount from RMB 20,000 to 50,000 yuan<sup>10</sup>. Given the low average annual income of the people in China<sup>11</sup> and the provisions on statutory damages in the laws of other countries<sup>12</sup>, for this writer, in respect of infringement of literary or artistic works, RMB 2,000 yuan is a proper minimum amount of damages where a copyright owner chooses for the statutory damages to apply. This amount may cover the relevant costs of litigation of a right owner, and is unlikely to induce a few copyright owners to bring litigation just for making money. In respect of the maximum amount of damages of RMB 500,000 yuan as provided for in the Chinese Copyright Law, this writer does not think it is necessary to increase it to RMB one million yuan (the maximum amount provided for in the Chinese Patent Law). If a copyright owner claims that an infringement has caused serious losses to him

or an infringer has made tremendous amount of money, he should not claim statutory damages. He should rather request to calculate the amount of damages in some other ways.

How to address all these relations in the upcoming amendment to the Copyright Law will be one of the important areas in the amendment now underway to the Copyright Law.

The amendment to the Copyright Law to be underway has drawn wide attention as it involves the interests of authors, users of works and communication organisations, and has bearing on the development of cultural industry and build-up of the soft capacity of culture in China. To this end, the Copyright Law should be amended with full consideration taken of the practical situations in China and with good work done to duly address the various relationship in the amendment. ■

<sup>1</sup> Wang Hanbin, former Vice Chairman of the Standing Committee and Chairman of the Legal Affairs Commission of the National People's Congress, said, when the Draft Copyright Law was under review, that "of all the draft laws reviewed by the Standing Committee of the National People's Congress, the Copyright Law is the most complex as it covers the broadest scope and its review takes the longest time".

<sup>2</sup> Liu Binjie's remark "the launched amendment to the Copyright Law should be oriented towards the era, the world and the future" made at the Meeting starting the work on the amendment to the Copyright Law on 13 July 2011 and published on the Guangming Daily on 25 July 2011.

<sup>3</sup> Chen Jinchuan, Opinions and Recommendations Regarding Amendment to the Copyright Law, at [http://www.chinaxwcb.com/2011-08/11/content\\_226475.htm](http://www.chinaxwcb.com/2011-08/11/content_226475.htm) as last browsed on 1 September 2011.

<sup>4</sup> Ibid.

<sup>5</sup> Zhang Min, Cyber Infringement Expected to Be Curbed in the Third Amendment to the Copyright Law, the Network Guide, on 16 August 2011, at [http://www.chinadaily.com.cn/micro-reading/tech/2011-08-16/content\\_3512835.html](http://www.chinadaily.com.cn/micro-reading/tech/2011-08-16/content_3512835.html) last browsed on 1 September 2011.

<sup>6</sup> See Magill, Joined cases C-241/91P and C-242/91P RTE, and ITP v Commission [1995] ECR I-743.

<sup>7</sup> In China, there had been heated debates on whether to establish the compulsory license system. The system was proposed in the Draft Copyright Law sent for review. The provision did not pass the review by the National People's Congress as its scope of application and the modes of use of works too broad, and limitations too few. See Ge Rong and Ye Chuxuan, Necessity for Establishment of Compulsory License System in China, the Theory and Practice of Library, 2005 (4). For this writer, copyright license should be one of the issues to be addressed in the pre-

sent Amendment to the Copyright Law.

<sup>8</sup> [http://www.sipo.gov.cn/mtjj/2011/201108/t20110818\\_616589.html](http://www.sipo.gov.cn/mtjj/2011/201108/t20110818_616589.html).

<sup>9</sup> According to the statistics issued by the State Statistics Administration, in 2010, the average disposable income of each urban and rural resident was RMB 3,587 yuan.

<sup>10</sup> See "Zhang Kangkang Proposed Revising the Copyright Law as Soon as Possible, the Information Times on 3 March 2011.

<sup>11</sup> See Supra Note 7.

<sup>12</sup> For example, Article 540 of the U.S. Copyright Act provides that for example, Section 504 (c) of the U.S. Copyright Act states that the copyright owner may recover an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just.