Fall 2021

# A Comparative Study of Copyright Protection in China and the U.S, In the Context of U.S-China Trade Disputes

Lin Zhu


# GOLDEN GATE UNIVERSITY SCHOOL OF LAW

**A COMPARATIVE STUDY**

**OF**

**COPYRIGHT PROTECTION IN CHINA AND THE U.S.**

**IN THE CONTEXT OF U.S.-CHINA TRADE DISPUTES**

**LIN ZHU**

**SUBMITTED TO THE GOLDEN GATE UNIVERSITY SCHOOL OF LAW, DEPARTMENT OF INTERNATIONAL LEGAL STUDIES, IN FULFILMENT OF THE REQUIREMENT FOR THE CONFERMENT OF THE DEGREE OF SCIENTIAE JURIDICAE DOCTOR (SJD).**

**MEMBERS OF THE DISSERTATION COMMITTEE**

**Professor Dr. William T. Gallagher**
**Dr. Ifeanyi Innocent Onwuazombe**
**Professor Dr. Chinyere Okpala Chukwuka**

**SAN FRANCISCO, CALIFORNIA**

**FALL 2021**

## ACKNOWLEDGEMENTS

I would like to express my sincere thanks and gratitude to Professor Dr. Christian Nwachukwu Okeke, head of the Department of International Legal Studies at Golden Gate University School of Law, San Francisco, U.S.A, and the distinguished members of my Dissertation Committee: Professor Dr. William T. Gallagher, Professor Dr. Chinyere Okpala Chukwuka, and Dr. Ifeanyi Innocent Onwuazombe, members of the faculty of Golden Gate University School of Law, San Francisco, in the completion of this dissertation, submitted in partial fulfillment of the requirements of the degree of Doctor of Juridical Science (S.J.D) at Golden Gate University. Without their suggestions and directions, this project would not have been successful.

Further, I would like to extend my heartfelt thanks to my family who have been with me all the time.

## ABSTRACT

In the new round of scientific and technological revolution and industrial reform, emerging technologies and the information industry are in dire need of the protection of intellectual property rights. Copyright is viewed as one of the long-standing driving forces for productivity, economic growth, and employment in the US. In particular, copyright-intensive industries play a major role in the US economy and international trade. Therefore, the protection and enforcement of copyright is a crucial part of US legislative policy and US trade negotiation objectives.

A majority of the countries in the world developed copyright law due to its unique legal protection to creators and communicators of science and technology. The US not only established a relatively perfect copyright legal system domestically but also implemented international cooperation that greatly expanded the breadth and depth of copyright protection worldwide.

Intellectual property rights (IPR) are almost central subjects in US-China relations. The debates between the two countries over IPR protection have been more like an endless chess puzzle. It has become a popular topic to compare the two countries to gain a deep understanding of the legal differences and the reasons of disputes in this regard. To a certain extent, the two countries represent the future course of copyright development.

Therefore, this paper attempts to compare the copyright legal system of the two countries by examining the historical development of foreign copyright protection, including domestic legislation and international conventions.

# A Comparative Study of Copyright Protection Between China and the US in the Context of US-China Trade Disputes

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# CHAPTER 1 INTRODUCTION

## 1.1 Background

### *1.1.1 The Role of Copyright Protection in US-China Trade Disputes*

In 2019, China was the third largest goods export market for the US; the US was China's second largest goods export market.[1] Meanwhile, the trade frictions between them have also become more tumultuous. In recent years, the US has maintained a huge trade deficit with China and the gap of the US-China trade deficits has shown an expanding trend.[2] An important reason for the trade conflict is that the US believes that the trade imbalances are caused by China's lack of protection of US intellectual property rights, which are seriously hurting the US market and economy. On one hand, intellectual property protection influences China–US trade relations through US-China trade structures; on the other hand, China–US trade relations may act on the intellectual property frameworks for the same reason.[3]

A trade deficit implies a nation's imports are more than its exports from other countries. From Figure 1, the grey line is evident that the US ran a surplus or a small deficit during the 1960s and 1970s, after which a large deficit (the orange line) began in the 1979 and continued to expand through the 1990s and 2000s, particularly after 2001[4]. Interestingly, US-China formally normalized diplomatic relations and became trade partners in 1979, when the US put forward IPRs with China.[5] Moreover, it was in 2001 when China became part of the WTO. Can this all be a coincidence?

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1 USTR. (2020a). 2020 National trade estimate report on foreign trade barriers. Office of the United States Trade Representative, 99. https://ustr.gov/sites/default/files/2020_National_Trade_Estimate_Report.pdf

2 Yang, Y. (2019). Analysis of China-US Intellectual Property Trade Friction. 2018 International Symposium on Social Science and Management Innovation (SSMI 2018).

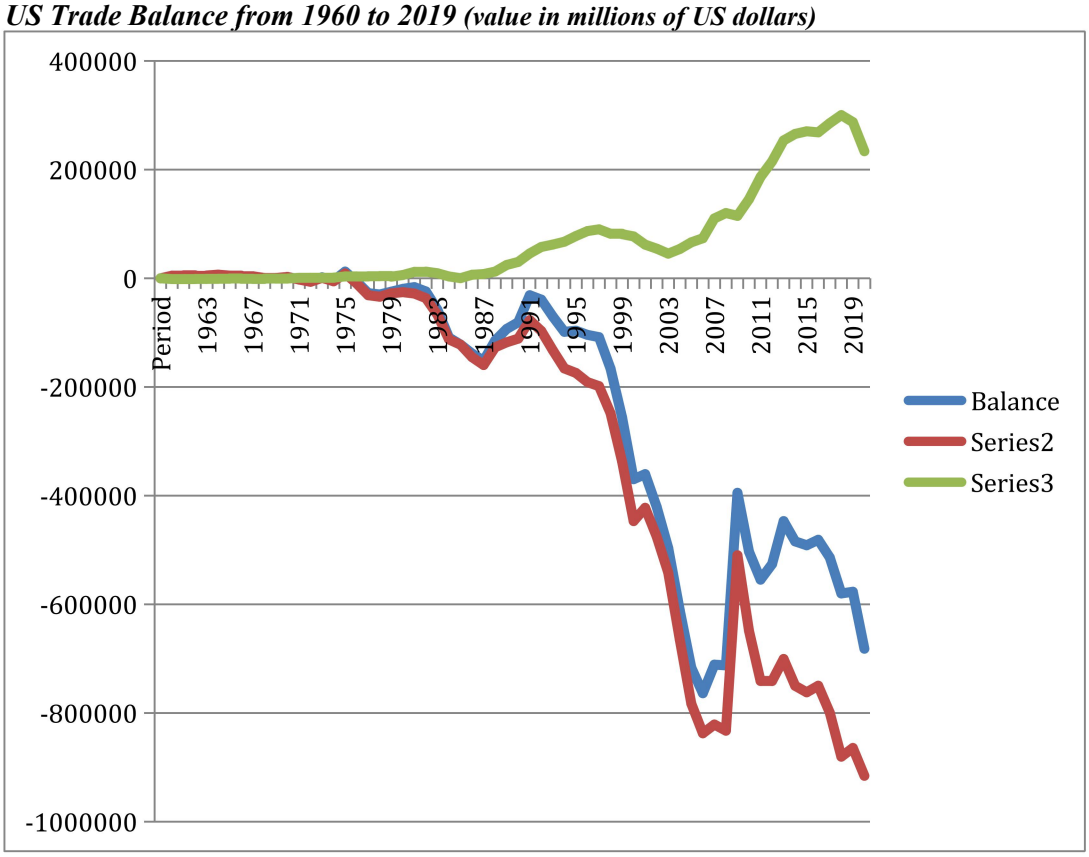
3 Li, W., & Chen, Y. (2020). A study of the influence of intellectual property on China–US trade relations. SAGE Open, 10(2), 1-9.

4 McBride, J., & Chatzky, A. (2017). The US trade deficit: how much does it matter? Council on Foreign Relations, 17.

5 Akhtar, S. (2015). U.S. Trade Policy: Background and Current Issues. U.S. Trade Policy: Background and Current Issues. Library of Congress. Congressional Research Service.

**Figure 1**

***US Trade Balance from 1960 to 2019 (value in millions of US dollars)***



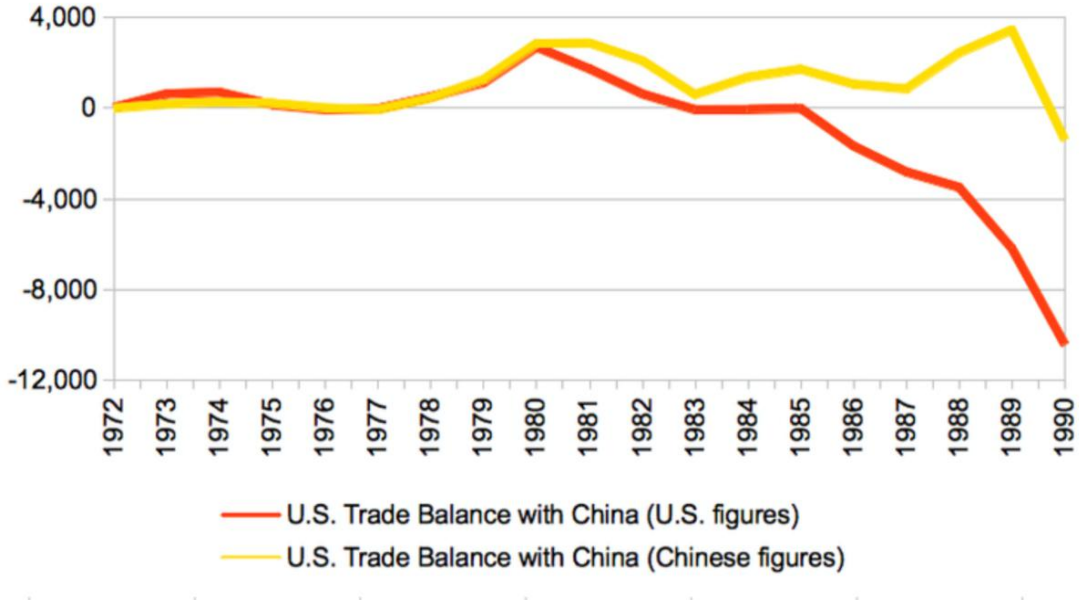

*Source U.S. Census Bureau*

Figures 2 and 3 depict the trends of US trade deficit with China, which are in accord with the entire US trade deficit in figure 1. Due to inconsistent statistical calibers and methods between China and the US, the imbalance that China holds is not as huge as is claimed by the US.[6] Even so, it is important to recognize that the US' largest bilateral trade imbalance is with China by far. Thus, China, arguably, is the most challenging US trading relationship.[7] The question is how China's failure to protect IPR affects US-China trade relations and, in turn, the US economy. In other words, it is helpful to understand how the US pushes China to provide adequate and effective protection and enforcement for US IPRs.

6 Tao, H., & Di, Y. (2018). Is US-China trade really imbalanced: Empirical analysis based on data from the US Bureau of Economic Analysis. Journal of WTO and China, 8(2), 50-66.

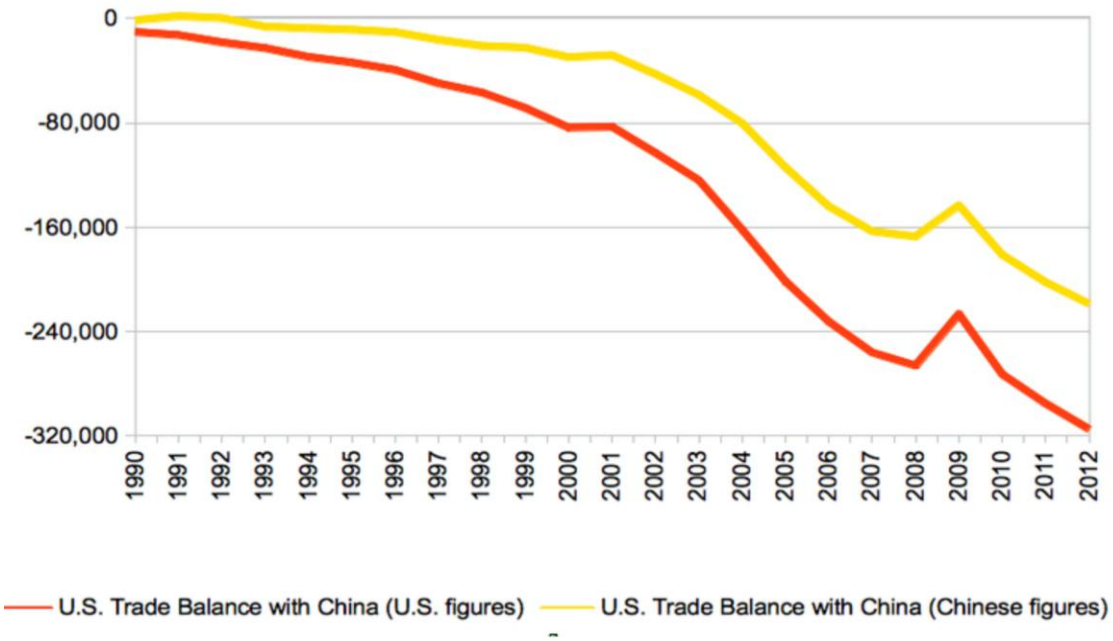
7 Akhtar, S. U.S. Trade Policy: Background and Current Issues.

**Figure 2**
***US Trades Balance with China 1972–1990 (values in millions of US dollars)***




*Source: The Asia-Pacific Journal, June 16, 2013, Volume 11 | Issue 24 | Number 4*

**Figure 3**
***US Trade Balance with China, 1990–2012 (value in millions of US dollars)***




*Source: The Asia-Pacific Journal, June 16, 2013, Volume 11 | Issue 24 | Number 4*

Intellectual property is defined as a valuable business asset. The products and services that must be protected by IP law constituted a significant portion of international trade. Even though a sector of the economy may not be dedicated to

creating IP, it still uses IP or is in some manner supported by industries that are part of the IP-intensive economy.[8] Thus, protection of IP is an international trade issue. In particular, in an interconnected economy like the US, when IP is lost in one sector, the negative effects of this loss are felt throughout.

Further, international trade involves multilateral relationships; protection of IP must closely follow this network.[9] The US market is affected by IPRs in every country upon which it depends for either supplies or sales.[10] For example, a US company depends upon its US copyrights, both to prevent infringement domestically as well as to bar entry of infringing imports. Overseas, that same US company must seek protection against infringers who may market in that country and who may also export their infringing manufactures from that country.[11]

However, different nations provide IP protection at varying levels based on numerous factors. According to the Organization for Economic Cooperation and Development (OECD), the US is a country whose goods are most counterfeited and pirated.[12] Further, China engages in IPR infringement and produces widespread pirated and counterfeit exports to global markets. In 2018, cargo and goods that originated from or came through China and Hong Kong accounted for 87% of all US Customs and Border Protection border seizures of IPR-infringing merchandise.[13]

The market barrier and inadequate protection of foreign copyright have caused the US trade distortion with China for a long time. A report of United States

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8 NBR. (2013). Commission on the theft of American intellectual property. http://www.ipcommission.org/

9 Dam, K. W. (1987). Growing Importance of International Protection of Intellectual Property. The International Lawyer, 21(3), 627-638. https://scholar.smu.edu/cgi/viewcontent.cgi?article=2488&context=til

10 Id.

11 Id.

12 USTR. (2020b). Fact sheet: The President's 2020 trade agenda and annual report. Office of the United States Trade Representative. https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2020/february/fact-sheet-presidents-2020-trade-agenda-and-annual-report

13 Id.

International Trade Commission estimated that an improvement in IPR protection in China to levels comparable to those in the US could lead to an approximate $107 billion gain in US exports and sales to majority-owned affiliates in China.[14] The exports of goods and services by the US to China, including the receipt of royalties and license fees, could increase by an estimated $21.4 billion with such an improvement.[15] The White House argued that China attempted to "access the crown jewels of US intellectual property" and led to widespread losses, amounting between $225 billion and $600 billion annually.[16] Forbes also commented that "IP theft is costing the US as much as $300 billion a year... and China accounts for 50% or as much as 80% of US intellectual property theft."[17]

Copyright, one of the substantive areas of intellectual property law, protects the authors' creative expression of their ideas. Since copyright has an extremely broad application, economic and trade sectors have long depended on copyright protection. Accordingly, the US has divided copyright-related industries into four categories: core, partial, non-dedicated, and interdependent.[18] The 2020 report of the copyright industry in US economy explained, "The core copyright industries are to create, produce, distribute or display copyright materials, including books, newspapers and periodicals, motion pictures, recorded music, radio and television broadcasting, software, and video games. Partial copyright industries are those in which only a certain proportion of the products created qualify for copyright protection, such as fabric, jewelry, and toys. Non-dedicated support industries distribute both copyright

14 USITC. (2011). China: Effects of Intellectual property infringement and indigenous innovation policies on the US economy, No. 332-519. http://www.usitc.gov/publications/332/pub4226.pdf

15 Id.

16 Shi, W. (2020). The cat and mouse saga continues: Understanding the US-China trade war. Texas International Law Journal, 55(2), 187-222.

17 Id.

18 Stoner, R., & Dutra, J. (2020). The 2020 report of copyright industry in the US economy, https://www.iipa.org/reports/copyright-industries-us-economy/

and non-copyright protected materials to businesses and consumers. Interdependent industries include manufacturers, wholesalers, and retailers of CD players, TV sets, VCRs, and personal computers."[19] Thus, the operation of copyright law must be assessed in the context of industry and trade practices.[20]

**Figure 4**
**US Trade with China in 2019** *(In Billions of US Dollars)*

| Type | Exports | Imports | Deficit-/Surplus+ |
|---|---|---|---|
| Goods | $106.4 | $451.7 | - $345.3 |
| Services | $56.5 | $20.1 | + $36.4 |

*Source U.S. Census Bureau*

Figure 4 indicates that the US featured plenty of goods trade deficits, but it experiences mostly service trade surpluses with China. It is known that IPR trade belongs to service trade in terms of classification. Further, copyright trade—one type of IPR service trade—plays a prominent role in the growth of US exports.[21] The sales of US copyright materials continue to expand in overseas markets, ranking it as having the highest volume of copyright trade in the world.[22] For selected core copyright sectors, sales in foreign markets exceeded $218 billion in 2019.[23] The foreign sales of these selected copyright sectors exceeded the foreign sales of other US industries.[24] These consistently positive trends solidify the status of the US copyright industries as a key engine of growth for the US economy as a whole. During the period 2016–2019, the core copyright industries grew at an aggregate annual rate of 5.87%. The average annual growth rate of the entire US economy over the same period was only 2.48%. The core copyright industries grow more than two

19 Id.
20 Nard, C. A., Madison, M. J., & McKenna, M. P. (2014). The law of intellectual property (4th ed.). Wolters Kluwer Law & Business, 5.
21 Stoner, R. & Dutra, J. (2020), Copyright Industries in the U.S. Economy: The 2020 Report of the International Intellectual Property Alliance (IIPA), https://www.iipa.org/reports/copyright-industries-us-economy/
22 Id.
23 Id.
24 Id.

times the rate of the remainder of the US economy and will continue to pave the way for economic growth abroad.

In China, the core copyright industries have a huge gap if compared with the United States. For example, in 2018, China's import account of royalties was $35.59 billion, while the export account of royalties was $5.56 billion.[25] However, in the same year, the US export account of royalties was $12.8 billion.[26] The ratio of 1:2.3 was larger than the gap between the two economic sizes.

Further, the copyright trade in China progressed very slowly. Figure 5 indicates that China imported a total of 12,386 copyright materials in 2006 and imported 18,120 in 2017. In the past 11 years, the annual growth rate of imported copyright products in China was only 3.5%. Moreover, the annual growth rate of imported books, audio recordings, video recordings, and electronic publications was 4.2%, -0.2%, 11.7% and 7.2%, which are much lower than the average annual growth rate of actual GDP in the same period. In other words, it is evident that China has a large space for copyright introduction in the future.

**Figure 5.**
**China's Core Copyright import in 2006 and 2017**

| Import | 2006 | 2017 |
|---|---|---|
| **Books** | 10,950 | 17,154 |
| **Periodicals** | 540 | |
| **Audio recordings** | 150 | 147 |
| **Video recordings** | 108 | 364 |
| **Electronic publications** | 174 | 372 |
| **Software** | 434 | |
| **Movies** | 29 | |
| **TV programs** | 1 | |

*Source: China State Administration of Press, Publication, Radio, Film, and Television*

In sum, China's copyright issues have been dominated trade relations between the US and China for decades. In order to reduce its trade deficit with China, the

25 D.H. & W.Y. (2019). Positively promoting China's copyright trade development, http://theory.people.com.cn/n1/2019/0529/c40531-31108348.html

26 Id.

United States will continue to take service trade as an important point-cut and consolidate its advantage in copyright trades. From the copyright trade perspective, US and China have a complementary relationship. Therefore, it is important not only to emphasize the research of copyright protection but also connect with the characteristics of copyright industrial development.

### *1.1.2 US Trade tools for copyright protection enforcement with China*

China's foreign copyright trade relation is mainly with the United States and it is the first country that had complaints about China's copyright protection.[27] Copyright issues have been central to US-China agreements stemming back to the beginning of normalizing US-China relationships in the early 1980s.[28] Thus, one of the top trade priorities for the US government is to use all possible sources to push China to provide adequate and effective protection and enforcement for US IP rights.[29] The US has several trade tools for improving compliance with copyright norms and addressing infringement of US copyright in other countries. Since not all disputes involve specific settlement mechanisms that are catered for, under trade agreements or treaties, the different policy tools under the disposal of the US government present diverse channels for encouraging copyright compliance and also dealing with violations. The available tools range from multilateral entities to unilateral engagements. In this regard, granting the president authority to negotiate improved IP protection in bilateral agreements and enacting more effective surveys in

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27 Feng, J., (2007). From Beijing to Berne: A history of copyright protection in China. Beijing Review. http://www.bjreview.com.cn/quotes/txt/2007-07/24/content_69996.htm

28 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535.

29 USTR. (2020b). Fact sheet: The President's 2020 trade agenda and annual report. Office of the United States Trade Representative. https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2020/february/fact-sheet-presidents-2020-trade-agenda-and-annual-report

accordance with Sections 301 or 337 against pirates and counterfeiters from foreign countries are powerful implementation measures for US standards.[30]

***(1) Trade Negotiations***

A critical tool that the US employs in enhancing compliance with copyright norms among its trade partners is trade negotiation. These include bilateral trade agreements, regional trade agreements as well as FTAs that the US enters with other nations. The trade negotiations feature exclusive IP chapters that further contain enforcement sections and substantive provisions focusing on patents, copyright, and trademarks among others. Despite the expansive inclusion of provisions for dispute resolution in the trade negotiations, the only instance in which the US has had to handle IP-related disputes is in the case of China. During the establishment of the China-US High-Energy Physics Cooperation in 1979, the US for the first time reiterated its concerns about intellectual property rights as it defined copyright protection obligations as one of the core clauses.[31] Since then, copyright rights have dominated the bilateral agreements establishing trade between China and the US. More importantly, Chinese copyright legal framework was built little by little after its each trade agreements with the US.

In January 2020, the US and China entered into a new trade agreement that was set to redefine China's commitment to the protection of the intellectual property rights of American creations. The new deal was focused on instituting drastic changes to China's IP laws on a broad scale compared to all other bilateral agreements between the two nations. The entire first chapter of the trade deal of 2020 was focused on

30 Dam, K. W. (1987). Growing Importance of International Protection of Intellectual Property. The International Lawyer, 21(3), 627-638. https://scholar.smu.edu/cgi/viewcontent.cgi?article=2488&context=til

31 Li, W., & Chen, Y. (2020). A study of the influence of intellectual property on China–US trade relations. SAGE Open, 10(2), 1-9.

guaranteeing the protection of intellectual property.[32] The implementation of the chapter was aimed at ensuring that US intellectual property laws are adapted to the Chinese environment to provide greater IPR guarantees. China's commitment to the provisions of the agreement is founded on the belief that its economic growth is geared towards transforming the country from an IP consumer into an IP producer.

Therefore, in affirming its commitment to the IP requirements set by the 2020US-China trade agreements, China made amendments to its Patent Law, Copyright Law, as well as Criminal Law and published some draft regulatory measures on its intellectual property. Despite China's commitment to making legal changes to its IP laws, tensions about copyright and other intellectual property rights continue to shape the trade environment between China and the US especially as the USTR continues to cast doubts into China's commitment to implement the changes.

***(2) Special 301 and section 337***

Special 301 is another trade policy tool that the US utilizes in ensuring the protection of copyright by its trading partners. Special 301 is the annual review of the state of IPR protection and enforcement around the world as well as market access for innovators relying on the protection of their intellectual property. China-US relations became even more strained between 2017 and 2020 since the Trump administration invoked a Section 301 investigation into whether China's laws, policies, or enforcements would be unreasonable or discriminatory and be harmful to US intellectual property rights and innovation.[33]

By invoking this mechanism, the US imposed a 25% tariff on Chinese goods

32 Bornstein, S.J., & Albanese, K. (2020, January 21). Impact of the China-US trade deal on intellectual property protection. GT Law. https://www.gtlaw.com/en/insights/2020/1/impact-of-the-china-us-trade-deal-on-intellectual-property-protection

33 House, W. (2017). Presidential Memorandum for the United States Trade Representative. https://www.whitehouse.gov/presidential-actions/presidential-memorandum-united-states-trade-representative/

worth $50 billion in August 2018 triggering a trade war.[34] This was followed by additional tariffs on other goods worth $200 billion. And it was the sixth Section 301 investigation against China that the US has ever launched in history. Four Special 301 investigations took place from 1991 to 1996 and were resolved by IPR protection agreements. After China joined the WTO in 2001, the US has launched another two Section 301 investigations against China.

The rapid economic growth and technological development that China has experienced in the recent past has however emerged as a significant source of conflicts between the national interests of China and the US and their respective copyright protection commitments. In response, the US established a property trade barrier according to Section 337 and following the investigations conducted under Section 301.[35]

Section 337 of the Tariff Act of 1930 can also be invoked as a way of protecting American copyright holders from unfair competition posed by imports that are made by foreign companies that are involved with the production of commodities that infringe on IPRs including copyrights. The US International Trade Commission (ITC) is charged with the adjudication of complaints presented by American companies citing Section 337 violations. In most instances, the remedy available under Section 337 is the issuance of an exclusion order that offers instructions to US Customs to bar all copyright-infringing imports from entering the US market.[36] In other instances, the ITC may give out cease and desist orders against some importers

34 Zuijdwijk, T. (2019). Understanding the intellectual property disputes between China and the United States. CigiOnline. https://www.cigionline.org/articles/understanding-intellectual-property-disputes-between-china-and-united-states/

35 Id.

36 USITC. (2021). Understanding investigations of intellectual property infringement and other unfair practices in import trade (Section 337). https://www.usitc.gov/press_room/us337.htm

or individuals found to engage in acts that violate the terms indicated in the section.

Chinese enterprises, which are seeking international markets, encounter much more cross-national copyright lawsuits and US section 337 investigations. China is likely to suffer greater losses if it does not increase the knowledge and capacity to respond to international disputes.

***(3) WTO/TRIPS DSU***

The WTO/TRIPS DSU is among the major multilateral tools used by the US to settle disputes concerning copyright infringements involving other countries or organizations. The DSU as established under the Marrakesh Agreement allows for the institution of a proper mechanism for the settlement of copyright-related disputes between the US and other countries. Disputes relating to government regulation of IPRs are resolved within the mechanism of the WTO as per the guidelines set forth by TRIPS. Numerous copyright cases involving the US and other nations have been resolved so far following the TRIPS Agreement. The most profound copyright panel report against China was issued on concerns of "piracy on a commercial scale" against China in 2009.

The recent example where the US President Trump filed a charge against China at the WTO on the ground of the Special 301 reports in March 22, 2018, claiming that China's certain measures concerning the IPR protection violate the minimum standards set by Article 3, 28.1(a) and (b) and 28.2 of the TRIPS Agreement.[37] In the other case, China accuses the US of undertaking unilateral measures against some Chinese commodities against its most-favored-nation treatment obligations set forth under the GAAT of 1994. After negotiations and tariff restrictions, the two sides signed the "Phase One Deal" on January 15, 2020, which

37 WT/DS542/1(2018), China-Certain measures concerning the protection of intellectual property rights.

was an official agreement to the rollback of tariffs and renewed commitments on intellectual property[38]. In September 2020, a WTO dispute panel determined that US Section 301 tariffs on imports from China violated WTO rules. Thus far, the three-year trade war between China and the US has come to a halt.

However, it is important to realize is that the US-China trade war is not going to disappear any time soon. On February 20, 2020, the USTR formed the Bilateral Evaluation and Dispute Resolution Office, with input from other US agencies, to monitor China's implementation of its commitments related to the Phase One Agreement.[39]

Therefore, except for the international political situation and social ideology, the flashpoints of the escalated trade war between the two big countries are IPRs issues. Copyright trade is not only a trade activity, but also a way of copyright protection. Positive Sino-US trade relations will bring long-term practical benefits to the US enterprises with investment in China.[40] In other words, resolving copyright disputes with China is also inevitable for the US.

In addition, the US Commerce Department reported that the US trade deficit jumped to $67.1 billion in August 2020, which is the highest level since 2006.[41] It can be demonstrated that higher tariffs alone will not solve the US trade imbalance problem. With the relations between the two countries being asymmetric in that China has a greater dependence on the US, the latter party emerges as more powerful when

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38 Wong, D., & Koty, A. C. (2020). The US-China trade war: A timeline. China Briefing, https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/

39 USTR. (2020c). US-China Agreement Bilateral Evaluation and Dispute Resolution Office seeks input from companies, industry associations, and other interested persons. Office of the United States Trade Representative. https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement

40 Id.

41 Monteiro, A., & Picket, R. (2020). US trade deficit widened in August to largest since 2006. Bloomberg.

it comes to forcing international copyright obligations on the former. Will the trade tools employed by the US still work on international copyright harmonization in the future?

## 1.2 Research Questions

In order to ascertain the best solution, this research attempts to examine the following questions:

### *1.2.1 What is the Influence of US Trade Policy on its Copyright Legislation? How Does it Affect China's Copyright Law?*

First, the United States government combined with economic markets to supervise copyright protection. For example, the US International Intellectual Property Alliance (IIPA) requested economic experts to issue an annual report that accurately revealed the copyright industry's contribution to the domestic economy.[42] It also provided a statistical basis to amend national copyright laws and trade policies. However, the research on the relationship between copyright protection and copyright industry in China is inadequate. Therefore, it cannot provide scientific support and economic analysis for the development of Chinese copyright industry and copyright legislation. Thus, it requires us to examine the copyright issues from the perspectives of Sino-US trade relations.

Second, the US copyright industries have made a significant impact both domestically and internationally. Congress enacted a series of domestic laws on trade and intellectual property since the late 1980s, which have already had a wide range of international impact.[43]

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42 Stoner, R., & Dutra, J. (2020). Copyright Industries in the U.S. Economy: The 2020 Report of the International Intellectual Property Alliance (IIPA). https://www.iipa.org/reports/copyright-industries-us-economy/

43 Id.

In addition, US copyright associations play an important role in the IPR protection. The Association of the American Film Industry, the Association of Computer Software and Services, the Business Software Alliance, the Association of Music Publishers and Recording industry represent over 1,600 US companies. They lobby the government in order to safeguard their interests, which promote the development of copyright laws.

At the international level, the most successful achievement of the US copyright industries is to make the copyright issue a major aspect of foreign trade.[44] Moreover, the US was the prime mover in China's accession to the WTO.[45] In turn, China implemented its first modification of copyright law in 2001. For example, the United States requested consultations with China in 2007 with regard to certain measures pertaining to the protection and enforcement of copyright in China, including matters of inconsistencies with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and unsatisfactory legal sanction against piracy.[46] Consequently, China implemented its second amendment of domestic copyright law and relevant regulations in 2010. As of June 2018, China has acted as the applicant in 12 US-China trade cases and as the respondent in 22 cases. In most cases, China compromised by amending its copyright legislations and international obligations. For example, the third amendment to China's Copyright Law was passed in November 2020, which came on the heels of the Phase One Deal.

Overall, the US used domestic law and international obligations as tools to infiltrate its copyright protection standard to other countries that had poor levels of

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44 Id.

45 Wang, D. (2013). U.S.-China Trade, 1971-2012: Insights into the U.S.-China Relationship. The Asia-Pacific Journal: Japan Focus, 11(24). https://apjjf.org/2013/11/24/Dong-Wang/3958/article.html

46 WT/DS362. (2010). China-Measures Affecting the protection and enforcement of IPR.

IPR protection, like China.[47] Thus, we trace the clues in history and demonstrate the impact of the US copyright industries and trade policy on the evolution of Chinese copyright evolution.

### *1.2.2 With Regard to the Evolution of US Copyright, Which Historical Stage is the Chinese Copyright Protection At? Can "American Model" Prevail in developing country, like China?*

The US copyright legislation has a long history, with development that spans over 200 years. It has put its own house in order and became a model for other countries seeking to protect intellectual property at home and abroad.[48]

For the modernization of the Chinese legal system, the fastest way to catch up with developed countries is legal transplantation. In the Law Dictionary, a legal transplant refers to "the phenomenon that one country voluntarily or passively accepts the legal system or legal concepts of other nations." The legal transplantation theory was introduced to China in the mid-1980s and became popular after 1990, which is when the PRC Copyright legislation began. However, Chinese scholars avoided using this term and instead used terms such as "reference to," "absorption," "adoption," and "introduction." The reason for this choice was that using the word "transplant" may be contrary to ideology and may affect state sovereignty.

In a short span of time, China established a seemingly complete copyright legal structure. Even some Chinese news exaggerated that it took China only 30 years to complete the legal construction that Western nations had spent hundreds of years on. However, these "skyscrapers" collapsed once enforced, since their bases that were rooted in the legal culture and awareness for copyright protection in China were

47 Yang, Y. (2019). Analysis of China-US Intellectual Property Trade Friction. 2018 International Symposium on Social Science and Management Innovation (SSMI 2018).

48 Dam, K. W. (1987). Growing Importance of International Protection of Intellectual Property. The International Lawyer, 21(3), 627-638. https://scholar.smu.edu/cgi/viewcontent.cgi?article=2488&context=til

fragile. At the present stage, the legal environment supporting copyright protection in China remains a problem due to the unique influence of traditional Chinese culture on the recognition of the value of IPRs. To a certain extent, China's inability to enforce copyright laws was caused by the conflicts between introduction and internalization. The key to the success of legal transplantation is the process of localization rather than the object because the laws that were transplanted only have symbolic meanings in judicial practice within a certain period of time. Legal cultural identification is often the complex factor that determines whether a legal transplant law actually works. Legal culture has broad connections with legal systemic traditions and national spirit.

Therefore, it is first important to ascertain the differences in copyright systems between the US and China from the perspective of legal tradition, which requires us to extract the "big picture" from legal system classification and legal education.

Also, people only regard the recent US as the leading IPR advocate, but few know that the United States was an IPR violator in the nineteenth century.[49] Indeed, the US considered itself an importer of intellectual property, and protection for imported works was minimal before. Initially, the United States did not join the Berne Convention, mainly because there were numerous significant differences between the Berne Convention and the US copyright system. Moreover, the US did not agree to provide such a high level of protection of foreign works at that time.

However, what happened in history and how the US went from a leading IPR violator to a leading IPR champion? Next, through historical analysis and comparisons, we attempt to identify the stage at which the current Chinese copyright protection is and whether the "American model" could prevail in China? What are the

49 Peng, M.W., Ahlstrom, D., Carraher, S.M. & Shi, W. (2017b). History and the debate over intellectual property. Management and Organization Review, 13(1), 15-38. https://doi.org/10.1017/mor.2016.53

possible enablers and obstacles to international copyright harmonization refer to US and China's experience?

## 1.3 Literature Review

This literature review is organized into sections that taken together, construct a comprehensive picture of the history of the US and China in terms of legal frameworks and copyright practices, a detailed explication of the historic IPR-related tensions between them, as well as critical commentary from various scholars on the question of IPR compliance in the international arena, and its cultural, historic, and developmental implications.

### *1.3.1 Literature on the Copyright/IPR Issues in the US-China Trade Disputes*

This first section presents critical information to place the question of copyright itself in context, as well as presenting some general context for how IPR legal issues have developed in the present global environment.

It is generally accepted by scholars and business leaders that legal copyright protection is necessary in order to foster creative development, as it allows the creators of innovation to reap the financial benefit of their work.[50] This is a proven belief and can be seen in a number of related economic measures consistently. For example, there is a strong relationship between IPR protection and the amount a company is willing to invest in its research and development, with greater protection being associated with more innovation.[51] However, while copyright is generally considered to be good legal practice that fosters innovation, it does not exist without limits or controversy.

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50 Haveman, H.A. and Kluttz, D.N. (2018), Cultural Spillovers: Copyright, Conceptions of Authors, and Commercial Practices. Law & Society Review, 52(1), 7-40. https://doi.org/10.1111/lasr.12308

51 Goel, R. K. (2020). IPR infringement in the United States: Impacts on the input and output of R&D. The Journal of Technology Transfer, 45(1), 481-493. https://doi.org/10.1007/s10961-018-9708-y

Copyright protects the creator and allows them to reap financial benefits with exclusive rights over manufacturing and distribution. However, it is also noted by many scholars that this exclusivity of copyright must be time-limited; otherwise, it can create monopolies, and prevent further innovation and development.[52]

While copyright law exists as domestic policy within nations, it also focuses on the international arena, which has become more critical in an age of advanced communications technology. International IPR law can be best understood as something that has been led by the most developed nations of the world, as it has been the technology and innovations from those markets that have been most controversial in terms of ownership and protection, as the globalization of the world economy has progressed.[53] In terms of the US-China relationship on copyright protections, IPR laws and debates have all occurred within the context the US leading global trade liberalization, while exporting US innovations and technology, which it has subsequently sought to protect in terms of copyright, specifically by focusing on stronger international IPR protection regimes.[54] This means that the context in which any US-China tensions take place regarding copyright and international IPR is one in which the US has had a leadership position with more to protect, while China has sought to enhance its own development, including through the introduction of new, foreign technologies.

While the world's most developed nations have been the majority exporters of intellectual property, international initiatives to protect IPR have not only taken place

52 Zhang, C. (2016). 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 US. The International Journal of Technology Law and Practice, 33(1), 73-86.

53 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535.

54 Tan, A.T.W. (2016.) Handbook of US-China Relations, Edward Elgar Publishing, p. 133-152.

through bilateral agreements with recipient nations, but also through the establishment of international institutions, complete with their own regulations and norms, intended to bring a level of standardization to the practice of IPR.[55] These institutions include for example, the WTO and the OECD, both of whom have constructed IPR regulations meant to harmonize legal practices for all member nations. At the same time, the role of copyright-related industry cannot be underestimated, particularly those associated with the leading nations. It has been noted that another characteristic of the international IPR protection is the fact that it is most often private business and/or powerful corporate interests that push for the establishment of such regimes, and give shape to them through the pursuit of their own best interest.[56] This is true particularly for nations in which democratic principles are common, and business interests have official channels of access with government.[57] This has been a feature of the business to government relationship in the US, but traditionally is not part of Chinese culture or government relations with civil society.

In total, copyright and IPR protection is an issue that takes place within the context of uneven global development and competing agendas of self-interest that must be negotiated by both providers and recipients of intellectual property. Internationally it has developed alongside increased globalization and closer international relations, including between the US and China, arguably the most important players in the contemporary international arena. Copyright laws have some controversy regarding how they should be best applied, and, as will be revealed in greater detail, this controversy plays a significant role in current US-China IPR-related tensions. However, copyright itself is widely accepted as good practice,

55 Id.
56 Id.
57 O'Connor, S. D. (2002). Copyright law from an American perspective. Irish Jurist, 37(1), 16-22.

and has its roots in democratic theories of communication and communication rights.[58] With this context established, the critical aspects of the US-China relationship regarding IPR can be better understood.

Copyright issues have been central to US-China agreements stemming back to the beginning of normalizing relationships in the early 1980s.[59] It has been noted however, that in the early years, the US was focused on establishing protocols and avenues for communication with China, while bringing them into the global institutions that shape trading and copyright norms.[60] However, by the late 1980s, China's copyright violations were becoming an issue of greater concern for the US, as more American and business entrepreneurs complained to their government about economic losses suffered as a result of China's copyright violations.[61]

In response, the administration of Bush Sr. put China on the Special 301 priority foreign countries report, identifying them as a major violator of copyright.[62] This was followed by an investigation by the USTR, and subsequent threats of tariffs on Chinese imports.[63] In this case, China responded with an updated 1990 Copyright Law, however, as enforcement was still lacking, China was again placed on the Special 301 list in 1992.[64] In reality, as much as China has responded with some initiatives, the tension around this issue has continued to grow, and has almost resulted in trade wars several times, often being avoided by a last-minute signing of a

58 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535.

59 Id.

60 Id.

61 Shi, W. (2020). The cat and mouse saga continues: Understanding the US-China trade war. Texas International Law Journal, 55(2), 187-222.

62 Tan, A.T.W. (2016.) Handbook of US-China Relations, Edward Elgar Publishing, pp. 133-152.

63 Id.

64 Id.

memorandum of understanding (MOU) between the two nations in 1989, 1992, 1995, and 1996.[65]

Despite these ongoing efforts, tensions between these nations around IPR protection have continued into the present millennium, and in some ways have become more heated. In addition to applying the bilateral policies of the Special 301, the US increased its pressure on China in 2007, by taking a formal complaint to the WTO.[66] Two formal issues were raised by the US at that time; the first focused on the refusal of China to protect foreign works that had not been officially approved for distribution by the central government, while the second focused on the failure to establish criminal proceedings for piracy on a commercial scale.[67] In essence, although China had made previous amendments to its copyright laws in order to come into compliance, the US accused it of violating the TRIPS agreement established within the WTO of which China was now a member.[68]

The ruling for this complaint was following released by the WTO in 2009, which was, according to many observers, ambiguous enough to allow both sides to declare some level of victory.[69] In its decision, the WTO agreed with the US in the first case, namely that Chinese legislation was not compliant with TRIPS, and could not make exclusions based on whether or not copyrighted material fit with its own domestic system of approval.[70] At the same time, the WTO declared that the US had

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65 Id.

66 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535.

67 Shi, W. (2020). The cat and mouse saga continues: Understanding the US-China trade war. Texas International Law Journal, 55(2), 187-222.

68 Bohanes, J., & Emch, A. (2009). WTO Panel Report on China IPR: A Mixed Result. China Law & Practice, pp. 19-20, Available at SSRN: https://ssrn.com/abstract=1516907

69 Id.

70 Yang, Y. (2018). Is the US method of challenging China's IP-related practices legally tenable from an international legal perspective? Journal of East Asian Law and International Law, 11(2), 413-444.

presented insufficient evidence that China was ignoring its obligations to pursue criminal charges against commercial piracy.[71]

While this finding represented a major legal challenge within this relationship, the resolution of the WTO complaint did not signal the end of the conflict. This has been made obvious more recently by the actions of the Trump administration after 2017, beginning a new round of investigations under Section 301 aimed specifically at China.[72]

In 2018, the US imposed tariffs of 25% on Chinese goods, while China responded with a counterclaim at the WTO.73 China was again elevated to the priority watch list through the mechanism of Special 301, making it the 14th consecutive year for China to be put on this list.[74]

Scholars point to a number of ongoing issues, such as the growing US trade deficit with China, which has become increasingly linked with discussion of IPR protection.[75] At the same time, China's chronic issues with piracy have continued to agitate American businesses, which have responded with more pressure on their government at home.[76]

The conflict and the tensions between these two nations continue, as scholars and observers assess the significance of various actions. At present there is little agreement on the meaning of recent events for the future of this relationship. Some scholars suggest that the 2017 section 301 complaints represent a turning point for this

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71 Bohanes, J., & Emch, A. (2009). WTO Panel Report on China IPR: A Mixed Result. China Law & Practice, pp. 19-20, Available at SSRN: https://ssrn.com/abstract=1516907

72 Liming, L., Haibo, L., & Yafeng, Z. (2020). Is China's Foreign Investment Policy to Blame for US-China "Forced Technology Transfer" and Trade Conflict? ?-Comment on Trump Administration's Section 301 Investigation of China. China Economist, 15(2), 42-65.

73 Id.

74 Id.

75 Id.

76 Shi, W. (2020). The cat and mouse saga continues: Understanding the US-China trade war. Texas International Law Journal, 55(2), 187-222.

relationship.[77] At the same time, others suggest that it is not substantially different from other chapters in this conflict, and merely represents a natural evolution between the world's two biggest economies, as China continues to grow and adjust its strategy accordingly.[78]

Literatures present China in ways that seem sometimes like two entirely different nations. On one hand, China has undertaken an ambitious program to harmonize its copyright and IPR laws with the powerful nations of the West, with a pragmatic aim of acquiring goods and technologies necessary for its own development. In that pursuit, China has appeared as constantly willing to adjust its own political outlook when necessary, in order to come into compliance.[79] At the same time, it has resisted the pressure from the WTO and associated nations to build a system based more thoroughly on transparency and the rule of law.[80] China joined the WTO, which was viewed positively by foreign nations who hoped it would mean greater and greater harmonization of practices, but in truth, it has resulted in a mixed outcome.[81] Regardless of whatever progress has been made in terms of legislation, observers and scholars agree that China has lagged behind in terms of enforcement to such an extent that it continues to be one of the world's biggest violators of copyright.[82] China has grown in the past years to being the world's second largest economy, yet it still accounts for the majority of copyright infringement and global piracy.[83] After all, it is

77 Yang, Y. (2018). Is the US method of challenging China's IP-related practices legally tenable from an international legal perspective? Journal of East Asian Law and International Law, 11(2), 413-444.

78 Tang, G. (2020). Analysis on the position of copyright trade in the Sino-US trade friction. Publishing Research Quarterly, 36(1), 284-295.

79 Wang, D. (2016). US-China economic relations. In Tan, A.T.W. (Eds.), Handbook of US-China Relations (pp. 133-152). Edward Elgar Publishing.

80 Id.

81 Shi, W. (2020). The cat and mouse saga continues: Understanding the US-China trade war. Texas International Law Journal, 55(2), 187-222.

82 Ellis, K. (2011). China to up IPR enforcement. WWD, 202(108), 1-2.

83 Shi, W. (2020). The cat and mouse saga continues: Understanding the US-China trade war. Texas International Law Journal, 55(2), 187-222.

often recognized that the copyright infringement is often a necessary source of domestic revenue, as well as a source of knowledge that might otherwise be inaccessible.[84]

Scholars note that there has been a theory put forward at different times suggesting that there is something inherent in Chinese culture that contradicts the premise of IPR, and of respecting copyright.[85] Within this line of thought, it is often suggested that in both the Confucianism that was dominant before the mid-20th century and in the communism that followed that time, there is evidence of resistance to the underlying premise of IPR.[86] Both Confucianism and socialism, as the theory suggests, see culture as a public space compromised of a wider social ownership, meaning that private property, particularly for ideas does not have a strong cultural basis.[87] However, it has also been pointed out that the majority of the delays and issues in establishing copyright laws relate to practical matters, and not ideological ones.[88] Therefore, it is possible to suggest that other explanations are more convincing, and rooted in historic truth.

Other scholars suggest that a great deal of China's behavior toward IPR and copyright infringement can be explained in terms of sociological theories, such as by examining these events through a cost-benefit analysis.[89] China, as noted, has been constantly on the watch list for Section 301 for over a decade, and yet trade, even with

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84 Peng, M.W., Ahlstrom, D., Carraher, S.M. & Shi, W. (2017b). History and the debate over intellectual property. Management and Organization Review, 13(1), 15-38. https://doi.org/10.1017/mor.2016.53

85 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535

86 Id.

87 Han, D. (2018). Proprietary control in cyberspace: Three moments of copyright growth in China. Media, Culture & Society, 40(7), 1055-1069. https://doi.org/10.1177/0163443718765929

88 Id.

89 Peng, M.W., Ahlstrom, D., Carraher, S.M. & Shi, W. (2017b). History and the debate over intellectual property. Management and Organization Review, 13(1), 15-38. https://doi.org/10.1017/mor.2016.53

the US's antagonism on several economic and political fronts, China continues to expand.[90] It may be that China has, to some extent, accepted that it will face pressures for anything other than total compliance to a U.S. hegemony, but, as some kinds of infringement seem necessary in order to protect its culture and advance its technological and economic development, this may be viewed as an unavoidable cost to be endured.[91]

Whether it has been a matter of strategy, China's copyright infringement has come at a real cost to American producers, which present a picture of China's IPR infringement in a concerning way. However, scholars also point out that copyright infringement by China can be overly politicized in the US for domestic purposes.[92] From a comparison of developmental path, China has accomplished a great deal in terms of IPR in a short period of time, establishing practices in fewer than 40 years what took the US more than 100 years to do.[93] Furthermore, the United States was a leading violator of IPR during its earlier development.[94]

### *1.3.2 Literature on Comparative Studies between the Copyright System of the US and China*

Bringing nations together into a harmonized set of norms for trade and interaction is generally a complex task, most often because of the substantial differences they tend to have in terms of culture, ideologies, history, laws, and the

90 Zhang, C. (2016). 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 US. The International Journal of Technology Law and Practice, 33(1), 73-86.

91 Tang, G. (2020). Analysis on the position of copyright trade in the Sino-US trade friction. Publishing Research Quarterly, 36(1), 284-295.

92 Tan, A.T.W. (2016.) Handbook of US-China Relations, Edward Elgar Publishing, pp. 133-152.

93 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535

94 Peng, M., Ahlstrom, D., Carraher, S.M. & Shi, W. (2017a). An institution-based view of global IPR history. Journal of International Business Studies, 48(1), 893-907

philosophies that underlie such notions. This is particularly true for nations from different cultural regions of the world, such as the US and China. But we can explore the legal roots of copyright in both nations, and the legal histories that have shaped them in the present context.

Copyright law has its foundation deep in the social, political, and economic thinking of the western liberal democracies, of which the US is perhaps the world's leading example. It is noted that foundational thinkers such as Adam Smith, who commented in his own works on the value of copyright to promote innovation and public good.[95] The history of copyright and IPR legislation in the US is a linear history that originates in early Western thought, predating the creation of the US itself.[96]

It is not surprising then, that copyright provisions were included in the U.S. Constitution, and that these provisions were copied almost directly from a pre-existing British law referred to as the Statute of Anne.[97] The provisions for copyright established in the US Constitution remained the single authority for copyright in the US until the Copyright Act of 1909.[98] Again, this one set of provisions would remain the single federal authority for copyright in the US for several decades, being replaced with a modernized set of regulations only with the establishment of a major Copyright Act in 1976.[99] The Copyright Act of 1976 was a major piece of legislation, and it marked the inclusion of newer technologies, such as computers and computer software, and the photocopier, which was coming into popular use and creating new

95 Zhang, J. (2014). The tradition and modern transitions of Chinese law. Springer.

96 Zhang, C. (2016). 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 US. The International Journal of Technology Law and Practice, 33(1), 73-86.

97 O'Connor, S. D. (2002). Copyright law from an American perspective. Irish Jurist, 37(1), 16-22.

98 Id.

99 Id.

circumstances in which copyright rules might apply.[100] Further, it created a list of media that could qualify for copyright protection without needing to register the work; once published, copyright rules would apply.[101] In general, much of the legal acts, steps, amendments, and changes made over time can be attributed to new technologies, and innovations which result in new media, or new methods of accessing existing media.[102] With a few major turning points at which new legislation was created in order to bring laws into line with changing times.[103] The US began to build a foundation for establishing rules and enforcement policies with foreign nations and trading partners, as the need for such bilateral policies grew.[104] The Trade Act of 1974 that laid the foundation for the Copyright Act to follow, also created the sometimes controversial Section 301, which gave the US the power to identify nations that were guilty of copyright infringement, and subsequently to put various sanctions and tariffs on those nations in order to pressure them into compliance.[105] Throughout the 1980s, further legislation was enacted in order to strengthen these earlier initiatives, such as the 1988 Omnibus Trade and Competitiveness Act, which created an amendment known as Special 301, allowing the US government to establish a "priority foreign countries" list, which singled out the most serious offenders for intervention, linking trade with their compliance with IPR rules.[106] These provisions

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100 Diaz, G. C. (2016). The text in the machine: American copyright law and the many natures of software. Technology and Culture, 57(4), 753-779.

101 Safner, R. (2016). The perils of copyright regulation. Review of Austrian Economics, 29(1), 121-137. https://doi.org/10.1007/s11138-014-0293-5

102 Diaz, G. C. (2016). The text in the machine: American copyright law and the many natures of software. Technology and Culture, 57(4), 753-779.

103 Id.

104 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535

105 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535

106 Id.

in section 301 would go on to be applied many times to China, as discussed in the above section.

The path for the US toward IPR legislation would continue to expand toward a more integrated global initiative throughout the 1980s as both bilateral agreements and legislation would be strengthened, and greater harmonization with other nations would occur.[107]This period marks the beginning of a concentrated effort toward global institutionalism by the US, and other leading nations. This can be seen in the formation of the expansion of the WTO, and the 1994 creation of the TRIPS[108] binding trade and IPR protection into a more coordinated international regime. In terms of its own capacity to respond to trade and copyright issues internationally, the US has developed long-standing and powerful domestic institutions with a clear mandate for addressing grievances, such as the USTR.[109]

In observing this early establishment of copyright protection in America, it is also critical to note some key characteristics as to how the American experience has proceeded. First, it has been noted that legal processes regarding copyright in the US have often followed from the informal establishment of social norms and legal traditions.[110] In this sense, the process may be considered to follow a natural path of development that has occurred over time. Second, the process through which copyright law has been developed in the US has also followed processes associated with a democratic system, meaning that non-governmental actors in the society, primarily businesses with intellectual property to protect, have been central not only in pressuring the government to enact copyright laws, but also in shaping the content

107 Tan, A.T.W. (2016.) Handbook of US-China Relations. Edward Elgar Publishing. 133-152.
108 Id.
109 Id.
110 Haveman, H.A. and Kluttz, D.N. (2018), Cultural Spillovers: Copyright, Conceptions of Authors, and Commercial Practices. Law & Society Review, 52(1), 7-40.
https://doi.org/10.1111/lasr.12308

and limits of those laws.[111] A third critical characteristic of the US experience of copyright protection relates to changes that have taken place in the US orientation toward copyright as the nation developed economically. European initiatives in international copyright protection can be seen as early as the late-nineteenth century, with the formation of the Berne Convention for copyright protection in the 1880s, which the United States chose to not join or to adhere to.[112] In fact, the early constitutional provisions for copyright protection in the US offered protection to domestic and national producers only, while holders of foreign copyrights had no protection in the US whatsoever.[113] So, in the nineteenth century, America was considered to be a major violator of copyright from outside its borders, specifically because at the stage of economic development that America was experiencing at that time, accessing copyrighted innovations and ideas without paying for them was in America's self-interest.[114] In fact, the 1909 Copyright Act, which formally extended IPR to foreign nationals, is considered by many legal experts to be an act of international compliance the US was willing to undertake only when it became more economically advantageous to it, owing to a different stage of development.[115]

The role the US has established as an innovator of critical IP and a provider of innovations to other nations through trade has given it a position of advantage, which helps explain its relatively simple and linear path toward greater regulation. Throughout the past decades of expanding globalization, the leading nations of the

111 Han, D. (2018). Proprietary control in cyberspace: Three moments of copyright growth in China. Media, Culture & Society, 40(7), 1055-1069. https://doi.org/10.1177/0163443718765929

112 O'Connor, S. D. (2002). Copyright law from an American perspective. Irish Jurist, 37(1), 16-22.

113 Tan, A.T.W. (2016), Handbook of US-China Relations. Edward Elgar Publishing. pp. 133-152.

114 Peng, M., Ahlstrom, D., Carraher, S.M. & Shi, W. (2017a). An institution-based view of global IPR history. Journal of International Business Studies, 48(1), 893-907.

115 O'Connor, S. D. (2002). Copyright law from an American perspective. Irish Jurist, 37(1), 16-22.

world have been able to "proactively shape IPR regimes" to fit with their own desires, as technology, trade, and investment patterns have changed.[116] This can be seen in the initiatives at establishing copyright within the digital realm and cyberspace, something that has occurred through step-wise amendments, coordinated specifically with US industries who are the innovators in this space.[117]

The chronology of US copyright legislation therefore can be understood in terms of a series of coordinated steps toward stronger IPR protection, based on responses from external changes, such as technological innovations, and changing global trade patterns. At the same time, the US has been able to maintain a position of leadership and power, maintaining great influence both through bilateral agreements and policies, as well as the expansion of global institutions.[118]

In contrary, China's experience with copyright legislation has occurred within a context of unequal development, and the importing of laws and traditions from a very contrasting cultural background. China's path can be understood by considering the necessity to absorb and adapt to Western laws and practices, while trying to make those laws fit within a Chinese political framework. As a result, China's progress is much less linear, and may appear to the outside observer as sometimes contradictory.[119] For example, unlike the US, China does not have a history of protecting or promoting 'free speech' within its legal or social traditions, meaning that, unlike the US, civil actors have not played a role in shaping China's laws, even when

116 Tan, A.T.W. (2016). Handbook of US-China Relations. Edward Elgar Publishing. 133-152.

117 Han, D. (2018). Proprietary control in cyberspace: Three moments of copyright growth in China. Media, Culture & Society, 40(7), 1055-1069. https://doi.org/10.1177/0163443718765929

118 Shi, W. (2020). The cat and mouse saga continues: Understanding the US-China trade war. Texas International Law Journal, 55(2), 187-222.

119 Zhang, C. (2016). 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 US. The International Journal of Technology Law and Practice, 33(1), 73-86.

they seem to represent the rights of the people in some way.[120] Regardless, overall, China demonstrates a willingness to be pragmatic, and to work consistently toward integration with the West in terms of IPR regulation and trade, while protecting what it sees as its own national interest, which sometimes conflicts with the process of global integration.[121]

The history of China, in terms of copyright, economics, and the formation of modern legislation is a clear exercise in contrast when compared to the United States. Although from a historical point of view there are many important chapters in China's history, for the purposes of the present discussion it can be roughly divided into the dynastic period before the early 20th century, and the period of modernization that began in the early 20th century.[122] In the dynastic period, laws were in many ways practices established by different emperors that were handed down between rulers and dynasties without modern forms of legal scrutiny or recourse.[123] Built upon a myth of divine order, laws were 'autocratic codes', that could be created and applied in a mostly arbitrary fashion by leaders, and punishments could appear as random and without modern notions of jurisprudence.[124] When the gunboats of the newly industrialized nations of the world infiltrated Chinese waters and began imposing the will of foreign powers, a shock set upon China, and inspired a radical and rapid need to modernize, and to develop modern ideas of legality.[125] This began the period of time, starting in the early 20th century, in which China became a modern state, and formulated a modern system of laws, including those associated with copyright.

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120 Id.

121 Tan, A.T.W. (2016), Handbook of US-China Relations. Edward Elgar Publishing. 133-152

122 Zhang, C. (2016). 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 US. The International Journal of Technology Law and Practice, 33(1), 73-86.

123 Id.

124 Id.

125 Id.

Han (2014) also identifies four major themes that have given shape to the chosen path of copyright regulation in China. These include the notions of learning and absorbing practices from the West. The second involves questions of whether copyright is a good fit with Chinese culture, or if there is a tradition within both Confucian and socialist thinking that is incompatible with copyright. Third, there are issues associated with tension and direct pressures from the US; and fourth, there is the role of private businesses, both inside and outside China attempting to shape its IPR regulation.[126]

The evidence of these themes can be seen from the beginning of the first Western incursions. Under increasing pressure from both external and internal forces, the Qing dynastic rulers attempted to respond to the shock of foreign intrusion in a number of ways, including through the creation of copyright legislation.[127] These first initiatives were reportedly in response to pressures from Chinese businessmen who suddenly found themselves under great pressure and losing money to foreign interests in their own nation for the first time and were attempts to use copyright as a form of protection for Chinese business.[128] The willingness to move forward into uncharted territory can be seen throughout the early decades of changing and uncertain leadership as well, with three different attempts made at establishing western-style copyright legislation in China between 1910 and 1949.[129]

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126 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535

127 Zhang, J. (2014). The tradition and modern transitions of Chinese law. Springer.

128 Zhang, C. (2016). 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 US. The International Journal of Technology Law and Practice, 33(1), 73-86.

129 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535

The collapse of the Qing Dynasty was followed by some years of uncertainty in leadership for China, which ended by the middle of the 20th century as the CCP finally established itself as China's government.[130] But, in the early years of this regime China was generally isolated from the rest of the world. While the 1980s witnessed a change in program for the US in terms of greater global integration, the same can be said for China. Under the leadership of Deng Xiaoping, China began a program of looking outward, and attempting to normalize relations with the US for the purposes of trade and its own developmental path.[131] The importance of copyright had already been impressed upon its leaders, and the CCP examined copyright law in order to promote trade and to create an avenue for Chinese patents.[132] Between 1979 and 1992, UNESCO representatives made several visits to China and began advising it on copyright practices.[133] At first, several ministries within the Chinese government raised serious concerns, noting that, once such a law came into practice, China would suddenly face enormous payments that needed to be made to foreign copyright owners for textbooks, and other copyrighted material necessary for its scientific development.[134] For practical reasons associated with unmanageable costs, the law was stayed and did not pass until the early 1990s when pressure on China finally became too great.[135] In the same time period, China joined World Intellectual Property Organization (WIPO), one of several rising global institutions that sought to standardize practices.[136] The benefits of this endeavor were experienced by China

130 Id.
131 Id.
132 Id.
133 Id.
134 Wang, J. (2015). Development of hosting ISP's secondary liability for primary copyright infringement in China – as compared to the US and German routes. *IIC - International Review of Intellectual Property and Competition Law*, *46*(3), 275-309. https://doi.org/10.1007/s40319-015-0325-0
135 Tan, A.T.W. (2016), Handbook of US-China Relations. Edward Elgar Publishing. 133-152.
136 Wang, J. (2015). Development of hosting ISP's secondary liability for primary copyright infringement in China – as compared to the US and German routes. *IIC - International Review of*

almost immediately, as the WIPO established Intellectual Property teaching and research programs at various Chinese universities.[137] China joined the WTO in 2001, obliging it to bring many of its laws into alignment with global and US practices.[138]

It has not been lost on scholars that this situation that China faced in the 1980s was very similar to the choices America faced in the nineteenth century, at which time the US also delayed its compliance with international copyright practices for similar reasons.[139]

However, even in this pursuit there has been conflict and controversy, particularly over the idea of censorship.[140] China faced an enormous rise in domestic IPR lawsuits, with over 60 000 being filed in 2011 alone.[141] These are issues unique to China, and a path of rapid integration of a system of laws and practices that do not have a traditional place, and therefore can present unexpected events such as this. China has attempted to create a legal framework from the West and to integrate it into their own developing system, which has also had the obligation to stay true to Chinese communist principles.[142] As a result, progress seems uneven, and at times contradictory.[143] For example, in contrast to the US in which copyright laws developed through a process involving civil actors and business leaders pressuring

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*Intellectual Property and Competition Law*, *46*(3), 275-309. https://doi.org/10.1007/s40319-015-0325-0

137 Id.

138 O'Connor, S. D. (2002). Copyright law from an American perspective. Irish Jurist, 37(1), 16-22.

139 Shi, W. (2020). The cat and mouse saga continues: Understanding the US-China trade war. Texas International Law Journal, 55(2), 187-222.

140 Tan, A.T.W. (2016), Handbook of US-China Relations. Edward Elgar Publishing. 133-152.

141 Id.

142 Zhang, C. (2016). 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 US. The International Journal of Technology Law and Practice, 33(1), 73-86.

143 Liming, L., Haibo, L., & Yafeng, Z. (2020). Is China's Foreign Investment Policy to Blame for US-China "Forced Technology Transfer" and Trade Conflict? China Economist, 15(2), 42-65.

politicians, Chinese copyright law has been an exclusively 'top-down' process.[144] Laws in China, in fact, are created almost exclusively through a process involving ministries and different governmental organs, and do not follow the patterns associated with the democratic pluralism of the West.[145]

### *1.3.3 Gaps and new things*

A review of the existing literature reveals that while scholars have expressed remarkable interest in considering the impact that bilateral and multilateral trade and investment agreements have on the harmonization of IPR protection laws, there are apparent conceptual gaps in the explanations of how compliance can be possibly enhanced.

However, while the legal steps and the related nuances of copyright issues between the US and China are well explored in the research, a gap exists in terms of understanding the exact influence and meaning that copyright has within the context of modern culture in China. While many scholars and observers are critical of China's issues with IPR non-compliance, other scholars suggest that copyright law is not fully understood in terms of its critical role in building new relationships of cultural production and encouraging domestic culture industries.[146] Copyright issues also relate closely to questions of cultural commodification, and scholars suggest that international copyright laws should be more responsive to the needs of changing global circumstances.[147]

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144 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535

145 Id.

146 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535

147 Id.

Besides, since most studies explaining the impact of international trade on IPR law harmonization focus on the US trade policy[148], there is an apparent gap in the consideration of how international trade, as viewed from the perspective of developing nations means for the prospects of IPR harmonization. While the most notable focus is on the impact of incorporating IPR protection in bilateral and regional trade and investment agreements and what this means to perceptions of US hegemonic influence on other countries, scholars have failed to establish the vested economic interests of developing nations that are brought to the table during trade and investment negotiations with the US mean for the efforts aimed at harmonizing IPR protection law.

Another gap in the current literature concerns prospects of future Sino-US relations considering the rapid changes in China's economic status and position in global geopolitics. The trade war witnessed recently between China and the US was mostly fueled by accusations of IPR infringements by China. Yet, China and the US were forced by their ever-growing economic dependence to renegotiate and sign a new trade deal that intensively emphasizes the commitment of China to revamp its commitment to IPR protection.[149] However, as China's position in the economic world is changing rapidly and its current status as a consumer of intellectual goods shifts towards becoming a producer of economic goods, it is not apparent what this would mean to the US's approach of using trade policy tools to enforce compliance as well as the reaction of China to the IPR compliance pressure from the US. An overview of China's system in a vacuum would not be entirely instructive as the system was only amended in 2021. While it remains to be seen how successful this

148 Wasserman Rajec, S. R. (2020). The harmonization myth in international intellectual property law. Arizona Law Review, 62(3), 735-784.

149 Mak, T. (2020). China update – US trade agreement. Tee & Howe. https://www.mondaq.com/china/trademark/949988/china-update-us-trade-agreement

project will be, it is useful to compare this copyright scheme to the one that exists in the United States. If there are enough similarities, this could bode well for the future of China's copyright protection laws.

The purpose of this review is to outline the critical nuances in the current global arena of IPR, particularly in regard to the contentious relationship between the US and China. In total, this discussion presents a comprehensive picture of the history of western ascendance to a position of global power, and the ways that nations like China have had to respond in order to pursue their own success on an uneven modern playing field. The resulting tension in copyright protection thus reflects longstanding political and economic grievances.

This discussion brings several issues into focus, including jurisprudence, legal tradition and legislation history, as well as issues of culture, both in terms of copyrights and the international copyright harmonization.

**1.4 Research Methodology**

In the previous introduction, I presented the background to the topic and supportive literature reviews. The following section of this chapter is to outline the research methodology used for this dissertation. Methodology refers to more than a simple collection of approaches under which rational and logical assumptions motivate a certain study in relations to the systematic way. It is the overall approach to analyzing about a topic and particular issues, including the research philosophy, design and material collection procedures. This dissertation has multiple perspectives that consist of primary and secondary sourced research. In particular, the research methods include historical study, comparative study, case study, institutional structure study, and literature review study.

### *1.4.1 Historical Study Approach*

Historic study is a method to research the facts that happened in the past, collect and reconstruct data through a systematic organization, in order to deeply understand the past and the present with a scientific attitude and to predict the future in a more informed way. By critically analyzing both Chinese and US legal tradition and philosophy, the article tries to establish a theoretical foundation and pave the road for the following discussion of copyright development. In addition, by ordering the history of copyright legislation and policy transforming, the dissertation attempts to assess contemporary US-China debate on copyright and suggests possible future directions.

This research used two kinds of channels for collecting data, including library research and official websites. Previous documents that demonstrated the impacts and outcomes of copyright evolution could be found in the library database. The terminology like “Section 301” is explained clearly by the Trade Act of 1974. The regulatory processes for protection intellectual property by the USTR and by the WTO could be found in official websites.

### *1.4.2 Comparative Study Approach*

Comparative study, as a kind of research technique, compares the characteristics of two or more things in order to find out the similarity and difference between them. This analysis reduces the challenge presented by interpretation of a foreign law and provides an understanding of domestic law from an outsider’s perspective.

The reason for the adoption this method to this paper is that the United States, as the leader of intellectual property protection in the world today, has exerted a huge influence on the development of international intellectual property and the direction of

global industrial trades. Through comparative study, this dissertation explores the general rule and special rule between US and China and provides useful reference for the future development of copyright in China. In addition, the tension relationship between China and the United States is also closely related to intellectual property disputes. Through a comparative study of the copyright policies, legal documents and enforcements of the two countries in the same period, we can find out the specific gaps and disputes between them. Also, by comparing and studying the documents of the two countries in different periods, we can find the development trend of the two countries and know-how and to what extent the US affect Chinese legal evolution and copyright reform.

### *1.4.3 Case Study Approach*

A case study is a research approach that is used to deeply explain and explore events and complex issues in the real-life contexts. In this dissertation, the case study is approached in the analysis of judicial enforcement of copyright law and public awareness of copyright protection. In addition, some data are summarized from the US-China IPR dispute cases in WTO DSM.

Cases can be found in Westlaw, Lexis-Nexis, IP law textbooks, and China Judgments online. In addition, Chinese judicial guidance cases issued by the Supreme People's Court are treated as primary resources.

### *1.4.4 Literature Study Approach*

The literature study is a kind of research approach that is based on organization and analysis of the previous and present literature. In this article, this mainly includes copyright legal documents and policies of both countries. The range encompasses the origin of copyright to the current digital copyright challenge. The main sources of information are legislative documents, state policy guidance,

government agencies' work and survey reports, and statistics published by relevant copyright industry associations. Chinese sources also include the Intellectual Property Yearbook from the State Copyright Office.

**1.5 Organization**

This dissertation attempts to study the copyright legal system of China and the United States from the perspective of comparative law in order to identify common ground while revealing differences and to recognize the copyright disputes and relations between China and the United States. The remainder of this paper is organized in the following manner:

Chapter 2 provides a comprehensive comparison of legal systems between the US and China from the perspective of legal family. It mainly discusses the historical evolution of the legal traditions and demonstrates the general features of two different legal systems in order to display a macro impression of them. Further, it discusses the theoretical value of copyright protection in order to justify its existence.

Chapters 3 and 4 respectively address the legislative process of both countries from the view of historical development. Further, the evolution of copyright legislation is examined from the perspective of the following six aspects: (1) The objective and scope of copyright protection, (2) the duration of copyrights, (3) the contents of copyright protection, (4) moral rights protection, (5) national treatment, (6) copyright industry and trade development. Moreover, this study analyzes the attitudes of both countries toward fulfilling international obligations by referring to the international copyright treaties in order to reveal the influence of international copyright development over US and China as well as the legal transplantation process of Chinese copyright law.

Chapter 5 analysis the current substantive copyright rules in the US and in China to see if China's new 2021 copyright scheme will bring it closer to the tradition of western democracies in promoting copyright protections or if China is determined to forge its own path in this area of the law. Such an analysis will provide clues as to what individuals and businesses may expect as they consider their relative rights in both countries in the near future.

Chapter 6 focuses on the issue of copyright enforcement in both countries, including the identification of copyright infringements and the remedies for them. Specially, this chapter tries to make a vertical comparison of the copyright enforcement in both countries through the following three parts: (1) judicial enforcement, (2) administrative enforcement, and (3) social and industrial support for copyright protection.

Chapter 7 provides the conclusion to this dissertation as well as suggestions and directions for future development of copyright law in China.

# CHAPTER 2 AN OVERVIEW COMPARISIONS OF THE US AND CHINESE LEGAL SYSTEMS

## 2.1 Introduction

Comparative law involves comparing the law of one country to that of another in order to understand how the two bodies are similar or different and to find explanations for their existence.[150] Comparative analysis, like a bridge, provides insight and perspective for us so that we could better self-reflect critically about our own legal system,[151] as exposure only to a single legal system can be insulating and distorting. By studying the legal tradition, it can be identified why these rules are formed in the manner that they are, how they function, and how they influence the culture in turn. Only then can a panoramic worldview of law be obtained.

Moreover, not all law is external or readily identifiable on the surface. The legal culture of one country is often formed and regulated by the non-written communication. For example, the legal norms in China are still regulated more by the teachings of Confucius or other traditional powers. Therefore, we have to mention another term in comparative law—"legal family". No two nations have the same legal systems, but they may have systems that belong to one legal family.[152] The overall

150 Eberle, E. J. (2007). Comparative Law. Annual Survey of International & Comparative Law, 13, 93-102.

151 Id.

152 Bowal, P., & Kirsch, A. (2010). The world's legal systems. Law Now, 35(2), 23-27.

legal family contains the main idea of historical relationship that governs different systems of law.[153]

By grouping, the problematic diversity of the world's legal systems is simplified. It is useful to lower the knowledge threshold of foreign laws, particularly because the legal systems concerned are very different from each other. In addition, statutory law changes at a fast pace, but "deep-structure" knowledge of law on the legal traditions changes slowly, such as the concept of legal source, doctrine on the use of legal sources, and the core content of legal concepts. Legal families are formed by such "typical characteristics."[154]

Nowadays, most countries in the world mainly follow two legal families: common law tradition or civil law tradition. The civil law family, also called the Romano-Germanic system, originated from the European continent during the twelfth century.[155] It is mainly based on ancient Roman laws and is primarily developed in the form of statutory law. Colonization also encouraged its expansion throughout the whole Continental European countries, such as France, Germany. Subsequently, Russia, Japan, and China adopted civil law systems. The common law family, also called the Anglo-American law system, is linked to the English crown, and applied as a system to British colonies, such as Canada, the United States, Australia, New Zealand.[156]

Here, another question has to do with the manner in which the classification of legal systems is transmitted or developed. As mentioned earlier, colonization is one

153 Husa, J. (2001). Legal families and research in comparative law. Global Jurist, 1(3), [i]-12.
154 Id
155 Gariepy, R. (1984). The major legal systems. Resource News, 8(6), 4-4.
156 Id.

kind of passive legal transplantation. As Alan Watson described, legal transplantation is "the moving of a rule or a system of law from one country to another, or from one people to another."[157] This usually implies the digestive and absorptive process that occurs in defining the legal concept, legal norms, legal principle, and legal system. For non-statutory countries, this may also include international practices and international precedents. However, this adoption is a complicated and lengthy process that entails the introduction of foreign legal models, responses to local resistance, and repeated negotiations among the various stakeholders."[158]

Legal transplantation can achieve results in a short time and ultimately decrease costs in learning international conventions and universal procedures in different countries. Also, the incomplete market economy and imbalance of legal development forces some developing country like China to carry out legal transplantation, especially from US and Japan. For example, the rule of protecting private property is to some degree an introduction of the US law.

The differences between legal systems are not only caused by legal methods and legal techniques, but also exist due to legal values and legal mentalities. It is actually the differences in legal spirits and legal values that distinguish traditional and modern and developed and underdeveloped legal systems.[159] It is easy to transplant individual parts of the laws from another legal system, but how to implement them are

157 Zhuang, S. (2005). Legal transplantation in the people's republic of china: response to Alan Watson. European Journal of Law Reform, 7(1/2), 215-236.

158 Yu, P. K. (2010). Digital copyright reform and legal transplant in Hong Kong. University of Louisville Law Review, 48(4), 693-770.

159 Zhuang, S. (2005). Legal transplantation in the People's Republic of china: response to Alan Watson. European Journal of Law Reform, 7(1/2), 215-236.

crucial. Therefore, we should not be focused on one single law of a given period since legal transplantation is a massive project. Rather, we should make corresponding legal culture, circumstances, and the legal framework to make sure that the transplanted law can perform successfully.

Similarly, every country's copyright legal structure has evolved in response to their historical, political, technological, economic and cultural contexts. Thus, a comparison is conducted between copyright law in China and the United States from the perspective of legal families, including sources of law, legal culture, and legal profession.

## 2.2 The Origin and Features of Legal Traditions

### *2.2.1 The US Legal Tradition*

The common law system dates back to the Norman conquest of England in 1066, when feudalism was established.[160] Traditional courts strived to create a unified King's law to remove the control of barons. Since court rulings may be permanently documented on paper, similar trials had similar results. This implies that a judge was allowed to decide outcomes of similar disputes through previous judgments. The use of precedent came into being and a doctrine of Stare Decisis was accepted in English court. The common law judge draws upon precedents established by other earlier judicial decisions before deciding cases. Judges interpret legislation and fill in the gaps in the law by judicial principle in each case if not already covered by existing precedent. Legal rules and principles are refined or scrapped altogether in favor of new ones. The case law and statutory law are complementary and interdependent, which are reflected in litigation activities.

160 Gariepy, R. (1984). The major legal systems. Resource News, 8(6), 4-4.

With regard to the trial style, judges rely on lawyers in an adversarial system to present the full case to them and answer only the narrowest issue that will dispense with the case. They will not generally raise or decide issues that the parties themselves did not ask them to decide. During the debate, both parties in a case present evidence that supports their views, cross-examine, and challenge the opponent's arguments. This helps the jury discovers the truth of the facts and decide who should bear the responsibility. The adversarial trial model and the "judge-made law" mechanism are still basic features of the common law tradition. In a certain sense, common law was developed in the mutual promotion and cooperation of judges and lawyers.

The common law system crossed the Atlantic with the English language and customs, and it served as the legal system for the fledgling North American colonial settlements. The United States, once a colony of Britain, followed the common law tradition eventually. The thirteen original colonies had been following English common law for many years.

After the War of Independence in North America, the United States decided to implement the Confederate System in the United States in accordance with the "Confederation Regulations" that came into effect in 1781.[161] The sovereignty of the country is shared by the federal and the states. The federal and state governments function independently. The federal government includes the president, congress (house and senate), federal courts, and federal administrative agencies. The federal government enjoys the constitutional power, and the state government has the constitutional "reserved powers." Every state has a system of government organized under state constitution that includes legislature, governor, state courts and lots of

161 Bowal, P., & Kirsch, A. (2010). The world's legal systems. LawNow, 35(2), 23-27.

administrative agencies. Federal law is the supreme law of the land when it conflicts with state laws.[162] But sometimes their roles will overlap. The American federalism is more than a political system because of the separation of powers. It helps maintain the power of the Federation while ensuring the flexibility of the states to prevent excessive concentration of power.

The theory of separation of powers was first put forward by Locke and further developed by Montesquieu in the eighteenth century. The system of separation of powers in the US refers to legislative, administrative, and judicial powers, which are separately exercised by the Congress, the president, and courts with checks and balances. It is conducive to promoting mutual cooperation and mutual restraint between various power organs.[163] Just as Montesquieu believes; the separation of powers is to better guarantee freedom. With regard to the IPR remedies in the United States, they are generally by judicial relief.

### *2.2.2 The Chinese Legal Tradition*

The socialist legal system with characteristics adapted for the Chinese context was proposed by Deng Xiaoping during China's reform and opening up and is mainly applied to the legal systems of Mainland China, Hong Kong, and Macau. In October 2017, the XIX Congress of the Communist Party of the People's Republic of China formally embodied that characterization in the Constitution and Charter of the Communist Party.[164]

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162 Howard, A. (1992). The uses of federalism: The American experience. American University Journal of International Law and Policy, 8(3), 389-412.

163 Vile, M.J.C., (1998), Constitutionalism and the Separation of Powers (2nd edition). Indianapolis: Liberty Fund.

164 Butler, W. E. (2019). What makes socialist legal systems socialist. Law of Ukraine: Legal Journal, 131-157.

The modern Chinese legal system has been greatly influenced by traditional Chinese legal traditions, the "socialist legal systems," and the continental European Civil law system. In recent years, particularly in the IP law area, the US legal principals are also increasingly reflected in China's legal system. Thus, China has a mix of characteristics of numerous excellent legal systems in the world, while adding on unique aspects.

First, the traditional Chinese legal system referred to the ancient (Imperial) Chinese legal codes and unwritten customary laws that were based on moral precepts of Confucianism.[165] The Tang Dynasty (A.D.618) made "The Tang Code", which consisted of 12 books and covered many law areas. However, it mainly focused on penalty and administrative law, whose primary purpose was to increase government efficiency and the Ruler's power, rather to protect individual rights.[166] The Confucian values heavily affected the Chinese legal philosophy, which caused people's preference for extrajudicial remedies for disputes, such as mediation means.[167] The deep-rooted tradition of settling disagreements by moral persuasion has grown over the centuries in China and was treated as its legal sub-culture.[168] The legal profession was discouraged and private lawyers were seen as "shysters." As adopted and expanded by the Sung, Yuan, Ming and Qing Dynasties—which lasted for over 1200 years in Chinese history—traditional Chinese legal systems also influenced most Asian countries, such as Japan, Korea, Vietnam, and Thailand. Since the Opium War

165 Kim, C. (1986-1987). Modern Chinese legal system. Tulane Law Review, 61(6), 1413-1452.

166 Liu, J. (2011). Overview of the Chinese legal system. Environmental Law Reporter News & Analysis, 41(10), 10885-10889.

167 Id.

168 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535.

and the Western nations' invasion of China (1840 to 1911), China has gradually become a semi-colonial, semi-feudal society. The Chinese legal systems began to westernize under the foreign pressure. Japan transplanted German law; China transplanted Japan law. Namely, China's modern legal system arises from the Civil law tradition. Therefore, someone placed China within the Romano-Germanic legal family because they found many civil law features in Chinese legal structure, such as the general principle of civil code, legal terminology and divisions of law.[169]

Second, the Civil law system dates back in A.D. 533-34, when the emperor Justinian codified the Roman law into the Corpus Juris Civilis.170 The Roman code influenced legal thought and legal techniques, including attitudes to legal rules, legal classifications in civil law jurisdictions. Moreover, having descended from the law of the Roman Empire, these private laws and procedures embodied in legal codes are easy to copy and transmit and most countries followed it—for example, Europe, Asia, South America, and Africa. China also follows this statute-law legislation, such as constitution and administrative regulations.

Apart from codification, precedents by previous judicial decisions plays a very limited role in a civil law system. Civil judges use statutory law rather than judge-made law in practice. The academic jurist had high prestige compared to a judge and there were no juries. Civil judges assume an active role in the courtroom, questioning parties and lawyers to determine the facts in an inquisitorial style (interrogation litigation). Moreover, compared with the principle of presumption of

169 Id.
170 Bowal, P., & Kirsch, A. (2010). The world's legal systems. LawNow, 35(2), 23-27.

innocence in common law countries, civil law countries focus more on the presumption of guilt.

In China, although legal cases have a certain guiding significance, they are not the source of law. The precedent can only help the judge understand the existing law and case. Another basic function of a judge in China is to ascertain facts and specific statutory provisions. Further, the Supreme People's Court is given the authority to issue judicial interpretations that are treated as supplementary laws in trial.[171]

Third, the period 1949–1979 was a highly speculative one for the family of socialist legal systems in China.[172] The socialist legal systems originated from the former Soviet Union. Marx proposed a vision of the future socialist classless society with no state or law as the end point of social evolution.[173] In the long period of transition, economy and industry would be centralized in the hand of the state and laws were considered tools of socialism. In the late 1930s, a new soviet legal theory emphasized the doctrine of the unity of state ownership[174]; it was accorded a place among the world's "family of laws."[175] It is now prevalent in six countries: China, Korean, Vietnam, Laos, Cuba, and Ethiopia, in each of which the population exceeds 1.7 billion people.[176] All these countries have been exposed at some moment of their history to at least the importation of Soviet legal experience and Soviet legal models. Generations of jurists from each Asian that socialist legal system have been educated

171 Liu, J. (2011). Overview of the Chinese legal system. Environmental Law Reporter News & Analysis, 41(10), 10885-10889.

172 Id.

173 Raff, M. (2015). The importance of reforming civil law in formerly socialist legal systems. International Comparative Jurisprudence, 1(1), 24-32.

174 Id.

175 Reynolds, T. H. (1992). Socialist legal systems: Reflections on their emergence and demise International Journal of Legal Information 20(3), 215-237.

176 Bowal, P., & Kirsch, A. (2010). The world's legal systems. LawNow, 35(2), 23-27.

in the former Soviet Union. These countries received legal assistance from Soviet Socialist Republics (USSR).[177]

In 1949, the PRC was founded by the Chinese Communist Party (CCP) and adopted the unitary political system, in which a single central government had sole authority over all other branches. In contrast with the US federal system and separation of powers, there was only one unified constitution and one party that guided all powers in China. In 1982, the first constitution of China continued to adhere to Marxism-Leninism and Mao Zedong was believed as the provider of its national ideology and legislative guide.[178] Further, the special feature of the Chinese legal system was that the party leadership was the guardian of socialist legality due to its involvement with the legislature and judiciary.[179] For example, the National People's Congress (NPC), as the highest legislative institution in China, elects the chairman and shares the executive power with/of the chairman. Meanwhile, the trial committees of the Supreme People's Court and the Chief procurator in the Supreme People's Procuratorate are both appointed and dismissed by the Standing Committee of the NPC. It is worth noting that the NPC was formed by 2980 committees, in which the Communist Party members took up 2097 seats. In other words, the Party is the one and only guardian of the law in China.[180]

However, certain Western scholars criticized that there probably never was a real socialist legal family.[181] John Hazard said, "traditional methods of comparing legal systems fail the analyst who seeks to establish the distinguishing feathers of the family of Marxian socialist legal systems...The Anglo-American and Romanist

177 Id.
178 Kim, C. (1986-1987). Modern Chinese legal system. Tulane Law Review, 61(6), 1413-1452.
179 Id.
180 Id.
181 Reynolds, T. H. (1992). Socialist legal systems: Reflections on their emergence and demise. International Journal of Legal Information 20(3), 215-237.

systems have usually been distinguished by differing concepts of sources of law and by contrasting attitudes of judges, clustered around the core concept of the role of the judicial decision in the legal process. However, the socialist legal systems offer no novelty. Its method is the method of the Romanist codification, particularly the civil codes that follow the Romano-Germanic legal tradition."[182] Thus, there is no such pure legal system. They tend to be "mixed" systems.

In conclusion, legal systems are the product of history and culture. By "legal family," we could understand a foreign law more easily since it first roughly sketches the general features of this legal system.[183] Today, the civil and common law legal systems also share many ideas and legal constructs as both of them value liberty, individual autonomy, and human rights equally. As a result, the legal systems and laws in the world have merged closer. For example, the rule of precedent has taken hold in Europe in which consistent judicial decisions are accepted as a source of law.[184] The Chinese legal system models Western systems in terms of trade and economic development and also adapts elements of Anglo-American legal experience—for example, the codification of commercial laws has been based on Western legal norms. In fact, with the development of the international copyright trades in the era of globalization, the copyright legislation has an assimilation tendency. For example, "the principle of fair use" which was firstly created by a British judge was absorbed both in China and the United States. Moreover, the United States included a limited "moral rights" provision in the Visual Artist Rights Act of 1990. We describe more details regarding this tendency in the dissertation.

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182 Id.

183 Husa, J. (2001). Legal families and research in comparative law. Global Jurist, 1(3), [i]-12.

184 Eberle, E. J. (2007). Comparative Law. Annual Survey of International & Comparative Law, 13, 93-102.

## 2.3 Sources and Priority of Laws

### *2.3.1 The US*

There are various sources of law in the US legal system, mainly including the constitution, statutes, administrative agency regulations, executive orders, judicial decisions, and international treaties and customary law.

From the perspective of law formation, laws are divided into the statutory law and the common law. Both statutory and common laws must be consistent with its provisions. Congress creates statutory law and courts interpret constitutional and statutory laws. Where there is no constitutional law or statutory law, the courts will rely on common law.

From the perspective of legal force, they are divided into the Constitution and others. In addition, each state has a constitution due to the US federal system. In other words, not all laws are created equally. However, they can be made into a cause of action under positive law.

#### *(1) Constitution*

The US Constitution that came into effect in 1788 is not only of great significance to the United States but also provides an important reference for the formulation of written constitutions of other countries. Since the United States is the first country in the world to enact a written constitution that provides for the legislative, executive, and judicial frameworks, it takes precedence over all statutes and judicial decisions that are inconsistent. Like statutes, each state also has a constitution that can provide people with a cause of action in positive law. However, there have been only 27 Congress amendments for two centuries because they must be passed by two-thirds of the House and Senate and approved by three-fourths of the states.

The principal source of US copyright law comes from the Constitution, Article I, Section 8, Clause 8, which authorizes Congress to enact a copyright statute: "*the Congress shall have the Power... to promote the progress of Science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries*". It demonstrates the goal of US copyright law. Essentially, the Intellectual Property Clause focuses on two different powers: the power to grant authors, for limited durations, the exclusive rights to their artistic or literary works (copyright law) and the power to secure for inventors the exclusive rights to their inventions for a limited duration (patent law). As noted by Sucker,[185] the Intellectual Property Clause is different from other clauses in that it grants Congress the means for accomplishing its stated purpose. The limitations of the clause have also been set clear in several US Supreme Court cases that seek to interpret the clause.

***(2) Statutes and International Conventions***

A statute is a law enacted by a legislature. Federal statutes are enacted by Congress of the United State which consist of a Senate and House of Representatives. The House works closely with various partners including the Library of Congress, Constitutional Research service, and the Government Printing Office, which provide professional assistance and support for Congress. The Copyright office is the centralized agency charged with regulating copyright law and is responsible for registering copyright claims.

185 Sucker, F. (2019). Why an absent international regulatory framework for competition and strong copyright protection harms diversity of expressions and what to do about it. In New Developments in competition law and economics (pp. 169-195). Springer, Cham.

Generally, legislation is initially submitted in the form of a bill by a representative to the House Committee for vote and debate.[186] If it was passed by simple majority of House of Representatives, the bill shall be moved to the Senate for discussion in the same procedure. After the bill is approved by both committees, the resulting bill is enrolled by the government printing office and is sent to the President for his signature. The president has a veto, which can be overridden by a two-thirds vote of both houses. The legislative process of states law is much like that of Congress, which made by the state legislature. Moreover, a statute is amended by the same process as it is first enacted.

Congress first placed copyrights under federal protection in 1790. The primary statute that governs copyright issues in the US is the Copyright Act of 1976, which is codified in Title 17 of the United State Code. Another copyright statute is Digital Millennium Copyright Act 1998 (DMCA), related to software protection and digital technology, is codified in Title 17 USC 512, 1201-1205, 1301-1332. Moreover, there are a few related US Code provisions that are responsible for copyright crimes and criminal procedures or judicial procedures, such as Title 18 and Title 28 of US Code.

International conventions create international rules or standards by which the involved parties agree to abide. In the US, the word “treaty” has a much more restricted meaning under constitutional law. In practice, international treaties are first submitted to the Senate for approval (2/3) and then ratified by the president. They are subject to the Bill of Rights. As a matter of US law, Congress can supersede a prior inconsistent convention or a congressional-executive agreement rather than as a matter of international law. Courts interpret the conventions to prevent Congress from placing the United States in violation of its international law commitments. A

186 Article I section 1 of the US Constitution. (1787)

self-executing treaty provision is the supreme law of the land in the same sense as a federal statute that is judicially enforceable by private parties.[187]

The United States is a member of the following international copyright treaties: the Buenos Aires Convention; the Berne Convention for the Protection of Literary and Artistic Works; the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms; the Convention Relating to the Distribution of Programmed-Carrying Signals Transmitted by Satellite; the Universal Copyright Convention (Geneva 1952 and Paris 1971); the World Intellectual Property Organization (WIPO) Copyright Treaty; and the WIPO Performances and Phonograms Treaty.

The US has also engaged in various multilateral and bilateral trade and investment agreements that underscore its commitment to international copyright protection. Save for the FTA between the US and Israel, all other FTAs that the US is a party to often include substantive clauses of copyright law and enforcement obligations.[188] These include FTAs such as the North American Free Trade Agreement (NAFTA), which was later renegotiated to become the United States-Mexico-Canada Agreement (USMCA) and came into effect in 2020.

***(3) Administrative agency regulations and executive orders***

Administrative agencies, created by the legislature, are part of the executive branches of US government and are in charge of carrying out the government operations. The administrative agencies act like a legislature when promulgating rule, regulations, and procedures and orders. Moreover, they act quasi-judicially when conducting hearings and issuing decisions. For example, subject to the approval of the

187 Kirgis, F. L. (1997). International Agreements and U.S. Law. American Society for International Law. https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law

188 Boie, B. (2010). The protection of intellectual property rights through bilateral investment treaties: Is there a TRIPS-plus dimension? Swiss National Center of Competence in Research.

library of Congress, the US copyright office has promulgated regulations relating to the examination and registration of copyrights and the recordation of transfers of copyright ownership, which are embodied in title 37 of the Code of Federal Regulations.[189] Other examples of administrative agencies for copyright protection would include the Department of Justice; the Department of State; the office of US Trade Representatives; the Department of Commerce, the office of the Intellectual Property Enforcement Coordinator (IPEC). They attempt to deliver critical domestic and international copyright policies and advice. At the federal level, the Prioritizing Resource and Organization for Intellectual Property Act of 2008 (PRO IP) was a government agency that regulates IPR violators.

Executive orders were signed by the president within his constitutional authority and sent to the office of the federal register (OFR). Like statutes and the regulations promulgated by government agencies, executive orders are subject to judicial review and may be overturned if the orders lack support by statute or the Constitution. For example, the executive order 13565 "establishment of the intellectual property enforcement advisory committees" is to strengthen the federal effort for protecting copyright and other forms of intellectual property both in US and abroad. According to the order, the Senior Advisory Committee shall assist in the development and execution of each Joint Strategic Plan required every three years under the PRO IP (15 U.S.C. 8113).[190]

189 Compendium of U.S. Copyright Office Practices (3). (2021). Washington, D.C., Copyright Office, Library of Congress.

190 Obama, B. H. (2011). Executive Order 13565--Establishment of the Intellectual Property Enforcement Advisory Committees. Daily Compilation of Presidential Documents. https://obamawhitehouse.archives.gov/the-press-office/2011/02/08/executive-order-13565-establishment-intellectual-property-enforcement-ad

***(4) Common law***

The common law is law made by the courts, which is referred to as case law. It does not involve interpretation of constitution, treaties, statutes, and regulations. Various court rulings in the US have had significant precedence for copyright protection in the country throughout history. Prior to the 1976 amendments to the copyright act, copyright protection was based on old English law and copyright legislations passed in different states. Common law copyrights contained the right to prohibit anyone from copying or using the works when they are unpublished and the right to decide when the work will be published and by whom. Since the effective date of 1976 amendments, Congress replaced and pre-empted the common law copyright protection by new legislation. However, there are still cases brought for common law infringement, because there is legal room for state and common law to operate. For example, California has a broader protection for artistic works that are not fixed in a tangible medium. Among the landmark cases ruled since 1976 touched on aspects of subject matter and conditions of copyright protection, rights, ownership of rights, as well as on infringement and enforcement.

### *2.3.2 China*

China's legal system is generally composed of seven branches under the guidance of the Constitution, including the Constitution, civil and commercial laws, administrative laws, economic laws, social laws, criminal laws, and procedural laws.

The sources of law can be divided into five levels in terms of effectiveness in a descending hierarchy: (1) Constitution, (2) International Treaties, (3) National Basic Laws, (4) Administrative Regulations and Judicial Interpretations, and (5) Local Laws and Departmental Regulations.[191] The legislative system of China is a unitary and

191 Du, G. (2020), What's Chinese legal system? – China legal research guide. China Justice

centralized structure, with different levels of government organs empowered to issue laws, regulations, or other provisions that will be considered "legislative powers".[192] In other words, China's legislative activity is led by the ruling Communist Party of China. (CCP)[193]

Specifically, the legislative process in China includes four steps. First, the bill is proposed to National People's Congress or its Standing Committee; second, the bill shall be deliberated three times at the sessions of the standing committee; third, the bill will be submitted by the NPC presidium to the plenary session of the NPC for voting. It will be passed by more than half of all deputies to the NPC or all members of the standing committee of NPC. Last, China's President signs an order to publish the law.

***(1) Constitution***

The constitution, formulated by the National People's Congress (NPC), prevail over all other laws and regulations in China. However, it has a different and lesser legal value from what is attributed to the document in the US. It is more like a political guide, rather than a legal document. Since the articles of the constitution are rarely used to be a reference for judgment by court. Chinese constitution did not express or implies the goal of copyright protection. The most relevant constitutional provision for copyright law is Article 22 which states that: "*The state promotes the development of literature and art, the press, broadcasting and television undertakings, publishing and distribution services, libraries, museums, culture centers, and other cultural undertakings, that serve the people and socialism."*

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Observer. https://www.chinajusticeobserver.com/a/what-is-chinese-legal-system

192 Bi, Y. (2015). Experimentalist approach of Chinese legislation model: From passive response to institutional design. Theory and Practice of Legislation, 3(2), 141-168.

193 Id.

### *(2) International Treaties and National basic laws*

In the past three decades or so, China has depicted considerable progress when it comes to the implementation of international obligations within its internal legal system. China has also ratified about thirteen WIPO-administered treaties on intellectual property including some that focus explicitly on copyright such as WCT and WPPT.

International treaties ratified by China's NPC Standing Committee (NPCSC) are directly applicable and prevail if they conflict with domestic laws. The Treaty Procedure Law defines China's engagement with international copyright entities including conventions such as the Berne Convention, TRIPS, and WTO among others.[194] International copyright treaties have the same rank in the Chinese hierarchy of norms as national basic laws that are enacted by the NPC and NPCSC. For example, the Chinese government made amendments regarding its legal system about IPR according to the requirements of Agreement on the TRIPS.[195] As a show of the force of international copyright law on the domestic sphere in China, the country has developed a comprehensive copyright legal framework. China became a member of the Beijing Treaty on Audiovisual Performances, which is a demonstration of its continued commitment to international copyright protection.

In China, the national basic laws mean statutes that codified by legislature, that is, the Copyright Law of PRC. In addition, a few of these Chinese civil laws, criminal laws, foreign trade laws include special regulations about copyright protections. For example, the "General Principles of Civil Law of the People's

194 Brander, J. A., Cui, V., & Vertinsky, I. (2017). China and intellectual property rights: A challenge to the rule of law. Journal of International Business Studies, 48(7), 908-921.

195 MOFCOM. (2005). Status regarding legislation in terms of IPR in China. Ministry of Commerce of the People's Republic of China. http://www.mofcom.gov.cn/aarticle/b/d/200503/20050300029076.html

Republic of China" first stipulates that the copyright law in China, a special law that involves the possession and control of intellectual achievements.

***(3) Administrative regulations and judicial interpretations***

Administrative regulations are formulated by the State Council. For example, the Implementing Regulations on Copyright law of PRC; Regulations on Computer Software Protection; Regulations of the People's Republic of China on the Customs Protection of Intellectual Property.

There is no common law in China. However, some notable cases and judicial interpretations of statutes that formulated by the Supreme People's Court and the Supreme People's Procuratorate provide guidance to the judges who are facing similar cases.

***(4) Local and departmental regulations***

Local laws and regulations are formulated by the Provincial People's Congress and its Standing Committee, with the effect covering the areas under its jurisdiction. Departmental regulations are formulated by the departments directly under the State Council. For example, measures for the enforcement of copyright administrative penalty; measures for implementation of regulations governing custom protection of intellectual property rights.

## 2.4 Structure of the judicial system

### *2.4.1 US*

The US judicial system includes the courts, judicial conferences, justices, prosecutors, jury, and lawyers. Here, we only mention the courts system.

Article 3 of the U.S. Constitution states, "The judicial power of the United States belongs to the Federal Supreme Court and the lower courts established by Congress from time to time." Thus, the US court systems can be divided into federal

courts and state courts. Federal courts have exclusive jurisdiction only over certain types of cases, including the cases involving federal laws, controversies between states or foreign governments.[196] State courts systems vary from state to states. In certain cases, the federal courts share jurisdiction with the state courts. The plaintiff has an option of the trial court from the federal and state.

The courts of the United States execute copyright law through civil litigation filed by the holders of the copyright of exclusive licensee. In the United States, there are no specialized copyright courts. Federal courts have the exclusive original jurisdiction over copyright cases. In particular, the federal courts have more experience and expertise with copyright law that state courts—such as the District Court for the Southern District of New York, the District Court for the Central District of California, and the District Court for the Northern District of California—which represent areas where copyright cases are often filed.[197]

***(1) Federal Court (Three levels)***

A. Supreme Court of the US

The US Federal Court, established in accordance with the US Constitution, is a court at the top of the federal court system. It comprises nine justices who sit together to hear cases, including appeals from the federal circuit courts of appeals and the highest states courts that involve the US constitution or federal law.[198]

B. Federal circuit of appeal

The US Federal Court of Appeals, also known as the Circuit Court of Appeals, is the intermediate court in the US federal judicial system. There are 12 such regional intermediate appellate courts located in different areas and the court of appeal for the

196 Federal Judicial Center. (2014). The US Legal System: A short description. https://www.fjc.gov/content/us-legal-system-short-description-english-original

197 Hunton Andrews Kurth LLP. (2019). Copyright in the United States. Lexology, https://www.lexology.com/library/detail.aspx?g=45b57c94-9e9c-4593-82bf-c51afe3b7ce2

198 Id.

federal circuit that is located in Washington. Each circuit hears appeals from the district courts within its jurisdiction and federal administrative agencies in certain instances.

The CAFC, based on subject matter, hears appeals on patents and certain civil cases from international trade court, federal claims court and review administrative rulings of the USPTO and 337 reports of the ITC. The judgments from CAFC are binding in all states.

C. Federal district court

Federal district court, as the general trial court in the federal system, was established by Congress. There are 94 such district courts throughout the US; each state has at legal one courtroom. For example, there are four federal district courts in California and four federal district courts in Texas.

***(2) State Court***

Federal courts and states courts are independent. State courts, established by each state's constitution and laws, can hear both criminal and civil cases. The structure of a state court system is similar to that of the federal court. All states have a highest court, called the state supreme court. Numerous states have an intermediate appellate court. Below these appeals courts are the state trial courts. However, the state court's judgments are only binding in each state.

### *2.4.2 China*

China's judicial comprises of court, procuratorates, supervisory commissions, public security organs, and judicial administrative organs. There is no jury system in China. Here, we focus on the judicial system in a narrow sense, namely the court system.

Chinese courts are divided into three categories: the SPC, local courts, and specialized courts. They can be also divided into **four levels** in accordance with their effectiveness: the Supreme People's Court (the SPC), high people's courts, intermediate people's courts, and primary people's courts. Courts at a higher level supervise the trials heard by the lower courts.

Moreover, the courts at different levels correspond to the respective governments at the same level. Each court has jurisdiction over cases within the territorial scope of the authority at the same level. In other words, each judicial organ is subject to the supervision of the people's congress at the same level.

***(1) The Supreme People's Court (SPC)***

The Supreme People's Court, whose judges are elected by the NPC, is at the highest court level in China. It has the first trial jurisdiction over cases that have a major impact on the entire country and over appeals from high people's courts and specialized courts. The SPC is responsible for issue judicial interpretations and certain legislative activities. Moreover, it sets 33 permanent divisions throughout the nation, including six circuit courts and two international commercial courts.[199] It is worth noting that the **SPC's intellectual property court (IPC) was created in 2019.**

***(2) Local court***

In general, the local courts hear most of the cases except that under the jurisdiction of specialized courts. More specifically, there are a total of 3,140 primary people's courts at county or district level in China. Moreover, there are 409 intermediate people's courts in cities and prefectures within provinces. They are mainly responsible for major foreign-related cases or cases that have significant influence in their jurisdiction. Lastly, 32 high people's courts exist at the provincial

199 Id.

level, which are responsible for cases that have a significant national impact and supervise the trial work of lower courts.

***(3) Specialized Court***

Specialized courts hear certain types of cases in a certain area. For example, military courts, maritime courts, intellectual property courts, Internet courts, and financial courts. They exercise judicial powers along with different local courts. For example, **the three intellectual property courts at intermediate court level** — located in Beijing, Shanghai, Guangzhou—were created in 2014. They have no jurisdictions over other civil or criminal cases except for IP cases. Recently, The IP court of Hainan Free Trade Port is established in 2021, which is to create a good business environment through the construction of a free trade port.

In addition, there are another **21 intellectual property tribunals** within intermediate courts nationwide since 2017. After 2019, second-instance appeals with strong technical features — such as invention, patents, and technical secrets — are subject to jurisdiction of the Intellectual property Tribunal. Other IP-related cases and complaints or retrial cases where the appellants are unsatisfied with the IP Tribunal's judgments are heard in the SPC's IPC. Thus, the unique of IP cases in China is reflected in their judicial mode of **(1)+(4)+(21)**.

## 2.5 Justification for Copyright Protection

### *2.5.1 Theoretical Basis*

"Copyright" means "copy right" and now it is legally designed to prevent others from copying works without permission and harm the author's economic

interests and moral rights. Copyright law offers legal protection to the fruits of human creativity so that the public as a whole may benefit.[200]

However, the concept of copyright originated in the common law system. Based on the "mercantilism" and idea of "private property is sacrosanct," the copyright systems in common law countries are built on the value of "property"[201]. The legislators transformed the royal printing privilege into capitalist property right and then granted it to authors and publishers. As the author's private property, it was protected in the form of property interest. Property interest is an interest in monetary and material means of satisfying one's needs.[202] Therefore, copyright can also be freely transferred like other tangible property. The US copyright law of 1790 embodies the "property value theory" and utilitarianism. However, they failed to take into account the author's moral rights.

In civil law countries, the authors' interest can be both proprietary and non-proprietary.[203] The non-proprietary interest refers to the benefits associated with honor and affections of a person, which is expressed in the recognition of their work, fame, and realized through the right of authorship.[204] Thus, it is important to mention the concept of "moral right" when we talk about the copyright evolution in the comparative legal studies.[205] Civil law countries view "Copyright" as the author's individual characteristic and spirit as expressed in his literary or artistic creation and

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200 Nard, C. A., Madison, M. J., & McKenna, M. P. (2014). The law of intellectual property (4th ed.). Wolters Kluwer Law & Business, 435.

201 Vile M.J.C., (1998). Constitutionalism and the Separation of Powers. Indianapolis: Liberty Fund, 2nd edition.

202 Sitdikova, R. (2019). Concept of interest in copyright: Definition and types. Kazan University Law Review, 4(3), 215-223.

203 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535

204 Id.

205 Nard, C. A., Madison, M. J., & McKenna, M. P. (2014). The law of intellectual property (4th ed.). Wolters Kluwer Law & Business, 678.

can only be enjoyed by the author.[206] Based on the idea of "personality values" and "natural human rights," they think although a work may be commercially exploited, it is not simply a commodity. The Confucian idea of valuing moral justice over property made China tend to the civil law tradition. The remedies for copyright infringement in China are usually through powerful and unique administrative means.

***(1) US***

Copyright protection in the US arises automatically so long as a given "work of authorship" meets three broad criteria: original, fixed in tangible form, expression rather than ideas.[207] Copyright owners have exclusive rights to reproduce, distribute, and publicly perform or display copyrighted "works".[208] Those who infringe any of the author's exclusive rights without the copyright owner's permission are liable for damages, except for defenses for it. The theoretical research of copyright protection are diversified—for example, the utilitarian theory, labor-desert theory, and personal autonomy theory—are reflected in US copyright legislation.

A. Natural Law Theory

Natural law advocates equality, justice, private property, and other natural human rights for all. Among these aspects, the labor theory of property is the basic theory of copyright.[209] The property theory of Locke, the ownership theory of Hegel, and the labor theory of value of Marx emphasize the rationality of obtaining property rights.[210] Both the common law system and civil law system inherited the concept of property rights. The generalized theory of property decides the copyright as a private right. The first introduction of property rights to legal practice was the Massachusetts

206 Id.
207 Id.
208 Id.
209 Peng, L. (2010). Intellectual property in the ethics perspective. Beijing: Intellectual Property Publishing House, p. 55.
210 Id

Copyright Act of 1789.[211] The preamble of the law clearly states, "There being no property more peculiarly a man's own than that which is produced by the labor of his mind."[212]

French scholar Renouard advocated that copyrights have two legal attributes: property and personality.[213] German philosopher Kant believed that copyright was actually a personal right and the economic rights of the authors are derived from the author's personality [214] Copyright interests may exist as society's expression of the inherent value of the human person and of human creativity.

German philosopher Johann Gottlieb Fichte put forward the dichotomy of thought and expression, which further expanded the subjects of copyright.[215] Subsequently, Josef Kohler established the theory of intangible property in 1874.[216] He denied the pure theory of personality or property rights. He believed that the property theory was only related to the tangible property, but the exclusive right of the author was an intangible property that possessed economic values. This dichotomy of the doctrine and intangible property theory were affirmed in the twentieth century. In sum, they marked the beginning of the expansion of the privatization of copyright.

The founder of the theory of intellectual property rights is Picard (a Belgian jurist). He placed copyright, patent, industrial designs, and trademarks into a new and independent legal subject—intellectual property rights law—in order to distinguish it from traditional property law. This theory has been widely discussed in modern society and has become the core theory of intellectual property law. The "intellectual property right" firstly appeared in the case "*Davoll et al. V. Brown*" (a patent case in

211 Xiao, Y. (2011). The copyright system in history: Rights and Authorship. Huazhong University of Science and Technology Press, p. 208.
212 Id.
213 Id. p. 209-211
214 Id.
215 Id. p. 213-216
216 Id.

the Court of Appeals for the Massachusetts Circuit Court).[217] Charles L. Woodbury said, "Only in this way can we protect intellectual property, the labors of the mind, productions and interests as much as a man's own ... as the wheat he cultivates, or the flocks he rears."[218] This term was not recognized until 1967 because of the big push by WIPO. Then, it was widely used after the Bayh-Dole Act in 1980. (The Bayh-Dole Act was an Act to amend the patent and trademark laws, which was enacted by the 96th US Congress.)

However, some philosophers argue that nature law is not the form of law, but an idea about law, which only express a fair and just order.

B. The Utilitarian Value Theory

Utilitarianism was a concept propounded by Jeremy Bentham and John Muller in the eighteenth and nineteenth centuries.[219] They inherited the ideas of Adam Smith who commented in his own works on the value of copyright to promote innovation and public good[220] and put forward the utilitarian theory. This theory matured in the 1970s. As part of intellectual property law, copyright exists to maximize the welfare of society as a whole.[221] Utilitarianism pays attention to practical functions and effects. The US copyright legislation has its policy goal. Examining the purpose of the copyright law from the perspective of the Constitution of the United States, it is found that it contains the spirit of balance and utilitarianism.

The US copyright law has economic orientation due to the outstanding contribution of copyright industry to the US economy. For example, US GDP and

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217 Id.

218 Id.

219 Nard, C. A., Madison, M. J., & McKenna, M. P. (2014). The law of intellectual property (4th ed.). Wolters Kluwer Law & Business, 437.

220 Zhang, J. (2014). The tradition and modern transitions of Chinese law. Springer.

221 Han, D. (2014). How the copyright law was (not) made: Intellectual property and China's contested reintegration with global capitalism. International Journal of Communication, 8(1), 1516-1535

employment rate plummeted because of the subprime crisis in 2007, but the copyright industry still contributed to the national economy and provided a large number of jobs. According to statistics, the working population in US copyright industries reached 11.5772 million that year.[222] There are a larger number of export markets for the copyright-related industry than that of other industries such as aircraft, automobiles, agricultural products, food, and medicine.[223]

However, many scholars recently criticized the utilitarianism because it only relies on the outcome of things.

***(2) China***

In China, copyright is considered more as a general justice acknowledged by the public and society. According to the General provision of Copyright law of PRC, "*This Law is enacted, in accordance with the Constitution for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and rights and interests related to copyright, of encouraging the creation and dissemination of works which would contribute to the building of an advanced socialist culture and ideology and to socialist material development, and of promoting the development and flourishing of socialist culture and sciences.*"[224] We can see that the actual goal of Chinese copyright protection is to contribute to socialist culture and ideology, which serves the political system.

The theoretical support for copyright protection is rather lacking in China. Recently, a few Chinese scholars brought the economic rational theory and globalization theory into the justification of copyright protection. The economic rationality theory stated that copyright disputes often come with the economic and

222 Zhao, S., & Li, J. (2014). The Comparative study of Sino-US copyright industry. Journal of Hebei University of Economic and Business, 35(1).

223 Id.

224 Article 1 of Chapter 1 of the Copyright Law of PRC (2021)

trade activities. Copyright protection could promote economic development and reduce disputes in the intellectual property market.[225] The theory of globalization advocates the copyright protection internationally to advance the interaction of global culture and economy.[226]

They attempt to imitate the US utilitarian theory to build the theoretical foundation for Chinese copyright protection. However, the traditional Chinese culture is still a barrier to success. Chinese public law underwent dramatic development and private law lagged far behind. Collectivist culture, obligation-based habit, and the rule of man-made Chinese lack of knowledge of the value of intellectual labor and products. Despite the Chinese government attempt to publicize copyright protection, the enforcement of law was weak.

### *2.5.2 Public legal consciousness*

Legal awareness is the public's evaluation and interpretation of legal provisions and legal thoughts in different historical periods.[227] It can be seen as the social effect of the legal system.[228] People's legal consciousness is usually influenced by morals and ethics and the policies formulated by the ruling class.

Copyright protection and copyright recognition are interdependent. The consciousness among people in terms of protecting copyright is helpful to enhance the enforcement of copyright law. Western countries are the creators of IPRs and also the largest beneficiary of this system. Their success lies in the spirit of autonomy of private law that is the foundation of the IP system. The industrial revolution also

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225 Downs, A. (1957). An economic theory of political action in a democracy. Journal of Political Economy, 65(2), 135-150. http://www.jstor.org/stable/1827369

226 Gul, N. (2003). Globalization and developing countries. Pakistan Horizon, 56(4), 49-63. http://www.jstor.org/stable/41394391

227 Cowan, D. (2004). Legal consciousness: Some observations. The Modern Law Review, 67(6), 928-958. http://www.jstor.org/stable/3698990

228 Nielsen, L. (2000). Situating legal consciousness: Experiences and attitudes of ordinary citizens about law and street harassment. Law & Society Review, 34(4), 1055-1090. https://doi.org/10.2307/3115131

promoted the establishment of the IP system. The US government respects civil rights and individual freedom and places IPR protection into their economic and social policies. Therefore, US citizens have strong legal awareness of copyright.

It appears that the better educated a citizen is, the more he is aware of the damage of infringing other people's IPRs and the more he will restrain from infringing IPRs. But the actual situation is completely contrary. According to a survey of the Chinese citizens' legal recognition of IPRs, the proportion of citizens who believe that protecting IPRs is rather important or relatively important is 89.1%.[229] However, among citizens who buy pirated products and counterfeit branded products while being aware of the situation, the proportion of those with a bachelor's degree and above is as high as 73.8%.[230] Evidently, the attitude of the right holder and the public remain passive.

The reason for this contradiction is the lack of faith in IPRs, which is caused by disadvantageous factors in Chinese traditional culture, including the lack of the concept of independent personality, the excessive concept of knowledge sharing, and incomplete knowledge value. Traditional Chinese culture is rooted in Chinese people's subconscious and has deeply influenced people's habits. Confucian philosophy, with thousands of years of history, has influenced every Chinese, including their way of thinking, way of acting, customs, and morality.

Confucius taught people that the pursuit of economic interests was the villain's behavior. "To create was not for economic value " became an old saying, which made people lack an understanding of the concept of private rights. Copyright owners

229 Zhu, J., & Xiao, Z., (2014), The study of Chinese citizens' legal awareness of intellectual property rights, Xi'an. Northwestern Polytechnic University Publishing House, pp. 94-100.

230 Id.

seldom strive for property rights of intellectual products to avoid being labeled greedy.

Next, Confucius emphasized collectivity and believed that an individual's value was attached to the state and the family. It is rather difficult for a person with no independent personality to develop the concept of private property. For example, traditional intellectuals hope that their work will be recognized by society and be shared rather than for it to be merely their private property. This is totally different from that in the West, where the private property right is regarded as a natural right that has supreme sanctity.[231] The spirit of individualism is the cultural foundation of modern private law and the intellectual property right is a private right. On the contrary, in the view of traditional Chinese culture, the creation of intellectual products is just a process of self-cultivation. Thus, when Western intellectual property law that is based on individualism, liberalism, and rationalism is transplanted to China—where obligation, despotism, and family-reverence was emphasized—it will naturally become complex.

According to Confucius, law prevents people from committing a crime more out of fear than sense of shame. However, morality and ritual cultivated a sense of shame and self-discipline so that people did not want to do bad things anymore. Finally, there will be no lawsuit in the world that is a perfect society. Thus, ruling the country by ritual resulted in rule of man in China. Thus, in the Song dynasty, copyright had appeared in the form of a writ that was like a privilege in the West. European publishers converted this kind of privilege into a legal right. However, the Chinese government continued to use it as a tool of imperial power.

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231 Id.

## 2.6 Legal Education and Profession

### *2.6.1 Legal Education*

The different modes of legal education determine the quality of training of legal talents. Legal education is the main means to disseminate and improve the legal culture of the entire society, conduct in-depth legal research, and cultivate the ability to create direct employment for themselves. History has shown that the effective operation of any country's legal system results in the formation and development of a legal society depends on the improvement of legal education and legal profession in the country.

In the U.S., there are debates regarding whether the law school is too expensive and whether the J.D. program must be two years instead of three years. In China, legal education reform is heavily influenced by the US system. For example, the Chinese Master of Law program is imitative of the JD program of the United States. Moreover, Chinese professors attempted the Socratic teaching method and introduce textbooks from the United States. Overall, it makes sense to compare the legal education between China and the United States in the context of copyright comparison.

***(1) Law school admission***

Legal education in the United States is mainly aimed at cultivating lawyers. The US Law School focuses on providing all students with skills to train to be lawyers, thereby emphasizing the practicality of knowledge and practicality in society; the courses aim to develop students' legal thinking skills, analysis, and problem-solving abilities. There are three types of law degrees in the United States: Juris Doctor (J.D.), Master of Laws (LL.M), and the Doctor of Judicial Science (JSD).

The requirements for studying law are strict and generally require three conditions: (a) an undergraduate degree; (b) undergraduate GPA plus LAST score; (c) the personal statement and recommendation letters. After entering the door, a JD degree usually takes three years of study to complete the corresponding credit courses and the final defense of the dissertation.

The LL.M degree in the United States is an academic Master of Law degree. It usually takes nine months for completion. LL.M students can be roughly divided into two categories: (a) students who have obtained a JD degree or native lawyers who have a deeper understanding of a certain professional field, such as tax law and commercial law, intellectual property, etc.; (b) international students and foreign lawyers who are interested in the Anglo-American legal system and education.

An SJD degree takes three to five years. This degree is truly academic. Numerous law schoolteachers in the United States have this degree. In short, the characteristics of American legal education are that it is professional, specific, and practical.

In China, law schools, political and law academies, and comprehensive universities determine the design of law undergraduate education. To become a student of the Faculty of Law, the student must take the national college entrance examination. After four years of undergraduate study and completion of credits, the student receives an LLB degree. The education for graduate students and doctoral students is basically a theoretical study.

The master's degree of law in China is special. In 1994, they learned from the successful experience of the US law school's JD education and created the JM education. Its goal is to cultivate high-level compound and practical legal talents for the legal profession. The course requires the mastery of the basic principles of law and

to acquire legal knowledge, legal terminology, legal methods, and professional skills required for engaging in legal professions as well as to have the ability to independently perform legal professional work.

Another type of master's degree of law is to cultivate academic-type legal talents who are engaged in legal research, teaching, or independent professional work. Their admission requirements are a LLB degree and passing the national post-graduate entrance exam. After admission, the course requires undergoing three years of study.

China's doctoral education in law began in 1984. The first group of students who pursued doctoral education in international law. A doctorate in law is the highest academic degree in China's current three-level degree, and a person who has obtained a master's degree in law or equivalent academic qualifications (such as a lecturer in a higher education institution) is the target of enrollment. The Ph.D. generally requires three to five years of study.

***(2) Law school Curriculum***

There are numerous courses available for selection in the US law school, which are detailed and based on the different grades of students. These courses encompass a wide range of fields and are highly professional, focusing on cultivating students' legal thinking, research, and writing skills. There are also courses for research on legal systems in countries such as India, China, and Africa. It is worth noting that the US law schools pay a lot of attention to the professional responsibility (PR) course. This kind of courses examine the professional and ethical obligations and duties of the lawyers. Each J.D or LLM student is required to take a course in PR in order to graduate.

Traditional first-year courses of JD students include Contracts, Criminal Law, Property, Torts, and Civil Procedure. The second-year required courses include Constitutional law, Criminal Procedure, Evidence, and Professional Responsibility. After the second year, JD students have the flexibility of choosing remaining courses, such as "bar courses," upper division writing courses, and experiential courses.

Take intellectual property area in LLM program as an example, the course include Patent law of the US; trademark, copyright, trade secret, privacy law, entertainment law, cyber law, sports law, venture capital business transactions, IP litigation; trademark &copyright transitions; IP law moot court and externship.

In contrast, China's legal education has a history of only 70 years. The legal education programs have established numerous non-law courses in Chinese law school, such as foreign languages and political philosophy courses. The compulsory courses include civil law, criminal law, jurisprudence, constitutional law, legal history, civil litigation, administrative law and administrative litigation law, criminal procedure law, intellectual property law, commercial law, international law, private international law, economic law, international economic law. In addition, corporation law, contract law, maritime law, evidence law, etc., are offered in the form of selective courses. As noted, legal professional ethics courses are not popular in the country.

The doctoral education includes (a) Marxist theory as required course; (b) first foreign language as required course, second foreign language (optional course), (c) professional basic courses and other elective courses, and (d) a doctoral dissertation (more than100, 000 words).

***(3) Teaching Method***

The specific teaching method is also symbolic of different educational modes. In the United States, lecture-textbook, discussion-case, and Socratic methods are the main traditional instructional methods.

In the 1970s, Randall C.C. Langdell, the president of Harvard Law School, initiated the case teaching method and was widely adopted by law schools throughout the United States. The case law teaching method is actually to grasp the basic principles of the law and the legal reasoning process by studying various case judgments given by judges. The teacher selects the representative jurisprudence to provide some pre-learning to students. Therefore, students independently learn the materials assigned by the teachers before class and prepare opinions and problems that must be further discussed. The teacher guides the students to understand the rules through cases analysis in class and answers difficult questions from students at their office hours. In brief, the legal thinking is integrated in the entire teaching process. For a century, case-based teaching has occupied the dominant position in American legal education.

Moreover, clinic-style pedagogy enables students to expose to real parties and handle real cases. Students learn the law in practice and can improve the practical ability to use the law. Next, the law library plays an irreplaceable role in the legal education and high-quality legal talent training. As a law school student, you must be able to know how to obtain legal information and how to research in the law library. Teachers cannot put all kinds of legal knowledge and information in their heads.

China, influenced by the civil law system, generally adopts a theory-based teaching method. Teachers instruct students to systematically study the legal principles and rules on the basis of textbooks and legal provisions. This is because

statutory law is an important source of laws in civil law countries. In addition, Chinese law schools adapts to the exam-oriented mode. The contents of tests are generally taught in class and placed emphasis on ability of memory.

### *2.6.2 Legal Profession*

To achieve rule of law, it is essential to guarantee a fair judiciary and independent legal profession. The lawyers, by building up a respectable and independent legal profession, can play an important role in the development of a legal system.

The world's largest number of lawyers exist in the US. They are licensed by the individual states in which they practice law. There is no national authority that licenses lawyers.[232] A few states allow lawyers to become bar members based on membership in another state's bar. The out-of-state lawyers may practice in a particular case in this state under certain conditions.

Specifically, the states usually require applicants for legal licenses require the fulfillment of the following conditions: (a) hold a law degree (Juris Doctor) from law schools that accredited by the American Bar Association; (b) completed a detailed application for a lawyer to meet standards of character; (c) passed a written bar exam; (d) take the oath of office.

The examination takes place in February and July each year. The first day of the test was the federal law MBE. The second day's exams were essay and PT, which involved state laws. Most states also require applicants to pass "MPRE." In recent years, Chinese attorneys have also begun to travel to California and New York for judicial examinations in the hope of upgrading their international ability.

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232 Federal Judicial Center. (2014). The US Legal System: A short description. https://www.fjc.gov/content/us-legal-system-short-description-english-original

In China, the reliance on lawyers was totally an alien concept until 1976.[233] Initially, the legal training program was in accordance with the Soviet and East European model.[234] Thus, the legal profession in China developed much later than that in the US. The first regulation that directly concerned the Chinese legal profession issue was the "Provisional Regulations on Lawyers of the PRC in 1982."[235] Article 1 of this regulation defined lawyers as state legal workers whose task is to provide legal assistance to state agencies, enterprises and units, and social organizations in order to safeguard the national interest and citizen's right.[236] The lawyers were guaranteed a minimum salary as government workers or assigned in legal counsel offices that were supervised by the national judicial administration.[237]

The national judicial examination and the civil service examination are the basic "steppingstones" for legal practice in China. They require that the participants must be Chinese citizens. However, the judicial examination does not require that participants must be law school graduates. Those who have received higher education and work experience of more than three years can give the Chinese bar exam.

The employment of law students can be roughly divided into the following categories: (a) the national civil service system, which mainly includes public security agencies, procuratorates, courts, judicial administrative agencies, and government agencies. (b) Private law firms or in-house. However, the serving officials of the people's court, procuratorates, and public security must support the socialist system

233 Kim, C. (1986-1987). Modern Chinese legal system. Tulane Law Review, 61(6), 1413-1452.
234 Id.
235 Shiu-fan, J. (1983). The role of lawyers in the Chinese legal system. Hong Kong Law Journal, 13(2), pp. 157-173.
236 Id.
237 Shi, W. (2020). The cat and mouse saga continues: Understanding the US-China trade war. Texas International Law Journal, 55(2), 187-222.

and cannot practice as lawyers concurrently. Foreigners cannot be admitted as lawyers in China.

# CHAPTER 3 THE HISTORICAL STUDY OF THE U.S. COPYRIGHT LEGISLATION

## 3.1 Introduction

To understand the current copyright legislation, its history and evolution should first be known because it is more persuasive to explain problems and then imply possible directions.

Copyright law is traceable to the 15th century in England. With the invention of printing, Gutenberg printed a book with movable types in 1451.[238] The printing industry has formed and spread to Europe. In 1474, William Caxton, a British businessman, established the first press in England.[239] However, the editing, printing, and selling of books were not divided then. A group of publishers established the Stationers' Company, promising not to print books that another was already printing. Later, many speculators, who were driven by profits, pirated popular books and other works they liked. Alternatively, the original printer publishers took a higher risk when a rival press sent forth a copy of their edition and sold it at a lower price. Therefore, the Stationers' Company petitioned the King for a monopoly to protect their business. Meanwhile, the King realized that the printing press would greatly hamper its dominion and sought to control the printing of books by licensing. Star Chamber Decrees of 1586, Star Chamber Decrees of 1637, and the Licensing Act of 1662 confirmed the privilege of Stationer's Company.[240] Also, the Stationers' Register was established to record the publishers' right to produce a particular printed book—the earliest form of copyright law.[241] However, no penalty was actioned for infringing

238 Matthews, B. (1890). The evolution of copyright. Political Science Quarterly. 5(4). pp. 583–602

239 Id.

240 Id.

241 US Copyright Office. (2021). A brief history of copyright in the United States. https://www.copyright.gov/timeline/

this right by copying and publishing until 1694.[242] From this point on, the "copyright" became a censorship system that gave the Crown the ability to restrict free speech.[243] By 1695, these licenses had expanded to a perpetual monopoly over the publishing of maps and books.[244] The history of copyright is considerably inextricably mixed with the story of press censorship.

The justification of copyright protection changes with the cognition of authors' role. Since 1694, the owner of copyright could bring an individual action for each infringing copy made or sold.[245] However, the cost for litigation was more than the recovery, and it was impossible to bring suit to each small edition.[246] Hence, the Statute of Anne in 1790, as the first modern copyright law in the world,[247] was passed and designed to promote the advancement of science and technology. Also, it gave more protection to authors than pressmen, including the authors' right to use and dispose of their work and the right to get paid. The law allows authors to enjoy the exclusive right to published books for 21 years from the date the law takes effect, which unpublished books are protected for 14 years, after which authors can legally request renewal for another 14 years. Importantly, the Statute stipulates that a work becomes public by making it available to the public after the expiration of copyright protection. Many of the ideas of modern copyright can be found in this Statute in its earliest form.

The Statute of Anne inspired American colonial copyright legislation and the Article of Confederation.[248] The United States did not form a federal republic

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242 Fenning, K. (1935). Copyright before the constitution. Journal of the Patent Office Society, 17(5), 379-392.

243 Id.

244 Id.

245 Id.

246 Id.

247 Id.

248 Whaples, R. (2008). Khan, B. An Economic History of Copyright in Europe and the United

immediately after its independence. The states remained self-governing and had the right to make individual laws. Many states established their own copyright laws following the Statute of Anna. For example, in 1783, Connecticut first issued an "Act for the encouragement of literature and genius," which stated that authors should be given profits from the sales of their works because of the principles of natural equity and justice.[249] The Connecticut's Act was transmitted and followed by the Legislatures of the thirteen original States, except Delaware, between 1783 and 1786. To unify conflicts of states' copyright laws, the 1787 U.S. Constitution gives Congress the power to ensure exclusive rights to authors' or inventors' works. According to Article I, Section 8, Clause 8 of the 1787 U.S. Constitution, the Congress passed the Copyright Act of 1790 "… to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In conclusion, when we go back to the early colonial law, the US copyright law emulated the law of UK very closely. However, influenced by domestic, economic, and industrial development alongside international trends, the U.S. copyright law has undergone three stages: the establishment of the U.S. copyright system during 1790–1954, the internationalization of the U.S. copyright law during 1955–1997, and the significant creative development of the U.S. copyright law during1998–2020. The scope of copyright protection and the term of copyright protection have been continuously expanded. The U.S. copyright law is constantly improving to better adapt to the development of technology and industry.

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States. EH.Net Encyclopedia.
http://eh.net/encyclopedia/an-economic-history-of-copyright-in-europe-and-the-united-states/

249 Fenning, K. (1935). Copyright before the constitution. Journal of the Patent Office Society, 17(5), 379-392.

### 3.2 The Establishment of the U.S. Copyright System (1790–1954)

In the history of US copyright law, particularly in its first century, American remained isolationist. During this stage, the U.S. trade policy tends to nativist protection, the scope of copyright protection objects is narrow, and the copyright protection duration is relatively short. It mainly focuses on domestic legislation, with just two attempts at foreign protection.

Shortly after adopting the constitution, many authors petitioned for the protection of their works. **The U.S. copyright law of 1790**, as the first copyright law in the US, was enacted for the encouragement of learning by securing copies of maps, charts, and books to the authors and proprietors of these copies.[250] Based on the Statute of Anne, the 1790 Act granted copyright protection only to created maps, charts, and books.[251] The exclusive rights of printing, publishing, and vending were given to the authors and proprietors of these works. It also provided copyright protection for only 14 years, including a 14-year renewal—the maximum term of copyright protection for authors could be 28 years if they were living.

In the early days of the founding of the United States, American booksellers could obtain the works of well-known British authors for free, print them in the United States, and sell them at low prices to make a huge profit.[252] Writers in both England and America protested. However, booksellers' and publishers' argument that it was most important to give cheap books to the American public prevailed, leading to a century of copyright protection only for domestic authors. So, this Act only protected the copyright of American citizens. Since the United States benefited more

250 .
251 Id.
252 Gantz, J., & Rochester, J. B. (2004). Pirates of the digital millennium: How the intellectual property wars damage our personal freedoms, our jobs, and the world economy. FT Press, 27.

than the loss from its domestic copyright policy, it did not protect foreign copyright in the next 100 years.[253]

In a short term, the U.S. publishing business flourished, and some native publications increased substantially. However, pirated foreign works struck the local cultural industries, and the copyright holders did not seek court relief because they failed to register their copyright. The 1790 Act required the author to deposit a copy of their work with the Secretary of State and publish a 4-week copyright notice in newspaper as a condition to copyright registration. According to Charles Warren, there were only five copyright cases decided in the U.S. circuit courts between 1815 and 1830.[254]

Due to the inefficiency of the 1790 Act, numerous invaluable American books were not protected by the copyright law. Thus, the 1790 Copyright Act was revised no less than 12 times, especially from 1831 to 1870.

In 1831, the first comprehensive revision of the 1790 Copyright Act extended copyright protection to designs, engravings, and other printed matter.[255] Later, musical composition as a copyright work was added to the Copyright Revision of 1831. It also extended the protection period to 28 years for the first time, with an additional 14 years in certain cases. That is, the copyright protection term could be up to 42 years. Nonetheless, the protection was still a little inadequate compared with the European approach of protecting authors for life and 50 years after their death.

In *Wheaton vs. Peters (1834)*,[256] a "condensed report" of cases decided during Wheaton's tenure was published by Peters. Therefore, Wheaton brought an action.

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253 Id.

254 Fenning, K. (1935). Copyright before the constitution. Journal of the Patent Office Society, 17(5), 379-392.

255 Magavero, G. (1978). History and Background of American Copyright Law: An Overview. IJLL, 152-153, p156.

256 Wheaton v. Peters, 33 U.S. 591 (U.S.,1834)

Peters' argument was that Wheaton did not obtain the copyright, and Wheaton's argument was that he had perpetual property rights to his work. The Court held that the author owned property in his work under common law, but this differed from the author's right to claim perpetual and exclusive property after the work was published. The decision disorganized the concept of copyright protection. The idea then was that copyrights were granted only for limited term to protect the public interest and promote new works' creation.

In *Folsom vs. Marsh (1841)*,[257] Charles Upham used hundreds of pages of Washington's letters, where he was sued for infringing the owner's copyright. Upham argued that Washington's letters were not the "proper subject of copyright," and the creation is not literature. Justice Joseph Story held that the writer and his designated heir were copyrighted. The story explains that the essence of infringement is that the value of the original has been significantly reduced, or that the work of the original author has been seriously damaged by someone else. The Court's statement of what constituted the "justifiable use of the original materials" formed the basis of the fair use doctrine.

In *Stowe vs. Thomas (1853)*,[258] Thomas made a German version of Uncle Tom's Cabin and sold those books in the US without permission. The court held that once an author published his works, he no longer had exclusive possession of the thoughts, sentiments, knowledge, or discoveries. Moreover, translation cannot constitute the same composition.

In the 1856 revision, it first provided for the limitation of copyright protection of a dramatic composition designed for public representation and performance.

257 Folsom v. Marsh, 6 Hunt Mer. Mag. 175 (C.C.Mass.,1841)
258 Stowe vs. Thomas, 23 F. Cas. 201 ( C.C.Pa.1853)

In the 1865 revision, the photographs and their negatives were added to the subject scope of copyright protection.

In the 1870 revision, dramatizations and translations of copyrighted works were added to the scope of copyright protection. Also, it extended to paintings, drawings, sculptures, models, or designs for works of the fine arts. Under the 1870 revision, the administration of the registration was transferred to the Library of Congress Copyright Office.

Industry and governments were more invested in securing their interest abroad. Intellectual property harmonization became a central topic since the international trade bloomed in the late nineteenth century. During this period, several attempts were made to allow foreign authors' works to be protected in the US but without success.[259] Until 1891, the "**International Copyright Act of 1891**," also called the Chase Act,[260] extended copyright protection to foreign works from designated countries. Presidential orders or treaties with European countries invoked the law. Under the Act, English language books and other printed materials produced in the US or Canada would be eligible for domestic protection. Also, this Act regulated the "Manufacturing Clause," which gave different treatments between the foreign and the U.S. citizens. This was the first attempt of the U.S. international copyright legislation. However, it conditioned the protection on the domestic manufacture of these works. Even, this Manufacturing Clause remained in full force until 1955 when the US joined its first international copyright convention, the universal copyright convention. It was abolished by the U.S. Copyright Act of 1976.

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259 Fenning, K. (1935). Copyright before the constitution. Journal of the Patent Office Society, 17(5), 379-392.

260 Briggs, W. (1906). Law of International Copyright with Special Sections on the Colonies and the United States of America. London, Stevens & Haynes.

At the beginning of the 20th century, the print-based copyright protection system began to change, as the spread of records, radios, and video recorders disrupted the old routes of distribution and reproduction. Numerous changes have existed in the way the authors create their work. Literary creators discard the traditional mode of creating literary works on paper and can create new works using network technology. Art creators are also updating new ways of creating work using the Internet to create digital video files and storing and distributing them. The form of expression of works is also undergoing great change. Digital formats such as DVDs and Internet-stored audio and video are flooding the market.

In a letter to Congress in 1905, the president specified that the relevant provisions in the U.S. Copyright Law were vague and inconsistent, which was not conducive to the normal play of the function of the copyright law or full protection of copyright owner.[261] Hence, the enforcement by the administrative departments of the Copyright Office always failed to satisfy the public and the development demands of society, which was not conducive to scientific and technological innovation and progress. It was necessary to comprehensively revise the current copyright law to conform to the development level of modern technology.[262]

In June 1905 and March 1906, the Library of Congress held seminars and invited representatives from more than 30 organizations and copyright registration offices.[263] Finally**,** the United States promulgated the second **Copyright Act in 1909**. This large-scale revision established the limitations of the 1790 Copyright Act and greatly promoted the modernization and systematization of the U.S. copyright law.

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261 Brylawski, E. (1905). Legislative History of the 1909 Copyright Act.

262 Id.

263 Marke, J. J. (1977). United states copyright revision and its legislative history. Law Library Journal, 70(2), 121-152.

The 1909 Copyright Act greatly expanded the scope of protection. For example, books, lectures prepared for oral presentation, works of art, photographs, musical compositions, maps, etc., are all types of copyright protection. Simultaneously, the Act provided special protection for compilers and periodicals. Its 1912 amendment extended copyright protection to motion picture film.[264] But, the works produced by the U.S. government and its officers and employees, as part of their official duties, are not subject to copyright protection.[265]

The 1909 Copyright Act extended the renewal period by 14 to 28 years, with copyright protection for a workup to 56 years. However, there was a debate in the US about the need for a separate renewal term. The advantage of the renewal term was that if the author transferred the rights within the initial protection term at a price below the market price, the author could still obtain the compensation by extending the term. However, the beginning of the renewal term should be based on the premise that the author is still alive, which is not conducive to the protection of the author's rights.

As International trade has increased, differences in IP protection between countries became a big barrier to trade development. At the beginning, there was no international intellectual property law. Instead, copyright remains territorial. However, authors and other copyright holders had become more desirable to obtain protection in foreign countries and markets. **The Buenos Aires Convention of 1910** provides for mutual recognition of copyright in works that contain a statement of property rights reservation between the US and all other American Republics except Cuba, El Salvador, and Venezuela.[266] This is the second attempt of the U.S. international

264 Id.
265 Id.
266 (1977). International Copyright Conventions. Washington, D.C., Copyright Office, Library of

copyright legislation, although this convention only applied to copyrighted works produced in inter-American countries that were party to it.

The Convention required that either the author or his legal representative be a national or domiciled foreigner in an American republic, and the work be published in the territory of such republic.[267] Mutual recognition of copyright between States' parties does not require formality.[268] But, the assertion "all rights reserved" in copyright declarations was a notice requirement in member countries.[269]

The duration of copyright protection under it was based on the law of the country where the protection was claimed, except that such duration could not exceed the term given by the country of origin.[270]

But this convention did not cover mechanical reproduction. The translation right and protection for unpublished works are not clear.

For a long while, the US primarily on the copyright protection available under the Buenos Aires Convention of 1910 in its copyright relations with the other American countries.[271] But, the expansion of copyright industry called for a more sophisticated copyright protection, especial in recording area. After 2000, all states' parties to the Convention signed the Berne Convention. Under Article 20 of the Berne Convention, the Buenos Aires Convention becomes a "special agreement," which define the terms of protection by identifying the source country of a work. The term applies to states that have adopted "short-term rules." The Convention State is

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Congress.

267 Rinaldo, A. L. (1975). Scope of copyright protection in the united states under existing inter-American relations: Abrogation of the need for U.S. protection under the Buenos Aires convention by reliance upon the UCC. Bulletin of the Copyright Society of the U.S.A., 22(6), 417-436.

268 Id.

269. Id.

270 Id.

271 Id.

considered the source country of a work in both a Convention State and a non-Convention State.

### 3.3 International Copyright Development in the United States (1955–1997)

After World War II, the publishing industry in the US developed rapidly and exported numerous copyrighted works abroad. With the popularization of new technologies such as films and radios, the US has become a major copyright exporter, but it remains in a weak position compared with traditional copyright powers. To protect the export interests of U.S. copyrighted works, the US joined the Universal Copyright Convention in 1955 and began to march into the international copyright mainstream system. By the end of the 20th century, the US changed dramatically and had become the global leader in copyright protection. Nonetheless, it went from a period of low-level protection to high-level protection.

#### *3.3.1 Low-Level Protection*

In the 1920s, with the development of new technologies, such as film and broadcasting, new industries and new methods for the reproduction and dissemination of copyrighted works were generated. The US gradually became a big export country of copyrighted product. Therefore, the US advocated establishing a new international copyright protection system: **the Universal Copyright Convention of 1952 (UCC)** that was signed on behalf of the US and 39 other states.[272] It was ratified by the US President in 1995.

The scope of copyright protection mainly includes literary, artistic, and scientific works, including writings, musical, dramatic, and cinematographic works,

272 (1954). Legislative History of the Amendment of the Copyright Law in Implementation of the Universal Copyright Convention: P.L. 83-743: Ch. 1161, 2nd Session: August 31, 1954. Washington, D.C., Covington & Burling.

paintings, engraving and sculpture.[273] Also, an intergovernmental committee has been established to study the international protection and cooperation of copyright.

According to the Article III of UCC, a protected work was automatically protected by a member state without registration once in certain formalities. If the formalities were unmet, the work was considered to be in the public domain.

The copyright protection term lasts for 25 years after the author's death or 25 years after the work's publication.[274] Photographic works and applied artworks are protected for longer than 10 years.

The economic rights enjoyed by authors covered at least the right of reproduction, the right of public performance, the right of broadcasting, and the right of translation.

The convention is characterized by the principle of national treatment, which allows a country that has relatively low-level protection system for copyright to joining in the UCC.

In a word, this convention offered a more adequate basis for copyright protection abroad of US books, music, motion pictures and other cultural works.[275] At the same time, it was a compromise of Berne Union copyright system.

Since almost all parties followed the TRIPs later, the UCC later lost its relevance. To reconcile the Berne Convention with the Buenos Aires Convention, the convention was signed under the organization of the United Nations Educational, Scientific and Cultural Organization (UNESCO).

To combat the growing piracy of phonograms, so as to protect the author, performers, and producer of phonograms, the **Geneva Convention for the Protection**

273 Article I of UCC (1952)

274 Article IV of UCC (1952)

275 (1954). Legislative History of the Amendment of the Copyright Law in Implementation of the Universal Copyright Convention: P.L. 83-743: Ch. 1161, 2nd Session: August 31, 1954. Washington, D.C., Covington & Burling.

**of Producers of Phonograms Against Unauthorized Duplication of their Phonograms** (Geneva Convention of 1971) was signed in January 1971 and came into force in 1974.[276] The Convention required Contracting States to enact effective provisions in their domestic laws to stop the act of unauthorized duplication of Phonograms.

The term of copyright protection shall be provided by the laws of each Contracting State but shall not be shorter than 20 years from the end of the year in which the sound contained in the phonogram was first fixed or from the end of the year of publication.[277]

The subject entitled to the protection provided for in the Convention shall be a producer of phonograms as nationals of other Contracting State.[278] Namely, the producer is eligible for protection if he has the nationality of any Contracting State other than the State for which protection is requested.

Article 3 of the Convention provides that it is up to the Contracting States themselves to decide how to protect once it is within the framework of copyright law, unfair competition law, or penal law.

The Geneva Convention ignores the principle of automatic protection.[279] It permits State parties to request certain formalities, simplifies all formalities to the notice comprising the symbol ® of copies of phonograms or their containers.

The Convention provides that State parties providing protection by copyright or other specialized rights or via criminal sanctions may, in their domestic law,

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276 Article 1(a) of Geneva Convention, (1971), "Phonogram" means any aurally perceptible fixation of the sound of a performance or other sound; Article 1(b) of Geneva Convention, (1971), "Producer of phonogram" means any natural or legal person who for the first time has fixed the sound of a performance or any other sound.

277 Article 4 of Geneva Convention (1971)

278 Article 2 of Geneva Convention (1971)

279 Article 5 of Geneva Convention (1971)

provide for the protection of phonograms with limits of rights similar to those permitted for the protection of authors of literary and artistic works.

According to the Convention, a compulsory license can be granted only when reproduction used exclusively for teaching or research is limited to the territory of the granting State, and reasonable remuneration is provided.[280]

This convention permits the US to apply its domestic decisions on record piracy and the common law.[281] And it induces those countries that do not have such legislations to protect performers and producers of recordings.

To prevent the piracy of the signals which carry radio or television programmed and are transmitted from the originating organizations to the distributor designated by the latter through space, by means of a satellites for multi-destination reception, the **Brussels Convention** Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite was signed in 1974.[282] The derived signal that is transmitted from a satellite to a ground station and then broadcast to the user by the receiving station is protected by the Convention. The signal, which is made from a direct broadcasting satellite and can be listened to and watched directly by users on the ground with their own radios or television sets, is not protected by the Convention.

The developing countries and the Soviet Union called for many exceptions since they wanted maximum freedom to use signals. But the developed countries opposite the proposals of the developing countries because they believed it was serious prejudiced.[283] Finally, the Convention allows certain fair uses of the protected

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280 Article 6 of Geneva Convention (1971)

281 Kaminstein, A. L. (1972). Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms. Bulletin of the Copyright Society of the U.S.A., 19(3), 175-183.

282 Straschnov, G. (1974). Convention relating to the distribution of programme-carrying signals transmitted by satellite the twelfth annual Jean Geiringer memorial lecture on international copyright law. Bulletin of the Copyright Society of the U.S.A., 21(6), 369-381.

283 Id.

signals, such as the signals that carry short excerpts containing reports of current events, and in developing countries, the program is distributed for educational and scientific purposes, which are exempt from the Convention. However, it does not specify a term of protection. And China did not join this convention.

Although the dissemination of works in the early 20th century had a qualitative leap compared with the printing method, they still relied on tangible material carriers, such as records, films, and videotapes, for sales and broadcast, and their dissemination was limited to some countries and regions. However, the advent of the personal computer (PC) in the 1970s dramatically changed this mode of communication, turning the world into a global village. Digital users can spread their works globally via the Internet in a matter of seconds, thereby greatly expanding the audience for works. The geographical factor is no longer an obstacle to the dissemination of works due to the anonymity of the network and the decentralization of the region, and the protection of works has been severely challenged, which infringes on the legitimate rights of the copyright owners and impacts the copyright market.[284] The traditional copyright market for literary and artistic works is mainly based on physical products. However, with the advent of the digital age, the whole copyright-trading market has been in turmoil. Consumers are increasingly turning to digital works that are more portable, causing the market for traditional copyright trading to face a crisis. The previously revised copyright law remains unable to tackle the challenges posed by the digital age. The call for a revision of the Copyright Act grew so strong that the US created a third **Copyright Act in 1976** to respond to the continuous strengthening of economic globalization and the deepening of scientific and technological revolution. Specifically, this Act was only 62 pages when it was

284 Rubin, A., & Babbie, E. R. (2010). Research Methods for Social Work (7th Edition). Monterey, CA: Brooks Cole, 146.

promulgated in 1976. But, after 34 years and 25 revisions, it reached 235 pages at the beginning of the 21st century.[285] The Copyright Act of 1976 covered the scope and subject matter of the work, exclusive rights, copyright term, copyright notice and registration, copyright infringement, fair use, defense, and remedy, which established the basic framework for today's U.S. copyright law.

As to the subject matter of copyright, the new act substitutes the phrase "original works of authorship," comprising (a) literary works; (b) musical works; (c) dramatic works; (d) pantomimes and choreographic works; (e) pictorial, graphic, and sculptural works; (f) motion pictures and other audiovisual works; and (g) sound recordings.[286] Also, it extends copyright to unpublished works. Section 108 permits unauthorized photocopying of libraries under certain circumstances.

The exclusive rights granted to copyright owners have a new collation: (a) to reproduce (rather than to print, reprint, publish, or copy); (b) to prepare derivative works (rather than to translate, make versions, dramatize, convert into a novel, arrange, adapt, complete, execute, or finish); and (c) to distribute copies by sale or other transfer, and to display publicly.[287]

As to the exclusive federal protection for written works, the new act abolishes the common law protection for unpublished work under state laws; instead, all works of authorship that are fixed in a tangible medium of express and created after 1/1/1978 come within the subject matter of copyright, whether they are published or not. Hence, only the federal courts have jurisdiction over copyright cases.[288]

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285 Cohen, J. E., Loren, L. P., Okediji, R. L., & O'Rourke, M. A. (2015). Copyright in a global information economy. Wolters Kluwer Law & Business, 36-38.

286 Section 102 (a) of US copyright law of 1976

287 Gorman, R. A. (1978). An Overview of the Copyright Act of 1976. University of Pennsylvania Law Review, 126(4), 856-884. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6925&context=penn_law_review

288 Marke, J. J. (1977). United States copyright revision and its legislative history. Law Library Journal, 70(2), 121-152.

As to the duration of copyright, the 1976 Act cancelled the fifty-six-year limit on copyright protection and the renewal format for newly created works. It adopted a single federal copyright protection term, that is, fifty years after the author's death.

Unprecedentedly, the 1976 Act at first clearly made the fair-use doctrines as defense to copyright infringement. Works may be used without authorization for six statutory reasons: (a) as an example of academic criticism; (b) for non-profit or governmental purposes; (c) for the purpose of teaching; (d) for personal or private use; (e) for the purpose of citation; and (f) for the purpose of parody.[289] It also needs to consider the purpose and character of the use alongside the length of use of the original copyrighted work: whether they are distinguished from the original copyrighted work, and whether they have an impact on the potential market of the original copyrighted work.[290] Concurrently, the 1976 Copyright Act provides for the licensing of copyright, which stipulates that various proprietary rights of copyright can be separately licensed or enforced. It strikes a better balance between the author and the public.

As for foreign protection, the new act extends to unpublished works without regard to the nationality or domicile of the author.[291] Also, the U.S. copyright law can protect published works of foreign nationals if (a) one of the authors is a national or domiciliary of the US or a national or domiciliary of a foreign nation that is a party to a copyright treaty to which the US is a party; (b) the work is first published in the US or in a foreign nation that is a party to the UCC; (c) the work is published by the UN or any of its specialized agencies; and (d) the work comes within the scope of a presidential proclamation.

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289 Magavero, G. (1978). The history and background of American copyright law: An overview. International Journal of Law Libraries, 6(2), 158.

290 Section 107 of Title 17 of U.S.C. (1976)

291 Section 104 of US copyright law of 1976.

In conclusion, the 1976 Act simplifies copyright law with concrete guidance and new principles and definitions. In addition, the US anticipated acceding to the Berne Convention through this revision to bring US law in line with international copyright law, which strengthened the trend of internationalization of copyright protection.

### *3.3.2 High-Level Protection*

With the further development of science, technology, and cultural industry in the US, the copyright industry has become an important emerging industry playing a decisive role in the U.S. economy. In 1977, the economic value that the copyright industry created took about 3.73% of GNP; the number of employees in the copyright industry accounted for 3.3% of the total number of employees in the US.[292] Later, the US became the largest export country of copyrighted products.[293] However, the developing countries and new industrial powers from Asia have reduced the competitiveness of older industrialized countries, such as the US, because of much less expense products since 1980s. Meanwhile, the blossomed counterfeit and piracies products made U.S. companies suffer heavy losses in the international trade market.[294] The U.S. trade deficit is continuously mushrooming. Therefore, foreign trade was a top-level political and diplomatic issue after 1985.[295] To maintain the advantage of its copyright industry and enhance international competitiveness, the US began to use aggressive trade policies to comprehensively strengthen copyright protection in international markets.

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292 Solberg T. (1925). Copyright law reform. The Yale Law Journal, 35(1), 48-56.

293 Wang, D. (2016). US-China economic relations. In Tan, A.T.W. (Eds.), Handbook of US-China Relations, Edward Elgar Publishing. (pp. 133-152).

294 Peifer, K. (1996). Brainpower and trade: The impact of TRIPS on intellectual property. German Yearbook of International Law, 39, 100-133.

295 (1985-1986). Trade Conflict in the 99th Congress. Congress and Foreign Policy, 12, 92-120.

The first step was to open bilateral/multilateral trade negotiations related to IPR protection. The principle of reciprocity, national treatment, and minimum standard of protection which were made by bilateral and multilateral treaties smoothed out variations in copyright protection between countries. The second step was to enact national trade law to fight the unfair trade activities of foreign countries.[296] **Section 301 of the Trade Act of 1974**, which refers to section 301, grants the president and the U.S. Trade Representative authorities to deal with foreign countries that violate the U.S. trade agreement or engage in activities that are unjustifiable (defined as those that are inconsistent with the U.S. international legal rights) and unreasonable and that burden or restrict the U.S. Commerce.[297] Section 301 provides a domestic procedure whereby the affected enterprises or individuals may petition the USTR to investigate a foreign government policy or practice and take affirmative steps to remedy the offending practice. The USTR may also self-initiate an investigation.[298] Dissatisfied with the level of international protection for intellectual property and multilateral efforts designed to heighten protection, Congress created Section 182 of the Omnibus Trade Act of 1974, commonly referred to as "Special 301." It was a means by which the US could identify countries that denied adequate intellectual property protection for the U.S. firms and encourage the identified country to alter its offending practices.[299] Besides, the **Omnibus Trade and Competitiveness Act of 1988**—an amendment to Section 301 of the Trade Act of 1974—endowed the U.S. International Trade Commission (ITC) with considerable ability to exclude foreign goods that infringe American intellectual property right. The

296 Id.

297 19 U.S.C. Subchapter III. §2411-2420, Enforcement of US rights under trade agreement and response to certain foreign trade practice

298 Id.

299 Bickham, T. C. (1995). Protecting U.S. intellectual property rights abroad with special 301. AIPLA Quarterly Journal, 23(2), 195-220.

1988 amendment to Section 337 appeared to benefit U.S. intellectual property rights owners by reducing the burden of proof on petitioners and increasing their likelihood of outlawing foreign defendants. Petitioners need only show that (a) they have intellectual property rights under the Act; (b) the respondent has infringed on the right; (c) the respondent has imported or sold infringing goods in the US; and (d) a related industry exists or is being established. Third, the US started regional free trade agreements to push its high-level protection standards. So, advancing international IPR protection has been a US trade negotiating objective since 1988.[300]

Modern international copyright law is rooted in the 1886 **Berne Convention**. It is the largest international copyright convention with 179 nations as its parties until now.[301] The preamble of this convention declared: "to protect effectively the rights of authors over their literary and artistic works and in as uniform manners as possible." It defines the range of "literary and artistic works" includes all works in the fields of science, literature, and art, regardless of their form of expression. The Berne Convention also regulates that the authors shall enjoy: (a) the right of translation (Article 8)； (b) the right of reproduction (Article 9); (c) the right of public performance and communication to the public of a performance (Article 11); (d) the broadcasting and related rights (Article 11); (e) the right of public recitation (Article 11); (f) the right of adaptation (Article 12); (g) the right of recording (Article 13/Article 9(3)); (h) cinematographic and related rights (Article14); and (i) the right to protect the integrity of the work and other moral rights. Notably, the economic rights of the authors provided in the Convention cover the right of translation and the right of reproduction. Under Article 9, authors of literary and artistic works may authorize

300 Akhtar, S., (2020a), USMCA: Intellectual Property Rights (IPR).

301 WIPO (2021), Contracting parties of Berne Convention for the protection of literary and artistic works, https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15

the reproduction of those works in any manner. The laws of the member states can permit the reproduction of these works without prejudice to the normal use of the work or unreasonably endanger the legitimate interests of the author. We can see this convention has a dual protection of authors moral rights and economic rights, which is also recognized in the Universal Declaration of Human Rights.[302]

According to article 7 of this Convention, the copyright term is for the life of the author and 50 years after his death. For a cinematographic work, the members of the Convention have the right to provide that the term of protection expires 50 years after the publication with the consent of the author; if the work is not publicly distributed within 50 years after its completion, it shall expire within 50 years after the completion. The term of protection of a work of unknown author or created under a pseudonym shall be 50 years after its publication to the public. Photographic works and works of applied art may be protected for a term specified by national legislation, but not exceeding 25 years from the date of making.

The Berne Convention provides national treatment, which requires a member state to give the same protection to the works of citizens of other member states as it does to the works of its citizens. It must be noted, however, that national treatment does not mean that a work of the US receives the same protection in a foreign country as it does in the US, but rather that a work of the US receives the same protection in a foreign country as that country gives its own work.

Another important principle is the territoriality principle. Following Article 5, Paragraph 2 of the Berne Convention, copyright protection applies to the law of the state under which protection is claimed. This provision can be further interpreted as

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302 Shen, J. (1991). The P.R.C.'s first copyright law analyzed. Hastings International and Comparative Law Review, 14(3), 529. https://repository.uchastings.edu/hastings_international_comparative_law_review/vol14/iss3/18.

the law of the country where the infringement occurs. Authors enjoying national treatment are protected in any member state, irrespective of the source of their work. The protection of authors' rights, administrative or judicial remedies, etc., are implemented following the laws of the country providing protection. Thus, even if a work is first published in another country, the U.S. law gives it all the rights it would have under copyright law if the infringement occurred in the U.S.

The Act removes the mandatory use of notices of copyright on protected works for public distribution, bringing U.S. law in line with the Berne Convention. It removes the copyright notice requirements for all copies of works for public distribution and makes registration a prerequisite for copyright infringement actions. Therefore, only works whose country of origin is not the US are exempted from registration—a prerequisite for bringing copyright infringement actions. The Berne Convention clarifies the principle of the automatic protection of copyright. According to the Convention, the enjoyment and exercise of copyright need not go through any procedures, regardless of whether the country of origin of the work of the relevant protection procedures, that is, works are automatically protected by copyright law.

Initially, the US did not join the Berne Convention mainly because there were many significant differences between the Berne Convention and the U.S. copyright system. For example, the Berne Convention provided copyright protection based on the author's life, and no registration and copyright notice were required. In the US, copyright protection was for a fixed term, required registration with the Copyright Office, and included a copyright notice. Hence, the US would need to make several major changes to its copyright laws to become a party to the Berne Convention. Moreover, the Berne Convention was far more protective of copyright than the U.S.

copyright law and other international conventions then. The US did not agree to provide such a high level of protection of foreign works then.

However, with the development of international trade, many countries have imported numerous U.S. books, movies, computer software, and other copyrighted works. In the late 1980s, the technology and economic level of the US had reached the leading level in the world, and the copyright industry had developed into an emerging industry sector, making a huge economic contribution to the US. Then, the US had become the world's largest beneficiary of copyright protection. The copyright protection policy of the US was a global expansion. American lawmakers are aware of the necessity to participate in the Berne Convention to protect the copyright of U.S. citizens in other countries. After weighing the stakes, the US passed the **Berne Convention Implementation Act** and amended its 1976 Copyright Law in 1988, including the copyright registration rule, extended the term of copyright protection, etc., and formally acceded to the Berne Convention in 1989. So far, the US has entered the mainstream system of international copyright protection. Now, it extends the U.S. copyright protection to all works of Berne member countries.

With the trade volume of intellectual property rights is increasing much faster than that of goods. Free trade was seen as a new target for the new world order. The US enjoyed its “trade-driven” copyright success in the 1980s when it negotiated bilateral and regional treaties with other countries, especially in Caribbean and the Pacific Rim.[303] Although these negotiations showed the value of trade tools in enhancing IPR protection worldwide, the US dissatisfied with the uneven process under W.I.P.O. For example, there is a lack of international protection for computer software and sound recordings. Furthermore, there is a lack of an effective dispute

303 Oman, R. (1994). Intellectual property after the Uruguay round. Journal of the Copyright Society of the U.S.A., 42(1), 18-38.

settlement mechanism to tackle trade-related intellectual property issues, especially between the socialist countries and capitalist countries. With a great increase in the number of developing countries in the WIPO, three rigid counterbalanced groups formed.[304] In addition, the WIPO secretariat tried to revise the Paris Convention and Berne Convention that were under frame of WIPO, but he failed due to the impossibility of amending US laws. "Let's change you law, not our law,"[305] thus the US actively promotes the establishment of a new official international trade-related copyright protection system and put this issue on the agenda of the Uruguay Round.

In the end, the new GATT Agreement in Marrakech Meeting, the general agreement on trade in services (GATS), and the TRIPS agreement became three parts of the WTO system. In 1994, President Clinton signed the **Uruguay Round Agreement Act** (URAA), which implemented the new GATT Agreement and the WTO/TRIPs to ensure that measures and procedures relating to intellectual property rights do not become obstacles to international trade.

Actually, the GATT initiative started after World War II as an effective means of reducing tariffs and trade barriers on an international level.[306] Its most important provision is the principle of unconditional MFN (Most-Favored-Nation) treatment, which impedes national regulations discriminating between foreign goods coming from State A and those coming from State B. However, the intellectual property protection was exempted from the MFN clause in Article XX of GATT 1947. We can see that the legislation on IPR protection is used as a trade restriction and an obstacle to technology transfer into developing countries.[307] However, the 1994 GATT gave a bigger pie to slice up that benefited more countries by tariff cuts and trade measures.

304 Id.
305 Id.
306 Peifer, K. (1996). Brainpower and trade: The impact of TRIPS on intellectual property. German Yearbook of International Law, 39, 100-133.
307 Id.

**The TRIPs agreement** is the first multilateral treaty to cover the enormous types of intellectual property, including specific provisions on the copyright protection of computer software and databases, alongside the settlement and enforcement of international intellectual property disputes. It has also set new standards for international intellectual property protection, exceeding the Berne Convention. Besides the principle of MFN treatment and national treatment, the TRIPS agreement added a new principle of minimum protection, which is valid only for IPR. It required WTO members that had a lower level of copyright protection to amend domestic copyright law to align with the TRIPs Agreement, which extended to the substantive law and enforcement of national copyright law.[308]

In the broad sense, its copyright protection includes not only economic rights and moral rights, but also the neighboring rights. Moral rights are the rights of authors to make their copyrights recognized by people and to prevent their works from derogatory treatment. Specifically, they include the right to publish a work; right of attribution; right to modify or authorize others to modify the work; and right to protect the integrity of the work from alteration or derogation.

The term of copyright shall be not less than 50 years from the end of the calendar year in which the work was authorized to be published (or completed). The rights of performers and producers of phonograms should be protected for at least 50 years, and the rights of the media should be protected for at least 20 years.

In sum, the TRIPS agreement regulated a uniform minimum standard of copyright protection in the matter of originality, duration, scope, and enforcement and extended copyright protection to computer programs and databases. Moreover, disputes on intellectual property rights would be settled by the WTO, which

308 Id.

strengthened the obligations of the member states in international trades. Therefore, the TRIPS agreement has become one of the most influential international copyright agreements. However, the TRIPs agreement is special due to the single-package approach, which means that the joining parties should accept it as a whole, regardless of the developing country. Since the creation of this Agreement cannot be separated from the promotion of the US in the negotiations, it can be said that it is the internationalization, expansion, and systematization of Special 301 of the US. Alternatively, the TRIPS agreement caters to the needs of the overseas expansion of the U.S. copyright industry, enlarges the scope of U.S. copyright protection, and strengthens the ability of U.S. copyright protection abroad. The powerful U.S. software, film, and other copyright industries obtained broad and effective protection through the implementation of TRIP agreement. However, the US is now dissatisfied with the protection provided by TRIPS. So, it has further improved the protection of copyright overseas by pushing for amendments to the agreement and signing free trade agreements, such as the **North American Free Trade Agreement** (NAFTA).

It is exactly what the US has been seeking for high standards of international intellectual property protection and enforcement. NAFTA was a comprehensive free trade agreement between the US, Canada, and Mexico in 1994， which goes a bit further in some aspect than the GATT agreement.

NAFTA provides automatic protection for works within the meaning of the Berne Convention.[309] Therefore, although this agreement does not expressly describe new forms of works that shall be protected, computer programs, databases and other compilations, encrypted program-carrying satellite signals,[310] and recordings will be within the scope of copyright protection. Computer programs are protected as literary

309 NAFTA. (1994). Supra note 3, art. 1705, para. 1.
310 NAFTA. (1994). Art. 1707.

works and deserve the highest protection. NAFTA's broad protection of software is a major advantage. The original work shall be fully protected, whether it falls into the category of historically protected works. NAFTA explicitly covers all new forms of work to provide the most effective protection.

NAFTA provides for authors broader exclusive rights: the right to control the importation of unauthorized copies; the right to make initial public distribution of original copy and each copy; and the right to fully control rental of copies of computer programs.[311] Selling copies does not exhaust the right to control a commercial rental. The exclusive rights to sound recordings are subject to the same provisions on rental rights as those for computer programs.[312] Copyright holders have extensive exclusive rights that enable them to benefit fully from their copyrights. NAFTA excludes the protection of moral rights.[313]

NAFTA gives copyright holders the right to transfer their rights freely and without hindrance.[314] In addition, assignees and other rights holders should be able to fully enjoy the whole benefits of their rights. Contractual rights enable the assignee to benefit from these laws on a non-discriminatory basis, just as its transferors can benefit.

NAFTA provides comprehensive national treatment, and member states are guided by the principles of national treatment, MFN treatment, and transparency to achieve their objectives. The only exception is the recording rights of performers, which involve secondary uses (public performance and broadcasting) of a sound recording,[315] and NAFTA applies the reciprocity standard. National treatment provisions in NAFTA ensure that most rights holders will receive non-discriminatory

311 NAFTA. (1994). Supra note 3, art. 1705, para. 2.
312 NAFTA. (1994). Art. 1706, para. 1.
313 NAFTA. (1994). Supra note 3, annex 17013, para. 2.
314 NAFTA. (1994). Supra note 3, art. 1705, para. 3.
315 NAFTA. (1994). Art. 1703, para. 1.

treatment, enabling foreign copyright holders to benefit fairly from these systems. NAFTA sets out enforcement provisions that protect rights holders and ensure that these measures do not become barriers to trade.

NAFTA, while still imperfect, represents a major advance in copyright protection. It is based, in large part, on a US-led process to improve the protection of intellectual property around the world. Later, the United States—Mexico—Canada Agreement (USMCA) replaced it in 2020.[316] We can find that the trade approach to solving IPR problems has been widely used and are proved useful. It successfully induced more countries to model their copyright laws in American image.[317] But, with the increasing economic power of China or other countries, can the US trade leverage help the copyright or IPR trade? How does the trade policy instrument which has evolved by technology deal with the copyright issues in the future? And the political will and pressure is going to be there.[318]

### 3.4 Significant Creative Development of US Copyright Law (1998–2020)

#### *3.4.1 Establishment period of Digital Copyright Law (1998–2009)*

In a traditional publishing environment, copyright protection balances the interests of two large groups, that is, the public interest in new and creative ideas and the benefits that authors get from a limited monopoly. While it protects the author's rights and stimulates the author's enthusiasm for creation, it effectively protects the interests of the public so that the public can contact and use the works. However, with the development and changes in network technology, the copyright environment has changed. Individuals can easily obtain work on the network and re-disseminate works.

316 Akhtar, S. (2020b), Intellectual property rights and international trade.

317 Yu, P. K. (2003). The harmonization game: What basketball can teach about intellectual property and international trade. Fordham International Law Journal, 26(2), 218-256.

318 Anonymous. (1996). Session III Panel Discussion: Intellectual Property Issues in Multilateral Trade Agreements. International Intellectual Property Law & Policy, 1, 159-164.

Hence, copyright works are simple to infringe on, and the balance of copyright law has been quickly broken. Faced with the adverse impact of the development of the Internet on copyright law, the WIPO adopted the **World Intellectual Property Organization Copyright Treaty** (WCT) and the **WIPO Performances and Phonograms Treaty** (WPPT) in 1996, which are known as the "International Internet Treaties." This represents the first international effort to response to the digital challenge and to extend traditional copyright protection to digitized reproductions.

The WCT of 1996, signed with the participation of more than 125 countries, is intended to solve the new problem of copyright protection caused by the application of digital technology in the Internet environment. In particular, it also provides provisions tackling the copyright liability of online service providers, ephemeral copying, and fair use. Briefly, it is the updating and supplement of the Berne Convention.

It covers copyright protection for computer programs, databases as intellectual works, and digital communications, including the transmission of copyrighted works over the worldwide Internet and other computer networks.

New exclusive rights for authors: (a) reproduction rights to indirect and temporary copying by computers transferring files on the Internet and other computer networks; (b) public distribution right319; (c) and the commercial rental rights.[320]

Meanwhile, this act provides two limitations on the above exclusive rights: (a) ideas, procedures, methods of operation, or mathematical concepts[321]; (b) contracting

319 Article 6 (1) of the WIPO Copyright Treaty (1996)
320 Article 7 (1) of the WIPO Copyright Treaty (1996)
321 Article 2 of the WIPO Copyright Treaty (1996)

parties' legislations about limitations or exceptions would not conflict with the normal market and unreasonably harm the interest of the author.[322]

Article 9 provides the member states the standard term of life of the author plus 50 years of protection for photographic works.

The WPPT of 1996 is a new treaty to better protect the rights of performers and producers of phonograms regarding the Internet. It is actually a treaty on "neighboring rights."

WPPT covers two types of IPR beneficiaries: performers (actors, singers, musicians, etc.); and the producer of Phonograms (the natural or legal person who initiates and handles the Phonograms).

The Article 5 of WPPT extends to performers of performances and phonograms "moral rights", that is, the right to claim to be identified as a performer and the right to object to distortions or other modifications that may damage the reputation of the performer. It is a significant departure from US law since the US recognizes moral right only with respect to visual works at that time.[323] Article 15 grants the performer and producer of the phonograms the right of broadcasting. They could be paid an equitable remuneration for using the phonograms for broadcast to the public, provided that the State Parties may reserve that right. In cases where one Contracting Party has reservations, the other Contracting Party is allowed to refuse national treatment regarding the retaining Contracting Party.

According to the Agreed Statement, the limitations and exceptions provided for in national legislation under the Berne Convention apply to the digital

322 Article 10 of the WIPO Copyright Treaty (1996)

323 Jun, M., & Rosenboro, S. D. (1997). The WIPO treaties the international battle over copyright cyberturf. Entertainment and Sports Lawyer, 15(3), 8-13.

environment. In addition, State parties may establish new exceptions and restrictions applicable to the digital environment.

The term of protection must not be less than 50 years. The exercise of the right does not require any formalities. The Parties shall provide legal remedies and necessary measures to implement the Treaty.

The true effects of these WIPO treaties start with the domestic legislation of member countries. In 1997, the US joined the two Internet treaties and began to modify the domestic copyright law. Since then, several new copyright legislations have been introduced. Since the IP law treaties have not been considered self-executing under the US law.[324] IP treaties represent private international law rather than public international law. Any inconsistencies between the provisions of the copyright treaty and the existing national copyright law are ordinarily resolved by the time the treaty is ratified to satisfy the U.S. international treaty obligations. So, the legislation is subject to public debate and assessment by different interest groups, such as the Digital Future Coalition that represents the electronic industry, technology and communication companies, and online service providers.[325] The copyright holders thought that the US should become a model for copyright protection in the digital environment, so copyright law should be powerful and strict, especially for online piracy. But the Internet service providers (ISPs) and libraries asserted that copyright law should consider the public interest. After negotiations, ISP and copyright holders ultimately reached a compromise.

The US has passed the **Digital Millennium Copyright Act** in 1998 and other laws to strengthen copyright protection for digital works and their dissemination regarding the rapid development of digital technology and the Internet.

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324 Sheinblatt, J. S. (1998). The WIPO Copyright Treaty. Berkeley Tech. LJ, 13, 535.
325 Id.

DMCA comprises five aspects: (a) the implementation of the WIPO Treaties; (b) the limitation of liability for copyright infringement on the Internet; (c) the exemption of copyright for computer maintenance; (d) the comprehensive provisions, and (e) the protection of certain original designs. It emphasizes the inclusion of the WIPO Internet treaties of 1996 into the scope of copyright protection of the US and clearly stipulates the criminal responsibility of those who violate the copyright protection system and the integrity of copyright right management information. From US perspective, much of the WTC provisions merely conforms international standards to domestic copyright law. DMCA provides higher copyright protection standards than the International Internet Treaties.

Also, this Act exempts ISPs from liability for infringing other people's copyright through their networks and enlarges the scope of fair use of the library and exempts the responsibility of infringing the copyright by transmitting the Phonograms.

In sum, it provides new security for computer software, online music, and books. However, the provisions of the technical measures contained in the Act have caused many debates in the US. They prohibit interference with any technical protection measures taken by copyright holders to restrict their use by others. Critics generally argue that provisions on technical measures favor copyright owners too much, upsetting the balance of copyright law between owners and users.

Last, the **Sonny Bono Copyright Term Extension Act** (CTEA) extended the term of copyright protection to the author's life plus 70 years. It also increases the length of protection for anonymous and pseudonymous works alongside hired work.

### *3.4.2 Adjustment Period of Digital Copyright Law (2003–2020)*

Before, the law's attitude toward technological protection measures is too inclined toward copyright owners, and it neglects the public interest and breaks a balance between the copyright owners and users established by the copyright law, so consumer groups, education institutions, research institutions, libraries, manufacturers of consumer electronics, computer and communication industries, and many other interest groups are called for to change the law.

In *Eldred vs. Ashcroft*[326], Eldred ran a website that offered free downloads of books that were out of copyright. Changes in copyright law in 1998 ruin Eldred's plans to publish some of his early poetry online. Eldred sued Congress for violating the U.S. Constitution when it passed the law in 1998. According to Eldred's argument, repeated extensions of copyright were in effect a form of perpetuating copyright, in clear contradiction to the Constitution's "limited time" Copyright Clause. The Court upheld the constitutionality of the CTEA, rejecting a challenge to the CTEA by Eldred. The Supreme Court held that the term of protection of copyright, which includes only the life of the author and 70 years after his death, was a limitation of the Copyright Clause of the Constitution.[327] Copyright protection is an option for the author, not a requirement. Authors have the option to change their minds and individually decide whether to sell or give up their music. The question is how to balance copyright protection and public domain. While we want to give copyright holders proper protection to encourage creative individuals to do their work, we want to ensure that future users of copyrighted works are not overburdened so that those creators can build on the original work and create new works, which can also promote the development of culture. Currently, these two goals are not in balance. The

326 Eldred v. Ashcroft, 537 U.S. 186 (U.S.,2003)
327 Id.

Congress had always extended, never shortened, the term of copyright. All of these extensions are at the request of copyright owners and the industries that thrive in their copyrights.

Since 2003, the US proposed specific measures to amend the DMCA from different perspectives, including expansion of the scope of fair use and personal use of digital works by the public and expansion of the scope of exceptions prohibiting circumvention of technology protection measures. Under the environment of digital technology development by leaps and bounds, the U.S. IP law is constantly being adjusted.

**The Family Entertainment and Copyright Act** (FECA), which was enacted by President George W. Bush in 2005, provides legal protection for a new DVD-filtering technology on the market that allows parents to automatically skip violent and pornographic content that is unsuitable for children.[328] Under the law, parents can edit DVDs using special players to remove objectionable content from them. The law also made it illegal for individuals to record motion pictures in a theater or distribute unpublished works, such as movies or software.

The **PROTECT IP Act** (PIPA) or Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act was introduced as S.968 in 2011. Its aim is to give the U.S. government and intellectual property owners more legal tools to intervene against rogue websites that specialize in offering and distributing pirated copies and counterfeit goods to US customers by operating outside the US.[329]

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328 Gansheimer, S. (2006). The Family Entertainment and Copyright Act and its consequences and implications for the movie-editing industry. Tulane Journal of Technology and Intellectual Property, 8, 173-188.

329 Gregory, H. W. (2012). Congress sets its sights on online piracy of intellectual property: Protect IP and SOPA. Landslide, 4(4), 2-8.

Under the Act, ISPs must block the domain names of websites with pirated content and prevent Internet users from accessing foreign sites with pirated content or face penalties. Despite the competing interests of media groups and Internet companies, there are widespread concerns that the legislation will induce censorship, hamper freedom of expression, and hamper innovation on the Internet.

PIPA will provide a mechanism to prevent online copyright infringement by allowing the Department of Justice or copyright holders to block access to social networking sites and domain name services suspected of infringing content. The legislation was opposed by digital rights organizations which believed that the bill could pave the way for the government to shut down infringing websites without due process.

**Stop Online Piracy Act** (SOPA), known as H.R. 3261 bill, was introduced shortly after the sending of PIPA. This bill directed at entities, such as Internet service providers (ISP), search engines, Internet advertising service and payment service provides, and victims of online sale of pirated or counterfeit goods. It also makes it easier for the Department of Justice and other copyright holders to seek court injunctions against such rogue websites. For example, banning online advertising companies from placing advertisements on suspected websites; banning payment websites from providing payment services to suspected websites; banning search engines from displaying suspected websites' addresses; and even requiring ISPs to deny users access to suspected websites.

The bill increases penalties for Internet users who share copyrighted content online without authorization. The law also holds websites liable if they know content is infringing but claim ignorance and refuse to remove it. But if the ISPs have

voluntarily taken measures to combat online piracy or other copyright infringing activities, they would be granted legal immunity.

The victims can seek damages from any website that knowingly offers infringing content or pirated products. They can request the ISPs to suspend the service of the suspected infringing website if the site does not provide evidence to the contrary. Otherwise, the victim can seek for a court order to force the ISP to perform the duty.

Overall, the PIPA and SOPA have strong bipartisan support in both houses of Congress and broad support in the affected community, but there also strong opposition.[330]

Due to the cumbersome regulations of DMCA, it fails to adapt to current technological progress and changing business development. Today's copyright law does not suit the needs of the majority of copyright owners and individual users. The framework of copyright law should be reformed to better encourage the creation of copyrighted works and to protect users who lawfully use copyrighted goods. **The Digital Copyright Act of 2021** (DCA) is a modernizing reform of the U.S. copyright law. The DCA has revised key provisions on combating online copyright piracy, improved exemptions that users can use to circumvent technical protection measures (TPM), and increased attribution protection for authors so that copyright can be properly recognized.

In the Act, individual federations play a greater role in establishing regulations to better protect copyright owners and individual users and to increase the certainty of the online service providers regarding their obligations under Section 512. The bill reduces the need for copyright owners to identify the specificity of infringing material

330 Id.

in some cases and establishes a notice-and-staydown system for complete and near complete works. Liability is limited in cases where, after a diligent search by good faith users, they are unable to find the copyright owner and decide to continue using orphan work.

A Copyright Office will be established within the Department of Commerce under the direction of a Register of Copyrights appointed by the President. It modernizes permanent exemptions and expands the scope of temporary exemptions. Also, if copyright management information on a digital or analog copy is removed or altered to conceal the author's attribution information, the author has the right of action.[331] Rights holders were happy with it, but digital rights groups believed that it would destroy the Internet and "end online creativity."

Updated and rebalanced, the **USMCA** replaced NAFTA in 2020. Under USMCA332, copyright protection includes: (a) 10 years of data protection for biologics and various products; the protection of copyright shall not expire less than 70 years after the death of the author; for works not based on life, the minimum term is 75 years since the first licensed publication; (b) copyright and related rights enjoy full national treatment; (c) civil and criminal penalties for circumventing technology protection measures; (d) establishing copyright-safe harbors following the U.S. intellectual property law, and providing predictability to legitimate businesses that do not directly benefit from copyright infringement; (e) notice and takedown approach to address intermediary liability of ISPs.

The copyright protection standard of USMCA is higher than NAFTA or TRIPs Agreement, which shows that the US began considering new bilateral and

331 Tillis, T., (2020), Tillis releases landmark discussion draft to reform the Digital Millennium Copyright Act. https://www.tillis.senate.gov/2020/12/tillis-releases-landmark-discussion-draft-to-reform-the-digital-millennium-copyright-act

332 Akhtar, S., (2020a). USMCA: Intellectual property rights (IPR).

multilateral trade treaties to export their law and to achieve stronger IP protection in the world as the rise of its nationalism and protectionism.

But how is the implementation of IPR obligations by USMCA parties? Whether it advances US trade negotiations objectives and protects IPR and other interests? where will the international copyright harmonization go?

### 3.5 Trends and Summary

Throughout the history of copyright protection in the US, the US implemented different copyright laws in different historical periods, which can be divided into the stage of copyright protection and the stage of copyright expansion. In the stage of copyright protection, the US only provided protection for domestic copyrighted works; in the copyright expansion stage, the US extended the scope of copyrighted works to foreign countries and tried to achieve the purpose of rights expansion by participating in the legislation of international copyright conventions.

The U.S. copyright protection system has been rapidly improved. Before the Copyright Act of 1976, the U.S. copyright law mainly focused on the revision and improvement of the subject, object, term, and other copyright protection. Although some progress has been made, there are still many institutional deficiencies compared with the current Copyright Act. In 1976, the US began to amend the third Copyright Act. For the first time, the fair use of copyrights has been clearly stipulated. There are six statutory reasons for fair use without a license.[333] For uses that meet these grounds, the law also needs to consider whether they are distinguished from the original copyrighted work, the length of use of the original copyrighted work, and whether they impact the potential market of the original copyrighted work. Concurrently, adding to the provisions on fair use, the Copyright Law also conducts relevant

333 Magavero, G. (1978). The history and background of American copyright law: An overview. International Journal of Law Libraries, 6(2), 158.

provisions on the licensing of copyrights. The U.S. copyright law was improved initially and gradually with social progress.

The history of copyright protection in the US is a history of the evolution from short-to long-term copyright protection. The first federal Copyright Act, enacted in 1790, set a term of 14 years plus an additional 14 years. In 1831, the initial term was changed to 28 years; the renewal term was extended from 28 years in 1909 to 47 years in 1962. The Copyright Act of 1976 abolished the fixed term and replaced it with a variable term, which is the life after the author's death plus 50 years after his death. If it is a work for employment, whether published or not, the term of protection is 75 years from the date of publication or 100 years from the date of creation, whichever terminates first. The Sonny Bono Act of 1998 extended the protection to 70 years after the author's death. If it was a work for employment, those protections were extended to 95 years for published and 120 years for unpublished.

While the term of copyright protection has been extended, its scope has also been expanded. Prior to the Copyright Act of 1976, federal copyright protection was largely limited to publications, and other works were protected primarily by state common law. However, a federal copyright can be obtained if unpublished work or material parts of the work are registered with the Copyright Office.

Also, the internationalization trend of copyright protection is obvious. Due to the low-level copyright protection adopted by the US (the US has always adopted a low-level copyright protection development model), after the Berne Convention, the US had been free from it for more than 100 years to escape its high-level copyright protection and promote the development of its own copyright industry. However, due to the development of network technology and the integration of global information in the 1980s, the low-level copyright protection had been unable to meet the needs of the

domestic copyright industry in the US. As international exchanges and integration became more frequent, the US began to consider the international protection of copyright to strengthen its integration with the international community and improve its participation in the international market. In 1989, the US joined the Berne Convention to provide national treatment to member countries and protect the moral rights and interests of authors. In 1995, the US joined TRIPs and adopted the principle of dichotomy of expression of ideas following the requirements of TRIPs and clarified the protection of computer software and film production works. In 1996, the US joined the WCT and WPPT of the WIPO. To implement the convention, the US launched the DMCA in 1998. The Act prohibits circumventing or cracking technology protection measures, prohibits the production, sale, or provision of any technology, products, or services that circumvent or crack technology protection measures, and concurrently strengthens the protection of online copyright. After that, the US no longer committed to just joining the international Copyright Convention, but it strives to lead the formulation of international copyright conventions and to become the dominant player in international copyright protection rules.

Before the 20th century, the U.S. copyright law was not taken seriously enough. Originally conceived of as private law, copyright law has been transformed into a form of public law. This change is related to the change in the ideas of law in American legal thinking after World War II. The 1950s and 1960s were the period during which the current U.S. copyright law was constructed. Today, the U.S. copyright law is a "legal process" because law is dynamic, purposive, and multi-institutional in origin—modern copyright in the US constantly adapts to this reality.

The balance of interests determines the direction of copyright protection. It is necessary to restrict copyright for the public interest to ensure the public's fair use of copyright. With the development of network technology in the digital environment, traditional copyright law has been impacted. The expansion of copyright owners' rights, coupled with strict technical protection measures, has also greatly affected the public's access to and use of works. The conflict between copyright owners' rights and public interest is more and more tense. Concurrently, the presence of disseminators in the digital environment also affects this balance. Thus, a new balance of interests has emerged, that is, copyright law will balance copyright owners, disseminators, and the public. Currently, the most typical communicators are ISPs.

In the digital environment, the balance of interests in the U.S. copyright law often tilts to the side of the copyright owner, which is closely related to the tradition of private rights first in the US. In its copyright legislation, the US has embarked on a road that focuses on safeguarding the interests of copyright owners. The formulation and modification of copyright laws in the U.S. digital environment are completed considerably under the intervention of various interest groups. The formulation of the famous Digital Millennium Copyright Act is due to the lobbying of the traditional software entertainment industry to the Congress. If the protection is insufficient, it can promote the progress of science and technology and guarantee the free development of Internet technology, but simultaneously, it will face the risk of destroying the achievements of copyright protection for hundreds of years, which may damage the rights of copyright owners. If excessive protection is chosen, the status of copyright protection can be maintained, and the rights of copyright owners can be preserved. However, it also faces the risk of damaging the development of Internet technology, which may induce the interruption of the free flow of information on the Internet. In

choosing between these two options, Congress has chosen to overprotect copyright holders at the expense of the free flow of information on the Internet.[334] Therefore, some scholars believe that the current copyright law is no longer a tool to protect the interests of copyright owners and the public. Instead, it has been overused by copyright owners and has become a means to trample on cultural freedom.[335]

However, as you look at some of the development within US intellectual property law, a lot of it has occurred in the context of trade.[336] There has been one consistency throughout the entire history of US copyright law: the market-based approach.[337] Copyright in the US is treated as a trade-off and economic reward for creation. US intellectual property law is absolutely exceptional since its emphasis on competition. When we mentioned US intellectual property law, people did take a view of it as trade regulations. If you take intellectual property law from a comparative perspective, the US approach is largely about promoting competitive value in international trades. The US and other developed countries have been more successfully in increasing international IPR protection, nevertheless, the developing countries made concession on it under the "sticks" of the developed countries. The developed countries claimed that the stronger IPR protection would benefit the developing countries and the universalized IPR regime would maximize global welfare, is that true? Even the identical laws are involved, different outcomes might result, for laws are normally applied by reference to national market conditions, social

334 Lunney, G. S. (2001). The death of copyright: Digital technology, private copying, and the Digital Millennium Copyright Act. Virginia Law Review, 87(5), 813-820.

335 Lessig, L. (2004). Free culture: How big media uses technology and the law to lock down culture and control creativity. New York, USA: Penguin Press, 276-286.

336 Ghosh, S., Kieff, F., Mossoff, A., & Tepp, S. M. (2008). Intellectual property: American exceptionalism or international harmonization. New York University Journal of Law & Liberty, 3(2), 448-490.

337 Id.

contexts, and local practices.[338] Some scholar said that it was the developed countries that benefit from high levels of protection have chosen maximization of IP rights over harmonization. The real story is maximization, not harmonization.[339]

338 Yu, P. K. (2003). The harmonization game: What basketball can teach about intellectual property and international trade. Fordham International Law Journal, 26(2), 218-256.

339 Wasserman Rajec, S. R. (2020). The harmonization myth in international intellectual property law. Arizona Law Review, 62(3), 735-784.

# CHAPTER 4 THE HISTORICAL STUDY OF THE CHINESE COPYRIGHT LEGISLATION

## 4.1 Introduction

The development of copyright in China has gone through four important stages and involved the period of ancient China, modern China, and new China. The first stage is the origin of copyright protection prior to 1903. The second stage is the early twist development of China's Copyright Law between 1903 and 1977. The third stage is the rapid development of China's Copyright Law from 1978 to 2000. The fourth stage is the new explore of China's Copyright law from 2001 to 2020.

The idea of protecting copyright to prevent damage to the authors and publishers has been produced in China in the 13th century, and a complete publishing industry chain that worked for editing, distribution, and dissemination appeared during the Song Dynasty.[340] In the 15th century, German inventor Johannes Gutenberg developed a method of moveable type, which brought a rapid development of the printing and publishing industry in Europe and triggered fierce competition in the book market, especially in Germany and the United Kingdom. At present, the protection of the author's rights in England has not yet been raised. So, what caused China to suddenly lag behind western countries despite it has invented the World's first printing technology? Why did the bud of copyright protection not burst out in China?

In 1972, President Nixon visited China, which marked the beginning of more cultural, economic, and legal exchanges between China and the United States. This allowed China's Copyright Law to absorb the advantages of many common law

340 Strong, W. S. (2014). Copyright notice. In The copyright book: A practical guide. 6th ed. (pp. 111–126). The MIT Press. http://www.jstor.org/stable/j.ctt9qf8gq

countries, which is conducive to the international dissemination of works.[341] Led by Deng Xiaoping, China introduced the "Open Door Policy" in 1978 and decided to open to the outside world, enabling foreign trade. Since then, China has undergone a sea of change.[342] This is reflected in the numerous revisions of the Chinese copyright law after the establishment of diplomatic relations between China and the United States.

In general, the tangible property theory was the basis of intangible property. However, it is worth noting that China firstly carried out the legislation of intellectual property rights (IPRs) prior to the tangible property rights. When the property law had not yet started in China, the patent law, trademark law, and copyright law had begun to be drafted. In addition, China joined the WIPO in 1980. But until 1985, the Family Law of PRC first stipulated authors' property rights as a legitimate inheritance, and the Civil Law of PRC recognized both moral rights and property rights of authors in 1986.

In 1990, the "Copyright Law of People's Republic of China" was formally promulgated in order to be in line with the international standards and to fulfill the commitments made in their negotiations with the US. However, Special 301 of the United States placed China on the "Priority Watch List" where such protection needed further improvement many times. In January 1992, China and the United State signed the "Memorandum of Understanding" (MOU)[343] in the 8th round of Sino-US IP negotiations, in which China committed to provide strong protection for published

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341 Weisenhaus, D., Cottrell, J., & Ning, Y. (2007). Copyright. In Hong Kong media law: A guide for journalists and media professionals (pp. 187-206). Hong Kong University Press. http://www.jstor.org/stable/j.ctt1xwg5z.18

342 Lim, E. H. (2012). Influencing the evolving IP system and law of China through international outreach. Washington Journal of Law, Technology & Arts, 7(4), 501. https://digitalcommons.law.uw.edu/wjlta/vol7/iss4/11

343 Massey, J. A. (2006). The emperor is far away: China's enforcement of intellectual property rights protection, 1986-2006. Chicago Journal of International Law, *7*(1), 231-237. https://chicagounbound.uchicago.edu/cjil/vol7/iss1/10

works and extend coverage to software and sound recordings. Accordingly, China enacted the "Provisions on the Implementation of International Copyright Treaties" in September 1992 and modified domestic copyright laws according to the MOU. Finally, the Berne Convention entered into force in China on October 15, 1992; UCC entered into force in China on October 30, 1992. Subsequently, China joined the Convention on phonograms in April 1993. Under Chinese law, these international treaties automatically became domestic law. Thus, in some cases, the foreign copyrighted works enjoyed a higher level of protection than domestic works.[344]

Furthermore, in order to access the WTO in 2001, the Chinese government carried out the first amendment to copyright law in 2001 to meet the requirements of the TRIPS Agreement. The second amendment in 2010 is the result of the Sino-U.S intellectual property dispute case since the WTO Panel ordered that the original Article 4 of China's Copyright Law was inconsistent with the Berne Convention and the TRIPS Agreement.[345] The third amendment to China's copyright law came into effective just after the US-China phase one Agreement.

**4.2 The Origin of Copyright Law in Ancient China (---1903)**

In the spring and autumn period (770-476 BC), philosophers created a precedent for authorship.[346] However, this kind of authorship was just a way to propagate doctrines of the ancient saga, rather than true authorship in copyright law. Faced with piracy, the majority of the authors showed great tolerance as long as there were no additions or deletions that could potentially mislead the reader and damage their academic reputation. Since the authors in ancient China did not make their living

344 Yufeng, L., & Ng, C. W. (2009). Understanding the great Qing copyright law of 1910. Journal of the Copyright Society of the U.S.A., 56(4), 767-788.

345 Qi, T. (2012). China's first decade experience in the WTO dispute settlement system: Practice and prospect. Asian Journal of WTO and International Health Law and Policy, 7(1), 143-180.

346 Lee, I. (2001). Culturally-based copyright system?: The U.S. and Korea in conflict. Washington University Law Review, 79(4). http://openscholarship.wustl.edu/law_lawreview/vol79/iss4/3

by selling works, they did not treat the works as profitable commodities. Chinese ancient scholars, as bureaucrats, had stable income mainly from political careers. Moreover, the authors were pleased their works were copied and shared by the public because they believed it was a shortcut to obtaining appreciation from the ruling class. Therefore, no substantial effort was made to regulate publication until the advent of the world's first movable type printing technology in the Song Dynasty (960-1127).[347] With a rapid development of various literary works and publications, a large number of pirated works began to appear, including Confucian publications, which greatly affected the imperial control to cultural communications.[348] Thus the Empire granted the privilege to the Imperial Court as the only national printing and publishing department to produce official versions and forbade private publishers from reprinting unauthorized copies. Some scholars interpret this as an imperial copyright system. With time, this publishing privilege expanded to private publishers, and the authors were aware of protecting their moral rights. In the mid-South Song Dynasty, the famous educator Wang Chong marked his exclusive right in his work "Story of the Eastern Capital," which was considered to be the earliest sign of copyright in China.[349] He clearly stated that his work cannot be copied and also described the serious consequences if copied. In addition, Wang claimed that he aims to advocate authors to protect their copyrights and authorship from infringement. His viewpoints were partially recognized by the Song Dynasty government.[350] Thus, the Song government banned illegal publishing based on the request of the authors or

347 Yufeng, L., & Ng, C. W. (2009). Understanding the great Qing copyright law of 1910. Journal of the Copyright Society of the U.S.A., 56(4), 767-788.

348 McIntyre, S. (2010). Trying to agree on three articles of law: The idea/expression dichotomy in Chinese copyright law. Cybaris, 1(1), 62-98.

349 Gasaway, L. (2013). Copyright basics. In Copyright questions and answers for information professionals: From the columns of against the grain (pp. 1–22). Purdue University Press. https://doi.org/10.2307/j.ctt6wq4qg.5

350 Id.

publishers. Furthermore, the government strictly stipulated that certain books were prohibited to print or publish without prior authorization from governors, such as calendars, maps, and religious books, because they might be used for predictions that can produce adverse effects on the stability of the imperial power. If the author paid a lot of labor in his works or the infringer engaged in piracy for a long time, the infringer would be subject to administrative penalties and more severe criminal penalties. This was the first time that the Chinese government protected private copyright rights in its historical stage. The governmental prohibition orders, as an effective measure to fight against piracy and plagiarism at the time, extended to Japan and other Asian countries. It was used to protect authors' rights for nearly 700 years in ancient China.

All in all, it is evident that the idea of protecting copyright to prevent damage to the authors and publishers has been produced in China in the 13th century, and a complete publishing industry chain that worked for editing, distribution, and dissemination appeared during the Song Dynasty.[351] The development of the publishing industry facilitated cultural prosperity. In turn, the high demand for engraved and printed books contributed to the publishing industry.

It was the Renaissance (14th–16th centuries) that awakened people's awareness for private property protection and promoted the development of the cultural industry of Western countries. In addition, authors started using their native language instead of Latin to create literary works and reconsidered the relationship between book suppliers, authors, and publishers. Therefore, protecting the author's copyright became a sharp social issue in England and Europe.

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351 Strong, W. S. (2014). Copyright notice. In The copyright book: A practical guide. 6th ed. (pp. 111–126). The MIT Press. http://www.jstor.org/stable/j.ctt9qf8gq

However, it was the Ming Dynasty (1368-1643) that governed ancient China when the Renaissance happened. The first emperor of the Ming, Zhu Yuanzhang, ordered to destroy all works regarding the human spirit of independence and liberty and cut off all connections with foreign countries. The traditional Chinese culture, in a way, became an immoral culture that once abandoned Confucianism, let alone the enlightenment movement, such as the Renaissance. Since the Late Qing Dynasty (1842-1901), eight-party alliance of British, France, the US, Germany, Italy, Japan and Austria-Hungary opened the way to an invasion of China and secured leased territories within China.[352]

### 4.3 The Early and Twist Development of Chinese Copyright Law (1903-1977)

Due to the drastic changes in the international situation, the modern copyright law was passively introduced in China at the beginning of the 20th century. Indeed, some Chinese ideologists, such as Yan Fu who was a British-educated theorist, actively translated many Western legal provisions that had a great influence on the development of Chinese copyright law. However, reformers such as Kang Youwei and Liang Qichao who hoped to change the culture and legal system through transplantation of western doctrines failed because of the semi-colonial and semi-feudal political system at the time. Foreign policy created a climate that called for copyright protection at the end of Imperial China.[353]

The term "copyright" appeared for the first time in Article XI of the **US-Sino Treaty for the extension of commercial relations** in 1903.[354] In the beginning of the US-China negotiation, Chinese government opposed copyright protection because

352 Yufeng, L., & Ng, C. W. (2009). Understanding the great Qing copyright law of 1910. Journal of the Copyright Society of the U.S.A., 56(4), 767-788.

353 Id.

354 Office of the Historian. (n.d.). Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress December 7, 1903. https://history.state.gov/historicaldocuments/frus1903/d93

it would put up book prices. However, the US proposed to relinquish their extra-territorial rights if China reforms its judicial system and bring it into accord with that of Western nations.[355]

The treaty stated: "*Whereas the Government of the United States undertakes to give the benefits of its copyright laws to the citizens of any foreign State which gives to the citizens of the United States the benefits of copyright on an equal basis with its own citizens. The Government of China, in order to secure such benefits in the United States for its subjects, now agrees to give full protection to all citizens of the United States who are authors, designers, or proprietors of any book, map, print, or engraving especially prepared for the use and education of the Chinese people, or translation into Chinese of any book, in the exclusive right to print and sell such book, map, print, engraving, or translation in the Empire of China during 10 years from the date of registration.*"

Subsequently, Zhang Baixi, a government worker and scholar, called for copyright legislation and submitted "On the Copyright Book with the Minister of Management" to the Late Qing government. Zhang systematically explained the behavior of disseminating copyright and the circumstances that would cause copyright infringement. But he strongly argued against to protect foreign works because the level of China's economic development is out of place.[356]

Nonetheless, the foreign missionaries spread Catholicism throughout China. And, in order to prevent their works from being translated into pirated editions, the British began introducing and promoting the copyright legal ideology and concepts to China from 1904, such as notices aimed at anti-piracy. Moreover, British and French

355 Article 15 of the Sino-US Treaty for the extension of the commercial relations. (1903).

356 Yufeng, L., & Ng, C. W. (2009). Understanding the great Qing copyright law of 1910. Journal of the Copyright Society of the U.S.A., 56(4), 767-788.

officials in Shanghai who then asked to provide administrative protection for foreign owners of the copyright. This was the first time in Chinese history that the copyright of foreign citizens was universally and legally protected.

In 1906 and 1907, the Late Qing government promulgated the "Special Rules on the Matters of Printing" and "The Newspaper Law of the Qing Dynasty," which stipulated that the authors of newspapers and periodicals were protected as copyright owners. A year later, the Late Qing government sent officials to Germany to participate in the revision of the Berne Convention. (The Copyright Law of the Qing Dynasty was based on the Berne Convention.)

In 1910, the abolition of the imperial examination cut off the connection between intellectuals and the government. Losing stable incomes from the state, intellectuals became free resources and moved to the academic and cultural community.

Under both internal and external pressure, the Late Qing government enacted the first written Copyright Law of China ——"**Copyright Law of the Qing Dynasty.**"

According to the article 1-4 of this Act, the protection covered literary and illustrated works that have been registered. Noted, the right of translation was granted to the translators instead of the authors.

The protection period lasted for the life of the author plus 30 years, or 30 years from registration.[357] The fourth chapter of this article also provided detailed regulations on the ownership of co-operative works, commissioned works, and translation works. The remaining parts of the law separately stipulated copyright infringements and penalties.

357 Article 5 of the Chinese Copyright law of 1910

In short, the "Copyright Law of the Qing Dynasty" was the result of China's legal transplantation from other Western legal systems, so it basically reached the same level of copyright legislation as other countries of the world at that time. Although it never actually implemented since the Qing Dynasty was overthrown in 1911, this Act marked a turning point in the history of China and served as a model for subsequent copyright laws, such as the Copyright Law of 1915 and 1928.[358]

In 1914, in order to achieve spiritual and cultural control over the Chinese people by implementing strict publications censorship, the temporary Northern Warlords Government (1912-1927) issued the "Publishing Law" which stated "*Prior to distribution or dissemination, published volumes or pictures should be reported to a competent police officer along with one copy if the publication should be submitted to the government's office. This copy should then be submitted by the said government office to the Ministry of Internal Affairs for filing.*"[359]

In 1915, the temporary government promulgated the "Republic of China Copyright Law" which is based on the "Copyright Law of the Qing Dynasty" and continued to use the definition of "Copyright Law."[360] A year later, the government promulgated the "Regulations for the Implementation of Copyright Registration Procedures and Fees," which regulated detailed regulations on copyright registration procedures. Nonetheless, due to the constant coups during this period, none of these statutes were ever widely applied.

In 1928, the Nationalist Government (1928-1948) made a revision to the "Republic of China Copyright Law," which expanded the scope of protecting copyright objects and reducing the restrictions on the rights of copyright owners. This

358 Yang, Y. (1993), The 1990 Copyright law of the People's Republic of China. UCLA Pacific Basin Law Journal, 11(2).

359 Publishing law of 1914 of the Republic of China

360 Yang, Y. (1993), The 1990 Copyright law of the People's Republic of China. UCLA Pacific Basin Law Journal, 11(2).

is the first copyright law that was enforced in real life and became an original copyright law in Taiwan after 1949.

After the founding of new China, the government that was guided by Marxism criticized capitalism and determined the legal system in accordance with that of the Soviet Union. It carried out the planned economy and implemented public ownership and state-owned property rights. In the copyright area, the Central Publishing House was established in 1949, which dealt with all the publishing management and coordinated with every publishing department. Nonetheless, the copyright protection had been informal and limited to quasi-copyright relationships, for example, the remuneration distribution between authors and publishers.[361]

In 1950, the PRC government ordered a policy to improve and develop the publishing industry by stipulating copyright royalties. People who use copyrights, franchises, trademarks, patents, and other IPRs may need to pay royalties to authors and translators according to the number of the words or copies. In 1954, the Ministry of Culture replaced the Central Publishing House.

In 1957, the government formulated the draft "Interim Regulations for the Protection of Copyright of Publications." This was new China's first attempt to establish copyright legislation, which was based on the Copyright Regulations of the Soviet Union.

In 1958, however, the Ministry of Culture carried out the Anti-Rightist Movement to prevented authors from receiving more royalty if their incomes could cover bare livelihood.[362] The government stated, "*high remuneration for intellectual property would result in special treatment for this small group and isolate them from*

361 Id.

362 Liu, W. (2014). Evolution of intellectual property protection in post-Mao China: Law and enforcement. Erasmus University Rotterdam. http://hdl.handle.net/1765/76065

*the public, which would widen the gap between rich and poor*."[363] At the same time, to prevent deepening the difference between manual labor and mental labor, some writers actively requested lower royalties. The public did not feel guilty to freely use others' intellectual products because they believed it was evidence of the superiority of socialism. Therefore, the author's remuneration was not determined by the market, but by the politics. In 1961, the Ministry of Culture directly canceled the royalty system, and the authors only received a one-time low fee according to the words and quality of their work.[364]

Since 1966, the Chinese government carried out the Cultural Revolution Movement that destroyed all legal works, including the copyright system. Government agencies, factories, and schools were closed, and people lost their jobs. All intellectual properties were not entitled to receive remuneration, and political issues had become the first factor considered by creators. Scholars and writers were imprisoned, tortured, or even killed due to offenses committed against their leader's ideas.[365] Therefore, authors' rights were trampled on, and the copyright law was suppressed. Until 1980, the State Publishing Administration issued the Provisional Regulations on Book Royalties.[366]

**4.4 The Rapid Development of Copyright Laws in China (1978–2000)**

In 1979, US-China formally normalized diplomatic relations and signed the **US-China Agreement on Cooperation in Science and Technology** (S&T Agreement), launching an era of government-to-government science and technology collaboration. The general agreement was extended every 5 years, suggesting that renewal was supposed to be in 1989. In fact, United States President Reagan issued an

363 Id.
364 Id.
365 Id.
366 Yang. Y, (1993), The 1990 Copyright law of the People's Republic of China, UCLA Pacific Basin Law Journal, 11(2).

executive order in 1987 to ensure the United States benefits from and fully exploits scientific research and technology developed abroad. According to the Order, the head of each executive department and agency shall, in consultation with the United States Trade Representative, give appropriate consideration to whether those foreign governments have policies to protect the United States IPRs when negotiating or entering into cooperative research and development agreements and licensing arrangements with foreign persons or industrial organizations (where these entities are directly or indirectly controlled by a foreign company or government).[367] Therefore, the United States requested China to add a new annex agreement concerning IPR issues, especially copyright, before renewing S&T agreement. However, China did not have any law governing copyright protection at the time. As a result, bilateral negotiations on copyright protections began in 1988, which was also the first confrontation between China and the United States on intellectual property issues. Cooperative activities were affected by the pending resolution of IPR issues. The United States accused China of lacking copyright laws and patent protection for computer software, drugs, and chemical products and proposed that if the U.S. Computer Software Copyrights Act are not fully protected in China, the United States will not provide or transfer computer software to China. Consequently, the United States placed China on the Special 301 "Priority Watch list." As a result, the United States and China signed a memorandum on intellectual property protection. China was required to complete a copyright draft regarding the international practices by the end of 1989.

367 Reagan, R. (1987). Executive order 12591 - - Facilitating access to science and technology. Ronald Reagan Presidential Library & Museum. https://www.reaganlibrary.gov/archives/speech/executive-order-12591-facilitating-access-science-and-technology

In 1987, the "**General Principles of Civil Law of the People's Republic of China**," which was heavily influenced by the German Civil Code, first stipulated that the Chinese Copyright Law was a special law that belonged to its civil law system.

According to Article 94 of the Civil Law of 1987, citizens and legal persons shall be entitled to authorship, issuance, and publication of their works and obtain remuneration.

If a case involves a breach of copyright-related contract, the General Principles of the Civil Law will be applied for. In addition, a contractual dispute over copyright can be resolved by mediation, arbitration, or adjudication.[368]

According to Article 118, if the rights of authorship are infringed upon by means such as plagiarism, alteration, or imitation, they shall have the right to demand that the infringement be stopped, its ill effects are eliminated, and the damages are compensated for.

Article 142 expressly states that if any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply unless the provisions are ones on which the People's Republic of China has announced reservations. Therefore, although it does not particularly regulate copyright protections for foreign persons, civil law applies to foreign legal persons as well if it is within effective international treaties in China.

In May 1989, China committed to provide copyright protection for computer software, and the United States promised not to comply with the "Special Section 301"

368 Shen, J. (1991). The P.R.C.'s first copyright law analyzed. Hastings International and Comparative Law Review, 14(3), 529. https://repository.uchastings.edu/hastings_international_comparative_law_review/vol14/iss3/18

and, therefore, listed China as a "key foreign country."[369] Subsequently, in September 1990, the PRC passed the "**Authorship Right Law of the People's Republic of China**" (the A.R.L.), which covers all of the basic copyright issues, such as the scope of copyrighted works, ownership of copyright, duration of copyright protection, and legal liabilities for copyright infringements.[370] The new enactment would be effective in June 1991.

This Act aimed to protect the legitimate rights of authors derived from their authorship of artistic and scientific works, to encourage the creation and dissemination of works of excellence, to stimulate the development and advancement of science and culture, and to promote the construction of socialist spiritual and material civilizations.[371] Instead of "copyright," it adopts the expression of "authorship right," which is based on Japanese Copyright Law. However, the "copyright" and the "authorship right" are both used in practice in China. From the provisions, the public and even the Chinese lawyers cannot distinguish between the two terminologies.

Subject matters include (a) literary; (b) oral; (c) musical; (d) operatic and dramatic works; (e) performing folk arts; (f) choreographic works, (g) works of fine arts and photographic works; (h) cinematographic, (i) television, (j) video graphic works, (k) drawings, (l) engineering and product designs (m) maps (n) schematic drawings and other graphic works, and (o) computer software.[372] Noted, the official

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369 Mercurio, B. (2012). The protection and enforcement of intellectual property in China since accession to the WTO: Progress and retreat. China Perspectives, 1(89), 23–28. http://www.jstor.org/stable/24055441

370 Shen, J. (1991). The P.R.C.'s first copyright law analyzed. Hastings International and Comparative Law Review, 14(3), 529. https://repository.uchastings.edu/hastings_international_comparative_law_review/vol14/iss3/18.

371 Article 1 of the Authorship Right Law of the People's Republic of China. (1991).

372 Article 3 of the Authorship Right Law of the People's Republic of China. (1991).

publication has not been protected in this copyright legislation. And these terms lack full or definite explanations.

The law makes it clear that computer software protection measures are to be separately made by the Regulations of 1991 for the protection of computer software. In order to promote the development of China's software industry, encourage innovation, and better communicate with the United States in business and trade, the State Council gives priority protection to the registered software and program code.[373] The registration of computer software copyright is generally through regular announcements by the registration agency. When software copyright disputes occur, the "Software Copyright Registration Certificate" is a prerequisite for bringing a lawsuit to the people's court and evidence for damages.[374]

It will protect both the moral and economic rights of authors which involve: (a) the right of publication; (b) the right of authorship; (c) the right to protect the integrity of the works and property rights: (d) the right to authorize alteration; (e) the right of exploiting one's work by reproduction, live performance, exhibition; translation; broadcasting; dissemination of works; and other adaptions of work and (e) the right to obtain remuneration for such authorizations.[375] However, the Act did not specify which of them are moral rights and which are property rights.[376] Nonetheless, we believed that the Chinese Copyright Law of 1990 provided higher level of protection

373 Dong, X. S., & Jayakar, K. (2013). The Baidu music settlement: A turning point for copyright reform in China? Journal of Information Policy, 3, 77-103. https://doi.org/10.5325/jinfopoli.3.2013.0077

374 Breyer, S. (1970). The uneasy case for copyright: A study of copyright in books, photocopies, and computer programs. Harvard Law Review, 84(2), 281–351. https://doi.org/10.2307/1339714

375 Shen, J. (1991). The P.R.C.'s first copyright law analyzed. Hastings International and Comparative Law Review, 14(3), 529. https://repository.uchastings.edu/hastings_international_comparative_law_review/vol14/iss3/18.

376 Id.

for authors' moral right than that of the economic right due to the traditional legal tradition and socialist ideology.[377]

Neighboring rights are provided in this Act. They are rights relating to copyright, including the exclusive rights of publishers, performers, producers, and broadcasters. Notably, the U.S. Copyright Law does not have the concept of neighboring rights. It appears that the concept of Chinese copyright is broader than the US Copyright law.

The duration of an author's moral right is perpetual with no time limitation.[378] The duration of an author's economic right is the author's lifetime plus 50 years after death, whether published or not.[379] The duration for the protection of some neighboring rights is 50 years after the creation or first publication of the works.[380] The increase in the protection term for recordings and broadcasts is due to pressure from U.S. industry groups.[381]

According to this Act, the infringing acts that are only subjected to civil liabilities include (a) publishing works without the consent of the copyright owner; (b) publishing joint or collaborative works as a work created solely by oneself without authorization from the co-authors; (c) claiming authorship or co-authorship to a work without having made any contribution to the work "for the purpose of gaining personal reputation and interests"; (d) distorting or mutilating another's work; (e) unauthorized performance, broadcasting, display, distribution, cinematizing, televising, and production of video recordings of the another's work and unauthorized

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377 Yang. Y, (1993), The 1990 Copyright law of the People's Republic of China, UCLA Pacific Basin Law Journal, 11(2).

378 Article 20 of the Authorship Right Law of the People's Republic of China. (1991).

379 Article 21, Para. 1 of the Authorship Right Law of the People's Republic of China. (1991).

380 Article 30 of the Authorship Right Law of the People's Republic of China. (1991).

381 Shen, J. (1991). The P.R.C.'s first copyright law analyzed. Hastings International and Comparative Law Review, 14(3), 529. https://repository.uchastings.edu/hastings_international_comparative_law_review/vol14/iss3/18.

adaption, translation, annotation, and editing of existing work; (f) failure to pay royalties or remuneration; and (g) unauthorized live broadcasts of performances.[382]

The infringing acts that are also subjected to administrative liabilities include (a) plagiarizing and pirating; (b) unauthorized reproducing and distributing work for a commercial purpose; (c) violation of a publisher's exclusive right to publish; (d) unauthorized production and publication of sound recordings, video recordings of a performance; (e) unauthorized reproduction and distribution of another producer's sound or video recordings; (f) unauthorized reproduction and distribution of a broadcaster's radio or television programs; and (g) producing and selling a work of the fine arts where the signature of an artist is counterfeit.[383]

The civil remedies include (a) ceasing the infringing act; (b) eliminating the effects of the act; (c) making a public apology; and (d) paying compensation for damages.[384] The administrative penalties include (a) confiscation of unlawful income from the act and (b) imposition of a fine.[385] However, this Act did not provide statutory damage or specify actual damage. Furthermore, it did not provide a criminal penalty for copyright infringement.

This Act identifies broader fair uses exemptions than that enumerated in the US copyright law of 1976.[386] They are: (a) personal enjoyment and education; (b) comment; (c) news reporting; (d) classroom teaching; (e) use by state organs; (f) reproduction by libraries and archives; (g) non-profit performances of a published work; (h) copy and photographing of outdoor public exhibits; (i) translation of

382 Article 45 of the Authorship Right Law of the People's Republic of China. (1991).
383 Article 46 of the Authorship Right Law of the People's Republic of China. (1991).
384 Id.
385 Id.
386 Yang. Y, (1993), The 1990 Copyright law of the People's Republic of China, UCLA Pacific Basin Law Journal, 11(2)

Chinese works into ethnic minority languages; (j) translation into languages for the visually impaired.[387]

However, since this copyright law did not protect foreign author's works first published outside of China, the United States placed China on the "Priority Watch List" with serious intellectual property issues and initiated the first "Special 301" investigation on April 26, 1991. The United States alleged that China is its only major trading partner not to offer copyright protection for American works.[388]

As previously mentioned, in October 1991, a "general 301 investigation" was launched in response to the unfair barriers of American products entering the Chinese market. As a result, the Chinese and the American government signed an **MOU** committing China to improve protection for U.S. Intellectual Property on January 17, 1992. In this memorandum, the Chinese government promised to join the Berne Convention and Geneva Convention and amended its copyright law to comply with these conventions and the MOU.[389] That is to say, China would recognize the protection of computer programs as literary works automatically. Moreover, the Chinese government agreed to give copyright protection for sound recordings. In return, the United States and China established bilateral copyright relations in March 1992, which marked the end of the first US-China trade dispute.

Furthermore, in October 1992, China and the United States signed another "MOU on Market Access between China and the United States." China promised to gradually remove import barriers to American goods from 1992 to 1997. As a result,

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387 Article of 22 (1)-(12) of the Authorship Right Law of the People's Republic of China. (1991).

388 USTR. (1991). "Special 301" on intellectual property. Office of the United States Trade Representative. https://ustr.gov/sites/default/files/1991%20Special%20301%20Report.pdf

389 Shen, R. (1996). Copyright Law in China. International Intellectual Property Law & Policy, 1, 73-78.

China became a member of the Berne Convention, the Geneva Convention,[390] and the UCC.[391]

In order to implement international copyright treaties and MOU, the State Council enacted the "Provisions on the Implementation of the International copyright treaties," which basically resolved the problem that foreigners could not obtain protection under China's 1990 Copyright Law. But the protection level for foreign works was higher than that of China, which is called "super national treatment."[392] For example, it is not necessary for a foreigner to register as Chinese copyright holders do to protect his computer programs in China, which was rare in the world.

On June 30, 1994, the United States launched another "Special Section 301" regarding the enforcement of Chinese IPRs and alleging copyright piracy was particularly acute in China.[393] After strenuous and marathon negotiations and tariff sanctions, China and the United States reached the "**US-China Intellectual Property Enforcement Agreement**" on February 26, 1995.[394] This agreement committed China to strong measures to combat copyright piracy and to enhance market access for IPR-related industries, which allows more access of U.S. goods to the Chinese market. Finally, China's State Council established the Executive Conference on IPR, which is designed to develop an action plan to solve copyright violations.[395] Besides,

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390 Davis, G. (1907). The Geneva Convention of 1906. The American Journal of International Law, 1(2), 409-417. https://doi.org/10.2307/2186169

391 Alikhan, S. (1986). Role of the Berne convention in the promotion of cultural creativity and development : Recent copyright legislation in developing countries. Journal of the Indian Law Institute, 28(4), 423-440. http://www.jstor.org/stable/43951043

392 Feng, X., & Wei, Y. (2002). Internationalization of the copyright system and the 2001 amendment of the copyright law of the people's republic of china. Journal of World Intellectual Property, 5(5), 743-764.

393 USTR. (1994). USTR announces three decisions: Title VII, Japan supercomputer revie w, special 301. Office of the United States Trade Representative. https://ustr.gov/sites/default/file s/1994%20Special%20301%20Report.pdf

394 USTR. (1995). USTR announces two decisions: Title VII and special 301. Office of the United States Trade Representative.
https://ustr.gov/sites/default/files/1995%20Special%20301%20Report.pdf

395 Prohaska, F. V., (1996). The 1995 agreement regarding intellectual property rights between

China made concessions that changed existing copyright-related regulations. For example, a new customs regulation was enacted to prohibit infringing goods from Chinese Customs. If an applicant who was a national of Berne Convention has legal proof of copyright, Chinese customs can also enforce copyrights as long as the applicant registers it in that country.[396]

The 1995 MOU does signify a chance for improved US-China trade relations in a short time.[397] According to the USTR, the Agreement would have an enormous impact on the $30 billion trade deficit the United States has with China.[398] However, how to guarantee the implementation of this Agreement by the Chinese government?

In April 1996, China was listed as the "Priority foreign country" under Section 301 once again because it failed to implement the 1995 intellectual property enforcement agreements. The United States believes that the Chinese government has failed to stop the illegal CD, video, and CD-ROM production or to prevent export piracy, which harmed the U.S. economy.[399] After multiple rounds of negotiations, the third US-China agreement on intellectual property enforcement was reached on June 17, 1996. This US-China Intellectual Property Enforcement Accord announced the closure of many underground illegal production facilities and the raid action of the Customs at the border. In addition, the Chinese State Council IPR Executive Conference issued "the Regulations of 1997 on Publication Management Measures."[400] In the same year, the "China's Criminal Law of 1997" that firstly regulated the criminal protection for IPR in China, as well as the "Regulations on

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China and the United States: Promises for international law or continuing problems with Chinese piracy. Tulsa Journal of Comparative & International Law, 4(1) 169-183.

396 Id.

397 Id.

398 Id.

399 USTR. (1996). USTR announces two decisions: Title VII and special 301. Office of t he United States Trade Representative. https://ustr.gov/sites/default/files/1996%20Special%20301%20Report.pdf

400 Id.

protection and management of Computer Information Network and Internet Security" were made. In 1998, the State Council put forward the "Protocol for the Amendment of the Copyright Law of PRC" to the Standing Committee of NPC.[401]

**4.5 The New Explore of Chinese Copyright Law**

In order to join the WTO, China significantly amended its copyright laws and improved relevant legislation to meet the requirements of TRIPs.[402] The following three revisions of the 1990 Copyright Law of PRC marks a signify milestone in the history of copyright system in China.

The legislative purpose of **the 2001 Amendment of Chinese Copyright Law** is changing from achieving a balance between the protection of IPRs and the public interest of the society to encouraging the legal dissemination of works and creators to innovate, which is closer to that of the US copyright law.[403]

It clearly clarifies and divides the property rights in copyright provided for into the following 12 kinds of rights: (a) reproduction; (b) disturbing; (c) rental; (d) exhibition; (e) screening; (f) broadcasting; (g) transmission through information and network; (h) making cinematographic works; (i) adaptation; (j) translation; (k) compilation; (l) performance.[404] Noted, the right of rental and the right of transmission through information and network are two added rights here. Further, the rental rights are limited to the cinematographic works and computer software.[405]

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401 Feng, X., & Wei, Y. (2002). Internationalization of the copyright system and the 2001 amendment of the copyright law of the people's republic of china. Journal of World Intellectual Property, 5(5), 743-764.

402 Qin, J. Y. (2007). Trade, Investment and beyond: The Impact of WTO accession on China's legal system. The China Quarterly, 191, 720-741. http://www.jstor.org/stable/20192817

403 Towse, R. (2008). Why has cultural economics ignored copyright? Journal of Cultural Economics, 32(4), 243-259. http://www.jstor.org/stable/41811000

404 Feng, X., & Wei, Y. (2002). Internationalization of the copyright system and the 2001 amendment of the copyright law of the people's republic of china. Journal of World Intellectual Property, 5(5), 743-764.

405 Id.

The scope of the works protected is enlarged and definite. For example, the acrobatics works, architecture works, and compilation works are added for the first time in China.[406] The compilation works that was called worked of edition in the copyright law of 1990 are extended to the database protection since the related industry has a determinate scale.[407]

As to the neighboring rights, the 2001 Amendment extends the subject-matter and property rights of neighboring rights holders. By all appearances, it makes Chinese copyright law in conformity with the WPPT.

Also, China established a new legal system for collective management of copyright, which allowing professional organizations to manage copyright and neighboring rights on behalf of copyright holders. Article 54 of the Regulations of 2001 on implementation of the Copyright Law stipulates that copyright owners may exercise their copyrights through collective management. The National Copyright Administration approved the establishment of the Chinese Writing Copyright Association and China Music Copyright Association.[408] Also, the "Regulations of 2003 on Collective Management of Copyrights" authorized these copyright management agencies to charge users for royalties and initiate litigation or arbitration on behalf of the copyright owner for infringements

In addition, foreign-related copyright administrative cases are accepted by the National Copyright Administration. In this way, foreign rights holders can file a complaint with the administrative department if their copyright has been infringed. Performance and sound recordings produced and distributed by foreigners are

406 Id.

407 Article 14 of the first amendment to the copyright law of 1990. (2001).

408 Zhang, Z. (2019). The Political Economy of Chinese Copyright Legislation. In Intellectual Property Rights in China (pp. 85-111). University of Pennsylvania Press. http://www.jstor.org/stable/j.ctv16t6k9b.6

protected by China's Copyright Law.[409] The administrative agencies specified in the "Rules for the Implementation of Copyright Administrative Penalties" may use methods such as warnings and fines for copyright infringements, even if the copyright owner does not discover potential infringements, the infringer will still be subject to administrative penalties.

"Regulation of 2006 on the Protection of the Right to Communicate Works to the Public over Information Networks" provides that the information network communication rights cover broadcasting rights, adaptation rights, translation rights, compilation rights, performance rights, rental rights, exhibition rights, and distribution rights.

On March 20, 2009, the WTO Dispute Settlement Body adopted the report of the Expert Group on the US-China Intellectual Property WTO Dispute.[410] The case has been ongoing for nearly 2 years, beginning in April 2007. The Group considers that copyright protection should be provided for works that fail to pass the Chinese government's censor. The Group also stressed that Section 301 is an unequal clause since it is to protect U.S. trade by forcing other countries to accept US-recognized international trade norms.

**The Second Amendment to China's Copyright Law** in 2010 is the response to the WTO's ruling on the Sino-US intellectual property dispute case. Mark Cohen said that the so-called second amendment in 2010 made one change only, that is, to remove any censorship approval as a prerequisite for copyright protection.[411]

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409 Gibson, C. (2007). Globalization and the technology standards game: Balancing concerns of protectionism and intellectual property in international standards. Berkeley Technology Law Journal, 22(4), 1403-1484. http://www.jstor.org/stable/24117465

410 WT/DS362, (2010), China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WTO. https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds362sum_e.pdf

411 Cohen, M. (2020). Further observations on the recent copyright law amendments. China IPR. https://chinaipr.com/2020/11/12/further-observations-on-the-recent-copyright-law-amendments/

The rapid development of global science and technology has changed the creation, dissemination, and protection of works, which caused many new problems. Since the formulation of copyright law is statutory in China, it cannot promptly solve these new problems, such as the lack protection for the short video works and animations. Actually, **the Third Amendment to China's Copyright Law** began in 2010.[412] The National Copyright Administration has specially established the "Leading Group for the Revision of the Copyright Law" and the "Authority of the National Copyright Administration."[413] The Committee of Experts on the Revision invited more than 30 people from different departments to form a special organization to listen to opinions and suggestions from all walks of life. Nearly 200 organizations and individuals were invited to submit their opinions on the third revision of the Copyright Law, including administrative agencies, people's courts, social organizations, scientific research institutes, industries, experts, and scholars.[414] At the same time, the National Copyright Administration has specially commissioned three Intellectual Property Research Center in Renmin University of China, Chinese Academy of Social Sciences Institute of Law, and Zhongnan University of Economics and Law to draft the expert recommendations.

According to article 20 of the 2020 Act, it specifies that the exhibition of a work of fine art or photographic work by an assignee does not infringe upon the author's right of publication. Also, Article 24 elaborates all of the legitimate uses of copyright-protected works, including a new provision for the disabled. Further,

412 Liu, J. (2016). Copyright reform and copyright market: A cross-Pacific perspective. Berkeley Technology Law Journal, 31(2), 1461-1514. http://www.jstor.org/stable/26381957

413 Id.

414 Mercurio, B. (2012). The protection and enforcement of intellectual property in China since accession to the WTO: Progress and retreat. China Perspectives, 1(89), 23–28. http://www.jstor.org/stable/24055441

Article 49, 50, and 51 added the legal liability for circumvention or destruction of the technical measures for copyright protection and exemptions.

More importantly, Article 54 provides for a higher ceiling and a floor for statutory damages. Also, it adds 1-5 times of ordinary damages as punitive damages for serious willful infringement.

Besides, the new Civil Code of PRC and the Criminal amendment of PRC were made in 2020, with which the third amendment to copyright law unified the relevant legal terms.

In the aspect of international conventions, the Beijing Treaty on Audiovisual Performances and the Marrakesh Treaty are also legal source of the new copyright law in China.

In sum, it is expected to ensure more wide protection of copyright objects and strengthen the responsibility for illegal use.[415]

**4.6 Trends and Summary**

Copyright has changed from a privilege granted to publishers by the imperial power to the ownership of authors in the field of private law and to the transferable property right, which reflects that copyright protection has undergone a fundamental change. In addition, we can see a big change in Chinese copyright legislation, namely, property rights have become the core and practical concern of Chinese authors at present.

It is worth noting that despite the rapid development of China's IPRs, its existing copyright protection still does not meet the development needs at this stage due to China's special national conditions.

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415 CRSEA. (2021). People's Republic of China tighten the《copyright law》. Confederation of Rightholders' Societies of Europe and Asia. http://crsea.one/peoples-republic-of-china-tighten-the-copyright-law/

We can summarize that the two countries have different attitudes towards international treaties. China applies the principle of "international treaty priority." When domestic laws conflict with the international treaties, China applies the international treaties, except for some reservations. Therefore, China sets up its copyright system based on implementing international treaties, while keeping the domestic laws consistent with the international treaties. On the contrary, the US applies domestic laws and prioritizes them over the international treaties if any conflict arises.

The development of copyright policy in the US shows that the copyright system protects the national economy, culture, and industry. Countries with different levels of economic, cultural, and technological development are subject to different levels of copyright protection and copyright policies. The low-level protection of copyright adopted by the United States in the beginning has greatly promoted the introduction of foreign intelligence. When the United States became a scientific and cultural power in the world, the policy of copyright protection was changed according to the industrial development. Therefore, China should enact appropriate and dynamic copyright laws according to the development of its copyright industry and technology. Although copyright legislation lags behind technology development, the United States has responded to it timely and passed the "Digital Millennium Copyright Act" in 1998. However, China has no formal digital copyright act, which has harmed the interests of digital copyright holders. More importantly, there still is a significant gap in criminal law protection for copyright between China and the US.

In conclusion, Intellectual property has become an important factor affecting national competitiveness. If China cannot stay clear-minded now, it would more likely fall behind in this new round of competition, and backwardness leaves one vulnerable

to attack. Harmonization does not mean increasing or decreasing protection, which depend on what you focus ultimately should be, whether it's going to be all about the market or moral rights.[416]

416 Ghosh, S., Kieff, F., Mossoff, A., & Tepp, S. M. (2008). Intellectual property: American exceptionalism or international harmonization. New York University Journal of Law & Liberty, 3(2), 448-490.

# CHAPTER 5 A COMPARATIVE STUDY OF SUBSTANTIVE COPYRIGHT LAW BETWEEN THE U.S. AND CHINA

## 5.1 Introduction

To understand how a legal system functions it is necessary to understand its basic components. However, no two sets of copyright laws are exactly the same, and this especially true for the United States and China. Therefore, this chapter will focus on the substantive copyright law in the two countries to determine if they are completely incompatible or if there is some general overlap in order to understand how such laws fit into the larger analysis of the two countries as a whole. This is necessary because it would be impossible to properly discuss enforcement options without a base understanding of the substantive laws.

While it is important to understand that China's copyright tradition grew from a mix of western jurisprudence and Confucianism, this analysis will focus on the law as it has been amended. The law as it has been amended has been designed to focus on protecting the rights of copyright holders and deterring the infringement of legitimate copyrights. Some of the key reforms in the amendments were: the number of damages available, the scope of protection, protections for derivative works, rights of actors in the system, shifts in burdens of proof, and increasing the power of investigators.

Therefore, this section will be divided into four distinct parts, that is, the types of works protected, the rights recognized, the length of protection, restrictions on protection. Through this analysis it will be possible to determine if China's new 2021 copyright scheme will bring it closer to the tradition of western democracies in promoting copyright protections or if China is determined to forge its own path in this area of the law. Such an analysis will provide clues as to what individuals and

businesses may expect as they consider their relative rights in both countries in the near future.

## 5.2 The Types of Work Protected

The types of work protected in copyright law is always evolving because human advancement allows for the creature of new types of output that may not have been envisioned under the original copyright code. Furthermore, because some works that are copyrighted may use other copyrighted materials in the final product, there is a constant push to increase protections for one type of work, while, at the same time, pressure to decrease protections for other types.[417] For example, a film production company may want stronger protections for finished films, but weaker protections for the songs that may be incorporated into those films. This highlights the fact that the types of works that are protected may not always be as clear as it seems on first glance.

### *5.2.1 Under US Copyright law*

However, as a preliminary matter, the types of work protected by United States Copyright law can be found in the Copyright Act of 1976. Generally, seven categories of subject matter are protected under the act. These are: **literary works, musical works, choreographic works or pantomimes, dramatic works, graphic or pictorial or sculptural works, motion picture and audiovisual works, and, finally, sound recordings.** And, for any type of work to receive protection, it must first qualify for an attachment of protection. Importantly, according to the legislative history of the act all of these categories are to be construed liberally.[418] This was in recognition of the simple fact that with technological advancement it may be

417 Bartow, A. (2014). A restatement of copyright law as more independent and stable treatise. Brooklyn Law Review, 79, 454-503. https://core.ac.uk/download/pdf/72051994.pdf

418 Joyce, C., Ochoa, T., Leaffer, M, & Carroll, M. (2016). Copyright Law. Carolina Academic Press.

necessary to construe a term such as audiovisual work liberally. The very fact that the 1976 Act has been able to survive the advent of the internet and all of the types of works that could be created on this new medium is a testament to the flexibility of the Act and the fact that the courts are following the intention of Congress and our liberally construing these categories to protect types of work that may not have existed in 1976.

### *5.2.2 Under Chinese Copyright law*

The current Chinese copyright law was made by the twenty-second Standing Committee of the Thirteenth National People's Congress on October 17, 2020, and came into effect on June 1, 2021.[419] It protects nine categories of work. They are **written works, oral works, works of fine art and architecture, audiovisual works, musical works, photographic works, graphic works, computer software, and other intellectual achievements**.[420] As to the subject matter of copyright, work refers to an intellectual achievement that is original and can be expressed in a certain form in the fields of literature, arts, and science, as well as other intellectual achievements that meet the characteristics of the work.[421] Thus the definition of works is in a more inclusive manner that is more flexible.

The first thing to note about Chinese copyright law in contrast to United States copyright law is that the number of categories recognized by the Chinese system is larger. While the United States specifies seven categories, the Chinese system has nine. Furthermore, the Chinese system leaves room for works that may not easily be

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419 NPC. (2020). Decision of the standing committee of the National People's Congress on amending the patent law of the People's Republic of China. The National People's Congress of the People's Republic of China. http://www.npc.gov.cn/englishnpc/c23934/202109/63b3c7cb2db342fdadacdc4a09ac8364.shtml

420 Wininger, A. (2021b). China's National People's Congress releases translation of the amended copyright law. The National Law Review, 11(292). https://www.natlawreview.com/article/china-s-national-people-s-congress-releases-translation-amended-copyright-law

421 Article 3 (9) of the third amendment of Copyright law of the PRC. (2020).

categorized into the first eight categories to be included in the ninth category of works that constitute intellectual achievements.

One of the important changes in the recent amendments is to give greater leeway as to what can be considered a work. For example, under a previous version of the rules, only cinematographic works were protected.[422] This has been adjusted to the category of audiovisual works, which solves the unclear concept issues that have long existed in judicial practice for a long time and keeps abreast of the industrial development.[423] What the drafters of the amendment realized is that with constant technological changes, restricting a work to boxed-in definition of cinematographic could quickly leave a wide-variety of works left outside the scope of the protection of the law. A more catch-all term, such as audiovisual, could include works such as YouTube streams or virtual reality movies that would not necessarily fall under the strict definition of cinematographic works. The sports programs and music videos may be more likely to be protected as copyright works than before.[424] This also brings the language of the Chinese law far closer to the language of the United States law which recognizes motion pictures and audiovisual works. Next, article 5 further clarifies that "news on current affairs" which is creative and original is also a subject matter of copyright. It is likely not a mistake that Chinese drafters recognized that their original language was too restrictive and needed to be adapted to match the types of protections that would be available to artists in western countries.

Like the United States, Chinese law does not require a work to first be published in order to enjoy copyright protections.[425] Here it is possible to see a

422 Hardingham, S., Yao, E., & Scott, T. (2021). Amendments to China's copyright law. The National Law Review. https://www.natlawreview.com/article/amendments-to-china-s-copyright-law

423 Cohen, M. (2020). Further observations on the recent copyright law amendments. China IPR. https://chinaipr.com/2020/11/12/further-observations-on-the-recent-copyright-law-amendments/

424 Id.

425 Wininger, A. (2021b). China's National People's Congress releases translation of the

connective thread between the primary goals of copyright protections in the United States and in China. The goal is not only to protect works that currently have commercial value, but, rather, to ensure that innovators can create new works without the fear that their works will need to be published in order to receive the full protection of the law. This leaves innovators free to focus on their primary task of innovating and not concerning themselves with rushing to publish their works in order to enjoy copyright protections. Indeed, copyright law in China expressly states that the goal is to encourage the dissemination of works that will help to contribute to Chinese society.

### 5.3 The rights recognized

Assuming that the type of work produced is protected it is next necessary to understand exactly what rights will be conferred to a copyright holder.

#### *5.3.1 Under US Copyright law*

The exclusive rights of the copyright holder can be found under Section 106 of the 1976 Copyright Act. There are five enumerated rights: **the right to reproduce, the right to adapt, the right to distribute, the right to preform, and the right to display.**[426]

The right to reproduce does not prevent the reselling of a copyrighted material. For example, an individual may buy a copyrighted novel, read the novel, and then resell that copy because they have not physically reproduced the copy that they legally purchased.[427] This would be different from an individual purchasing a book legally

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amended copyright law. The National Law Review. https://www.natlawreview.com/article/china-s-national-people-s-congress-releases-translation-amended-copyright-law

426 Joyce, C., Ochoa, T., Leaffer, M, & Carroll, M. (2016). Copyright Law. Carolina Academic Press.

427 Liu, J. (2001). Owning digital copies: Copyright law and the incidents of copy ownership. William & Mary Law Review, 42(4), 1245-1366. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1478&context=wmlr

then making a copy of the book and selling the one the purchased legally and the one copy. It is the act of making the copy that infringes on the right of the holder to reproduce and could result in legal action being taken.

However, new technology has made issues involving the right to reproduce less clear than they may seem at first glance. For example, in the case of *MAI Systems Corp. v. Peak Computer, Inc.* a computer repair company uploaded a RAM copy of the MAI system onto computers they were repairing even though they had only purchased one copy of the system which entitled them to one upload, this was seen as an infringement on the right of the copyright holder to reproduce.

Adaptation means taking the original expression and adapting in new way where the two works would not be readily distinguishable by the average observer. An example of this may be adapting a novel into a stage musical. This becomes complicated when the themes of two different versions are so similar that it suggests that the newer version was an unauthorized adaptation of the original. For example, it has been suggested that if Shakespeare was alive during the production of West Side Story, he may have a claim for unauthorized adaption of Romeo and Juliet.[428] However, it is important to know that simply borrowing a theme from one work may not infringe on an author's right to adaptation. It must be shown that the infringing party had possession of the copyrighted work and that the adaptation is so substantially similar to the original work that it would be apparent to an ordinary observer.

The right to distribute means as it says, the copyright holder has the right to determine how the work should be distributed to the public. Indeed, merely making a

428 Carroll, M. (2007). Fixing fair use. North Carolina Law Review, 85(4), 1087-1154. https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1041&context=facsch_lawrev

work available to the public without permission may violate the right to distribute the work. For example, in the case of *Hotaling v. Church of Latter-Day Saints,* the Church of Latter-Day Saints had maintained an unauthorized copy of the plaintiff's copyrighted genealogical research materials in its library after the statute of limitation had expired for reproduction violations but was still found liable under the theory that the distribution of the copy to the public violated the distribution rights of the plaintiff.[429]. In other words, the Church had no permission to distribute the materials to the public through its library system and this meant that there was still a copyright violation even though the statute of limitation had already expired on the unauthorized reproduction. However, in the digital world most unauthorized distribution takes place through file-sharing services, such as the now defunct Napster.[430]

The right to perform can best be illustrated through the example of stand-up comedians.[431] Though it is commonly misunderstood, courts have recognized that jokes written by comedians are works subject to copyright protection. Part of this protection extends to the right of the comedian to preform that joke for money or to choose who performs the joke to the public. For example, the comedian Jeff Foxworthy's copyright in his "You might be a redneck …" joke was found to be copyrightable by a Federal District Court in Georgia after a t-shirt company began to produce shirts with the joke on it without Foxworthy's permission. It follows that if another comedian attempted to perform the joke with Foxworthy's permission in a comedy show then that comedian would also be subject to a copyright infringement claim.

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429 Menell, P. (2010). In search of copyright's lost ark: Interpreting the right to distribute in the internet age. Journal of the Copyright Society of the USA, 13(53), 201-267. http://dx.doi.org/10.2139/ssrn.1679514

430 Id.

431 Bolles, E. M. (2011). Stand-up comedy, joke theft, and copyright law. Tulane Journal of Technology and Intellectual Property, 14, 237-260. https://journals.tulane.edu/index.php /TIP/article/view/2596/2418

The last of the rights of the copyright holder is the right to display. This means that the copyright holder has the exclusive right to determine how the whole, or any part, of the copyrighted work may be displayed to the public, whether it is in physical or electronic form.[432] However, this will not apply to the display of copyrighted material legally purchased and displayed by the owner. For example, the owner of a copyrighted piece of art is free to display the art at a public gallery without fear of being held liable of copyright infringement. However, the Internet has made it possible for copyright holders to sue for infringement when only a piece of the material is displayed on the Internet. For example, in the case of *Playboy Enterprises, Inc. v. Webbworld, Inc*., Playboy magazine was able to successfully assert a claim for infringement of the right to display when the owner of a website made certain pictures from issues of the company's magazine available for display on its website without permission.[433] This case could be differentiated from the example of the art piece in the gallery because the physically piece was being presented to the public by the owner, whereas the magazine pictures were digitally copied and displayed to the public in a virtual forum. This helps to demonstrate that context is extremely important when determining whether or not the right to display has been infringed.

In conclusion, when analyzing the rights recognized under current United States copyright law it is important to understand that such analysis is heavily fact driven. While it may appear on the surface that a right may exist, a closer analysis may reveal that the right does not exist in a given case. Furthermore, it must be understood that the right may not survive when a copy is legally purchased and properly used by the purchaser. A comedian may have a right to reproduce and

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432 Roarty, A. (1999). Link liability: The argument for inline links and frames as infringements of the copyright display right. Fordham Law Review, 68(3), 1011-1023. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3620&context=flr

433 Id.

display their copyrighted jokes but may not be able to enforce this right if someone chooses to purchase a copy of the material and display it for their friends. The facts will dictate whether a right exists and whether the right has been infringed.

### *5.3.2 Under Chinese Copyright law*

In China, there are four main types of rights that should be protected by the newest copyright law, including **the right of publication; the right of attribution; the right to modify; the right to protect the integrity of the work.** To be specific, article 10 covers the following exclusive rights:

(1) the right of publication, that is, the right to decide whether to make a work available to the public. It differs from the United States insofar as it expressly states that the copyright holder has the right to publication and the right to decide whether or not to make a work available to the public. While this type of right may be implied in the United States rights to control reproduction and distribution, this right goes farther in expressly stating that the holder of a copyright in China has the express power to determine whether or not a work should be published in the first place. This would suggest that in the case of a leaked original work it would be much simpler to bring a copyright infringement claim in China than in the United States.[434]

(2) the right of authorship, that is, the right to claim authorship, and to have the author's name mentioned in connection with the work. There is no similar right in the United States that expressly states that an author's name being associated with the work is a right and this can most likely be explained in the differing tradition in China which was more heavily focused on protecting the relationship to the work rather than protecting its monetary value.

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[434] Wininger, A. (2021b). China's National People's Congress releases translation of the amended copyright law. The National Law Review. https://www.natlawreview.com/article/china-s-national-people-s-congress-releases-translation-amended-copyright-law

(3) the right of alteration, that is, the right to alter or authorize others to alter one's work. The United States also does converge in the importance of protecting the right of the author to alter their work.

(4) the right of integrity, that is, the right to protect one's work against distortion and mutilation. The right against mutilation of work would suggest that a parody case in China would likely have a different result than the case of *Campbell v. Acuff-Rose, Inc,* which involved the parody of the Roy Orbison song "Pretty Woman".[435]

(5) the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, rubbing, sound recording, video recording, ripping, duplicating a photographic work, digitizing, or by other means; (6) the right of distribution, that is, the right to provide the original copy or reproduced copies of a work to the public by sale or donation. The fifth and sixth rights in China match two of the rights in the United States.

(7) the right of rental, that is, the right to non-gratuitously permit others to temporarily use an audiovisual work, or the original or copies of a computer software, except where the software itself is not the main object of the lease; (8) the right of exhibition, that is, the right to publicly display the original copy or reproduced copies of a work of fine arts or of a photographic work; (9) the right of performance, that is, the right to publicly perform a work, and to publicly communicate the performance of a work by various means; (10) the right of projection, that is, the right to publicly reproduce works of fine arts, photographic works, audiovisual works, or other works, by a projector, slide projector or any other technical equipment; (11) the right of broadcasting, that is, the right to publicly disseminate or rebroadcast works by wire or

[435] Id.

by wireless means, and to disseminate broadcast works to the public by loudspeaker or any other similar instruments for transmitting signs, sounds or images, but excluding the right mentioned in Subparagraph (12) of this paragraph; (12) the right of communication through information network, that is, the right to make a work available to the public by wire or by wireless means, so that the public may have access to the work at time and place chosen by them. The six rights are an attempt by the Chinese code to expand on the definitions of reproduction and distribution in order to ensure that there are no ambiguities as to what the right is and whether or not it is being violated.

(13) the right of cinematography, that is, the right to fix a work on the medium by producing an audiovisual work. This is one of the differences that will be seen between these rights and those in the United States, under the Chinese law the right to fix the work into a medium actually spelled out, whereas in the United States it is implicit in the right of copyright.

(14) the right of adaptation, that is, the right to modify a work to create a new one with originality; (15) the right of translation, that is, the right to transform the work from one language into another language; (16) the right of compilation, that is, the right to compile, by selection or arrangement, the works or fragments of works into a new work. Even though the right of alteration was already specified in the code, there are specified rights reserved to these types of altering activities.

(17) other rights which shall be enjoyed by the copyright owners. It is similar to the type of catchall provision that was already seen in the works listed under the code. Here again, the Chinese code is attempting to give flexibility to the types of rights that may be enjoyed that leaves room for technological changes that may alter the ways in which current rights are exercised.

Noted, this 2020 Act has made a reasonable expansion of broadcasting rights and information network communication rights due to the emergence of live broadcasts and other social media in recent years. The real-time network broadcast or live broadcast (webcast) is also included in the protection scope of broadcasting rights. Thus, the owners of the rights of broadcasting have a wider range of rights. And, the Article 45 adds the right of mechanical performance and the right of broadcasting for sound recordings, whose level of protection is higher than that provided in the US copyright Law.[436] Where audio recordings are used in wired or wireless public dissemination, or for public broadcast through technical equipment for transmit sound, remuneration shall be paid to the sound recording producer.

Even though the United States list of rights is shorter, this does not mean that the overall strength of United States copyright laws should be considered inferior when compared to those of China as the practice of the courts in respecting those rights will ultimately determine their strength.

**5.4 The Length of Protection**

The length of protection is critical to understanding substantive copyright law because many decisions made by copyright holders will be dependent on their understanding of how long their work will be protected for.

***5.4.1 Under US Copyright law***

To understand the length of protection currently available under substantive United States copyright law it is necessary to understand that the length of protection has been on a perpetual march towards further and further extension. Essentially, when it comes to understanding the length of protection under current United States law it must be understood that there is a constant push and pull between protecting the

436 Cohen, M. (2020). Further observations on the recent copyright law amendments. China IPR. https://chinaipr.com/2020/11/12/further-observations-on-the-recent-copyright-law-amendments/

rights of copyright holders and respecting the constitutional requirement that copyright terms have limits. As these terms keep getting extended it is getting increasingly difficult to see how they are limited and not design to create permanent copyrights.

In every revision of the copyright law since 1790 there has been an extension in the length of protection and by the 1998 Sonny Bono Copyright Terms Extension Act the length of protection was extended to life the author seventy years for individuals and ninety-five years for works for hire.

### *5.4.2 Under Chinese Copyright law*

The length of protection in China is different than that of the United States and the first difference is entirely due to the differing philosophies that underlie traditional understandings of the author's relationship with their work and the importance of copyright law in protecting this relationship.

Specifically, Article twenty-two states that the author's right to integrity, authorship, and alteration, shall be unlimited. This means that the Chinese law considers it important that the author's name be associated with a work permanently, whereas this is not a concern of the United States law and is actually foreclosed by the United States Constitution.

Article twenty-three specifies the limited terms made available under Chinese copyright law and divides these limits into three categories: natural persons, legal persons or works for hire. For natural persons, the rights are for the life of the author and fifty years after their death; in the case of joint authors the fifty-year period will be triggered following the death of the last author and not the first. For legal persons, the rights attach for fifty years after the works publication, or if the work was not publicized, then fifty years after the work was first created. Finally, for audiovisual

works, the same rules as legal persons apply, this means the author of a book and author of an audiovisual work will not have the same rights under Chinese law, which is a departure from the limits that are established for similar authors in the United States.

In sum, the length of protection is considerably longer than the terms that are currently allowed for under Chinese law.

## 5.5 Restrictions on the Exercise of Copyrights

### *5.5.1 Under US Copyright law*

While copyright protections under the 1976 Copyright Act are strong, they are not completely absolute. It was recognized that it is not always in the public's best interest to allow for copyrights without exception. Such a system would make it virtually impossible to criticize a piece of art or to conduct research in a library without violating a copyright. In such instances it was determined that the public's interest should outweigh the economic interests of the copyright holder and specific sections in the 1976 Copyright Act were drafted in order to address what restrictions on copyrights were in the public's interest. Specifically, these are sections 107 through 122 of the 1976 Copyright Act. Though each of these sections contains important restrictions, such as Section 121, which allows for reproduction of works intended for use by the blind and those with disabilities, it is Sections 107 and 108 that contain some of the broadest restrictions. As each of these two sections deal with different important restrictions on the rights of copyright holders they will be discussed separately.

#### *(1) Section 107 of the 1976 Copyright Act: Fair Use*

Essentially, fair use means that a copyrighted work is being used by the public in a matter consistent with their rights to free expression and free thought and the test

for what constitutes fair use is boiled down to four factors listed in Section 107 of the 1976 Copyright Act.[437] Importantly, Section 107 is broadly worded, which leaves rooms for courts to determine whether or not the factors are applicable to the specific facts of the case before it. However, it should be noted that this amount of flexibility has been criticized as allowing too much leeway in claims for fair use which would be defeated by a clearer definition as to the actual meaning of the term.

It is necessary to understand each of the four factors to see how they would operate in practice. The four factors of the test ask **whether the nature of the use of the copyright is for commercial or educational purposes, what the nature of the underlying copyrighted work is, the amount of the work used as opposed to its whole, and the effect of the use on the potential market and value of the work.** It can be seen that the test is an attempt to balance the rights of the individuals to use copyrighted works for non-commercial means against the rights of the copyright holders to expect that such fair use will not diminish the overall market value of their copyrighted work. It is this constant push and pull between the rights of the public and the rights of the copyright holder that lay at the heart of the restrictions under Section 107 of the 1976 Copyright Act.

***(2) Section 108 of the 1976 Copyright Act: Copyright and Digitization of Library Materials***

Section 108 of the 1976 Copyright Act also carves out large restrictions on the rights of Copyright holders. Indeed, it is possible to see the thread that connects Sections 107 and 108, which is the public interest in making copyrighted material available for educational and non-commercial uses. Section 108 is unique as it focuses on libraries and places wide restrictions on the ability of copyright holders to claim

437 Beebe, B. (2008). An Empirical study of U.S. copyright fair use opinions, 1978-2005. University of Pennsylvania Law Review, 156(3), 549-624. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1223&context=penn_law_review

infringement for materials that are copied in the course of most library operations. While this does not mean that every use of copyrighted material in the context of library operations will be permitted, it does mean that this restriction makes it very difficult for copyright holders to make a claim for infringement if a library is involved.

Under Section 108 there are three factors that the court is required to analyze to determine whether or not a copyright infringement has occurred. These factors are: **there is no direct or indirect commercial benefit to the distribution or reproduction of the material, that the library is open to the public or researchers in a specialized field, and that a notice of copyright appears on the reproduced material or a legend of reproduction that indicates a copyright is present.**[438] Indeed, Section 108 may be used when a defense to infringement under Section 107 has failed.

For example, in the case of *New York Times v. Tasani* a court found that a database maintained by a newspaper for private purposes could not be considered a library under the statute because the database was not made available to the public and thus could not avail itself of the argue that copyrighted materials in its possession were restricted from an infringement claim.[439] The New York Times case is interesting because it is easy to see how the court could have perhaps gone in a different direction and found a public interest in the newspaper maintaining an unauthorized database of copyrighted material even if the material was not made available to the public. For example, the court could have concluded that the operation

438 Gasaway, L. (2007). Amending the Copyright Act for libraries and society: The section 108 study group. Albany Law Review, 70, 1331-1356. http://www.albanylawreview.org/Articles/Vol70_4/70.4.1331-Gasaway.pdf

439 Hansen, D. (2014). Copyright reform principles for libraries, archives, and other memory institutions. Berkley Technology Law Journal, 29, 1559-1594. https://btlj.org/data/articles2015/vol29/29_3/29-berkeley-tech-l-j-1559-1594.pdf

of the database made it possible for the newspaper to compile stories that were in the public interest and, as such, the public policy implications inherent in Section 108 of the 1976 Copyright Act would be served by shielding the newspaper from liability.

This helps to demonstrate that the relative flexibility in the tests that are applied to the restrictions in Sections 107 to 121 of the 1976 Copyright Act mean that it can never be taken for granted that the court will choose to or choose not to impose restrictions on the rights of a copyright holder based on similar facts. Each case will be judged on its own merits and it is possible that the factors could be skewed in one way in a set of similar facts that would allow infringement to be found in one case and not to be found in another.

### *5.5.2 Under Chinese Copyright law*

Section Four Article Twenty-four of the Chinese copyright law lists thirteen specific restrictions to the rights of copyright holders. The majority of these restrictions are similar to what is referred to as fair use in the United States. For example, fair use a copyrighted work for study, research, quotation in a newspaper, publication by news broadcasters, and the publication of speeches.

However, in the case of public speeches and the publication of works by broadcasters, the copyright holder can expressly state such publications are prohibited and they will then not be protected by this version of fair use.[440] This means that a speech, that would be protected by fair use provisions in the United States copyright code would not be protected under the Chinese system if the copyright holder expressly declares that such use is not prohibited. This means that if a Chinese copyright holder does not take this affirmative step, then the normal restriction will apply. However, this does add a layer to the restriction that is not present in the

[440] Article 24 (4)-(5) of the 2020 Copyright Act of the PRC.

United States and can be seen as an element designed to prevent fair use by parties scrupulous enough to take advantage of the provisions hardwired into the law.

(6) translation, adaptation, compilation, broadcasting, 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 such a work shall not be published or distributed. Here, it is possible to see a connective thread between the rules in the United States and the rules in China. Both systems recognize that copyrights should not prevent educators from being able to provide valuable information to their students. However, the rights of educators to reproduce copyrighted material is predicated on the fact that the educators will not make the copies available for public consumption. In other words, both systems recognize that as long as the works are being used for educational and not commercial reasons, then the infringement of the right of the copyright holder is permitted in the name of social progress and education. Quite simply, commercial motivations do not take precedent in these types of restrictions in either system.

(7) use of a published work by a State organ to a reasonable scope for the purpose of fulfilling its official duties;

(8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, cultural center or similar institution for the purpose of display, or preservation of a copy of the work. It is similar to Section 108 of the United States code.

(9) free performance of a published work for non-profit purposes, for which the public does not pay any fees and no remuneration is made to the performers;

(10) copying, drawing, photographing or video-recording of a work of art put up or displayed in public places;

(11) translation of a published work of a Chinese citizen, legal person or unincorporated organization from the standard spoken and written Chinese language into minority nationality languages for publication and distribution in the country;

(12) provision of published works to dyslexics in a barrier-free way through which they can perceive; and

(13) other circumstances as provided by laws and administrative regulations.

## 5.6 Formalities required for copyright protection

### *5.6.1 Under US Copyright Law*

The 1976 Copyright Act states rather simply that a copyright in a work exists the moment that it is created, and that registration is not a condition precedent to copyright protection. The plain reading of this would mean that once an author writes a book a copyright is created, and the registration of that book would not be a condition precedent for the author seeking copyright protection. While this would seem relatively straightforward, it will become readily apparent that in practice more formalities are required. This is because no action for infringement may be brought in a federal court unless registration of the copyright has been achieved.[441] This means on one-hand a party is recognized under law as having a valid copyright and may seek protection without registration, while on the other hand the Act makes it clear that the courts will not entertain a copyright infringement claim unless the work has been registered. This means that the language of the statute indicating that the only formality is creation is inherently misleading to those seeking to understand copyright law. Indeed, a copyright is only valuable insofar as it can be enforced, and it can only be enforced if registration is completed. Thus, registration is a vital formality under

441 Bracey, M. (2006). Searching for substance in the midst of formality: Copyright registration as a condition precedent to the exercise of subject-matter jurisdiction by federal courts over copyright infringement claims. Journal of Intellectual Property Law, 14(1), 111-143. https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1304&context=jipl

United States copyright law, even if certain sections of the 1976 Copyright Act make it seem that formality is not terribly important. As such, it is important to understand what the formalities of registration are in practice.

There are three items that are required for copyright registration to be achieved. These items are: payment of a registration fee, a copy of the work, and a completed application. These three formalities alone may not seem onerous, even though there is the inherent conflict between these requirements and the code's proclamation that a copyright exists without registration, but the timing of registration can have a serious effect on the ability of a copyright holder to bring an infringement action. This is because there is a split in the federal courts as to whether merely going through the procedure of registration is sufficient to bring a claim or if it is necessary to receive an acceptance of the registration from the copyright office in order to bring a claim.[442]

Indeed, this can be critical because statistics reveal that with approximately 600,000 applications for copyright protection in any given year the wait time between the filing of an application and the acceptance of registration can be anywhere from five to six months.[443] This means that if an application has been filed in a state where the courts do not protect copyrights until after the registration has been completed there is a significant window where individuals that would otherwise hold valid copyrights may not be able to enforce their claims. As such, they have a theoretical copyright under federal law, but they have no way to enforce their rights in court.

It should be noted that the contradictions inherent in the law are not lost on the courts. Indeed, in the 1998 case of *Ryan v. Carl Corp*. the federal district court noted that even though congress had drafted a logically ill-advised law it is not up to the court to rewrite the law, only congress has the power to do so. This practice of judicial

442 Id.
443 Id.

restraint has resulted in many courts adopting the issuance-approach to cases where the infringement may have occurred after the application for registration was filed but before the copyright was registered. This has resulted in courts recognizing that the application is a requirement, but it alone is not enough to achieve copyright protection. These courts will find that the copyright is not effectuated until registration has been issued by the copyright office. This highlights the importance of a party understanding the backlog at the registration office and the utility that they may find in paying the higher fee to expedite the application.

In the case of *Fourth Estate Public Benefit Corp. v. Wall-Street.com*,[444] "Fourth Estate" creates online news articles and offers a license to publish them to the news website "Wall-Street". Under the terms of the licensing agreement, Wall-Street must first cancel the Fourth Estate's content before it can end its licensing agreement. However, Wall-Street terminated the licensing agreement, but not the Fourth Estate's content. According to 17 U.S.C. s 501, Fourth Estate sued Wall Street for copyright infringement arguing that it obtained copyright registration before filing the suit because it applied to the Copyright Office for registration, although the office did not act on the applications. Wall Street argued that a copyright suit must be filed after the copyright office approves it or disapproves it under S17 U.S.C.s 411(a), but Fourth Estate does not meet this requirement.

The Supreme Court dismissed the suit because that the copyright owner may file an infringement lawsuit after registration and may recover for the infringing acts that have taken place before or after registration. Although the Copyright Law gives copyright holders exclusive rights to a work immediately after it is created, copyright owners may commence proceedings only if they meet the "registration" requirements

444 Fourth Estate Public Benefit Corporation v. Wall-Street.com, LLC, 139 S.Ct. 881 (U.S., 2019)

of section 411 (a). In limited circumstances, copyright holders may sue prior to registration. Fourth Estate considered that registration shall be subject to application and that the registration shall take place when the copyright holder submitted the appropriate application for registration. Wall Street argued that application was subject to "registration", and only occurred when the Copyright Office granted the registration.

The current Chinese Copyright Law has three solutions to the copyright infringement: Mediation; Arbitration; Lawsuit in court. No matter what ways the right holder choose, he had better go to the National Copyright Administration for copyright registration first since that the preservation of the copyright certificates, payment records, and the original copyright carriers can provide sufficient evidence when you are facing infringement allegations.

### *5.6.2 Under Chinese Copyright Law*

However, unlike the United States, registration is not a perquisite to enforcement of an infringement claim under Chinese code. Article Twelve of Section Two of the code, which deals with ownership rights and this article makes registration with state organs an option for recognition by the state, but not a requirement. Indeed, this type of optional language can be found in other parts of the Chinese code. For example, in the section dealing with the organization of royalties in Article Eight of Chapter One the law states that copyright holders may authorize collective organizations to set and collect royalties, but, again, does not make this optional act a perquisite for the author to enforce their right against an infringing party.

## 5.7 Summary

This chapter provides a comparison between the current copyright laws in the United States and China by providing an in-depth analysis of each set of laws and

describing in which ways the laws are similar and in which ways they are different. Furthermore, due to the fact that China recently made several amendments to its copyright laws that came into effect in June 2021 this chapter highlights whether these amendments have brought Chinese copyright rules closer to those that exist in the United States. Specifically, this chapter focuses on what works are protected, the lengths of protections, the rights afforded, the formalities associated with gaining rights, and the relative enforcement options under each system.

An analysis of the works protected reveals that the two systems are designed to protect roughly the same types of work, although the Chinese rules have more specified categories than the United States system. Furthermore, this chapter explains that China altered some of the language it used to describe protected works in the recent amendments which resulted in audiovisual works being defined roughly the same in China and the United States. Though China specifically lists more works, this does not mean that China protects more works as the general descriptions of works in the United States law would subsume some of the works specifically mentioned in the Chinese system. This chapter highlights that both regimes offer lengthy protections for works, although the United States system allows for lengthier protections, especially for works for hire. Due to these recent changes, this chapter discusses the controversy surrounding relatively recent changes to the United States law that lengthened terms of protection and are suspected to be a response to industry pressure to offer protection to works about to fall into the public domain. Furthermore, this chapter explains why this has likely not happened in China but will caution that the Chinese system may come under the same pressures as time moves forward.

The section of this chapter focusing on the rights afforded to copyright holders reveals that cultural differences result in the Chinese system putting greater emphasis

on protecting the relationship between the author and their work, while the United States system is more focused on protecting the economic incentives for authors to create new works. Though these differences are codified in the laws, this chapter provides evidence that the new Chinese amendments are designed to increase the types of economic incentives for authors to create new works, which are a prominent feature of the United States law. Next, in the discussion of the formalities required to attain copyright protection, this chapter explains that though the United States does not make registration a formality precedent to achieving copyright status, it is a condition precedent to filing a lawsuit to protect a copyright. This means that, in effect, registration is required in the United States if a copyright holder hopes to protect their intellectual property. In comparison to Chinese law, this chapter reveals that no such contradiction in rules exists, although it is still advisable for Chinese copyright holders to register their works with the relevant authorities in China.

Both countries' copyright acts provide the rules by which copyrights can be successfully attached to works and be defended against infringement. However, it must be understood that much of the simple language in these acts is anything but simple when put into practice. One of the ongoing debates in United States substantive copyright law is the seemingly large inconsistency in the law stating that registration is not a prerequisite to holding a copyright while also making registration a requirement in order to seek relief in court. It should be pointed out that while registration fees may seem low, the time taken to achieve registration and the lack of clarity in what effective date a court will respect make the rights under current copyright laws murky at best for many content creators. Yes, sophisticated corporations have attorneys that can protect the intellectual property of their corporate clients, but for individual artists, the system may be so complicated as to discourage

the active use of copyright protection against infringement by individual artists.

However, it should be noted that any national copyright system could only be judged when compared to the way that similar systems are used across the globe. No two systems are entirely the same, although they may share general goals. As such, it is impossible to say that the United States system is either deficient or completely suitable without comparing it to the systems employed in other large countries. Comparing the system of the United States to that of China is useful for a comprehensive understanding of the system in both countries. Indeed, China serves as an excellent comparison system because its copyright system was amended in 2021 and its economy is the second largest in the world behind the United States. As such, a comparison to US substantive law will allow for an understanding if whether the system as it currently exists in China is appropriate in the twenty-first century and whether China's system has borrowed from the United States or whether it has forged its own path. This is why it is useful to go through the same type of analyze of China as was done for the United States, but to also augment this analysis with observations on the similarities and differences between China's new copyright scheme and that of the United States. There is no question that China, as it aims to become the world's top economic power, needs a system that is at least as effective at protecting copyrights as the United States. Economic power is, after all, largely dependent on the rule of law in the country in which the economic engine runs.

# CHAPTER 6 A COMPARATIVE STUDY OF COPYRIGHT ENFORCEMENT BETWEEN THE U.S. AND CHINA

## 6.1 Introduction

Though the previous sections have highlighted the practical uses of copyright law by focusing on specific cases as examples, this does not substitute for a robust discussion on the enforcement options available under current copyright law. A study of the copyright enforcement in the US and China can provide an objective view of the differences between the two countries' copyright laws. Enforcement is a matter of applying and interpreting the copyright act, namely how the right is enforced.

Indeed, most of the cases previously discussed have focused on civil proceedings brought by copyright holders seeking to enforce their rights against an infringing party, but this is not the only type of enforcement procedure available under the law. While enforcement is typically accomplished through civil proceedings, it can also be accomplished through criminal proceedings, institutional enforcement, and other pre-litigation enforcements. As such, it is valuable exercise to go through each of these types of proceedings individually in order to understand the types of infringement that will bring about a specific type of proceeding, the types of evidence necessary in a particular proceeding, and the relief that may be ordered through a particular proceeding. With this understanding it will be possible to see the relative benefits and disadvantages of seeking to enforce copyright actions through one type of enforcement action versus another.

## 6.2 The Copyright protection enforcement in U.S.

### *6.2.1 Judicial Enforcement*

The US Copyright Act has both criminal and civil provisions for infringement. There are four civil remedies for copyright infringement: injunctions, impounding and

disposition of infringing articles, damages and profits, and costs and attorney's fees.[445] Federal courts determine the civil remedies in action for infringement brought by the copyright owner. If it involves criminal infringement under 17 USC§ 506 or 18 USC§ 2319, he will face imprisonment and fines.[446]

***(1) Civil proceedings***

A. Civil copyright infringement

A civil proceeding is what one would typically imagine would occur in the case of a copyright infringement. "Anyone who violate any of the exclusive rights of a copyright owner...is an infringer of the copyright or the right of the author."[447] "The owner of that exclusive right is entitled ...to institute an action for any infringement of that right."[448] The US Copyright Act provides that any person who infringes the exclusive rights of the copyright owner under sections 106 to 122 or who imports from a foreign country copies or phonorecords in contravention of section 602, is an infringer of the copyright or the authorship right.[449] Importantly, the plaintiff does not need to prove that the work in its entirety was copied, but, rather, that parts were copied for the illicit use of the defendant. As with any civil action, it is important for a plaintiff in a copyright case to understand how the infringement is occurring and which defendant is best suited to take responsibility and pay damages. After all, the goal is not only to recoup past damages, but also to ensure that the time expense and seeking future damages can be resolved through a properly formulated civil strategy.

(a). Direct infringement

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445 17 U.S.C. § 502-505 (2012).

446 Fleming, K. (2016). Let It Go? A comparative analysis of copyright law and enforcement in the United States of America and China. The John Marshall Review of Intellectual Property Law, 15(3). https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1391&context=ripl

447 17 U.S.C. § 501(a) (2012).

448 17 U.S.C. § 501(b) (2012).

449 17 U.S.C. § 501 (2012).

Direct infringement refers to the act of directly implementing the exclusive rights granted to the copyright owner without the permission of the copyright owner and without the statutory grounds of exemption. It is true that proof of copyright infringement requires: (i) the defendant's copying in fact and (ii) substantially similar. To determine whether two works are substantially similar, the court applies a two-part test. One is the " extrinsic test" in an objective comparison of specific expressive element that focuses on the "articulable similarities" between the two works.[450] The other is the " intrinsic test", a subjective comparison that focuses on whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works.[451]

(b). Secondary infringement

The development of network technology brings great challenge to copyright system. The copyright infringement disputes frequently occur between the copyright owners and the digital technology disseminators represented by the network service providers. Secondary infringement means that although the infringer does not undertake direct infringement, it should assume necessary liabilities for the damage result because it plays an assisting role in the infringement of others or there is employment, subordinate, or other specific relations in accordance with the law between it and the infringer. However, secondary infringement is not explicitly stipulated in US copyright law. Instead, it is established and developed through common law, which includes two types of infringement: contributory infringement and vicarious infringement.

Contributory infringement is the act of inducing, causing or materially contributing to the infringing conduct of another with knowledge of the infringing

450 Cavalier v. Random House, Inc., 297 F.3d 815 (C.A.9 (Cal.),2002)
451 Id.

activity. The formation of contributory copyright infringement needs to meet the following three requirements simultaneously: (i) the infringement; (ii) the defendant encourages or assists the infringement; (iii) the defendant knew or should have known the infringement of the third party.[452]

Vicarious infringement is developed from the common law rule that the employer is liable for the tort when the employee is the direct tortfeasor. The court defines that if a person has the right and ability to supervise the infringement of others, and at the same time receives direct economic benefits from the infringement, it shall be liable for the infringement even if it is not aware of the infringement of others. The elements for vicarious copyright infringement includes underlying infringement, the fact that the defendant enjoys direct financial benefit from the underlying infringement, and the defendant should have the right and ability to supervise the infringement.[453]

In the case "*Unicolors v. NB Brother*"[454], the plaintiff UniColors, a Los Angeles-based company that designs, manufactures and sells fabrics, created a work in 2013 and registered the U.S. copyright. The defendant, NB Brother, is an import company. The plaintiff found that the defendant had sold unauthorized products with the patterns that were very similar to theirs. Therefore, the plaintiff filed three claims against the defendants: direct copyright infringement; contributory copyright infringement and vicarious copyright infringement. The court held that although the patterns of the products were substantially similar to the works involved, the defendant did not constitute direct infringement or contributory copyright.

452 Matthew Bender & Co. v West Publ'g Co., 158 F.3d 693, 706 (2d Cir. 1998)
453 Ellison v. Robertson, 357 F.3d 1072 (C.A.9 (Cal.),2004)
454 Unicolors, Inc. v. NB Brother Corp., 2017 WL 4402287 (C.D.Cal., 2017)

One of the requirements of direct infringement is the copying of a valid copyrighted work. A valid copyright should meet two conditions, one is registration; the other is originality, that is, the author must independently create a work with minimal degree of creativity.[455] In this case, the plaintiff provided evidence of originality and obtained a valid registration. But it did not provide any direct evidence of the copying of the defendant. The defendant's product in question and the plaintiff's work are considered not strikingly similar.[456] So, copying needs to be proved in other ways. Under US copyright law, the plaintiff has to prove both "access to the work" and "substantial similar"[457] If the plaintiff has no direct evidence to prove that the defendant have access the work, it needs to be proved by circumstantial evidence, such as chain of events and widespread dissemination.[458] In this case, the plaintiff provided two circumstantial evidences to prove that the defendant had a reasonable possibility to have access to the work, including the sales record of the fabric of the work involved and the distance between the defendant and the exhibition hall being only 1.6 miles away. The court held that the plaintiffs only provided the fabric of the works involved to a few manufacturers in Los Angeles and New York, and could not prove the widespread dissemination of their works; although the location of the defendant was close to the exhibition hall, the plaintiff failed to prove that the defendant had been there. Moreover, the defendant did not engage in design and productions. Instead, the defendant purchased garments and imported them from a Chinese manufacturer. Therefore, the court found that the defendant did not access to the work involved.

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455 Three Boys Music Corp. v. Bolton, 212 F.3d 477 (C.A.9 (Cal.),2000)
456 Gable v. National Broadcasting Co., Inc., 438 Fed.Appx. 587 (C.A.9 (Cal.),2011)
457 L.A. Printex Industries, Inc. v. Aeropostale, Inc., 676 F.3d 841 (C.A.9 (Cal.),2012)
458 Three Boys Music Corp. v. Bolton, 212 F.3d 477 (C.A.9 (Cal.),2000)

Since the two works have the same style, both use the same elements, and the structure distribution is similar, the judge recognized the similarity of the two to be substantially similar. However, the plaintiff has failed to provide sufficient evidence to prove copying. Therefore, the claim of direct copyright infringement cannot be supported.

In this case, if the defendant is to be identified as a contributory infringement, it is necessary to prove that the defendant's fabric supplier has an underlying infringement and he not only knew about the infringement of the manufacturer, but also provided corresponding contribution. However, the fact shows that the fabric supplier is a factory in China, which is far away from the plaintiff's location, and the plaintiff's customers are all in the US, so the possibility of contact with the Chinese factory is very small. Therefore, infringement by a third party is not recognized. Moreover, even if the manufacturer's infringement can be proved, it is also necessary to provide that the defendant knew about the manufacturer's infringement. The court held that the defendant could not know whether the product involved was infringing; the plaintiff also failed to submit relevant evidence to prove that the defendant had induced and facilitated the infringement. Therefore, the claim of contributory infringement cannot be supported.

Also, the defendant did not have the ability and right to supervise this infringement. Therefore, the defendant is also found not to constitute vicarious infringement.

In conclusion, even if the defendant’s product substantially similar to the plaintiff's work, but due to the plaintiff failed to prove that the defendant access to the plaintiff's work or to prove that the third party’s direct infringement. The court held that there was no infringement.

In a word, both the contributory infringement and the vicarious infringement break through the traditional theory and require the actor to bear the responsibility for others' copyright infringement under certain conditions. The appearance of such rules is helpful to recover for the loss of the copyright owner more effectively.

(c). Defense

The exclusive rights of copyright owners are not absolute. Besides some limitations on those rights, there are four defenses to a claim of copyright infringement: (i) obtain the permission of the copyright holder; (ii) statutory limitation on the exclusive right such as the fair use doctrine (iii) the first sale doctrine (iv) compulsory licensing of copyright.

B. Civil remedies

The remedies provided in the US Copyright Act mainly include injunction, impoundment and destruction, damages and attorney's fees, etc. In addition, DMCA only makes provisions on the remedies for the destruction of technical protection measures and copyright management information but does not provide the remedies for the network copyright under the digital environment. Thus, the US protects the network copyright through the interpretation of the traditional copyright rights.

(a). Injunction

The injunction was intended to restore copyrights to their pre-infringement state. However, when the copyright infringement of a work has a wide scope and great harm, and the loss of the copyright owner has been quite serious and irreparable after the whole proceeding has been completed, the court often uses injunction. There is preliminary or permanent injunction in the US. In practice, the courts are very cautious when granting injunctions, usually taking into account a variety of factors to

avoid adverse effects. A court issues an injunction "as it may deem reasonable".[459] Permanent injunctions are granted where liability is established and there is a threat of continuing infringement.

(b). Impoundment and destruction

Under section 503 of Title 17 of United States Code, the court may, at any time before its decision, issue an order to seize or destroy or otherwise dispose of infringing goods as part of a final decision. The court may order the destruction or other disposal of all copies or phonorecords, as well as all plates, molds, matrices, masters, tapes, film negatives, or other items made or used exclusively by the copyright holder, in violation of the copyright.

(c). Damages

The purpose of remedy is to make up for the loss suffered by the obligee due to the infringement of his right. Actual damages are the main way of remedies. In accordance with the 17 USC§ 504 (b), the copyright owner in an infringement action may claim damages from the infringer for its losses and the profits that the infringer has obtained from the infringement but not included in the aforementioned losses. In addition, the US copyright law also provides statutory damages at the copyright owner's election to recover in lieu of actual damage and profits. In accordance with the 17 U.S.C. §504(c)(1), the court decides the statutory damages in the amount of not less than $750 or more than $30,000. But for a willful infringement, the court may increase it to a sum of not more than $150,000.[460]

Later, the DMCA established the main basis for damages in the digital environment and the damage is the same as that for traditional infringement. And it

459 17 U.S.C. §502
460 17 U.S.C. § 504(c)(2)

provides the specific scope of damages for the infringement of copyright management information and technology protection measures, which reduces the burden of proof of the plaintiff.

Furthermore, US copyright law not only clearly provides the scope of damages for copyright infringement, but also has specific calculation method for the amount of damages, which well guarantees the reasonableness of damages.

(d). Court costs and Attorney's fees

Unless otherwise provided by the US Copyright Act, the court may also order that reasonable attorney's fees be awarded to the prevailing party under certain circumstances.[461] This effectively avoids the problem that many copyright owners give up remedies due to the high cost. But costs and attorneys' fees can be awarded only if the plaintiff has registered their works with the Copyright Office.

***(2) Criminal proceedings***

A. Criminal copyright infringement

A copyright infringement may be considered criminal when conduct results in the willful infringement of a copyright for commercial advantage or financial gain. Not every case of infringement will rise to the level of criminal enforcement. The US Criminal copyright infringement includes the followings offenses:

(a). Willful copyright infringement for commercial and private profit;[462]

(b). Copyright infringement without a profit motive;[463]

(c). Pre-release distribution of a copyrighted work over a publicly accessible computer network;[464]

461 17 U.S.C. §505
462 17 U.S.C. §506(a)(1)(A), 18 U.S.C. § 2319(b)
463 17 U.S.C. § 506(a)(1)(B), 18 U.S.C. §2319(c)
464 17 U.S.C. § 506(a)(1)(C), 18 U.S.C. § 2319(d)

(d). Circumvention of copyright protection systems in violation of the Digital Millennium Copyright Act;[465]

(e). Bootleg recordings of live musical performances;[466]

(f). Unauthorized recording of motion pictures in a movie theater;[467]

(g). Counterfeit or illicit labels and counterfeit documentation and packaging for copyrighted works;[468]

B. Criminal Penalties

The scope of criminal liability for copyright is quite extensive. The law provides for specific criminal fines amount[469] and imprisonment terms for criminal copyright infringement.[470] The US has different penalties for copyright infringers depending on whether they are profit-seeking. Moreover, the penalty standard of copyright infringement is based on the loss of the copyright owner. Title 17 of the US Codes 506 provides that if the infringement is intentional and for commercial advantage or private financial advantage or involves the reproduction or distribution of more than $1,000 worth of copies during a 180-day period, the penalty of five years in prison and a maximum fine of $250,000 can be imposed. Maximum imprisonment for copyright infringement is ten years.[471] Furthermore, the DMCA made it illegal to traffic in technologies that would allow someone to circumvent measures designed to control access to protected works.[472] The penalties for such crimes were a maximum fine of $500,000 for a first offense with a maximum prison term of five years and a

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465 17 U.S.C. § 1204
466 17 U.S.C. § 506 (3)(A)
467 17 U.S.C. § 506 (3)(B)
468 18 U.S.C. §2318
469 18 U.S.C. §3571
470 18 U.S.C. § 2319
471 18 U.S.C. § 2319(a)-(d) (2012).
472 Haber, E. (2015). The criminal copyright gap. Stanford Technology Law Review, 18, 247-288. https://law.haifa.ac.il/images/Publications/SSRN-id2624330.pdf

maximum fine of $1,000,000 for a subsequent offense with a maximum prison term of ten years.[473]

Recently, the US Department of Justice (DOJ) has substantially increased the number of resources devoted to investigating and prosecuting criminal copyright infringement, in response to pressure from the entertainment and computer software industries to ensure that the customers are aware of the penalty for criminal copyright infringement. For example, the FBI released and "anti-piracy warning" seal that affixed to copies of any copyright work to warn customers of criminal penalties associated with copyright infringement.[474]

In conclusion, criminal proceedings are an available tactic for preventing copyright infringement in the United States. Both the 1976 Copyright Act and the DMCA have mechanisms in place that give prosecutors the ability to prosecute and punish those who choose to flout the law. However, statistics reveal that prosecutions remain largely flat since the 1970s,[475] which means that despite the availability of tools to go after infringement, law enforcement has largely left the protection of copyrights to the civil realm. This does not mean that the most egregious cases will not be prosecutes, but it does mean that the most efficient road to enforcement will likely be civil rather than criminal under current copyright practices in the United States.

### *6.2.2 Administrative enforcement*

In the US, there are numerous bodies involved in copyright enforcement, including government departments that assume relevant responsibilities, specialized copyright administration organizations and some public and service organizations,

473 Id.

474 Nard, C. A., Madison, M. J., & McKenna, M. P. (2014). The law of intellectual property (4th ed.). Wolters Kluwer Law & Business, 830.

475 Haber, E. (2015). The criminal copyright gap. Stanford Technology Law Review, 18, 247-288. https://law.haifa.ac.il/images/Publications/SSRN-id2624330.pdf

forming a multi-level and crisscrossing copyright protection and enforcement network nationwide. The individual right holder can inform the US government about copyright issues they experience in other countries.[476]

***(1) The United States Copyright Office***

The Copyright Office is the main Copyright legislature in the US major responsibilities include advising the Congress on legislation and amendments to the Copyright Act, establishing a nationwide database of copyright information, providing copyright registration to the public and providing the public with information advisory services related to copyright, etc.[477] The process of copyright registration is usually to submit the works in a specific format first, and then the Copyright Office will accept the registration and review the works. After passing the review, the copyright certificate will be issued. US copyright law has introduced a series of measures to encourage copyright registration.[478] In addition to registration being a prerequisite to bringing a civil case in the United States for copyright infringement, it is also a prerequisite to recording the copyright with the United States border protection and customs agencies to help enforce action against infringing imports.[479]

There are three main ways to register copyright in the US. The first way is online registration, which is the main way. Online registration through the Copyright Office's online system is the preferred way to register primary ownership of literary, visual, and performing art works. The second better option to apply for copyright is to apply by filling in the form from the Copyright Office. By using QR code scanning

476 Strong, M. (2017). Enforcement tools in the U.S. government toolbox to support countries' compliance with copyright obligations. Columbia Journal of Law & the Arts, 40(3), 359-370.

477 Chestek, P. S. (2015). On notice, not claimed: The role of the copyright registration system. Landslide, 7(3), 29-36.

478 Simmons, J. L. (2015). The next great copyright office. Landslide, 7(6), 23-30.

479 Oliar, D., Pattison, N., & Powell, R. (2014). Copyright registrations: Who, what, when, where, and why. Texas Law Review, 92, 2211-2250. http://texaslawreview.org/wp-content/uploads/2015/08/Oliar-92-7.pdf

technology, the Copyright Office can process these forms more quickly and efficiently than if they were filled out manually. The third way is to register copyright by filling in a paper form.

***(2) Department of Commerce***

The Department of Commerce is one of the departments of the federal government. Its major responsibility is to promote domestic and international trade. The main Bureaus involved in copyright enforcement are the International Trade Administration (ITA) and US Patent and Trademark Office (USPTO). The ITA protects the copyrights of US businesses and citizens overseas and holds their international trading partners to account for copyright protection obligations in international trade. The ITA and USPTO have also worked with other Bureaus to establish a dedicated anti-piracy website through which the public can obtain important information about copyright protection. The USPTO also provides assistance in developing and enforcing copyright laws in a number of other countries. The website, www.stopfakes.gov, lists country-specific information on IPR matters and ways to inform oversees copyright holders about the local market conditions.[480]

***(3) The US Department of State***

The DOS is a foreign affairs department directly administered by the US government, with the equivalent of China's Foreign Ministry. An important part of the DOS's job is to protect US intellectual property overseas. The DOS has established the Office of International Intellectual Property Enforcement (IPE). When it comes to copyright trade disputes between the US and other countries, US embassy staff are on the front lines. They will take complaints from American companies and put pressure

480 Id.

on foreign governments to live up to their international obligations on copyright protection and their bilateral copyright agreements.[481]

***(4) The Office of the United State Trade Representative***

The Office of the USTR is the main office that sets US copyright policy. It actively participates in international negotiations on copyright issues around the world, actively promotes the formulation of various international copyright laws, and fulfills the US President's external commitment to copyright protection. The USTR undertakes a review of foreign IPR practice each year within 30 days after the issuance of the National Trade Estimates Report. For example, Special 301 is a trade mechanism of USTR to enforce copyright protection. Since 1989, over 90 countries have been on the three lists.[482]

And USTR is actively engaged in implementing the Administration's Strategy Targeting Organized Piracy initiative (STOP!) to cracking down piracy and counterfeiting. For example, USTR advocates an adoption of best practices guidelines of FTAs/ multilateral fora to improve the global intellectual property environment that will aid in disrupting the operations of pirates and counterfeiters.

***(5) The United States Department of Homeland Security***

The United States Department of Homeland Security (DHS) is an administrative Department of the federal government created in the wake of the 9/11 attacks for domestic Security and counterterrorism missions. DHS plays a key role in US copyright protection. It mainly carries out copyright enforcement through its subordinate US Customs and Border Protection (CBP) and USCIS. The CBP is primarily responsible for monitoring and regulating the flow of goods through US

481 DOS. (2021). Intellectual property enforcement. U.S. Department of State. https://www.state.gov/intellectual-property-enforcement/

482 Strong, M. (2017). Enforcement tools in the U.S. government toolbox to support countries' compliance with copyright obligations. Columbia Journal of Law & the Arts, 40(3), 359-370.

posts of entry. It will enforce trade and customs laws to detect goods that infringe copyright. This is why registration is so critical, without proper registration the customs services would not be able to engage in this form of enforcement. The staff of these services are specially trained to recognize and remove such goods from circulation and to assist in the law enforcement steps necessary to bring infringing parties to justice.[483] This could mean either referring the infringing party for criminal prosecution or providing the necessary evidence for the copyright holder to take the appropriate actions in civil court. Quite simply, with the amount of commerce entering and exiting the United States on a continuous basis, the customs services provide meaningful oversight that protects copyright holders in a manner that they could not accomplish on their own. This does not mean that the customs service will be capable of ensuring that all infringing material is removed from the stream of commerce, but it is part of the services mandate and resources are allocated to accomplishing this goal. USCIS mainly investigates criminal copyright cases, such as illegal production, sale and dissemination of pirated products, and smuggling of copyrighted products.[484]

***(6) The US International trade commission***

The US ITC is an independent, quasi-judicial federal agency which is headed by six commissioners who are nominated by the president and confirmed by the US Senate. The ITC performs a number of trade-related tasks and adjudicates intellectual property rights and trade disputes. It investigates and adjudicates in cases where imports are claimed to injury domestic industries or infringe US intellectual property

483 Jones, V., & Rosenblum, M. (2013, March 22). U.S. Customs and Border Protection: Trade facilitation, enforcement, and security. Congressional Research Service. https://ecommons.cornell.edu/xmlui/bitstream/handle/1813/77554/CRS_US_Customs_and_Border_Protection.pdf?sequence=1

484 Fandl, K. J. (2016). Theft of foreign-owned intellectual property in Latin America: New strategy. George Washington International Law Review, 49(2), 299-350.

rights. Also, the US ITC launched several times of Section 337 investigations over Chinese firms.

***(7) The US Immigration and Customs Enforcement***

The US ICE works with federal agencies to combat intellectual property crimes that threaten the health and safety of American consumers. The National Intellectual Property Rights Coordination Center (IPR Center), led by ICE, is a key weapon in the fight against counterfeiting and piracy. The center uses its 23 member agencies to share information, coordinate law enforcement and investigate IP theft cases. It was incorporated into the Trade Facilitation and Trade Enforcement Act of 2015. The IPR center supports a variety of industry and non-governmental efforts to curb counterfeiting and is committed to combating IP theft. It works with international law enforcement and provides expertise to nonprofit organizations that are prepared to fight copyright infringement.[485]

### *6.2.3 Public and Social service enforcement*

***(1) International Intellectual Property Alliance (IIPA)***

The IIPA is a private organization of the US copyright industry founded in 1984. It is comprised of eight members representing key sectors of the US copyright industry. Its responsibility is to take measures by bilateral or multilateral agreement for the realization of international protection of copyright works. Its members are the Association of American Publishers (AAP), the Motion Picture Association (MPA), Entertainment Software Association (ESA), Independent Film & Television Alliance (IFTA) and Recording Industry Association of America (RIAA). They lobbied Congress on the content of the copyright legislations.[486]

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485 Foucart, B. M. (2016). IPR center: Conducting effective IP enforcement. United States Attorneys' Bulletin, 64(1), 27-37.

486 Fandl, K. J. (2016). Theft of foreign-owned intellectual property in Latin America: New

The role of the AAP is to promote the status of publishing around the world and to help protect the copyrights of its members at home and abroad. One of the MPA's main tasks is to guide many other countries around the world in developing copyright laws and other laws to protect American movies from piracy. The ESA is one of the most influential organizations in the world information industry. Its aim is to promote free and open trade in legitimate entertainment software around the world. It works with the US government, foreign governments, and leaders of other trade organizations and industries to maximize international copyright protection for software and combat software piracy. IFTA is an organization that unites Independents around the world and ensures that they are represented on all issues affecting independent businesses. IFTA supports and protects the global independent film and television industry. RIAA is a non-profit trade association representing the recording industry in the US. Its main task is to serve the common interests of the global recording community and reflect their needs under the conditions of modern technology.

***(2) US Intellectual Property Enforcement Coordinator***

The Office of the US Intellectual Property Enforcement Coordinator (IPEC) is committed to promoting the US innovation economy, coordinating and developing overall U.S. intellectual property policy, and ensuring effective enforcement of intellectual property rights. The Office works with the executive branch to coordinate government work. It also works with stakeholders and international partners to address intellectual property issues and is committed to expanding enforcement cooperation to ensure the enforcement of US intellectual property laws. For example, the IPEC presented the Joint Strategic Plan on IP enforcement (FY 2017-2019), which

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strategy. George Washington International Law Review, 49(2), 299-350.

was a blueprint for the work to be carried out over the next three years by the federal government and other sectors in support of a healthy IP enforcement environment in the world.[487] That way, American creators will have a level playing field, and their creations will be protected.

***(3) The US Chamber of Commerce's Global Innovation Policy Center***

The US GIPC uses intellectual property standards to promote world's innovation and creativity, and to provide solutions to global challenges. The goal of the GIPC is to enable strong IP standards to promote innovation and creativity on a global scale through a variety of programs, initiatives and activities.[488] It provides the world with the authoritative corporate voice on innovation policy and ensures that legislation; trade agreement negotiations and multilateral discussions at home and abroad promote innovation and creativity. It unites IP stakeholders at all levels to develop solutions. For example, the ninth annual US Chamber international IP Index evaluates IP right in 53 global economics across 50 indicators.

***(4) American Intellectual Property Law Association***

AIPLA is a national bar association, established in 1897, consisting of practitioners in private and corporate practice, government service and academia. Members of AIPLA represent owners and users of intellectual property. Its goal is to help improve intellectual property law and the interpretation of law by courts, and to provide intellectual property law education to the public. It is involved in the formulation of US intellectual property policy through its work in the US courts. It also has a global campaign and regularly participates in the meetings of the WIPO.

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487 USPTO. (2016). U.S. Joint Strategic Plan on IP enforcement announced. *United States Patent and Trademark Office*. https://www.uspto.gov/about-us/news-updates/us-joint-strategic-plan-intellectual-property-enforcement-announced

488 Acri, K. M. (2017). Economic growth and prosperity stem from effective intellectual property rights. George Mason Law Review, 24(4), 865-882.

## 6.3 The Copyright enforcement in China

The copyright enforcement in China falls within its judicial and administrative branches. China has IPR executive agencies within its own judicial systems. Next, we will discuss how China enforces and protects copyright from the perspective of civil liability, criminal liability, and administrative liability.

### *6.3.1 Judicial enforcement*

#### *(1) Civil proceeding*

If the parties do not have a written arbitration agreement, nor have an arbitration clause in the copyright contract, they can directly file a lawsuit in the people's court. Chinese court at all levels concluded 466,000 cases related to IPR of first instance in 2020.[489] The Local court across the nation concluded 313,497 copyright infringement cases in 2020.[490]

There are two requirements for civil infringement of reproduction rights, which are similar to the US copyright law. (a). The infringer must have access to the work. (b) As to whether it constitutes a substantial similarity. In China, an administrative agency will generally apply for a judicial authentication opinion, which can prove whether the alleged infringing work is highly similar to the copyright owner's work.

Anyone who commits any acts of infringement upon copyright and copyright-related rights without permission of the copyright holders or holders of copyright-related rights, where the infringing conducts also harm the public interest, shall bear civil liability for such remedies as (a) ceasing the infringement act; (b) eliminating the effect of the act; (c) making a public apology or (d) paying

489 MOFCOM. (2021). China to step up judicial protection of IPR. Ministry of Commerce of the People's Republic of China http://chinaipr.mofcom.gov.cn/article/centralgovernment/202103/1960297.html

490 Id.

compensation for damages.[491] At the request of the right holders, the court can order: (e) to destruct the infringing copies and to destroys the material, tools, and equipment that is used to create infringing copies without compensation; (f) to prohibit the aforementioned materials, tools, equipment from entering commercial channels. If the right holders have evidence to prove that another is committing or is going to committing infringement or impedes their realization of their rights, that if not promptly stopped will cause harm to their lawful rights, they may request the court to order: (g) property preservation; (h) evidence preservation; or (i) other certain actions to prohibit ongoing and potential infringement.

The damages available to parties in infringement cases have been increased by the amendments to the code. The compensation shall be given according to the actual damages suffered by the right-holders as a result or the infringer's unlawful gains and this is at the copyright holder's discretion.[492] If it is different to calculate the right-holder's actual damages or infringer's unlawful gains, compensation may be given by reference to the applicable royalties.[493] If the aforementioned methods do not work, the people's court is to make a judgment to give compensation between RMB 500 (nearly $77) to RMB 5,000,000 ($77,000) based on the circumstance.[494] Also, the amount of compensation shall include reasonable expenses paid by the right holders in stopping the infringement.

More importantly, the plaintiff may request punitive damages that can multiply the statutory damages at any time from one to five times higher than the statutory limits in a "serious and intentional" copyright infringement cases before the end of the trial in the first instance. It means that punitive damages can rise to as high

491 Article 52 of copyright law of the PRC. (2020).
492 Article 54 of the copyright law of the PRC. (2020).
493 Id.
494 Article 53 of the copyright law of the PRC. (2020).

as RMB twenty-five million. The court will consider many factors to determine if the punitive damage should be awarded, including the defendant's subjective fault and severity of the infringement. To calculate the amount of the punitive damages, the court shall determine a multiple of base damages, such as the actual loss of the plaintiff, the amount of the defendant's illegal gains or the benefits obtained due to the infringement. Noted, once the punitive damage is ordered, no defenses were given to exempt a defendant from it. And concurrent administrative fines or criminal fines will not waive punitive damages of the defendant.

***(2) Criminal protection***

Unlike US, copyright holders can individually seek criminal protection for copyright infringements by submitting complaints and evidence to the People's court or Public Security Department. Criminal Law of the People's Republic of China, which was amended in 1997, first imposes criminal penalties for copyright infringements.[495] If the copyright infringement constitutes a crime, criminal responsibility is to be pursued. Nonetheless, the Chinese criminal enforcement for copyright infringement has been criticized since only a tiny proportion of copyright cases enter the Chinese criminal judicial system, such as where the copyright holder involved is a proactive foreign corporation.[496] Chinese scholar Hanyan Liu said that criminal enforcement of copyright is the exception rather than the rule in China.[497]

However, the sixth Amendment to the PRC Criminal Law, which was passed in 2020, added single crime charges related to the protection of intellectual property rights and increased the statutory penalty for copyright infringement crimes. The

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495 NCAC. (2017a). Overview of China's copyright undertaking. National Copyright Administration of the People's Republic of China. http://en.ncac.gov.cn/copyright/contents/10359/329069.shtml

496 Cho, Y. (2019). Criminal copyright enforcement in China and South Korea a comparative perspective. New York University Journal of International Law and Politics, 51(2), 541-620.

497 Id.

Supreme People's Court introduced a series of judicial interpretations and guiding opinions concerning the copyright protection, such as "opinions of the punitive damages application on the IPR infringement cases in March 2021"[498]and the " Opinion on strengthen the protection of copyright and rights related to the copyright." According to a report of China's Supreme People's Court, the Local courts across the nation concluded 5,520 criminal IPR infringement cases of first instance in 2020. Among them, the criminal copyright infringement cases reached 273.[499]

Article 217 of the Criminal Law of 2020, the crime of copyright infringement refers to the following acts for the purpose of making profit or with large amounts of illegal gains or other serious circumstance.[500]

(a) the reproduction and distribution of written works, audiovisual works, motion pictures, computer software or other works without the permission of the copyright owner for the purpose of infringing copyright;

(b) the publication of books for which others have exclusive copyright;

(c) the broadcasting, reproducing and disseminating of audio or video recording produced by another person without the permission of the producer;

(d) the producing and exhibiting of fine art works with a forged the signatures of others.

As to the large number of illegal gains or serious circumstance, the criminal law regulates the following thresholds:

(a) not less than RMB 30,000 (approximately US$ 4,500);

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498 Wininger, A. (2021c). China's Supreme People's Court issues law interpretation for IP infringement. The National Law Review. https://www.natlawreview.com/article/china-s-supreme-people-s-court-issues-law-interpretation-intellectual-property

499 CNIPA. (2021). Summary of 2020: Chinese IP system to a new height. China National Intellectual Property Administration. https://english.cnipa.gov.cn/art/2021/1/27/art_2509_156421.html

500 Libson, A., & Parchomovsky, G. (2019). Toward the personalization of copyright law. The University of Chicago Law Review, 86(2), 527-550. https://www.jstor.org/stable/26590564

(b) more than 500 copies of third-party works have been disseminated;

(c) if third parties' works have been disseminated with an actual click number of 50,000 or more.

The new draft Amendment to Criminal Law of PRC proposes that the maximum prison term for copyright infringements will be increased from 3 years to 10 years. Before that, the criminal punishments include criminal detention; imprisonment of not more than three years, and fines. These amendments have the purpose of bringing the strength of enforcement actions in China to a level closer to western powers such as the United States.

### *6.3.2 Administrative Enforcement*

In fact, administrative relief is the core content of copyright administrative enforcement. Since it is time-saving; cost-saving and high-efficiency (usually around 4-8 months). The applicants do not need to pay litigation fees or provide guarantees when applying for evidence preservation. But the administrative agency only has the power to make an injunction; it cannot order the infringer to pay compensation. By request of two parties, mediation shall be conducted on the amount of compensation. According to China's "Administrative Law", any party who disagrees with the administrative decision made by the administrative department can bring an administrative lawsuit to the court. Noted, the right owner may file a complaint with the administrative department at the place where the infringing act is committed or where the consequence of the infringement arises. But the complaint should be claimed by a Chinese citizen, legal entity or organization other than a foreigner.[501]

501 NCAC. (2017b). Guide to copyright administrative complaints. National Copyright Administration of the People's Republic of China. http://en.ncac.gov.cn/copyright/contents/10367/355657.shtml

The administrative protection for copyright infringement is based on the Article 48 of the Copyright Law of PRC or on the Article 24 of the Regulations for the Protection of Computer Software. The specific administrative agencies are given the power to order the infringer: (1). To stop the infringement activities; (2). To destroy the infringing product or to confiscate the material, tools, equipment that are used to produce infringing copies if the circumstances are serious; (3). To confiscate the unlawful gains and (4). To impose administrative penalties and fines.

For the infringing acts specified in Article 48 of Copyright Law of PRC that is harmful to the common interest of the society, the copyright administration departments may impose a fine of not less than one time and less than five times the illegal business revenue where the illegal business revenue is RMB 50,000 ($7500) or above. If there is no illegal business revenue or the amount of illegal business revenue is below RMB 50,000, the copyright administration departments may impose a fine of less than RMB 250,000 ($37,500) according to the seriousness of matter.[502]

In a word, the wide remedial power of the Chinese copyright administration and the high threshold for criminal enforcement proceedings let more copyright holder choose the administrative agencies.[503]

***(1) The National Copyright Administration of China***

NCAC, which was established in 1985 under the State Council, is responsible for the nationwide copyright infringement cases. It has many branches at the local level. The local administrative agencies can only manage the administrative affairs of the local area and its regulations and orders must not be contradict the regulations and orders of the administrative agency at a higher level.

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502 Article 36 of the regulations for the implementation of copyright law of the PRC. (2013).

503 Cho, Y. (2019). Criminal copyright enforcement in China and South Korea a comparative perspective. New York University Journal of International Law and Politics, 51(2), 541-620.

The NCAC and its branches have authorities to register copyrighted works, set remuneration rate, and supervise the copyright collective management organizations. Also, it has quasi-judicial power to charge with the copyright infringement cases. With respect to copyright infringement that caused a significant national impact, the NCAC may conduct an investigation and impose punishment.[504]

It is impossible to discuss IPR enforcement in Chins without mentioning many kinds of specific campaigns.[505] Since 2005, the NCAC, along with Ministry of Industry and Information Technology (MIIT), Ministry of Public Security (MPS), the Cyberspace Administration of China (CAC) and other administrative authorities to launch a special campaign "Sword Net" against network copyright infringement and piracy for 16 years.[506] The following table is the statistics outcome of this campaign in 2019.

**Table 1**
**Nationwide administrative enforcement of copyright in 2019**

| Project | Quantity | Project | Quantity |
|---|---|---|---|
| **Administrative cases** | 2,539 | Total | 7,303,778 |
| **Case that Transfers to judicial authority** | 186 | Book | 5,740,610 |
| **Banned Illegal Business** | 1,224 | Software | 221,700 |
| **Banned underground factory of illegal publication and piratical audio-visual products** | 152 | Audio-visual | 693,861 |
| **Banned illegal web server** | 330 | Electronic Publication | 149,265 |
| **Total Fines** | $ 3,700 | | |

*Source: ncac.gov.cn*

In 2020, the NCAC mainly investigated and handled cases involving online infringement and piracy. Those whose infringing or pirating acts cause great harm to

504 Article 37 of the regulations for the implementation of copyright law of the PRC. (2013).

505 Hurtado, A. (2018). Protecting the mickey mouse ears: Moving beyond traditional campaign-style enforcement of intellectual property rights in china. Fordham Intellectual Property, Media & Entertainment Law Journal, 28(2), 421-[ii].

506 NCAC. (2017a). Overview of China's copyright undertaking. National Copyright Administration of the People's Republic of China. http://en.ncac.gov.cn/copyright/contents/10359/329069.shtml

society and are strongly opposed by the public will be punished more severely in accordance with the law. On 16 September, the NCAC Network Copyright Research Institute released the report of "Development of China's Online Copyright Industry (2019)," which shows that China's online copyright industry market in 2019 scored a year-on-year increase of 29.1% to nearly $ 148 billion.[507]

In addition, the WIPO-NCAC Copyright Awards program was held biyearly in China since 2008. This award is the only international award and the highest honor for copyright sectors in China, which is to celebrate and motivate Chinese individuals and entities to protect copyright. For example, the Beijing UniTrust Technology Service Co., Ltd. is awarded for its copyright protection practice in 2018.[508]

***(2) The China Intellectual Property Administration***

The China Intellectual Property Administration (CNIPA), a state agency under the State Administration for Market Regulation of China, formulates and implements the National Intellectual Property Strategy, coordinates foreign-related IP affairs, and accelerates the building of public service platform for IP information.[509] But, it mainly focuses on the field of patent, trademark, and geographical indication and layout design of integrated Circuits, especially the enforcement and examination of trademark and patent law. Also, CNIPA will handle the local intellectual property disputes and mediations. For example, it released a yearly statistic of 2020 which states that the IP authorities across the nation handled more than 42,000

507 NCAC. (2021). China's top 10 copyright events in 2020. National Copyright Administration of the People's Republic of China. http://en.ncac.gov.cn/copyright/contents/10361/428709.shtml

508 NACA. (2018). The award ceremony of the WIPO-NCAC Copyright Awards 2018 held in Suzhou. National Copyright Administration of the People's Republic of China. http://en.ncac.gov.cn/copyright/contents/10371/388135.shtml

509 CNIPA. (2018). The regulations on CNIPA functions, internal departments and staffing. China National Intellectual Property Administration. http://english.cnipa.gov.cn/col/col2068/index.html

administrative disputes over patent infringement and examined 149,000 trademark dispute cases in 2020.[510]

In addition, the CNIPA drafts the "Compendium of the Strategy on Developing an IP Powerhouse (2021-2035)" and issues the "2019 Promotion Plan for Deepening the Implementation of the National IP Strategy and Accelerating the Development of an IP Powerhouse." It organized several events such as the National IP Publicity Week, the China IP Annual Conference, and the High-level Forum of China IP Protection, etc.[511]

According to a nationwide survey by CNIPA, public satisfaction over China's IP protection in 2020 scored 80.05 out of 100.[512] And, satisfaction over enforcement reached 78.93. Among them, 96.94% of those surveyed believed the Chinese IP system was getting better and 85.46% of those surveyed believed the control of IP infringements was in the right direction.[513]

***(3) The General Administration of Customs Service***

Since 1994, the Customs provides protection for copyright in accordance with Regulations of the People's Republic of China on the Customs' Protection of Intellectual Property Right and exercises relevant powers under the Customs Law of the People's Republic of China.[514] If the customs discovers any suspected criminal offence in providing protection for copyright, it shall hand the case over to the Public

510 CNIPA. (2021). Summary of 2020: Chinese IP system to a new height. China National Intellectual Property Administration. https://english.cnipa.gov.cn/art/2021/1/27/art_2509_156421.html

511 CNIPA. (2020a). Commissioner's message of 2019 China annual report. China National Intellectual Property Administration. https://english.cnipa.gov.cn/module/download/down.jsp?i_ID=152467&colID=2159

512 CNIPA. (2020b). Public satisfaction over China's IP protection hits record-high in 2020. China National Intellectual Property Administration. https://english.cnipa.gov.cn/art/2021/5/12/art_2509_159306.html

513 Id.

514 Article 3 of regulations of the People's Republic of China on the Customs' Protection of Intellectual Property Right. (2004).

Security Authority for handling.[515] If the importation or exportation of goods that infringe copyright constitutes a crime, criminal liability shall be beard by the infringer.

If the copyright holder requests the Customs to protect the copyrighted works and products, he should submit an application and relevant evidential documents to the Customs for taking protective measures. If he requests to detain the suspected infringing goods, the copyright holder shall also provide with a security not exceeding or equivalent to the value of the goods.[516]

***(4) Ministry of Public Security***

The Ministry of Public Security plays an important role in enforcement of criminal copyright infringement law. During the Thirteenth Five-Year Plan (2016-2020), the public security agencies across China have investing more than 90,000 criminal cases of IPR infringement and arrested more than 130,000 suspects.[517] China's public security investigates criminal copyright infringements and counterfeiting activities by special operations and works together with other IP authorities. For example, the " Spring Action" which is designated to crack down international sales of pirated DVDs in 2004.

It also held the annual forum for criminal IPR protection and releases typical case of criminal IP infringement covering copyright, trademarks and trade secret. For example, the Shanghai police have taken criminal coercive measures against 14 suspects who download video from foreign pirated-video websites, translated the

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515 Article 26 of regulations of the People's Republic of China on the Customs' Protection of Intellectual Property Right. (2004).

516 Article 14 of Regulations of the People's Republic of China on the Customs' Protection of Intellectual Property Right. (2004).

517 Wininger, A., (2021a), China's Ministry of Public Security releases discusses status of intellectual property criminal investigations and lists typical cases of public security agencies cracking down on crimes of intellectual property infringement. National Law Review. https://www.natlawreview.com/article/china-s-ministry-public-security-releases-discusses-status-intellectual-property

video into Chinese and uploaded the subtitled videos their servers for dissemination, without the authorization of the copyright owners.[518] The suspects made profits about 2.5 million by charging memberships fees and advertising fees. Since 2018, the police investigated underground and collected proofs of crime.

***(5) State Administration of Radio, Film and Television***

The State Administration of Radio, Film and Television (NRTA) is responsible for the management and supervision of radio, television and information network programs in order to make China's entertainment industry comply with the provisions of the law and socialist values. Also, it reviews the content and quality of the imported radio and television programs.

***(6) State Administration of Press and Publications***

Actually, the State Administration of Press and Publications (SAPP) was an executive body of the Publicity Department of the Communist Party of China (CPCPD). It will formulate policies for press and publication industry management and supervise the content and quality of publications, the printing industry and importation of publications in China.

***(7) The Ministry of Commerce***

The Ministry of Commerce (MOFCOM) is responsible for multilateral and bilateral IP negotiations related to economy and trade, bilateral IP cooperation consultation mechanism and coordination of domestic positions. Chinese chief negotiator who equivalents to the USTR, has no direct authority over domestic enforcement as the USTR does. It acts more like a coordinator over enforcement agency.[519]

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518 Xia, H. (2021), Chinese police arrest 14 for running pirated-video platform YYeTs.com. Xinhua Net News. http://www.xinhuanet.com/english/2021-02/03/c_139718452.htm

519 Shi, W. (2008). Incurable or remediable clues to undoing the gordian knot tied by intellectual property rights enforcement in China. University of Pennsylvania Journal of International Law, 30(2),

6.3.3 Public and Social service enforcement

***(1) China Copyright Associations***

The goal of China Copyright Association is to promote the development of China's copyright law by providing related services for copyright owners and users of works. It, in cooperation with other departments and societies, regularly organizes a series of seminars and training courses, which is conducive to the promotion of all aspects of copyright communication, exchange and cooperation.

***(2) Copyright collective management organization***

In China, Copyright collective management organizations are non-profit legal persons, which means that it can also act as the plaintiff or defendant to participate in litigation and arbitration of copyright-related infringement cases on behalf of the rights holders. At the same time, the copyright collective management organization collects royalties from users based on authorization.[520] For example, the Music Copyright society of China (MCSC) is the only collective management organization for music copyright in China. The China Audio-Video Copyright Association (CAVCA), which undertakes the collective rights management for copyright and related rights in video and audio works, collect copyright fees from karaoke lounges and manage karaoke industry, including the overseas music & TV works.

From the development and revision of copyright in China, we can see that China has strengthened the supervision and management functions of the copyright collective management organizations, which is conducive to the disclosure of copyright information, and reducing overlapping jurisdiction and local protectionism.

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541-584.

520 Tan, C. (2018). Regulating Content on social media: Copyright, terms of service and technological features. UCL Press. https://doi.org/10.2307/j.ctt2250v4k

### *(3) Copyright Protection Center of China*

The China Copyright Protection Center (CPCC) under the National Copyright Administration of China is a national copyright public service institution. It is the only institution for computer software copyright registration and copyright pledge registration.[521] CPCC also provides research and consulting training on copyright identification and copyright appraisal.

### *(4) China Intellectual Property Right Aid Network*

This online service platform is a national unifies service outlet and management platform for IPR protection assistance.[522] It consists of the portal website (www.ipwq.cn) and its WeChat official account (China Intellectual Property Rights Protection Assistance), which it is open to the public. People can fill in assistance application online, select accepting institutions, and inquire about rights protection results in a timely manner.

### *(5) National Copyright Trade Center of RUC*

The National Copyright Trade Center of RUC was established in 2007 with the authorization of the NCAC. It is the first national copyright trade trial base in China, which is to effectively improve copyright trade and to promote the widespread of excellent cultural-related products and creative industries. It serves for the overall national copyright protection and the development of copyright-related industries by creating a national-level market for copyright industry and a high-end database in the copyright field. For example, it edits the China's Copyright Yearbook, organizes university copyright-related writing competitions, and provides professional services such as copyright transaction service, copyright asset evaluation, copyright theory

521 CPCC. (2017). About CPCC. Copyright Protection Center of China. http://www.ccopyright.com/en/mobile/index.php?optionid=1012

522 CNIPA. (2020c). China Intellectual Property Rights Aid Network put into operation. China National Intellectual Property Administration. https://english.cnipa.gov.cn/art/2020/4/28/art_1340_83355.html

research, copyright industry communication, copyright dispute mediation, and copyright talent training.

### 6.4 Summary

In China, the broad copyright enforcement authority is given to administrative agencies, which results in overlapping jurisdiction between the administrative and judicial authorities. The administrative agencies indeed reluctant to transfer copyright infringement cases to the judicial system due to the loss of revenue from confiscated goods.[523] Moreover, are the campaigns of administrative agencies effective? They have short-term tangible effects. The factory of pirated products closed, and the right holders received quick results, which also make China headlines in national and international papers.[524] However, shortly after a raid, infringers return to selling pirated products, just move to another place or a new factory, which made the pirated goods widespread across the global. Further, if the local authorities could benefit from industries of pirated goods, such as the pirated accounting software, the enforcement of copyright protection would become selective. So, if China wants to solve the root cause of copyright infringement, it needs to strengthen the judicial power and people's awareness of the protection of intellectual property rights. In most cases, the reason why the rights holders' intellectual property rights are infringed is because they don't know that their intellectual property rights have been infringed. So, there is a need to improve law enforcement capabilities since laws have not been strictly enforced. From the history, international trade policy and diplomatic measures that the US adopts are effective for strengthen China's IPR enforcement overall. However, if the pressure is too extreme, could it make China independent and be the second US?

523 Cho, Y. (2019). Criminal copyright enforcement in China and South Korea a comparative perspective. New York University Journal of International Law and Politics, 51(2), 541-620.

524 Hurtado, A. (2018). Protecting the mickey mouse ears: Moving beyond traditional campaign-style enforcement of intellectual property rights in China. Fordham Intellectual Property, Media & Entertainment Law Journal, 28(2), 421-[ii].

However, Article sixty of the Chinese copyright law specifically mentions that mediation and arbitration are methods that disputes may be solved by prior to litigation. Though there is no requirement to participate in the alternative dispute resolution (ADR) in China, much like the United States, it is important to note that when an arbitration clause is active in an agreement subject to a copyright dispute then the clause should be exercised prior to the parties availing themselves of the People's Court. Furthermore, even if the participation in ADR systems such as mediation and arbitration is not mandated by the Chinese code, the fact suggests that the government sees the value of ADR may play a greater role in the future of Chinese copyright disputes. Estimates of the costs of going through a trial for even a so-called low value copyright infringement case are a minimum of $100,000, which helps to demonstrate the complicated nature of even the simplest cases and why the help of a mediator to help resolve issues at an early stage can be seen as beneficial to both parties.[525] Currently, there is not a comprehensive arbitration program for copyright issues in the United States. There are several proposals that would take advantage of the flexible nature of the arbitration short-trial system and employ administrative law judges designed to reduce costs for both parties.[526] However, the complexity of such cases has so far made it difficult to come up with a comprehensive program.

525 Ciolli, A. (2008). Lowering the stakes: Toward a model of effective copyright dispute resolution. West Virginia Law Review, 110(3), 999-1031. https://researchrepository.wvu.edu /cgi/viewcontent.cgi?article=3014&context=wvlr

526 Id.

# CHAPTER 7 CONCLUSIONS

The intellectual property law of the United States has a long history. After the independence of the United States, each states enacted its own intellectual property law. With the rapid development of science and technology, the copyright law of the United States has been amended more than 26 times which covers both the substantive provisions and the procedure. In short, the US established copyright legislative value entirely on the basis of the development of its copyright-related industry. However, the United States joined the Berne Convention until 1989 in which it met the international standard of copyright protection. It is nearly 100 years later than the UK. So, in the international protection of copyright, United States shows that copyright should firstly protect domestic economy, culture, and industrial interests.

When China began to draft its copyright law, more than 100 countries had already drafted copyright laws.[527] Because the copyright law started quite late in China, in such a developing country which lacked the local resources of the copyright system, China transplanted or even directly copied a large number of foreign legislations and international treaties at the beginning. America is one of the earliest exporters of the modern copyright concept to China. The formal appearance of modern copyright in China is also associated with the United States. The Renewed Treaty of Commerce and Navigation between China and America is the first agreement on copyright trade in China. The Qing Dynasty Copyright Law is the product of the combination of the civil law and common law in China.

In order to deal with the external pressure， transplanting law from other countries is indeed unavoidable and at that time this method had a positive significance. But after 40 years of the establishment of copyright system, this simple

527 Feng, J., (2007). From Beijing to Berne: A history of copyright protection in China. Beijing Review. http://www.bjreview.com.cn/quotes/txt/2007-07/24/content_69996.htm

and rough transplantation leads to the logical contradiction between provisions. China even put the mutually incompatible standards between civil law and common law together into the Chinese copyright law. From a legislative point of view, though absorbing the essence of law from other country is attractive, but in reality, the successor may be subject to potential dangers which is like a beautiful but prickly rose. Because the legislations of each developed countries in each legal systems are unique in their own styles, both the legislative philosophy and the specific rules are complete, rational and independent of each other. It is better to choose one country in one legal system as a model for reference, rather than to collect scattered laws from many different countries. For China, which has only 40 years history of copyright system, but it guarantees the integrity and logic of copyright system. From the perspective of law enforcement, copyright infringements in China are frequent and serious. One of the important reasons why China is criticized by the US is that the law enforcement is insufficient and the spirit of the humanities and the belief of respecting for contracts and laws are missing.

From the international point of view, the game of interests has not stopped. The result is that WTO gradually lost its appeal and centrality as a dialogue platform. The international protection mechanism of intellectual property is also developing towards multi polarization when centrifugal tendency is becoming more and more obvious. That is the post-TRIPS era. The current patterns of international protection of intellectual property rights that are dominated by the United States provide TRIPS-PLUS standards. Therefore, we need to sort out the existing IP laws in China, find out the gaps, and make preparations in case for the transition to the TRIPs-PLUS standard. In addition, the Chinese government should examine bilateral Free Trade

Agreements, Anti-counterfeiting Trade Agreements and Trans-Pacific Partnership Agreements and deeply research the possible adverse effect on China.

In order to resolve the international copyright disputes between China and the United States, the most important thing is mutual understanding and respect. We should promote cultural exchanges between the two countries and eliminate misunderstanding and hostility caused by ignorance. No comparison, no truth and if there is no real coordination and mutual trust, common development and mutual benefit can only be empty talk.

Moreover, the differences of the copyright system between China and the U.S. are not absolute. We are striving to find the balance between individual interest and the public interest. Nowadays, with the development of international copyright trade and the establishment of the international copyright legal system, some common law countries which only protect the author's property rights have begun to introduce the "moral right doctrine" which is regarded as the legislative foundation by the civil law countries. In China, there is also evidence of a linear progress, and the attempt to build stronger institutions to maintain jurisprudence. The Supreme People's Court has taken a leadership role in establishing copyright laws and practices in the digital realm. Further, it has simultaneously undertaken amendments to its bills in order to come into compliance, even if enforcement is often lacking. This shows that the gaps in the legislative foundation of copyright between China and the United States will be gradually narrowed finally.

Therefore, China and the United States should actively find balance points, enhance the copyright protection cooperation and avoid subjective assumptions and politicization. As a typical developing country and a typical developed country respectively, the experiences between China and the U.S. are good examples to learn

from the whole world. To further improve the copyright law in contemporary China, Chinese legislators must keep open their minds and cultivate critical thinking. More importantly, China should pay attention to the IP law enforcement and IP legitimacy theory through a comparative study.

So far, we have analyzed the current situation of copyright protection in China and in the US and summarized the similarities and differences of legal systems between them. At the same time, we have found some problems that occur and why these problems exist. In the end, we have given some possible solutions towards them and predicted the future trends.

It is actually hard to say who has the better legal system or what is a success. However, the development of the "rule of law" in China still has a long way to go compared to developed countries.

Last, the topic between US-China will never be out of date. Future research should address arguments about impact of traditional Chinese culture on institutional designs and the enforcement of the Third Amendment to China's Copyright law.

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