
**THE AMENDMENT OF COPYRIGHT ADMINISTRATIVE
ENFORCEMENT IN CHINA**

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INTRODUCTION

Copyright administrative enforcement in China is also known as administrative protection, whereby the law authorizes an administrative entity to apply administrative means to protect copyright. Administrative protection is an efficient, effective, low-cost, and important part of copyright protection in China. In 2014, the Shenzhen Administration for Market Regulation imposed an administrative penalty of RMB 260 million on QVOD for infringing the right of communication through information networks and damaging the public interest.¹ Such a penalty, greater than any damages awarded in civil cases, indicates how powerful administrative

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¹ Without the rights holder’s permission, QVOD broadcast twenty-four television programs, including *Beijing Love Story*, to the public via the QVOD Player. It was understood that Tencent purchased the copyright and the exclusive right of communication through information networks in these twenty-four programs for RMB 430 million. In March 2014, Tencent complained to the Shenzhen Administration for Market Regulation. Through its investigation, the Administration found that QVOD had broadcast without permission close to 1000 episodes out of the twenty-four programs, including television series and variety shows. The Administration determined QVOD’s illegal business revenue to be RMB 86.716 million, based on the average market rate applicable to the infringing works. The Shenzhen Administration imposed a fine of RMB 260.148 million by applying the median value between one time and five times the illegal business revenue provided by the relevant legislation. In June 2014, the Administration served upon QVOD a Notice of Administrative Penalty, whereby QVOD was fined RMB 260 million for infringing upon the legitimate rights and interests of other persons, breaching the online video copyright regime, and jeopardizing the public interest.

protection can be. Despite the important role of administrative enforcement in copyright protection, there were debates during the drafting of the Third Amendment to the Copyright Law concerning whether administrative enforcement should be kept, broadened, or strengthened. Therefore, this Article primarily considers how these debates should be viewed and how the system of copyright administrative enforcement should be interpreted and applied.

I. THE EVOLUTION OF COPYRIGHT ADMINISTRATIVE ENFORCEMENT IN CHINA

Prior to the adoption of the Copyright Law in China in 1990, the Interim Regulations for the Protection of Copyright in Books and Journals satisfied the copyright protection requirements specified in the U.S.-China Implementing Accord on Cooperation in the Field of High Energy Physics and the Agreement on Trade Relations Between the United States of America and the People's Republic of China. These interim regulations were promulgated in 1984 to provide measures of administrative protection against copyright infringement.

When the Copyright Law was drafted in the 1980s, considerable debates arose over whether judicial or administrative enforcement should be used to handle copyright disputes.² The judiciary believed that the "administrative authorities might be able to help resolve some of the copyright disputes due to the large volume of cases to be heard." The administrative authorities believed that "they had the professionals that could effectively resolve issues."³ They also held the following view: "[T]he educated Chinese tended to avoid lawsuits, since going to court damaged their reputation, regardless of whether they had a valid case or whether they could win the case. They always felt ashamed of receiving subpoenas from the court."⁴

The Copyright Law 1990 thus provided a "dual protection regime" that encompassed administrative and judicial means of copyright protection. Articles 46 and 50 of the Copyright Law 1990 provided that the copyright authorities may impose administrative penalties such as confiscating illegal gains and imposing fines on the infringer. If the infringer was opposed to such administrative penalties, he or she could bring a lawsuit. Once the penalty decision had become effective, the copyright administrative authority could apply to the court to enforce it.

² YUFENG LI, A STUDY ON THE REFORM OF INTELLECTUAL PROPERTY ADMINISTRATIVE ENFORCEMENT MECHANISM IN CHINA 21 (2020).

³ Rengan Shen, *A Review on the Enactment of China's Copyright Law, in TWENTY YEARS OF INTELLECTUAL PROPERTY IN CHINA* 31 (Chuntian Liu ed., 1998).

⁴ *Id.*

The Regulations for the Implementation of the Copyright Law (“Implementing Regulations”), promulgated in 1991, specified the enforcement agencies that could impose administrative penalties for copyright infringement, the specific types of penalties, and the criteria for imposition. To provide specificity to administrative enforcement in the copyright realm, the National Copyright Administration (“NCA”) promulgated the Measures for the Implementation of Administrative Penalties Against Copyright Infringement (“Implementing Measures”) in 1994. These measures specified the scope of administrative penalties, the enforcement agencies, the specific types of penalties, the criteria for law enforcement, and the procedures for such enforcement.

To join the World Trade Organization, China amended its intellectual property laws, including the Copyright Law in 2001, in response to pressure from developed countries for stronger copyright protection. Regarding administrative enforcement against copyright infringement, the law added broader administrative protections against the following: infringement of the right of communication through information networks, the intentional circumvention of technical measures, and the removal or alteration of copyright management information. The copyright administrative authorities were empowered to order the cessation of infringement and the confiscation and destruction of infringing items and relevant materials, tools, and equipment. Where a crime was committed, the offender would be investigated for criminal liability. To prevent law enforcement from becoming overly broad, any imposition of administrative penalties was conditioned on the infringement being coupled with damage to the public interest.

Pursuant to the revised Copyright Law 2001, the Implementing Regulations were amended in 2002 to expand the application of administrative enforcement and to provide clear rules regarding the jurisdiction of the copyright administrative authorities and standardized methods for calculating fines. The ability of these authorities to order infringers to compensate for the rights holders’ loss was also removed. In 2006, the Regulations on the Protection of the Right of Communication Through Information Networks were further introduced to empower the copyright administrative authorities to request network service providers to disclose information about infringers.

In 2010, China entered a new stage of economic and social development, where the copyright industry became important to the national economy. Copyright laws therefore had to address new issues and challenges. With the development and application of network and digital technologies, some legislation had become outdated. Infringement also remained serious due to copyright protection costs, low compensation, and

the inadequate means of law enforcement.⁵ In 2011, China commenced the third amendment of the Copyright Law to develop a new law that would work better for the country. The amendment was adopted in November 2020 after about ten years of discussions. This amendment contains significant changes to administrative enforcement against copyright infringement.

II. AMENDMENT OF COPYRIGHT ADMINISTRATIVE ENFORCEMENT IN THE COPYRIGHT LAW 2020

The original provisions concerning administrative enforcement against copyright infringement were retained in the Copyright Law 2020. Changes were made primarily in the following areas: (1) enhanced duties of the copyright administrative authorities in law enforcement; (2) additional means of penalties with a lowered threshold for imposition; (3) expanded application of administrative enforcement; and (4) additional copyright enforcement measures.

A. *Enhanced Duties of the Copyright Administrative Authorities in Law Enforcement*

Copyright administrative enforcement has long been debated in China, and scholars challenged its justification during the amendment process. To the critics, copyright is a civil right that falls in the private realm, where administrative interference using public power is inappropriate. Copyright disputes should instead be brought to courts.⁶ Furthermore, copyright administrative enforcement has consumed excessive administrative resources and appeared inefficient. These scholars argued that civil sanctions should replace administrative penalties.⁷

In contrast, other scholars pointed out that years of practice have shown the important role of administrative enforcement in combating copyright infringement. The enforcement system has become a key part of the copyright protection regime in China, performing a task that is beyond

⁵ Hong Shi, *Important Contents and Value Considerations of the Third Amendment to Copyright Law*, INTELL. PROP., no. 2, 2021, at 4.

⁶ Shuhua Wang, *The Core Problems and Countermeasures of the Copyright Administrative Protection System in Contemporary China*, MOD. PUBL'G, no. 4, 2013, at 23–25.

⁷ Xiaoyao Xie, *Administrative Remedies for Copyright: Reflections and a Critique*, INTELL. PROP., no. 11, 2015, at 6–8. Civil sanctions refer to the compulsory measures taken by a court against the actor responsible for committing an act in violation of civil laws. The measures include a reprimand, an order to sign a personal statement of repentance, the confiscation of the illegal gains, a fine, or a period of detention.

the capacity of the judiciary.⁸ Furthermore, administrative enforcement produces the same outcome as civil litigation in deterring copyright infringement but exacts a lower cost. Such enforcement also allows the copyright administrative authorities to proactively take actions that are flexible, efficient, convenient, and inexpensive, as exemplified by the quick collection of evidence. In the meantime, the use of mandatory measures in administrative enforcement compensates for the judiciary's shortcomings in enforcement.⁹ In any event, it would be unrealistic to wholly replace administrative penalties with civil sanctions. Some scholars even considered further enhancing copyright administrative enforcement, focusing on massive infringement and the infringement that jeopardizes social and economic well-being.¹⁰

Despite calls for diminished administrative enforcement, the Copyright Law 2020 enhanced administrative protection for copyright to address the reality. As shown in Table 1, Article 53 of the Copyright Law 2020 no longer contains the word “may.” The copyright administrative authorities therefore no longer have discretionary power to apply administrative penalties. Instead, these authorities shall apply administrative penalties to all infringements that concurrently jeopardize the public interest. Otherwise, they will be held accountable for administrative inaction. Thus, under the revised Copyright Law 2020, administrative authorities have an enhanced duty to enforce the law.¹¹

⁸ Ziqiang Wang, *An Analysis of the Administrative Liability of a Copyright Infringer*, INTELL. PROP., no. 11, 2015, at 26.

⁹ LIANHONG HE, RESEARCH ON THE PERFORMANCE OF ADMINISTRATIVE AND JUDICIAL PROTECTION FOR INTELLECTUAL PROPERTY 41 (2018).

¹⁰ Shunde Li, *A View on Strengthening Copyright Administrative Enforcement*, INTELL. PROP., no. 11, 2015, at 23.

¹¹ Guangyao Zhang, *A Brief Introduction to the Relevant Provisions on Copyright Administrative Enforcement in the Newly Amended Copyright Law*, WEIXIN (Nov. 14, 2020), <https://mp.weixin.qq.com/s/VCifLMpwElmlmH1ZGVuaA>.

Table 1. Comparison of Copyright Administrative Enforcement Duties

Article 48 of the Copyright Law 2010	Article 53 of the Copyright Law 2020
Anyone who commits any of the following acts of infringement shall, depending on the circumstances, bear civil liabilities such as ceasing the infringement, eliminating the bad effects of the act, making an apology, or paying compensation for damages; where the public interest is impaired; the copyright administrative authority may order the cessation of such infringement	Anyone who commits any of the following acts of infringement shall, depending on the circumstances, bear civil liabilities in accordance with Article 52 of this Law; where the acts of infringement also impair the public interest, the copyright administrative authority shall order the cessation of such infringement

Note: The words in bold indicate revision, and the strikethroughs reflect deletion.

Some scholars doubted the enforceability of these enhanced terms of law enforcement. They argued that the copyright administrative authorities at the district level may find it difficult to decide complicated or highly technical cases, such as determining substantial similarity in the infringement of literary works or comparing source codes in the infringement of online game software cases, due to limited manpower and professional capabilities. However, the revised rules made it imperative that the copyright administrative authorities determine any infringement following complaints brought by rights holders. Otherwise, what awaited them could be administrative reconsideration and a lawsuit for administrative inaction.¹²

B. Additional Means of Penalties with a Lowered Threshold for Imposition

The revised Copyright Law 2020 added “warning” as an administrative penalty. An administrative authority gives a warning to denounce and caution a minor infringer against violating the law. Compared with other administrative penalties, a warning is lighter and is used to cause the infringer to realize his or her violation of the law and thereby prevent another violation. Administrative enforcement against copyright infringement previously consisted of confiscation and fines, among other harsh compulsory administrative measures. However, critics characterized this copyright administrative enforcement as overly simplistic and tough,

¹² Yong Yang, *A View on the Amendment to the Copyright Law from the Perspective of Administrative Enforcement*, CHINA INTELL. PROP. NEWS (Nov. 20, 2020) http://www.iprchn.com/cipnews/news_content.aspx?newsId=126029.

claiming that it would be unreasonable to infringers who lack subjective fault. In addition, the inadequate public awareness of copyright protection had led to persistent copyright infringement in China despite repeated penalties. Therefore, the legislature added a “warning” as a penalty both to raise awareness and punish.

The Copyright Law 2020 also contains enhanced actions against the sources of copyright infringement. If an administrative authority finds copyright infringement detrimental to the public interest, it must now apply the penalty of “confiscation of materials, tools and equipment primarily used for infringing copies.” As shown in Table 2, prior to the recent amendment, the imposition of these penalties was conditioned on “serious circumstances.” Words such as “may” implied that the administrative authorities could apply the foregoing penalties at their discretion. Such subtle changes to the wording show the strengthening of copyright administrative protection in China.

However, some scholars pointed out that these changes might confuse the copyright administrative authorities, potentially breaching the principle of imposing due punishment.¹³ For instance, there may be circumstances where someone else has engaged an individual, unaware of copyright infringement, to produce infringing copies. In that case, the confiscation of the infringer’s materials, tools, and equipment used to produce those infringing copies would be unjust because that individual lacks intent.

¹³ *Id.*

Table 2. Comparison of Administrative Penalties

Article 48 of the Copyright Law 2010	Article 53 of the Copyright Law 2020
<p>. . . The copyright administrative authority may order the person to cease the infringement, confiscate his unlawful gains, confiscate, or destroy the copies produced through infringement, and may also impose a fine; where the circumstances are serious, the copyright administrative authority may additionally confiscate the material, tools, and instruments primarily used to produce copies through infringement</p>	<p>. . . The copyright administrative authority shall order the person to cease the infringement, issue a warning, confiscate his unlawful gains, confiscate innocuously destroy and dispose of the copies produced through infringement and the material, tools, and instruments primarily used to produce copies through infringement, and, in the case of an unlawful turnover exceeding 50,000 yuan, impose a fine of one to five times the unlawful turnover, or, in the case of no unlawful turnover or an unlawful turnover that is difficult to calculate or less than 50,000 yuan, impose a fine of up to 250,000 yuan</p>

Note: The words in bold indicate revision, and the strikethroughs reflect deletion.

In addition, as shown in Table 2, the recent amendment contains clauses concerning the fines for copyright infringement. Originally appeared in the Implementing Regulations, these clauses were written into the Copyright Law to deter infringement and facilitate the copyright administrative authorities.

C. Expanded Application of Copyright Administrative Enforcement

To tackle the infringement of audiovisual works on the Internet, the Copyright Law 2020 expanded the administrative protection of the right of communication through information networks to cover radio and television programs. The enhanced protection of the neighboring rights of broadcasting and television organizations is conducive to fighting illegal broadcasting through administrative enforcement, as shown in Table 3.

Table 3. Comparison of the Scope of Copyright Administrative Enforcement

Article 48 of the Copyright Law 2010	Article 53 of the Copyright Law 2020
<p>...</p> <p>(5) retransmitting a radio or television program or reproducing such a program without permission, except where otherwise provided for in this Law;</p> <p>(6) intentionally circumventing technical measures adopted by a copyright owner or an owner of the rights related to the copyright to protect the copyright or the rights related to the copyright in the work or the sound or video recording, etc., without the permission of the owner, except where otherwise provided for in laws or administrative regulations;</p> <p>(7) intentionally removing or altering any copyright management information attached to a copy of a work, a sound or video recording, etc., without the permission of the copyright owner or the owner of the rights related to the copyright, except where otherwise provided for in laws or administrative regulations.</p>	<p>...</p> <p>(5) retransmitting, reproducing a radio or television program or communicating it to the public through information networks without permission, except where otherwise provided for in this Law;</p> <p>(6) intentionally circumventing technical measures, intentionally manufacturing, importing, or making available to the public devices or components primarily used to circumvent technical measures, or intentionally providing other persons with technical services to circumvent technical measures, without the permission of the copyright owner or the owner of the rights related to the copyright, except where otherwise provided for in laws or administrative regulations;</p> <p>(7) intentionally removing or altering copyright management information attached to a copy of a work, a typographical design, a performance, a sound or video recording, or a radio or television program, or making available to the public a work, a typographical design, a performance, a sound or video recording, or a radio or television program, knowing or having reasonable grounds to know that the copyright management information thereof has been removed or altered without permission, without the permission of the copyright owner or the owner of the rights related to the copyright, except where otherwise provided for in laws or administrative regulations.</p>

Note: The words in bold indicate revision.

Against the backdrop of the digital network, technical measures and copyright management information are crucial to the protection and use of copyright works. This amendment retains the original administrative liabilities for the direct circumvention of technical measures and adds new administrative liabilities for the indirect circumvention of technical measures, including the intentional manufacture or import, or the provision to others, of devices or components primarily used for such circumvention or the intentional supply of technical services to others for such circumvention. The administrative protections for copyright management information extend to such subjects of neighboring rights as typographical designs, performances, and radio and television programs. They also impose administrative liabilities on those who supply to the public the foregoing works or other subjects of neighboring rights whose copyright management information has been removed or altered.

D. Additional Copyright Administrative Enforcement Measures

Without any compulsory administrative measures, the Copyright Law 2010 seriously constrained the effect and deterrence of copyright administrative protection. To support the amendment of the Copyright Law, in 2017 the Standing Committee of the National People's Congress assessed the conditions and effectiveness of copyright law enforcement. In its report, the committee indicated weak areas of administrative enforcement against copyright infringement, including the copyright administrative authorities' inadequate means and capabilities to handle online infringement, universal difficulties in discovering and collecting evidence and ascertaining infringement, and failures to take timely actions.¹⁴ In response, the Copyright Law 2020 drew relevant lessons from the Trademark Law, and Article 55 made available the following means of law enforcement to a copyright administrative authority: (1) interrogating the parties concerned and investigating details related to the suspected offense; (2) conducting field investigation of the venues and objects related to the suspected offense; (3) reviewing and copying contracts, invoices, account books, and other relevant information related to the suspected offense; and (4) attaching the venues or seizing the objects in relation to the suspected offense. Attachment means the administrative authorities have the power to immediately seal up the venues, equipment, or properties related to the offense, thereby denying access or disposal to any organizations or individuals in an effort to prevent transfer, concealment,

¹⁴ Xiaolei Pu, *Accelerating the Amendment: Suggestions from the Report on the Copyright Law Enforcement Inspection Conducted by the Standing Committee of the National People's Congress*, NAT'L PEOPLE'S CONG. PEOPLE'S REPUBLIC CHINA (Aug. 29, 2017), http://www.npc.gov.cn/zgrdw/npc/cwhhy/12jcw/2017-08/29/content_2027392.htm.

destruction, or loss. Seizure is a compulsory measure for administrative authorities to withhold the properties of any individuals or organizations related to the offense, restricting their possession and disposal. Attachment and seizure, similar to the preliminary injunction and an order for preservation of property in civil proceedings, were compulsory administrative measures of significance to preventing, containing, or curbing ongoing or potential offenses.

III. THE IMPLEMENTATION OF COPYRIGHT ADMINISTRATIVE ENFORCEMENT

The Copyright Law 2020 and the relevant administrative regulations and ministerial rules state that copyright administrative enforcement in China consists of three stages: “complaint, investigation, and determination of liabilities for administrative penalty” (as shown in Figure 1). First, the rights holder or the informant collects relevant materials upon the discovery of any infringement for filing a complaint or whistleblowing to a copyright administrative authority that would initiate the procedures of administrative enforcement. Second, the authority preliminarily reviews the materials and decides whether to open a case and, once it has decided to do so, commences an investigation. Finally, after such investigation, if the authority finds the infringement detrimental to the public interest, it will impose an appropriate penalty based on the nature of the particular act. If the authority suspects such infringement to be criminal, the case materials will be transferred to the public security authority.

A. Case Filing and Jurisdiction Related to Copyright Administrative Enforcement

In China, copyright administrative protection is not the same as judicial protection in terms of case filing and jurisdiction. Meeting the case filing and jurisdiction requirements is a prerequisite to filing for copyright administrative enforcement.

1. Case Filing Requirements Related to Copyright Administrative Enforcement

In China, the persons qualified to file for an administrative enforcement action against copyright infringement include a rights holder, an interested person, and an informant, largely different from judicial proceedings where only a rights holder and an interested person can file the lawsuit. A rights holder or an interested person can complain to the copyright administrative authority after obtaining details of the infringement. Others, as informants, can also blow the whistle on the infringement. When making a complaint, the rights holder or the interested person is generally required to demonstrate his or her interests in the case

by providing evidence related to the copyright, such as the original works, lawful publications, and a certificate of copyright registration. If a member of the public is an informant, his or her whistleblowing shall generally include as preliminary proofs evidence related to the infringement, such as the infringing works, records of purchase, and photos and videos showing such infringement.

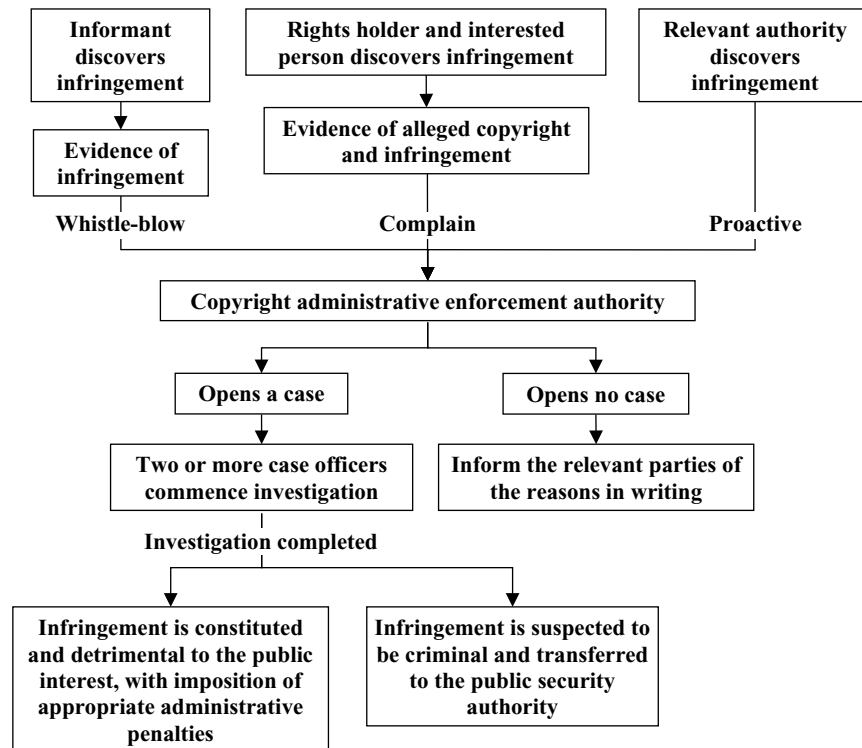


Figure 1: The Working Process of Copyright Administrative Enforcement

Notably, scholars disagree over whether the informant can initiate copyright administrative enforcement by whistleblowing. Some scholars believe that from an administrative law perspective, the right of claim means the administrative authorities must perform obligations relevant to the informant's claim. However, according to the relevant provisions of the Implementing Measures, an informant may blow the whistle on copyright infringement, but there is no prescribed timeframe during which the copyright administrative authorities must decide whether to accept the case or respond to any case acceptance or processing outcome. Therefore,

under the Implementing Measures, the right of whistleblowing is not a right of claim in an administrative law sense.¹⁵

Furthermore, because it is difficult for the whistleblower to obtain details of the copyright status and the infringement, the administrative authority may find it hard to accurately understand the infringement based on the whistleblower's information. Any absence of the rights holder and the interested person will make it difficult to collect evidence, significantly impacting the efficiency of copyright administrative enforcement. Therefore, it is neither reasonable nor feasible to initiate administrative enforcement procedures against copyright infringement by whistleblowing.¹⁶

Some other scholars argue that by prescribing the right of whistleblowing, China seeks to protect the right of informants to suggest to a copyright administrative authority the protection of the public interest and to put into effect the right to make suggestions conferred by the Constitution.¹⁷ If the whistleblower is dissatisfied with the authority's decision, he or she will not be able to seek relief via administrative reconsideration and litigation. That way, the whistleblower could escalate such dissatisfaction to a higher-level authority so that the copyright administrative authority will be urged to perform its duties.¹⁸ Thus, it is appropriate to grant the public the right to initiate copyright administrative enforcement by whistleblowing.

2. *Jurisdiction Requirements Related to Copyright Administrative Enforcement*

Under Articles 5 to 7 of the Implementing Measures, the NCA is responsible for taking or organizing national action against major cases of copyright infringement involving domestic and foreign interests, and the local copyright offices are responsible for handling copyright infringement cases within their own jurisdictions. The copyright administrative authority has competent jurisdiction over the place where copyright infringement occurs, where the outcome of such infringement is, or where the infringing products are stored, attached, or seized. Notably, for online copyright in-

¹⁵ Shaoling Chen, *On the Nature of the Right of Whistleblowing in Copyright Administrative Penalty*, CHINA COPYRIGHT, no. 4, 2015, at 29.

¹⁶ Yong Yang, *On the Role of Whistleblowing in Copyright Administrative Enforcement*, CHINA COPYRIGHT, no. 2, 2014, at 44.

¹⁷ Article 41 of the Constitution of the People's Republic of China provides: "Citizens of the People's Republic of China have the right to criticize and make suggestions regarding any State organ or functionary. Citizens have the right to make to relevant State organs complaints or charges against, or exposures of, any State organ or functionary for violation of law or dereliction of duty; but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited."

¹⁸ Chen, *supra* note 15.

fringement, the copyright administrative authority has competent jurisdiction over the place where the infringer is domiciled, where the devices for such infringement (e.g., Internet servers) are located, or where the infringing website is registered. Some copyright holders may forum shop their complaints to a particular local copyright administrative authority that they believe will benefit them. Such practice has resulted in cross-regional law enforcement, which is a concern. In determining which local law enforcement authority shall have competent jurisdiction — whether the one in the location of the infringement or the one in the location of the server— the investigation should focus on whether there is a close connection between the relevant infringement and location.

B. The Investigative Process for Copyright Administrative Enforcement

Upon receipt of a complaint, the copyright administrative authority should review the relevant materials and notify the complainant of their decision on whether the case will be accepted within fifteen days. In addition, the authority should provide in writing any reason not to accept the case. Once the case has been accepted, two or more officers will be assigned to carry out the investigative process, as illustrated in Figure 2.

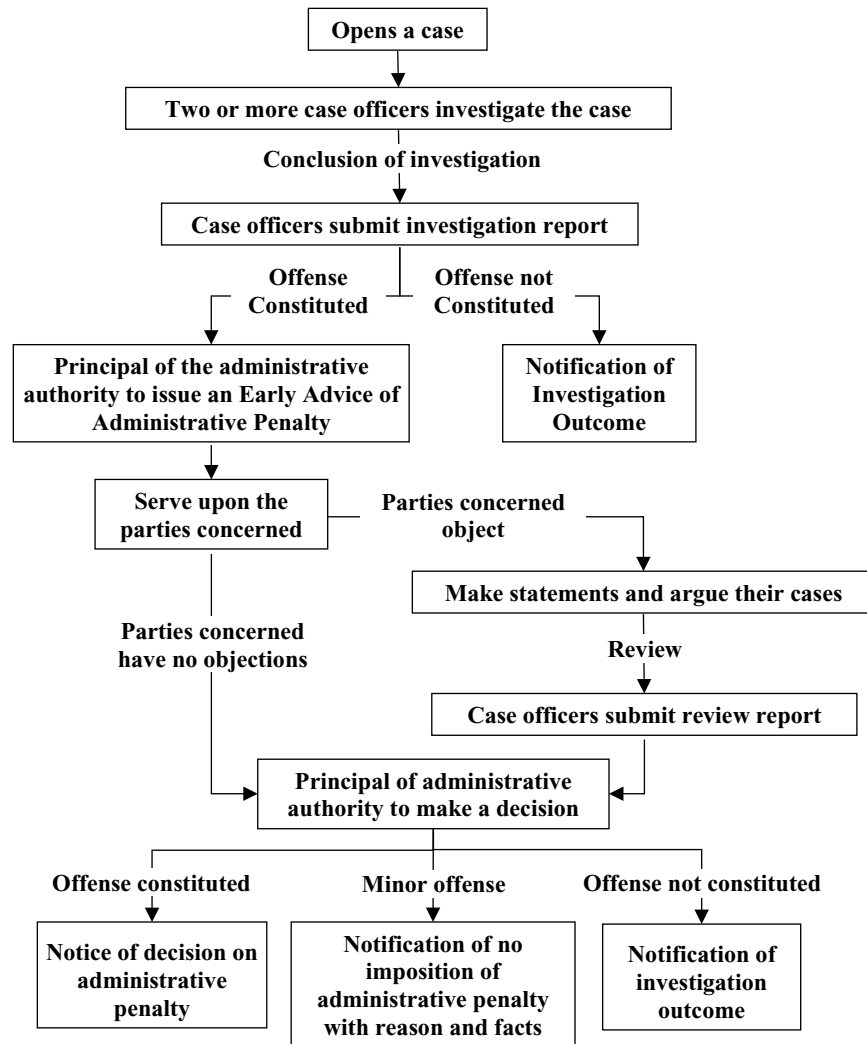


Figure 2: The Investigative Process for Copyright Administrative Enforcement

As part of administrative enforcement, the parties concerned must provide evidence within a prescribed timeframe, and the case officers may collect evidence. After the investigation, the case officers consider the evidence of infringement provided by the parties and any investigative findings. They then declare whether the respondent has committed infringement and submit an investigation report to the principal of the

copyright administrative authority. The respondent's failure to provide evidence of a license or any lack of probative value in their evidence, coupled with the sufficiency of the complainant's evidence in supporting the infringement claim, will result in a finding against the respondent.

Where the copyright administrative authority is to choose an administrative penalty based on the investigation report, the principal shall serve an Early Advice of Administrative Penalty upon the respondent. The respondent may request an opportunity to make statements and argue his or her case. In their review report, the case officers should fully consider these statements and arguments and review the case accordingly. The principal of the administrative authority will, in accordance with the investigation and review reports and in consideration of the offense, impose relevant administrative penalties, including ordering the cessation of the infringement; giving a warning; confiscating illegal gains; confiscating and harmlessly destroying and disposing of infringing copies and materials, tools, and equipment primarily used to produce infringing copies; and imposing fines. However, if there is no offense or if the offense is minor, corrected in a timely fashion, and of no harmful consequences, no administrative penalty will be imposed. Where the copyright administrative authority decides to impose an administrative penalty, a Notice of Administrative Penalty shall be prepared and served upon the respondent. Where the respondent is not satisfied with the administrative penalty, he or she may apply for administrative reconsideration or bring an administrative lawsuit.

C. Identification of Administrative Liability for Copyright Infringement

In determining whether a respondent should assume any administrative liability, the copyright administrative authority shall focus its investigation on whether two key components have been met: (1) the infringement falls into any of the eight categories specified in Article 53 of the Copyright Law 2020; and (2) the infringement is detrimental to the public interest.

During the amendment of the Copyright Law 2020, scholars and the legislators were concerned about whether the "detrimental to the public interest" component was a necessary condition as well as the identification of any such detriment. In the *Exposure Draft* and the *Second Amendment Bill*, which the NCA released in May and July 2012, respectively, the public interest component was retained, but the original wording "detrimental to the public interest" was replaced by "damage to the order of the socialist market economy." A few years later, in the *Draft Amendment Bill for Review*, which the Legislative Affairs Office of the State Council released in June 2014, the public interest component was removed. Such removal meant that the copyright administrative authority would unconditionally

impose administrative penalties. However, the finally adopted Copyright Law 2020 still contains the original wording “detrimental to the public interest” as a necessary condition to administrative enforcement. Nevertheless, Copyright Law 2020 has not yet provided any clarification to identify “the public interest.”

In relation to copyright administrative enforcement, the public interest could be defined as the orderly management of, and competition in, the cultural market. In the *Response Regarding Issues Relevant to the Interpretation and Application of the “Detrimental to the Public Interest” Rule in Copyright Infringement Cases*, the NCA indicated that any illegal public dissemination of copyright works causing damage to the economic order amounts to a detriment to the public interest.¹⁹ The Response also stated that under the Copyright Law, any infringement resulting in the assumption of administrative liability can be treated as detrimental to the public interest. The NCA document has therefore lowered the threshold for the identification of the public interest, prompting queries within academic circles. Some scholars have indicated that the Response provided a mechanism whereby copyright administrative enforcement would be triggered by any complaint or whistleblowing, leading to undue interference of public power with private rights while rendering the public interest component meaningless.²⁰

The Copyright Law 2020 does not provide a detailed criterion for determining acts that would be detrimental to the public interest, leaving room for the exercise of discretion by the copyright administrative authority. The authors of this Article believe that to determine if any infringement is detrimental to the public interest, multiparty interests should be taken into consideration. Here, the focus should be placed on the competition order of the copyright industry and the management of the cultural market. In particular, when dealing with online infringement that arises from innovation in network technology, the copyright administrative authority, before deciding on whether to deal with a dispute, should pay more attention to whether imposing administrative penalties would lead to a demonstrable positive outcome and whether these penalties would be destructive to the emerging market.

For now, in making specific judgments, the copyright administrative authority generally considers the number of infringing works, the number of instances of infringement, and the duration of such infringements. Such

¹⁹ NAT’L COPYRIGHT ADMIN., RESPONSE REGARDING ISSUES RELEVANT TO THE INTERPRETATION AND APPLICATION OF THE “DETRIMENTAL TO THE PUBLIC INTEREST” RULE IN COPYRIGHT INFRINGEMENT CASES (2006).

²⁰ Hongyou Wang, *On the Elements of the Public Interest in Copyright Administrative Enforcement: An Institutional Alienation Perspective*, CHINA PUBL’G, no. 1, 2020, at 36-38.

factors as the illegal gains from infringement, the willful intent, and the business model whereby the gains are obtained from the infringement are also considered. For example, in the case involving Beijing Zhongxing Huarui Technology Development Co. and its infringement of copyrighted journalistic works, the copyright administrative authority found a total of 250 infringing works (140 literary works and 110 photographic works) with extensive illegal reprints. The infringement was found to be detrimental to the public interest, and an administrative fine of RMB 200,000 was imposed.²¹

D. Transition from Administrative Enforcement to Criminal Prosecution

In China, when the copyright administrative enforcement suspects criminal activity in any copyright infringement, it should be transferred to the public security authority. However, few cases are transferred to the public security authority every year. For example, in the 2007–2019 data published by the NCA, 86,267 cases were accepted for copyright administrative enforcement. Of those cases, only 4,834 were transferred to the public security authority for criminal prosecution, accounting for no more than 5.6% on average (as shown in Figure 3).

²¹ *The National Copyright Administration and the National Office for Combating Pornography and Illegal Publications Jointly Release the Top 10 Cases Against Infringement and Piracy in 2019*, NAT'L COPYRIGHT ADMIN. (Apr. 24, 2020), <http://www.ncac.gov.cn/chinacopyright/contents/12549/353355.shtml>.

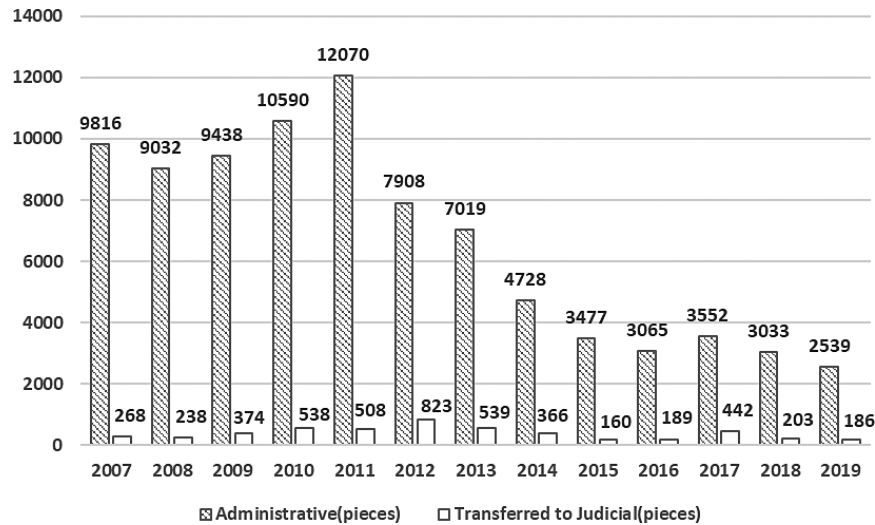


Figure 3: Cases of Suspected Criminal Liabilities Transferred from the Copyright Administrative Authority²²

There was a low ratio of infringement cases transferred from the copyright administrative authority to the judiciary for criminal proceedings. The unclear transfer criteria, transition procedures, and evidence identification requirements were the primary causes for such a low ratio. As a result, the State Council amended the Regulations for Administrative Agencies of Law Enforcement to Transfer Cases with Criminal Suspicion (“Regulations for Case Transfers”) to further specify that for any offense that falls in the realm of intellectual property, the administrative authority shall transfer the case to the public security authority if, based on the evidence collected from the investigation and the case facts found, they have reasonable suspicion that the case is a criminal offense and requires further investigation by the public security authority. The copyright administrative authority is not required to obtain concrete evidence, but just evidence that is likely to subject the case to criminal proceedings and a transfer to the judiciary.

To ensure an effective transition from copyright administrative enforcement to criminal prosecution, the copyright administrative authorities should make improvements in the following three areas.

²² The National Copyright Administration’s data on national copyright administrative enforcement from 2007 to 2019 are available at <http://www.ncac.gov.cn/chinacopyright/channels/12567.shtml>.

The first is the clarification of the criteria used by the copyright administrative authority to determine whether to transfer a case. In practice, the limitation of specialized knowledge of copyright case officers tends to make it difficult to accurately determine the key components of copyright crimes, such as “profit seeking purposes,” “a large amount of illegal gains,” and “other serious circumstances.” Such a limitation has directly discouraged administrative case officers from transferring cases and has indirectly increased the instances of “not transferring transferable cases” and “applying penalties instead of criminal sanctions.”²³ To raise the proportion of cases transferred, the copyright administrative authority may refer to the clauses in judicial interpretations and use regulatory documents to clarify the case transfer criteria.

In addition, the Copyright Law 2020 states that any direct or indirect circumvention of technical measures, removal or alteration of copyright management information, or sale of works whose copyright management information has been removed or altered will result in the assumption of administrative liabilities. Therefore, those suspected of criminal offenses will lead to the imposition of criminal liabilities. However, the Eleventh Amendment to the Criminal Law, adopted in November 2020, only stated that it was a type of copyright crime to directly circumvent technical measures. Thus, it is not clear whether the indirect circumvention of technical measures, the removal of copyright management information, and the sale of works whose copyright management information has been removed or altered will incur criminal liability, and in what circumstances such liability will be incurred. Further coordination between administrative enforcement and criminal prosecution is needed to provide such clarification.

The second area concerns the need to ensure that the evidence collected in the administrative procedure satisfies the probative value requirements for criminal procedures. In the Opinion on Several Issues Regarding the Applicable Law for the Handling Criminal Intellectual Property Infringement Cases, which the Supreme People’s Court, the Supreme People’s Procuratorate and the Ministry of Public Security jointly issued in 2011, Article 2 states that once cross-examined and confirmed at a court hearing, physical evidence, documentary evidence, audiovisual information, inspection reports, appraisal conclusions, crime scene investigation notes, and field notes may be admissible as criminal evidence.²⁴ Notably, the inspection reports, appraisal conclusions, crime scene investigation notes,

²³ Yongchao Gu, *The Review and Perfection of the Mechanism for Coordinating the Administrative and Criminal Procedures Regarding Copyright Cases Involving a Crime*, CHINA PUBL’G, no. 5, 2020, at 36.

²⁴ Opinion of the Supreme People’s Court, and the Supreme People’s Procuratorate and the Ministry of Public Security on Several Issues Regarding the Applicable Law for Handling Criminal Intellectual Property Infringement Cases

and field notes are not objective evidence. These four types of evidence are highly subjective verbal evidence, essentially the same as those witness and litigants' statements collected and produced by the public security authority as specified in Article 2, Paragraph 2. Thus, the Criminal Procedure Law as amended in 2012 and 2018 did not fully incorporate the foregoing contents from the 2011 Opinion but merely stated that of the evidence collected in the administrative enforcement by administrative enforcement authorities, "physical evidence, documentary evidence, audiovisual information and electronic data" may be admissible in criminal proceedings.

There is a large controversy among scholars and practitioners as to whether the judiciary may admit the verbal evidence produced by the administrative enforcement authorities, such as appraisal conclusions, which are important to the determination of copyright crimes.²⁵ To ensure the admissibility of verbal evidence, including appraisal conclusions, the copyright administrative authority shall follow judicial procedures and criteria for judicial proof to introduce independent third-party experts to help finalize test materials for appraisal, select a qualified appraisal agency and appraiser, clarify that the proposed issues for appraisal fall within the scope of the appraisal agency, and ensure that the appraisal agency complies with the appraisal procedures. Regarding the crime scene investigation notes and field notes, lawful procedures and objective and comprehensive note-taking shall be ensured. Wherever possible, photos should be taken, and audio and video recordings of the scene should be produced. The criteria for admissibility applicable to criminal cases should be applied to standardize the evidence collection procedures of administrative enforcement to ensure higher efficiency in transferring cases.

The third area relates to the improvement of working procedures for transferring cases from copyright administrative enforcement to criminal prosecution. According to the Regulations for Case Transfers, any transfer shall be accompanied by case-related materials, including the Suspected Criminal Case Transfer Form, the Case Investigation Report, the List of Case-Related Items, and relevant inspection reports or appraisal conclusions. Once the transfer materials have been received, the public security authority shall immediately commence an investigation, decide whether to open a case, and notify in writing the copyright administrative authority that made the transfer. The public security authority shall provide a reason if the decision was not to open a case. If the authority is not satisfied with the no-case-to-open decision, they may file for reconsideration or pe-

(Fafa [2011] No. 3) (promulgated by the Sup. People's Ct., Sup. People's Procuratorate and the Ministry of Pub. Sec., Jan. 10, 2011) (China).

²⁵ Qingyu Li, *A Study of the Difficulties in the Application of Administrative Evidence in Criminal Proceedings*, QINGHAI SOC. SCI. no. 4, 2015, at 98-99.

tion the procuratorate to commence legislative supervision in accordance with the law. Where a case is opened and investigated, and the public security authority believes there is no crime — or the crime is minor and lacks the necessity to impose criminal liability even though it warrants administrative actions — that authority shall transfer the case in a timely fashion to the copyright administrative authority.

CONCLUSION

The dual system of administrative and judicial protection is a key feature of intellectual property protection in China. The thirty years of copyright law in the country has shown that the administrative protection of copyright is an effective, efficient, and inexpensive means to fight infringement. Such protection has also filled the gap in judicial protection when the latter is unable to proactively fight infringement and to effectively curb massive infringement. The Chinese government will maintain steady progress and improve its system of copyright administrative enforcement. Going forward, the establishment of rational criteria for determining any detriment to the public interest caused by copyright infringement, the reasonable application of administrative enforcement and penalties under the law, and the development of solutions to ensure the effective transition from administrative enforcement to criminal prosecution are key to the successful implementation of the copyright administrative enforcement system in China.