
**THE COPYRIGHT LIMITATIONS OF THE 2020 COPYRIGHT
LAW OF CHINA: A SATISFACTORY COMPROMISE?**

by TIANXIANG HE*

I. INTRODUCTION

After almost a decade of discussion, public consultation, and legal debate, the third revision of the Copyright Law of China (“CLC”) was finally passed on November 11, 2020 and entered into effect on June 1, 2021.¹ The 2020 CLC made many major revisions to clauses related to the definition of works, the protected rights of the owner of copyright and neighboring rights, and the copyright exceptions. The law also added new clauses related to punitive damages. These topics are properly addressed by other participants to this Special Issue.

As this Author has provided detailed discussions elsewhere on the historical development of the section on copyright exceptions in the previous drafts of the CLC,² this Article focuses on the law’s new copyright limitations setting. Part II explores the new changes made to the copyright limitations and their possible implications. Part III critically assesses the current model of copyright limitations and provides recommendations. Part IV concludes.

II. THE CURRENT MODEL OF COPYRIGHT LIMITATIONS

Contrary to expectation, the 2020 CLC has only made a modest revision to its section on copyright limitations. From a broader perspective, the limitations set by the CLC can be divided into two types: (1) copyright

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¹ See *Copyright Law of China 2020*, NAT’L PEOPLE’S CONG. PEOPLE’S REPUBLIC CHINA (Nov. 19, 2020), <http://www.npc.gov.cn/npc/c30834/202011/848e73f58d4e4c5b82f69d25d46048c6.shtml>.

² Tianxiang He, *Transplanting Fair Use in China? History, Impediments and the Future*, 2020 U. ILL. J.L. TECH. & POL’Y 359.

exceptions as provided in Article 24 of the CLC; and (2) statutory license clauses as provided in Article 25 (textbook adoption), Article 35(2) (news-paper and journals), Article 42(2) (sound and video recordings producers), and Article 46(2) (radio and television stations). Although there are no mandatory license clauses in the CLC, China retains the right to issue mandatory license on foreign works in accordance with Articles II and III of the Appendix of the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”).³ The following discussions explore the changes made to the copyright limitations in the 2020 revision.

A. *Changes to Copyright Exceptions*

China has adhered to a closed model of copyright exceptions since the enactment of the CLC in 1990. In the past three decades, only a few minor adjustments have been made to the listed exceptions. The old Article 22 (equivalent to the current Article 24) provided a list of twelve exceptions whereas the current Article 24 provided a list of thirteen exceptions.⁴ Besides the minor changes to the enumerated exceptions, two major changes

³ Berne Convention for the Protection of Literary and Artistic Works art. 20, Sept. 9, 1886, 1161 U.N.T.S. 3 (revised at Paris July 24, 1971) [hereinafter Berne Convention].

⁴ Article 24 of the 2020 CLC provides:

In the following cases, a work may be exploited without the permission from, and without payment of remuneration to, the copyright owner, provided that the name or designation of the author and the title of the work are mentioned, the normal use of the work shall not be affected, and the lawful rights and interests of the copyright owner shall not be unreasonably damaged:

- (1) use of a published work for the purpose of the user’s own private study, research, or self-entertainment;
- (2) appropriate quotation from a published work in one’s own work for the purpose of introducing or commenting on a work or demonstrating a point;
- (3) inevitable reappearance or citation of a published work in newspapers, periodicals, radio stations, television stations, or other media for the purpose of reporting news;
- (4) reprinting by newspapers, periodicals, or other media, or re-broadcasting by radio stations, television stations, or other media, of the current event articles on the issues of politics, economy, and religion, which have been published by other newspapers, periodicals, radio stations, television stations, or other media, except where the copyright owner has declared that publication or broadcasting is not permitted;
- (5) publication in newspapers, periodicals, or other media, or broadcasting by radio stations, television stations, or other media, of a speech delivered at a public assembly, except where the author has declared that publication or broadcasting is not permitted;
- (6) translation, adaptation, compilation, and playing or reproducing, in a small quantity of copies, of a published work for use by teachers or

can be observed. First, the 2020 CLC inserted a two-step test in the first paragraph of Article 24, requiring that “the normal use of the work shall not be affected, and the lawful rights and interests of the copyright owner shall not be unreasonably damaged.”⁵ This addition replicates the wording of Article 21 of the 2013 Regulations for the Implementation of the Copyright Law (“RICL”).⁶ Second, the 2020 CLC added a thirteenth exception, which covers “other circumstances prescribed by laws and administrative regulations.”

The other changes made to the list of specific exceptions are minor and generally cover possibilities. For example, “designation of the author” is added to the first paragraph so that legal persons and other organizations can be covered. More permitted acts, such as the “adaptation, compilation, and playing” of published works, are provided to teaching and research staff in Article 24(6). For free performances as provided in Arti-

scientific researchers in classroom teaching or scientific research, provided that the translation or reproduction is not published or distributed;

(7) use of a published work by a State organ within the 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, art museum, or similar institutions, for the purpose of displaying or preserving a copy of the work;

(9) free-of-charge performance of a published work—that is, with respect to the performance, fees are not charged from the public, remuneration is not paid to the performers, or the performance is not for commercial purposes;

(10) copying, drawing, photographing, or video recording of an artistic work located or on display in a public place;

(11) translation of a work published by a Chinese citizen, a legal entity, or an unincorporated organization, which is created in the national common language and characters, into a minority language for publication and distribution within the country;

(12) providing published works in an accessible fashion that can be perceived by people with print disabilities;

(13) other circumstances prescribed by laws and administrative regulations.

The provisions of the preceding paragraph shall apply to restrictions on copyright-related rights.

Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), *translated at* <http://en.pkulaw.cn/display.aspx?cgid=a3b3a54bea64f090bdfb&lib=law> (with modifications by the author).

⁵ *Id.*

⁶ Regulations for the Implementation of the Copyright Law of the People’s Republic of China (中华人民共和国著作权法实施条例) (promulgated by Nat’l Copyright Admin., May 30, 1991, amended Jan. 30, 2013, effective Mar. 1, 2013), *translated at* http://www.wipo.int/wipolex/en/text.jsp?file_id=456390 [hereinafter RICL].

cle 24(9), the requirement that the performance is not “for commercial purposes” is added to make clear that performances that do not charge the public and that do not require payment of remuneration to performers can still infringe if the performance itself is of a commercial nature. In addition, the “outdoor” requirement is removed from the exception related to artistic works located or on display in a public place provided in Article 24(10). Such removal has raised concerns about potential conflicts between the public on the one hand and museums and art galleries that host indoor exhibitions on the other.⁷

Another change made to Article 24 is the modification of the exception (12) related to people with print disabilities. The new version has paved the way for China’s ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled in February 2022.⁸ It has also greatly expanded the coverage of this exception. Specifically, Braille as the designated accessible format of published works is changed to “an accessible fashion that can be perceived by people with print disabilities.” The beneficiaries of the new exception therefore include not only the blind who can read Braille but also those who cannot, other visually impaired people, and those who are unable to read due to physical disabilities. Moreover, the current requirement for accessible format is an open-ended setting that could include large-print books, audiobooks, and even 3D printed visual arts.⁹ With regard to the economic rights covered, “providing” is also a

⁷ Qian Wang (王迁), *Copyright Law Revision: An Interpretation and Analysis of Key Clauses (Part I)* (《著作权法》修改: 关键条款的解读与分析 (上)), INTELL. PROP., no. 1, 2021, at 31.

⁸ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, June 27, 2013, S. TREATY DOC. No. 114-6 (2016). China signed the Marrakesh treaty in June 2013.

⁹ Tianxiang He, *China*, in INTERNATIONAL PERSPECTIVES ON DISABILITY EXCEPTIONS IN COPYRIGHT LAW AND THE VISUAL ARTS: FEELING ART 203 (Jani McCutcheon & Ana Ramalho eds., 2020) (“Article 12 of the Marrakesh Treaty added a ‘development provision’, which allows its signatories to set other copyright limitations and exceptions that are not provided by the treaty, taking into consideration their economic situations, social, and cultural circumstances. This provision provides extra flexibility to China, as it gives its signatories a degree of legislative flexibility to expand the scope of their copyright exceptions to cover visual art works”).

much broader term than “translation” and “publication.”¹⁰ These changes echo the requirements in the Marrakesh Treaty.¹¹

B. Changes to Statutory License Clauses

Notable changes were made to the statutory licenses of radio and television stations. Deleted from the 2020 CLC was Article 44 of the 2010 CLC, which stipulated as follows: “A radio station or television station that broadcasts a published sound recording does not need permission from, but shall pay remuneration to, the copyright owner, except when the interested parties have agreed otherwise. The specific procedures for treating the matter shall be established by the State Council.” Such deletion, however, does not mean that permission is now required from the copyright owner should a radio or television station want to broadcast a published sound recording. As Article 43(2) of the 2010 CLC (now Article 46(2)) already provided that “[a] radio station or television station that broadcasts a published work created by another does not need permission from, but shall pay remuneration to, the copyright owner according to the provisions,” it is understandable that the deletion is to avoid repetition as the neighboring rights of sound recording provided by the CLC do not include broadcasting rights *ab initio*. Article 46(2) of the 2020 CLC can properly cover the function of the deleted Article 44.

In addition, “according to the provisions” was newly added to Article 46(2). As Wang Qian pointed out, the previously published Interim Measures for the Payment of Remuneration for Phonograms Broadcast by Radio and Television Stations¹² has indicated that it is based on the deleted Article 44.¹³ This new addition implies that the abovementioned provisions for remuneration will be revised soon to accommodate the requirements of Article 46(2).

¹⁰ The 2010 version of the exception only concerns the copyright owner’s reproduction right (Article 10(5)) and distribution right (Article 10(6)) — plus the exception on the right of dissemination via information networks under Article 6(6) of the Regulations on the Protection of the Right to Network Dissemination of Information — whereas the term “provide” can cover more rights such as the right of performance (Article 10(9)) or even the right of projection (Article 10(10)). See Wang, *supra* note 7, at 31.

¹¹ Marrakesh Treaty, *supra* note 8, arts. 2, 3, 4, 12.

¹² Interim Measures for the Payment of Remuneration for Phonograms Broadcast by Radio and TV Stations (广播电台电视台播放录音制品支付报酬暂行办法) (promulgated by the State Council, Nov. 10, 2009, amended Jan. 8, 2011, effective Jan. 8, 2011), translated at <http://en.pkulaw.cn/display.aspx?cgid=1f1a6bfac090701abdfb&lib=law>.

¹³ See Wang, *supra* note 7, at 34.

III. IMPACT ASSESSMENT, PROBLEMS, AND RECOMMENDATIONS

It is obvious from the above discussion that the 2020 CLC has made substantial changes to the copyright exceptions rather than the statutory license clauses. However, the impact of these changes is still limited.

A. *The Limited Impact and Problems of the New Copyright Exceptions Model*

Markedly, the new changes only have a limited impact on the general copyright exceptions model of the CLC, and nothing much about that model has changed in the 2020 CLC. The newly added two-step test in the first paragraph of Article 24 is merely a restatement of Article 21 of the RICL, and the new thirteenth exception is not immediately functioning and “merely opens the possibility of new exceptions set by future laws and administrative regulations.”¹⁴ For example, legislators could now insert new exceptions by revising the Regulations on the Protection of the Right to Network Dissemination of Information.¹⁵ The positive aspect of this change is that the new addition has finally confirmed that the role of the two-step test is to complement the listed exceptions rather than to serve as an independently applicable general clause. The application of that clause remains unclear in view of previous judicial practice.¹⁶ In terms of flexibility, the 2020 final text is a big step back when compared with the 2014 draft that proposed an open-ended copyright exceptions model by inserting a catch-all exception as the thirteenth exception.¹⁷

Instead of opening up this model, the newly added thirteenth exception puts the power to create new exceptions in the legislature rather than

¹⁴ Tianxiang He, *Copyright Exceptions Reform and AI Data Analysis in China: A Modest Proposal*, in *ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY* 213 (Jyh-An Lee et al. eds., 2021); see also Wang, *supra* note 7, at 29.

¹⁵ Regulations on the Protection of the Right to Network Dissemination of Information (信息网络传播权保护条例) (promulgated by the State Council, May 18, 2006, amended Jan. 30, 2013, effective Mar. 1, 2013), translated at <http://en.pkulaw.cn/display.aspx?cgid=01b481c749f70faebdfb&lib=law>.

¹⁶ Many Chinese courts have used Article 21 of the RICL as a general clause to adjudicate cases that do not fall squarely within the listed exceptions. See, e.g., Beijing Sogou Info. Serv. Co. v. Wenhui Cong (从文辉与北京搜狗信息服务有限公司侵犯信息网络传播权纠纷案) (2013) Zhong Min Zhong No. 12533 (Beijing First Interim. People’s Ct. Dec. 10, 2013); Zhang Haixia v. Yu Jianrong (张海峡与丁建嵘侵害著作权纠纷上诉案), (2012) Gao Min Zhong No. 3452 (Beijing Higher Peoples’ Ct. Dec. 20, 2012); Dongyang Le Shi Hua Er Co. v. Douban.com (东阳市乐视花儿影视文化有限公司与北京豆网科技有限公司信息网络传播权纠纷), (2017) Jing 0105 Min Chu No. 10028 (Beijing Chaoyang Dist. Peoples’ Ct. Sept. 15, 2017).

¹⁷ For a detailed discussion of the previous drafts, see He, *supra* note 2, at 392–95.

courts. As discussed above, new exceptions can only be added via new laws and regulations. However, this model is extremely inflexible in the face of new technological challenges. This Author has previously suggested that the CLC should adopt the U.S. fair use model¹⁸ or the new Japanese copyright exceptions model¹⁹ to accommodate the emerging issues such as webcasting, artificial intelligence analysis, and text and data mining. By providing open-ended standards for courts to decide copyright exception cases,²⁰ both the U.S. and Japanese models can respond to new challenges much faster than the current copyright exceptions model of the CLC. For example, the United States and Japan have empowered courts to decide whether a specific case is considered fair, whereas the Chinese judiciary will have to rely on a fixed list, either provided by the CLC or other current and future laws and regulations. This normative constraint has long perplexed Chinese judges in difficult copyright disputes (such as the Google Books case).²¹ This constraint has also forced Chinese courts to deviate from the doctrinal interpretation of the law in their judgments.²² Meanwhile, the Supreme People's Court ("SPC") issued a judicial opinion advocating the use of the U.S. four-factor fair use test.²³

¹⁸ Jie Wang & Tianxiang He, *To Share Is Fair: The Changing Face of China's Fair Use Doctrine in the Sharing Economy and Beyond*, 35 COMPUT. L. & SEC. REV. 15 (2019).

¹⁹ He, *supra* note 2; He, *supra* note 9; He, *supra* note 14.

²⁰ 17 U.S.C. § 107 calls for the consideration of the following four factors in evaluating a question of fair use: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. In May 2018, Japan amended its copyright law and changed the structure of its closed model of copyright exceptions to a semi-open one. In effect, Japan has inserted open-ended clauses into some of the listed exceptions such as Article 30-4 of the Japanese Copyright Law. See He, *supra* note 2; see also Tatsuhiro Ueno, *The Flexible Copyright Exception for "Non-Enjoyment" Purposes? Recent Amendment in Japan and Its Implication*, 70 GRUR INT'L 145 (2021).

²¹ Yong Wan, *Similar Facts, Different Outcomes: A Comparative Study of the Google Books Project Case in China and the United States*, 63 J. COPYRIGHT SOC'Y 573 (2016).

²² For example, in some typical cases, the courts indicated that it is a common practice for courts to go beyond Article 22 of the CLC to apply a more flexible assessment model. See, e.g., Wang Shen v. Google Inc.

(王莘诉北京谷翔信息技术有限公司等侵犯著作权纠纷), (2011) Yi Zhong Min Chu No. 1321 (Beijing First Interim. People's Ct. Dec. 20, 2012); Dongyang Le Shi Hua Er Co. v. Douban.com, *supra* note 16.

²³ Opinion of the Supreme People's Court on Several Issues on the Giving of Full Rein to the Function of Intellectual Property Rights Adjudication in Promoting the Great Development and Flourishing of Socialist Culture and Stimulating the Indigenous and Coordinated Development of Economy

(最高人民法院关于充分发挥知识产权审判职能作用推动社会主义文化大发展大繁

These initiatives no doubt have a positive effect on solving difficult cases, but the unconstitutional nature of these judicial practices and interpretations shows that they are not ideal solutions.²⁴ Unfortunately, the 2020 CLC failed to address this issue. This trend is therefore likely to continue despite the recent amendment.

In addition, the actual application of the newly added two-step test in the first paragraph of Article 24 is problematic. The requirement that “the normal use of the work shall not be affected, and the lawful rights and interests of the copyright owner shall not be unreasonably damaged” is also modified from the three-step test in Article 9 of the Berne Convention and in subsequent international treaties.²⁵ However, the three-step test is not designed for direct application, as the purpose of the test is to provide a standard for signatories to evaluate their domestic copyright laws.²⁶ Moreover, in the first TRIPS case that the United States brought against China before the World Trade Organization (“WTO”) Dispute Settlement Body, the WTO panel has indicated that the three-step test shall “apply cumulatively,” meaning that an exception will not be accepted if any of the three steps failed to be satisfied.²⁷ Since the CLC has introduced two of the three steps verbatim, it is foreseeable that Chinese courts will take the panel’s decision into account when interpreting the two steps.

In practice, Chinese courts have been relying on the two-step test in the RICL to adjudicate copyright fair use cases for decades. But the understanding of the function and application of the two-step test among courts was often diverse and even contradictory. According to the judgment of some difficult copyright cases, the courts indicated that the two-step test could serve as a general clause or an overarching principle for adjudicating cases that cannot be covered by any of the listed exceptions such as the case involving the Google Books Project.²⁸ However, in many

荣和促进经济自主协调发展若干问题的意见) Fafa [2011] No. 18 (promulgated by the Judicial Comm. Sup. People’s Ct., Dec. 16, 2011, effective Dec. 16, 2011) [hereinafter Judicial Opinion].

²⁴ He, *supra* note 2, at 388–89.

²⁵ Berne Convention, *supra* note 3, art. 9; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; WIPO Copyright Treaty art. 10, Dec. 20, 1996, 2186 U.N.T.S. 121.

²⁶ Edward L. Carter, *Harmonization of Copyright Law in Response to Technological Change: Lessons from Europe About Fair Use and Free Expression*, 30 U. LA VERNE L. REV. 312, 338 (2008).

²⁷ Panel Report, *United States—Section 110(5) of U.S. Copyright Act*, WTO Doc. WT/DS160/R, at 31 (adopted June 15, 2000); see also MARTIN SENFTLEBEN, *COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW* 125 (2004).

²⁸ *Wang Shen*, *supra* note 22; *Dongyang Le Shi Hua Er Co. v. Douban.com*, (2017) Jing 0105 Min Chu No. 10028 (Beijing Chao Yong Dist. Peoples’ Ct. Sept.

other cases, some Chinese courts believe that the two-step test is an additional check on the listed exceptions.²⁹ In other words, to pass the two-step test, a particular use must first fall into one of the listed exceptions.³⁰ By including the two-step test in Article 24, the 2020 CLC has made clear that the latter approach applies.³¹

Moreover, the Chinese courts' interpretations of the two steps were often confusing and problematic. For example, in some judgements, Chinese courts used the two-step test and the U.S. four-factor fair use test interchangeably.³² For those judgements that interpreted the two steps without referencing the four-factor fair use test, the reasoning was either overly simplified³³ or purely economic, focusing solely on market substitution and financial damages.³⁴ Such interpretations are understandable as

16, 2017).

(东阳市乐视花儿影视文化有限公司与北京豆网科技有限公司信息网络传播权纠纷), (2017).

²⁹ See, e.g., *Liu Feiyue v. CCTV Int'l Network Co.*

(刘飞越与央视国际网络有限公司、江苏省广播电视集团有限公司侵犯著作权纠纷), (2017) Jing 073 Min Zhong No. 1068 (Beijing Intell. Prop. Ct. Oct. 30, 2017); *Shanghai Animation Film Studios v. Zhejiang Xinying Niandai Culture Ltd.* (上海美术电影制片厂与浙江新影年代文化传播有限公司、华谊兄弟上海影院管理有限公司侵害著作权纠纷), (2015) Hu Zhi Min Zhong No. 730 (Shanghai Intell. Prop. Ct. Apr. 25, 2016).

³⁰ See RICL, *supra* note 6, art. 21 (referencing the "relevant provisions of the Copyright Law").

³¹ Hong Shi, the Deputy Director of the Chamber of Civil Law of the Legislative Affairs Commission of the Standing Committee of the National People's Congress, called the first paragraph of Article 22 of the 2010 CLC (now Article 24) the "cap" of the clause. See Hong Shi (石宏), *The Important Aspects and the Value Consideration of the Third Revision of the Copyright Law*

(《著作权法》第三次修改的重要内容及价值考量), INTELL. PROP., no. 2, 2021, at 8.

³² See, e.g., *Li Xianghui v. Guangzhou Huaduo Co.*

(李向晖与广州华多网络科技有限公司著作权侵权纠纷), (2017) Yue 73 Min Zhong No. 85 (Guangzhou Intell. Prop. Ct.) (Guangzhou Intell. Prop. Ct. July 21, 2017); see also Chenguo Zhang, *Introducing the Open Clause to Improve Copyright Flexibility in Cyberspace? Analysis and Commentary on the Proposed "Two-Step Test" in the Third Amendment to the Copyright Law of the PRC, in Comparison with the EU and the US*, 33 COMPUT. L. & SEC. REV. 73, 80 (2017) ("Both decisions assumed that the application of the fair use doctrine, as a flexible standard outside the legislative, enumerative catalogue of copyright exceptions, is not only permissible under the three-step test, but also (in essence) both integral to and harmonized with it.").

³³ See, e.g., *Shaoxing City Water Res. Bureau v. Wang Juxian Co.* (绍兴市水利局诉王巨贤公司侵害著作权纠纷), (2013) Min Ti No. 15 (Sup. People's Ct. Dec. 24, 2014).

³⁴ See, e.g., *Shenzhen Weishang Co. v. Jiecheng Huashi Wangju Co.* (深圳市维尚视界立体显示技术有限公司与捷成华视网聚(常州)文化传媒有限公司侵害信息网络传播权纠纷), (2017) Jing 073 Min Zhong No. 1115 (Beijing Intell. Prop. Ct. Dec. 12, 2017).

the wording of the two steps is ambiguous and “lean[] towards a strictly economic approach due to the WTO forum.”³⁵ Chinese judges also often find it hard to balance a variety of interests with that test alone.³⁶ In addition, precedents are rather scarce, and interpretations vary widely from country to country. Thus, these precedents do not provide much guidance.³⁷

Transplanting the two steps directly from international conventions may ease the burden on China to prove treaty compliance,³⁸ but the potential risks are obvious. As Daniel Gervais indicated, “[t]here is a risk that the test will be interpreted too strictly and cause welfare losses that do not translate into benefits that outweigh those costs.”³⁹ In the case where the two-step test can only be applied in line with the listed exceptions in Article 24 of the CLC, the statutory limitations are further restricted. This is similar to what Martin Senftleben referred to as the “worst-case scenario.”⁴⁰

B. Recommendations

1. Combining the Two-Step Test with Four Factors?

In the previously mentioned judicial interpretation, the SPC proposed an alternative solution, which combines the U.S. four-factor fair use doctrine with the two-step test to provide an overarching principle for solving intractable copyright cases.⁴¹ Although the legal effect of this SPC judicial

³⁵ SABINE JACQUES, *THE PARODY EXCEPTION IN COPYRIGHT LAW* 54 (2019).

³⁶ See, e.g., *id.* at 54 (“[T]rial judges are ill-placed to assess compliance with the three-step test . . . owing to the sheer difficulty of striking a ‘fair’ balance between the numerous interests at stake.”); SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* 771–72 (2006) (noting that “the second step of article 9(2) . . . require[s] consideration of non-economic as well as economic normative considerations”).

³⁷ According to Jonathan Griffiths, national courts in countries such as the Netherlands, Belgium and France follow a restrictive approach and tend to interpret the three-step test very strictly, whereas national courts in countries such as Germany, Switzerland, and Spain tend to interpret it flexibly. See Jonathan Griffiths, *The “Three-Step Test” in European Copyright Law—Problems and Solutions*, 2009 *INTELL. PROP. Q.* 428, 437–40 (2009).

³⁸ Qian Wang (王迁), *Copyright Law’s Reference to International Treaties and Foreign Legislation: Problems and Solutions* (著作权法借鉴国际条约与国外立法: 问题与对策), *CHINA LEGAL SCI. (中国法学)*, no. 3, 2012, at 35.

³⁹ DANIEL J. GERVAIS, *(RE)STRUCTURING COPYRIGHT: A COMPREHENSIVE PATH TO INTERNATIONAL COPYRIGHT REFORM* 87 (2017).

⁴⁰ Martin Senftleben, *Fair Use in the Netherlands—A Renaissance?*, 33 *TJDSCHRIFT VOOR AUTEURS, MEDIA EN INFORMATIERECHT (AMI)* 1, 4 (2009).

⁴¹ See *Judicial Opinion*, *supra* note 23.

document is questionable,⁴² that document is an official opinion of the SPC and has real practical effects in guiding all levels of courts in China.⁴³ More importantly, the proposed method is reasonable to an extent even though it requires further clarification.

On one hand, Chinese courts have received the four-factor fair use test well.⁴⁴ Not only are there ample precedents from the United States to research upon, the four factors are also clearer and hence more operational. Without the “apply cumulatively” restriction introduced in the WTO panel decision, the comparatively flexible four-factor test is handier for Chinese courts to solve difficult cases than the three-step test.

On the other hand, the relationship between the two steps in Article 24 of the CLC and the four factors provided by the SPC’s judicial interpretation is unclear. The latter provides:

[U]nder special circumstances necessary for promoting technological innovation and business development, a use of a work may be determined fair use after consideration of the nature and purpose of the use, the nature of the work used, the quantity and quality of the portion of the work used, the potential impact of the use on markets or values, and other factors, provided that such use neither contravenes the normal use of the work nor results in unreasonable damage to the lawful interests of the author.⁴⁵

It is clear that the application of the four factors comes with the prerequisite “under special circumstances necessary for promoting technological innovation and business development,” which is a vague restriction. In addition, the relationship between the two different tests is unclear. Judging from its literal meaning, the sentence suggests a cumulative application approach: after examining the four factors, the courts should run the two-step test.⁴⁶ Peter Yu has warned that this approach “will burden those using the fair use provision with an additional layer of legal analysis, which in turn will raise administrative, enforcement or litigation costs.”⁴⁷ In his view, “[i]f the interpretation turns out to be unduly restrictive, the added

⁴² He, *supra* note 2, at 389.

⁴³ NANPING LIU, *OPINIONS OF THE SUPREME PEOPLE’S COURT—JUDICIAL INTERPRETATION IN CHINA* 74 (1997).

⁴⁴ He, *supra* note 2, at 396; Zhiwen Liang, *Beyond the Copyright Act: The Fair Use Doctrine Under Chinese Judicial Opinions*, 56 *J. COPYRIGHT SOC’Y* 695, 716 (2008).

⁴⁵ See *Judicial Opinions*, *supra* note 23.

⁴⁶ Jyh-An Lee, *Tripartite Perspective on the Copyright-Sharing Economy in China*, 35 *COMPUT. L. & SEC. REV.* 434, 443–44 (2019).

⁴⁷ Peter K. Yu, *Customizing Fair Use Transplants*, *LAWS*, Mar. 2018, no. 9, at 6. For a more detailed discussion of this problem, see Martin Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*, 1 *J. INTELL. PROP. INFO. TECH. & ELEC. COM. L.* 67 (2010).

language will greatly curtail the benefits provided by the new fair use provision.”⁴⁸

This Article suggests that Chinese courts should merge the four factors with the two-step test and neglect the strict language in the SPC’s judicial interpretation when adjudicating difficult fair use cases.

On one hand, instead of strictly applying the ambiguous test in the SPC’s judicial interpretation, it will be wiser to consider blending the four factors with the two-step test and use them concurrently to adjudicate fair use cases that the listed exceptions cannot cover. Obviously, the four factors overlap with the two steps — for example, it has been pointed out that the second step “[does not contravene] the normal use of the work” parallels the fourth factor “the potential impact of the use on markets or values.”⁴⁹ Similarly, the language “the nature and purpose of the use, the nature of the work used, and the quantity and quality of the portion of the work used” relates to “the normal use of the work” and “the lawful interests of the author.” Thus, when a use such as a parody is deemed transformative in nature, the ruling also implies that the market of the parody is one that the copyright owner will not enter, thereby not interfering with the normal use of the work and not prejudicing the lawful interests of the author. The literal meanings of the factors do not conflict with the two steps and can thus be internalized.

On the other hand, the interpretation of the two-step test shall not strictly follow the WTO panel’s predominantly economic interpretation and should be more flexible. As pointed out by many scholars, the panel’s interpretation “was criticized for not taking sufficiently into account the diverse social, economic, and cultural policy objectives of WTO Members.”⁵⁰ It is also suggested that the “apply cumulatively” restriction shall be replaced by a U.S.-style fair use analysis, in which each step will be treated as an independent but indecisive factor in adjudicating fair use cases.⁵¹ The suggested approach is plausible. Even though the language used is almost the same, the two-step test in Article 24 of the CLC is actually China’s national design of a flexible standard related to copyright exceptions, rather than the three-step test itself. In other words, Chinese courts are not obliged to interpret the two steps cumulatively as Article 24 provides a copyright exception clause rather than the international standard for evaluating a nation’s design of copyright exceptions.

⁴⁸ Yu, *supra* note 47, at 6.

⁴⁹ Christophe Geiger et al., *The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law*, 29 AM. U. INT’L L. REV. 581, 613 (2013).

⁵⁰ *Id.* at 597; see also RICKETSON & GINSBURG, *supra* note 36, 771–72.

⁵¹ Geiger et al., *supra* note 49, at 606–07; Kamiel J. Koelman, *Fixing the Three Step Test*, 28 EUR. INTELL. PROP. REV. 407, 410 (2006); Senftleben, *supra* note 40, at 7.

Most importantly, the proposed approach should be an interim one. Although it is expected that Chinese courts in practice will tend to follow the SPC's judicial interpretation and treat the four factors and two steps as a general clause for determining difficult cases under special circumstances, that approach is not recommended due to the unconstitutional nature of the SPC's judicial interpretation. Nevertheless, if the application is unavoidable, it is suggested that courts should apply it in a logical and systematic way so that the law can recognize it with full confidence in the future.

If the CLC can include a similar mechanism in its copyright exceptions model via a fourth revision in the future, such inclusion will provide greater legal certainty. In the meantime, it seems that Chinese courts will have to act proactively for a long period of time, sometimes in an unconstitutional manner, to protect interests that are of great importance to society. As to the form of the design, this Author has made a specific suggestion in a previous article.⁵² In the alternative, legislators could make use of the newly added thirteenth exception to insert semi-open exceptions to the existing copyright-related regulations. No matter what form it takes, the design of copyright exceptions in China should be flexible enough to cover future challenges and accommodate local needs.

2. *Providing More Exceptions to Moral Rights?*

Unlike the economic rights, the moral rights provided in Article 10 of the CLC do not include clear exceptions. As Daniel Gervais argued, the exceptions related to moral rights “should be analyzed separately” from economic rights, and those exceptions “cannot be based on commercial exploitation, but on a combined test of public interest and practicality.”⁵³ It is believed that the exceptions provided in Article 24 of the CLC can apply only to economic rights,⁵⁴ and moral rights are subject to fewer restrictions than the economic rights,⁵⁵ due in large part to the *droit d'auteur* tradition.⁵⁶ In China, only a few articles provide exceptions to a certain

⁵² He, *supra* note 2.

⁵³ Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 32 (2005); see also Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 90 (1997).

⁵⁴ See Huaiwen He (我国著作人身权与著作财产权协调的法律原则), *The Legal Principle About the Harmonization Between the Moral and Economic Copyrights in China* (中华人民共和国著作权法实施条例), INTELL. PROP., no. 9, 2015, at 13.

⁵⁵ Handong Wu (吴汉东), *INTELLECTUAL PROPERTY LAW (知识产权法学)* 100 (2011).

⁵⁶ For example, in *Zhang Muye v. China Film Co.*, the Beijing Intellectual Property Court explained that the CLC followed a Berne-plus standard to offer better protection to authors. See *Zhang Muye v. China Film Co.*

type of moral rights, and these exceptions are scattered throughout the CLC and the RICL.⁵⁷ Thus far, it seems that the right of integrity is under minimal restriction, and the lack of restriction has caused many problems in practice.⁵⁸

The concern here is the potential abuse of moral rights to promote “an author’s economic interests under the guise of protecting his personality interests.”⁵⁹ As demonstrated in *Zhang Muye v. China Film Co.*, if explicit exceptions are provided for the right of integrity, the court will have a clear vision about the limits to that right. Similarly, when cases related to parody arise and when Article 24(2) of the CLC concerning quotation and criticism can justify the parody, there is an obvious risk of infringement of the right of integrity. A parallel exception to that right, similar to an exception to an economic right, will therefore make sure that the protection of the social and economic values behind parody is not disturbed.⁶⁰

This Article recognizes that the economic and moral rights are grounded in different theories and calls for prudence in introducing exceptions related to moral rights. No exceptions shall be added unless there is great public interest in curbing moral rights and unless it is practical to do so. In terms of the form, China could choose to introduce a closed model of moral rights exceptions or adopt an open-ended model such as the reasonableness defense to the right of integrity in the Copyright Act of Australia.⁶¹

(张牧野等与乐视影业(北京)有限公司等著作权权属侵权纠纷), (2016) Jing 073 Min Zhong No. 587 (Beijing Intell. Prop. Ct. Aug. 8, 2019).

⁵⁷ See e.g., RICL, *supra* note 6, arts. 10, 19.

⁵⁸ For example, in *Zhang Muye v. China Film Co.*, the plaintiff had a contractual relationship with the defendant to make a film of the plaintiff’s book, but the defendant had made some substantial changes to the story. The Beijing Intellectual Property Court opined that even if Article 10 of the RICL deemed an alteration “necessary,” the defendant could still infringe the right of integrity if it had distorted the author’s ideas and emotions expressed in the work. This kind of broad interpretation will greatly restrict the creative freedom of filmmakers and is detrimental to the film industry. If such an approach is widely advocated, authors of literary works, in the face of an established contractual relationship, will be put in a position to abuse their moral rights as they can always raise objections to the alterations of their literary works when converted to movies — which are inevitable. See Tianxiang He, *Copyright, Freedom of Speech and the Insult to the National Anthem*, 51 H.K. L.J. 53, 70 (2021).

⁵⁹ Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 264 (1994).

⁶⁰ Agustín Waisman, *Rethinking the Moral Right to Integrity*, 3 INTELL. PROP. Q. 268, 281 (2008).

⁶¹ *Copyright Act 1968* (Cth) s 195AS (Austl.).

IV. CONCLUSION

The copyright limitations provided by the 2020 CLC can only be considered as a satisfactory compromise: nothing much has been changed, and the few parts that have changed only have had a limited impact on the specific exceptions, not the general design. The copyright exceptions model in China is still based on a closed list. However, technological challenges and social demands will not perish and will force the Chinese judiciary to respond in a pragmatic but sometimes unconstitutional way. Although many have praised the SPC's "institutional pragmatism,"⁶² the unconstitutional nature of some SPC judicial interpretations suggests that, as an ultimate solution, the CLC should absorb some of the good practices and internalize them as good laws to provide greater legal certainty.⁶³ Until then, Chinese courts should breathe the four factors into the two-step analysis when using those two steps as a general clause in difficult fair use cases that cannot be properly covered by the listed exceptions in Article 24 of the CLC. The interpretation of the two steps should be flexible and should not be bound by the approach taken by the WTO panel. It is also suggested that the CLC should refine the exceptions model by providing clear but prudently selected exceptions to moral rights.

⁶² See Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 COLUM. J. ASIAN L. 1 (2012); see also DING QI, *THE POWER OF THE SUPREME PEOPLE'S COURT: RECONCEPTUALIZING JUDICIAL POWER IN CONTEMPORARY CHINA* (2020).

⁶³ Chen Li has warned that even though the proactive interpretation approach taken by Chinese courts to break through the legal limitations did achieve justice in individual cases, it is certainly not a normal condition. If going beyond the listed exceptions is not allowed and will cause massive injustice, the law should absorb that practice to avoid undermining the authority of the law. See Chen Li (李琛), *Interaction Between Context and Interpretation: A New Angle to Review the 30 Years of Copyright Law* (文本与诠释的互动: 回顾《著作权法》三十年的新视角), INTELL. PROP., no. 8, 2020, at 18–19.