
**INCONSISTENT ANTI-CIRCUMVENTION LEGISLATION AND
ITS FUTURE IN CHINA: TOWARDS A HARMONIZED AND
BALANCED APPROACH**

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INTRODUCTION

The anti-circumvention of technological protection measures (“TPMs”) is one of the most controversial areas in copyright law. In China, the related legislation has long been criticized for its confusion around the liability for circumvention and the inclusion of a very small number of exemptions. Unfortunately, the Copyright Law of the People’s Republic of China (2020 Amendment)¹ (“2020 Copyright Law”) has largely failed to resolve these problems. In some aspects, it has even aggravated the issues by introducing an inconsistent definition that only protects certain types of access and rights control measures.

This Article examines how the laws apply after the 2020 Copyright Law took effect and explores the likelihood of achieving a harmonized system with a balancing mechanism in the future. Part I discusses the inconsistent changes to the scope of TPMs and the negative impacts on legal practices. Part II explores how existing liabilities and exemptions apply with respect to statutory and non-statutory TPMs in different situations. This Part argues that expanding the statutory scope of TPMs to include all types of TPMs and characterizing the circumvention of TPMs as a violation of law may be the best approach to realizing harmonized protection through the establishment of a fair system with a balancing mechanism. Part III discusses the ways in which such a mechanism can be developed to ensure fair TPM protection.

I. INCONSISTENT SCOPE OF TECHNOLOGICAL MEASURES

To facilitate legal enforcement,² the 2020 Copyright Law adopts a pre-existing definition of technological measures from the Regulations on

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¹ Copyright Law of the People’s Republic of China (2020 Amendment) (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021) [hereinafter 2020 Copyright Law].

² *Report on the Results of the Review of the Amendment to the Copyright Law of the People’s Republic of China (Draft)*, NAT’L PEOPLE’S CONG. PEOPLE’S REPUBLIC CHINA (Nov. 11, 2020), <http://www.npc.gov.cn/npc/c30834/202011/16a796a57f1649d2959939519c4701df.shtml> (in Chinese).

the Protection of the Right of Communication Through the Information Network³ (“RPRCIN”). Article 49 of the 2020 Copyright Law provides:

“Technological measures” in this Law means effective technologies, devices, or components used for preventing or restricting others from browsing or enjoying works, performances, sound recordings, or video recordings or providing the public through the information network works, performances, sound recordings, or video recordings without permission of the right owners.

Despite its broad language, this adopted definition reduces the original scope of technological measures. Even though the anti-circumvention provisions in the Copyright Law of the People’s Republic of China (2001 Amendment) (“2001 Copyright Law”), which remain unchanged in the Copyright Law of the People’s Republic of China (2010 Amendment) (“2010 Copyright Law”), do not define technological measures, the provisions prohibit the act of “intentionally avoiding or destroying the technological measures taken by a right owner on his works, sound recordings or video recordings, etc. to protect the copyright or the rights related to the copyright without the permission from the copyright owner or the right owner related to the copyright”.⁴ The scope of protection can be literally inferred to be the direct circumvention of rights control measures that protect all the copyright and neighboring rights in all subject matters.⁵ Furthermore, some scholars and courts have in practice provided a broad interpretation that defines the direct circumvention of access and rights control measures and the provision of the means for direct circumvention. For example, in *Anhui Xufan Information Technology Co. v. Diao Minglei*, the court considered the provision of product keys to software as “intentionally avoiding or destroying the technological measures of the copyright of the computer software” under Article 48(6) of the 2010 Copyright Law.⁶ According to Professor Qian Wang’s opinion⁷ — a view also

³ Regulations on the Protection of the Right of Communication Through the Information Network (promulgated by the State Council, May 18, 2006, amended Jan. 30, 2013, effective Mar 1, 2013).

⁴ Copyright Law of the People’s Republic of China (2001 Amendment) (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Oct. 27, 2001), art. 47(6); Copyright Law of the People’s Republic of China (2010 Amendment) (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010), art. 48(6).

⁵ See GUOBIN CUI, COPYRIGHT LAW: PRINCIPLE AND CASES 840, 845 (2014) (in Chinese).

⁶ (2019) Zhe 01 Min Chu No. 3043.

⁷ See Qian Wang, *How to Define the Nature of Act of Selling Software Serial Number and Crack Program*, LAW SCI., no. 5, 2019, at 129 (in Chinese).

accepted by some judges⁸ — the anti-circumvention provisions of the RPRCIN prohibit not only the direct circumvention of rights control measures but also that of access control measures as well as the provision of the means to circumvent both measures. Because the RPRCIN was enacted in 2006 under the authority of the 2001 Copyright Law,⁹ it cannot increase the scope of protection of that law. Thus, the scope of protection under both the 2001 and 2010 Copyright Laws can be inferred to cover both the direct circumvention of access and rights control measures and the provision of the means to circumvent both measures.

Nevertheless, the definition provided in the 2020 Copyright Law only protects certain types of access control measures (those relating to the browsing or enjoyment of works, performances, sound recordings, or video recordings) and rights control measures (those relating to communication through the information network). Other types of access control measures (e.g., those preventing the unauthorized use of software), rights control measures (e.g., those preventing reproduction and distribution), and technological measures for “radio or television” seem to be no longer protected in the 2020 Copyright Law. These changes show the erratic nature of the protection afforded by the 2020 Copyright Law.

As discussed above, the direct adoption of the definition from the RPRCIN without modification is a shortcoming because the RPRCIN protects only the right of communication through the information network but not other exclusive rights. During the legislative process, several drafts of the copyright law amendment recognized this problem and proposed a wider definition of the terms used in the RPRCIN. For example, the 2014 Amendment Draft Submitted for Review (“2014 Amendment Draft”) proposed a broader definition to extend TPM protection to include TPMs that prevent the unauthorized running of computer programs, reproduction, and adaptation as well as those protecting radio and television programs.¹⁰ Unfortunately, the broader definition is not found in the 2020 Copyright Law.

As most TPM cases in China are related to TPMs that prevent the unauthorized use of software, one obvious negative impact on judicial practices is that those TPMs that were previously protected under the anti-circumvention provisions of the Regulations on Computers Software Pro-

⁸ See, e.g., Jianjun Zhu, *The Determination of Declassifying Technological Protection Measure*, PEOPLE’S JUDICATURE, no. 6, 2010, at 47 (in Chinese).

⁹ Article 58 of the 2001 Copyright Law provides: “Regulations for the protection of computer software and of the right of communication through the information network shall be stipulated separately by the State Council.”

¹⁰ Copyright Law of the People’s Republic of China (Amendment Draft Submitted for Review, June 6, 2014), art. 68, http://www.gov.cn/xinwen/2014-06/10/content_2697701.htm (in Chinese).

tection (“RCSP”),¹¹ which shares the similar provisions with the previous Copyright Law, seem to be no longer protected under the 2020 Copyright Law. Nevertheless, non-statutory TPMs are still protected under other laws in China, and there have been cases where courts applied other laws to protect TPMs.¹² Unfortunately, such application would result in inconsistent and erratic use of legal protection in practice.

Besides, the Eleventh Amendment to the Criminal Law of the People’s Republic of China (“Criminal Law”)¹³ — which was adopted on December 26, 2020, only about a month after the 2020 Copyright Law — introduced a new criminal offense on circumvention based on the previous scope of protection under the 2010 Copyright Law. Article 217 of the Criminal Law provides that for the purpose of making profit, “without the permission of the copyright owner or the copyright-related right owner” a person “deliberately avoiding or destroying the technological measures taken by the right owner to protect copyright or copyright-related rights for his works, sound recordings or video recordings, etc.” shall be subject to criminal liability when the amount of the illegal gains is relatively large or when there are other serious circumstances. However, ambiguity remains over whether the scope of protection of TPMs under the Criminal Law should follow that of the 2020 Copyright Law or stay true to the literal definition in its original provision.

One may possibly argue that the scope of TPMs should be expanded to cover all TPMs within a broad legislative interpretation, provided that it is the legislators’ oversight, but not their intention, to limit the scope of protection.¹⁴ However, such expansion would provide the highest level of protection worldwide against all violators without putting in place a proper balancing mechanism.

¹¹ Regulations on Computers Software Protection (promulgated by the State Council, Dec. 20, 2001, amended Jan. 30, 2013, effective Mar. 1, 2013).

¹² Part II will discuss these cases.

¹³ Criminal Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., July 6, 1979, amended Dec. 26, 2020, effective Mar. 1, 2021).

¹⁴ It raised little concern about how to limit the scope of TPMs during the legislative process. The *Guided Reading and Explanations on the Copyright Law of the People’s Republic of China*, written partially by the legislators, does not mention that the new definition aims to exclude certain types of TPMs. Thus, it can be inferred that the legislators’ true intention was not to limit the scope of TPMs. See GUIDED READING AND EXPLANATIONS ON THE COPYRIGHT LAW OF THE PEOPLE’S REPUBLIC OF CHINA 244-53 (Wei Huang & Leiming Wang eds., 2021) (in Chinese); see also Qian Wang, *The Scope of the Protection for Technological Measures from the Perspective of Revision of Laws*, PEKING U. L. J., 2022, no.3, at 643 (in Chinese); Jiarui Liu, Comments on the 2021 Amendments to the Copyright Law of the People’s Republic of China 45 (June 16, 2021) (unpublished manuscript) (on file with author).

II. POTENTIAL LEGAL LIABILITIES FOR CIRCUMVENTION

Different liability approaches have resulted in different ways of balancing the interests of the relevant parties. Liabilities for circumvention have been controversial since the 2001 Copyright Law first introduced the anti-circumvention provision. Unlike the violations under the Digital Millennium Copyright Act (“DMCA”) of the United States,¹⁵ Article 47 of the 2001 Copyright Law and Article 24 of the 2001 RCSP generally consider circumvention as copyright infringement, even though such infringement cannot explain the circumvention of access control measures. By contrast, the RPRCIN aptly outlines the liability of those providing the means for circumvention in violation of law (Article 19). The violator is only subject to administrative liability (e.g., a penalty), not civil liability (e.g., compensation). During the process of revising the Copyright Law, the 2014 Amendment Draft attempted to address this problem by defining circumvention as a violation of law in which the violator would be subject to both civil and administrative liabilities (Articles 72 and 78). Unfortunately, this idea is not adopted in the 2020 Copyright Law, which still erroneously considers circumvention as copyright infringement (Article 53). Moreover, the new TPM definition in the 2020 Copyright Law creates further complexities by excluding certain types of TPMs. Table 1 lists the potential legal liabilities for circumvention with their balancing mechanisms after the 2020 Copyright Law took effect.

¹⁵ See 17 U.S.C. § 1201.

Table 1

Liability	Scope of protection	Copyright limitations	Exemptions for direct circumvention	Exemptions for providing the means to circumvent
Joint infringement of copyright	Statutory rights controls	√	√	√
	Non-statutory rights controls			
Direct infringement of anti-circumvention rights or interests	Statutory access and rights controls	×	√	√
	Non-statutory access controls			
Direct violation of law	Statutory access and rights controls	×	√	×
Unfair competition	Non-statutory access controls (commercially)	System with balancing mechanism that takes all factors into account		

A. Joint Infringement of Copyright

With respect to rights control measures, some Chinese scholars such as Professor Huijuan Dong argue that circumvention should be subject to joint liability for copyright infringement,¹⁶ similar to contributory and inducement liabilities in the United States. As the subsequent use of circumvented works constitutes direct copyright infringement, both direct circumvention and the provision of the means for circumvention can be considered as joint infringement that aids or abets direct copyright infringement.¹⁷ As to non-statutory rights control measures that are no longer protected under the 2020 Copyright Law, circumvention will still be subject to joint liability for copyright infringement.

The advantage of adopting a joint copyright infringement doctrine is the availability of copyright limitations for both direct circumvention and the provision of the means for circumvention, as joint infringement will not be established unless the direct use of the works, which can be ex-

¹⁶ See, e.g., Huijuan Dong, *Doubts on Whether the Direct Circumvention of Technological Measures Would Constitute Independent Copyright Infringement*, INTELL. PROP., no. 7, 2015, at 14 (in Chinese).

¹⁷ Civil Code of the People's Republic of China (promulgated by the Nat'l People's Congress, May 28, 2020, effective Jan. 1, 2021), art. 1169 [hereinafter Civil Code]. It provides: "A person who aids or abets an actor in the commission of a tortious act shall assume joint and several liability with the actor."

empted through copyright limitations, is held to be infringement. According to the 2020 Copyright Law, copyright limitations in Article 24 do not apply to circumvention, and such non-application has upset the conventional balance. That is why some Chinese scholars such as Professor Dong have argued that the circumvention of statutory rights control measures should be considered as joint infringement to enable the application of copyright limitations.¹⁸

With respect to access control measures, however, joint infringement cannot be used to explain for their circumvention as the Copyright Law does not provide access right to TPM works. This doctrine is obviously defective especially in the case where circumvention and unauthorized access are carried out by different parties. Because the latter is by no means a legal liability, circumvention cannot constitute joint copyright infringement.

B. Direct Infringement of Anti-Circumvention Rights or Interests

As to both statutory access and rights control measures, some Chinese scholars, such as Professors Yang Li¹⁹ and Xiaoqing Feng,²⁰ have argued that the prohibition of circumvention under the Copyright Law has created a right to anti-circumvention. Direct circumvention therefore constitutes direct infringement of this right. In practice, some courts have also considered direct circumvention as independent infringement. For instance, in *Guangdong Shenzhen Tencent Computer System Co. v. Shanghai Zhencai Multimedia Co.*,²¹ a case involving TPMs that prohibit setting up deep linking, the Shanghai Intellectual Property Court (the court of second instance) held that the circumvention of TPMs to facilitate deep linking for online video viewing constituted independent infringement that was separate from the subsequent activities. In *Shenzhen Tencent Computer System Co. v. Beijing Yilian Weida Technology Co.*,²² the Beijing Intellectual Property Court (the court of second instance) pointed out that the court of first instance failed to separately consider the circumvention of TPMs and the setting up of deep linking, the two issues should be independent from each other.

¹⁸ See Dong, *supra* note 16, at 19.

¹⁹ See Yang Li, *A Brief Comment on the Relationship Between Technological Measures and Copyright*, ELEC. INTELL. PROP., no. 9, 2003, at 1 (in Chinese).

²⁰ See XIAOQING FENG, COPYRIGHT LAW 251 (2010) (in Chinese).

²¹ (2018) Lu 73 Min Zhong No. 319. For the judge's comment on this case, see Fuyu Yang, *The Nature of the Acts That Destroy Technological Measures to Set up Deep Links*, PEOPLE'S JUDICATURE, no. 14, 2019, at 85 (in Chinese).

²² (2016) Jing 73 Min Zhong No. 143. The case was selected as one of the 2016 Top Ten Media Law Cases in China.

Moreover, the notion of the right to anti-circumvention may allude to the best means for pursuing liability for circumventing non-statutory access control measures, considering the absence of clear legal standards in practice. To pursue liability for circumvention, software distribution has been broadly interpreted, as in *The People's Procuratorate of Haidian District, Beijing v. Tian Yanli*, to include the provision of the means for circumvention, such as the software product keys (the certificate of authenticity) and the circumvention tools used to generate the product key, both of which would constitute direct copyright infringement.²³ However, this view is erroneous because providing the means for circumvention cannot be equated with the distribution of copyrighted works.²⁴ Trademark infringement can even be established when the quality assurance function of the trademark is negatively affected, as in *Tencent v. Some Electronic Game Console Shop in Guangzhou Yuexiu District*,²⁵ where the electronic game console store sold Nintendo Switch game consoles whose operating system settings had been circumvented. However, trademark infringement would be too far removed from copyright law and could not offer a solution.

Instead, independent tort liability may be used as an alternative approach to prevent the circumvention of non-statutory access control measures. Under Chinese tort law, the application of independent tort liability would provide flexibility in protecting interests that are not recognized by statutes — that is, the protected “rights and interests” involve not only statutory rights but also non-statutory interests that deserve legal protection.²⁶ The interests protected here can be defined as “the interest to anti-circumvention,” which is different from the right to access TPM works, as the former prohibits only the circumvention but not unauthorized access.

In comparison with the joint infringement doctrine, the disadvantage of this approach is that copyright limitations are no longer applicable as circumvention is an independent tort that cannot be exempted when subsequent activities do not constitute copyright infringement. The advantage of this approach is that providing the means for circumvention can still be exempted when the anti-circumvention law provides exemption for direct circumvention. Such exemption occurs because providing the means

²³ See (2019) Jing 01 Xing Zhong No. 173 (providing the second-instance judgment on Tian Yanli's criminal copyright infringement case). For a similar opinion, see Xiaowen Li & Yongqin Yang, *A New Interpretation on Reproduction and Distribution Under the Criminal Law in the Context of the Internet*, CHINESE PROCURATORS (CLASSICAL CASES), no. 3, 2013, at 22 (in Chinese).

²⁴ See Wang, *supra* note 7, at 122-26.

²⁵ Tencent Tech. (Shenzhen) Co. v. Some Electronic Game Console Shop in Guangzhou Yuexiu District, S. METROPOLIS DAILY (Apr. 27, 2021), https://www.sohu.com/a/463247648_161795 (in Chinese).

²⁶ Civil Code, *supra* note 17, art. 120.

to circumvent is considered joint infringement of anti-circumvention rights, with direct circumvention serving as the underlying infringement. The 2020 Copyright Law does not have exemptions for cases that involve the provision of the means to circumvent. This lack of exemptions undermines the current exemptions for direct circumvention, as the general public do not always have the capacity to circumvent effectively protected TPMs. Instead, using the independent infringement doctrine can offer a more orthodox explanation for exempting legitimate cases that involve the provision of the means to circumvent.

Nevertheless, the adoption of an independent infringement doctrine also has some shortcomings. As Professor Qian Wang pointed out, the “right to anti-unlocking” should be avoided because the technical restrictions such as TPMs do not reflect any independent interests that warrant protection. Instead, they reflect the legal protection for the property itself or the interests in accessing the technologically protected works.²⁷

C. Direct Violation of Law

As discussed above, there are difficulties in terms of the right to access and the right to anti-circumvention. Some experts such as Professor Wang²⁸ and Dr. Jianjun Zhu²⁹ suggested that the liabilities of both direct circumvention and the provision of the means to circumvent should be considered as independent legal liabilities for violating the law but not as copyright infringement. This proposition was adopted in the 2014 Amendment Draft, but not the 2020 Copyright Law.

Moreover, even though the liability for circumvention is enacted under Article 53 of the 2020 Copyright Law (article on infringement), the criteria for determining the liability for providing the means to circumvent appear to rely on the violation of law but not infringement of copyright. Article 19(1) of the RPRCIN, which has been incorporated into Article 53(6) of the 2020 Copyright Law, lists two criteria for determining liability: (1) “intentionally manufacturing, importing, or providing to others devices or components mainly used for avoiding or destroying technological measures,” and (2) “intentionally providing others with the technological services for avoiding or destroying the technological measures.” According to the *Explanations on the Regulations on the Protection of the Right of Communication Through the Information Network* (“*Explanations on the*

²⁷ See QIAN WANG, *STUDY ON THE PROTECTION AND REGULATION OF TECHNOLOGICAL MEASURES IN COPYRIGHT LAW* 173 (2018) (in Chinese).

²⁸ See Qian Wang, *On the Legal Nature of Providing Circumvention Technological Measures*, *LAW SCI.*, no. 10, 2014, at 31 (in Chinese).

²⁹ See Jianjun Zhu, *Reflections on the Institution of Chinese Technological Protection Measure Legislation—Using the Trial Decision of Wen Tai Drawing Software Copyright Case as Example*, *ELEC. INTELL. PROP.*, no. 6, 2010, at 74 (in Chinese).

RPRCIN”), an official document, the first criterion “refers to the relevant regulations of other countries,”³⁰ most of which have adopted a model attaching liability to a direct violation of law. The first criterion, “judged from the purpose and use, refers to the device or component that is mainly designed and manufactured to avoid or destroy technological measures and that, except for this purpose, has no or few other uses or values.”³¹ This criterion is quite similar to the one concerning the “limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a [copyrighted work]” in the DMCA,³² which relies on a direct violation of law. Contrary to the joint infringement doctrine, these two criteria do not take into account the legality of direct circumvention, thus showing that the circumvention is a direct violation of law.

As to direct liability for violating the law, providing the means for circumvention can only be exempted when there are specifically prescribed exemptions in the law, similar to § 1201 of the DMCA.³³ However, the 2020 Copyright Law has not introduced any exemptions for providing the means for circumvention.

D. *Unfair Competition*

Regarding non-statutory access control measures, direct circumvention for commercial purposes and providing the means to circumvent could be considered as unfair competition. Article 2 of the Law Against Unfair Competition of the People’s Republic of China³⁴ (“Unfair Competition Law”) may be used as a so-called catch-all provision to protect those interests that fall beyond the scope of intellectual property rights:

An operator shall, in manufacturing and transaction activities, follow the principles of voluntariness, equality, fairness, *honesty*, and *credibility*, and observe the laws and *business ethics*.

“Unfair competition” in this Law means acts of operators in manufacturing and transaction activities that contravene the provisions of this Law, *disturb the order of market competition*, *damage the lawful rights and interests of other operators or consumers*.³⁵

³⁰ See EXPLANATIONS ON THE REGULATIONS ON THE PROTECTION OF THE RIGHT OF COMMUNICATION THROUGH THE INFORMATION NETWORK 17 (Jianhua Zhang eds., 2006) (in Chinese) [hereinafter EXPLANATIONS ON THE RPRCIN].

³¹ *Id.*

³² See 17 U.S.C. § 1201(a)(2)(B).

³³ See *id.* § 1201.

³⁴ Law Against Unfair Competition of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 2, 1993, amended Apr. 23, 2019, effective Apr. 23, 2019).

³⁵ Emphasis added.

In deep linking cases, video users circumvent the TPMs that secure the protected links to watch videos using a third-party application instead of the original site. For example, in *Feihu Information Technology Tianjin Co. v. Shanghai Qianshan Network Technology Development Co.*, the users watched videos through TV Cat instead of subscribing to Sohu.³⁶ More importantly, these users were subjected to advertisements on TV Cat instead of Sohu. The People's Court of the Shanghai Pudong New District held that circumventing the TPMs, hyperlinking the videos, and blocking the advertisements of Sohu caused great damage to the plaintiff. It further stated that the circumvention affected the normal operation of video content providers and telecommunication service providers and threatened the health of the entire internet ecology of video websites. Violating the principles of "honesty," "credibility" and "business ethics," providing TV Cat therefore constituted unfair competition.³⁷

The Unfair Competition Law seems to provide the most balanced approach. Unlike a rights law containing exemptions of a limited scope, this is a behavior law that takes all factors into account when determining unfair competition.

One shortcoming is that this law, strictly speaking, does not apply to those who provide the free means to circumvent without a commercial purpose or those who directly circumvent a TPM as a private citizen. The Unfair Competition Law specifically requires a competitive relationship between the plaintiff and the defendant, both of whom should be business operators. At the very least, providing the means for circumvention to the public without cost should be prohibited as such provision has severe financial ramifications for the copyright holders.

In sum, the legal protection of TPMs has been inconsistent in practice and is therefore defective. It has undermined the coherence and consistency of the laws. The most orthodox approach would be to frame circumvention of TPMs as a direct violation of law, even though this approach would generate the smallest number of exemptions. Expanding the statutory scope of TPMs to include all types of TPMs and framing their circumvention as a direct violation of law can facilitate harmonized legal protection. Nevertheless, exemptions and limitations of anti-circumvention provisions should be introduced in a more balanced manner.

III. TOWARDS A BALANCED APPROACH

It has long been a subject of contention that the exemptions for circumvention are extremely limited in China. The 2010 Copyright Law and

³⁶ (2015) Pu Min 3 (Zhi) Chu No. 2192.

³⁷ *Id.* For a similar judgement, see *Feihu Info. Tech. Tianjin Co. v. Beijing Xiaoyi Interaction Network Tech. Co.*, (2016) Jing 0108 Min Chu No. 9831.

the current RCSP provide no exemptions for circumvention, while the RPRCIN provides only four exemptions in the event of direct circumvention. The 2020 Copyright Law fails to fully address this problem; it has only incorporated the four RPRCIN exemptions and introduced one new exemption on “conducting encryption research or research on the reverse engineering of computer software.” Article 50 of the 2020 Copyright Law provides:

Under the following circumstances, technological measures may be avoided, but technologies, devices, or components for avoiding technological measures shall not be provided to others, nor shall other rights enjoyed by right holders according to the law be infringed upon:

(1) providing a small amount of published works to be used by teaching or scientific research personnel for classroom teaching at schools or for scientific research, where such works cannot be acquired by normal means;

(2) providing published works in an accessible fashion that can be perceived by people with print disabilities for non-profit purposes, where such works cannot be acquired by normal means;

(3) state organs performing official duties in accordance with administrative, supervisory, and judicial procedures;

(4) conducting security tests of computers, computer systems, or networks;

(5) conducting encryption research or research on the reverse engineering of computer software.

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

A. New Exemptions

Even though the exemptions for circumvention are very limited, the 2020 Copyright Law allows for new exemptions through other laws and administrative regulations. Article 49 provides that circumvention is prohibited except for “circumstances where laws or administrative regulations provide that circumvention is permissible.” The Regulations on the Implementation of the Copyright Law, the RPRCIN, and the RCSP can therefore subsequently introduce new exemptions.

1. Exemptions for Copyright Limitations and for Providing the Means to Circumvent

First, as discussed in Part II, copyright limitations should apply to the circumvention of rights control measures, and the exemptions specified for direct circumvention should also apply to those providing the means for circumvention. There are no reasons to hold someone liable if the means to circumvent are merely provided for legitimate direct circumvention. One potential concern may be that it would be difficult to differentiate the provision of means for legitimate circumvention from the provision of

such means to the public regardless of the legitimacy of the circumvention. This problem can be solved by putting the burden of proof on the claimant.

2. *New Circumstances for Exemptions*

The circumstances for exemptions in China are very limited, and such limitation is itself a serious problem. Professor Qian Wang proposed that China should introduce no fewer exemptions than those available in the United States and Australia.³⁸ Nevertheless, except the five exemptions that have been introduced by the 2020 Copyright Law, the scope of other exemptions in the United States and Australia is narrow and limited to certain specific uses, because those exemptions were proposed by specific groups of users interested in circumvention. Thus, China should not directly adopt their exemptions because they may not be appropriate for the Chinese context. The following identifies the main categories of exemptions, which have implications for future legislation in China.

(a) security: for example, “national security,” which is prescribed in Australia,³⁹ cannot be fully covered by the existing exemption of “state organs performing official duties in accordance with administrative, supervisory, and judicial procedures” or the one for “conducting security tests of computers, computer systems, or networks” in the 2020 Copyright Law. Besides, the scope of the latter is too limited and only applies to “computers, computer systems, or networks,” which can be extended to other activities (e.g., security research for computer programs done in good faith).⁴⁰

(b) Certain activities of nonprofit libraries and archives: most jurisdictions have enacted exemptions for libraries, but there are no such exemptions in China. During the legislative consultation process, libraries called for exemptions for circumvention,⁴¹ but the 2020 Copyright Law did not adopt their proposal. Libraries nowadays have an important role in many different projects — for instance, the preservation of cultural heritage, as shown in a new exemption prescribed in the 2019 European Union Directive on Copyright and Related Rights in the Digital Single Market.⁴² The existing copyright limitation of “reproducing works in the collection of li-

³⁸ See Wang, *supra* note 27, at 411.

³⁹ *Copyright Act 1968* (Cth) ss 116AN(7), 116AO(6), 116AP(6) (Austl.).

⁴⁰ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 83 Fed. Reg. 54,010, 54,030 (Oct. 28, 2018) [hereinafter Exemption to Prohibition on Circumvention].

⁴¹ See Xiao Yan, *Seeking Balance Between Copyright Protection and Limitation of the Rights: The Suggestions and Anticipation of the Library Community to the Draft Revision of Copyright Law*, 39 J. LIBR. SCI. CHINA 18 (2013) (in Chinese).

⁴² Directive 2019/790, recital 7, art. 6.

braries, archives, memorial halls, museums, art galleries, cultural halls, and so forth, as required to display or preserve editions” in Article 24(8) of the 2020 Copyright Law can be expanded to include circumvention.

(c) content detection and filtering: an example is an exemption regarding a technology, product, or service with the sole purpose of preventing the access of minors to material on the Internet, as provided in the DMCA.⁴³

(d) obsolete TPMs: an exemption can be provided when the format or system can no longer be acquired in the market — for example, discontinued external server support for video games or obsolete dongles that are malfunctioned or damaged.⁴⁴

(e) freedom of expression: an exemption can be provided to promote the freedom to criticize and comment.⁴⁵

These exemptions could be introduced through a well thought out and an appropriate legal design.

3. *Flexible Approach*

China does not have an administrative “fail-safe” mechanism, similar to those found in the United States and Australia to enact new exemptions on a regular basis. It is recommended that courts should have the discretion to strike a balance when necessary. As with the exhaustive list of copyright limitations in China, courts may, according to Article 8 of the 2011 Opinions of the Supreme People’s Court,⁴⁶ introduce new copyright limitations “in special circumstances . . . when it is necessary to promote technological innovation and commercial development,” by taking into account the four fair use factors borrowed from the U.S. Copyright Act,⁴⁷ provided that these limitations do not violate the second and third steps of the three-step test in the Berne Convention.⁴⁸

⁴³ 17 U.S.C. § 1201(h).

⁴⁴ See Exemption to Prohibition on Circumvention, *supra* note 40, at 54,014; see also Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 47,464 (Aug. 6, 2010).

⁴⁵ See Exemption to Prohibition on Circumvention, *supra* note 40, at 54,018; see also Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889 (2010).

⁴⁶ See Several Opinions on the Full Exertion of Intellectual Property Adjudicatory Function to Promote Greater Development and Flourishing of Socialist Culture and to Facilitate Coordinated Independent Economic Development, Fafa [2011] No. 18 (promulgated by the Judicial Comm. Sup. People’s Ct., Dec. 16, 2011, effective Dec. 16, 2011).

⁴⁷ 17 U.S.C. § 107.

⁴⁸ 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).

It should be noted that unlike an administrative process, courts might not be able to fully consult with interested parties. Therefore, the introduction of new exemptions should be subject to the full consideration of, as well as limited to, the circumstances where it is absolutely necessary to introduce such exemptions — for example, when there is market failure.⁴⁹ As Professor Jane Ginsburg noted, there are two general justifications for fair use: market failure and the public interest.⁵⁰ Unlike the public interest which largely relies on policy considerations, market failure is less controversial as it will not unreasonably prejudice the interests of copyright holders.⁵¹ It is obviously necessary for courts to introduce exemptions where there is market failure — for example, in relation to copyright limitations in image search (thumbnail) cases.⁵²

B. Misuse

Some of the missing exemptions in China, such as those for interoperability, can be better explained through a doctrine of prohibition against TPM misuse which can also serve to strike a fair balance. Even though the 2020 Copyright Law has failed to enact a doctrine of TPM misuse, this doctrine can be inferred from that of copyright misuse. Article 4 of the 2020 Copyright Law provides: “In exercising their rights, copyright holders and holders of copyright-related rights must not violate the Constitution or laws, and must not harm the public interest.”

TPMs can be misused in two ways. First, they can be used to satisfy interests irrelevant to the copyright — for example, when they seek to limit competition. As stated in Article 32 of a 2010 guiding opinion of the Beijing Higher People’s Court⁵³ (“Guiding Opinion”), technological mea-

⁴⁹ See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982); see also Qi Xiong, *On the Exemption of Copyright Technological Measures*, INTELL. PROP., no. 6, 2010, at 64 (in Chinese).

⁵⁰ See Jane C. Ginsburg, *Fair Use for Free, or Permitted but Paid?*, 29 BERKELEY TECH. L.J. 1383, 1386, 1387 (2014).

⁵¹ See Lin Xie, *Non-Transformativeness of Copyright Transformative Use*, ACAD. RES., no. 9, 2017 at 61 (in Chinese).

⁵² Providing thumbnails does not constitute infringement when such provision does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the right holder. See the Rules of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Adjudication of Civil Cases on the Infringement of the Right of Communication Through the Information Network, Fashi [2020] No. 19 (promulgated by the Judicial Comm. Sup. People’s Ct., Dec. 23, 2020), art. 5.

⁵³ Guiding Opinion (I) on Several Issues Concerning the Adjudication of Cases Involving Copyright Disputes in Cyberspace (for Trial Implementation), Jing Gao Fafa [2010] No. 166 (promulgated by the Beijing Higher People’s Ct., May 19, 2010).

asures refer to those adopted to protect the legitimate interests of the right holders under the Copyright Law; those that harm the protection of the public interest and *are irrelevant to the right holder's legitimate interests* under the Copyright Law, such as interoperability and bundling sales, cannot be considered as technological measures that deserve copyright protection.⁵⁴ Legitimate interests relevant to the copyright can be interpreted as receiving financial benefits from the exploitation of the works.⁵⁵ The doctrine of copyright misuse indicates that licensing terms that seek to advance interests that have not been granted by the copyright Law, such as noncompetition or limitations on the resale of the controlled copy,⁵⁶ may harm public policy, widen disparities, and erode fairness and should thus be excluded from protection. In a similar vein, TPMs employed to meet such interests — for example, encryption to leverage sales in aftermarket monopolies⁵⁷ — are equally problematic. As shown in the 2006 landmark case of *Beijing Jingdiao Technology Co. v. Shanghai Naikai Electronic Technology Co.* (Guiding Case No. 48 selected by the Supreme People's Court in 2015), measures adopted for the purpose of bundling sales of software and console, so as to extend the competitive advantages of the software to the console, do not belong to the technological measures used by copyright owners to protect their copyright interests in software as provided in the Copyright Law.⁵⁸

In addition, “interests irrelevant to the copyright” can be defined by taking domestic copyright policy into account. Take geographic market segmentation as an example. Whether an issue is relevant to the copyright largely depends on the domestic policy on parallel imports. In jurisdictions that allow parallel imports, such as Australia and New Zealand, access control measures protected under their copyright laws do not include those controlling geographic market segmentation by preventing the playback of non-infringing copies of copyrighted works.⁵⁹ Even though it remains unclear whether parallel imports are permissible under the 2020 Copyright Law, this Article argues that TPMs used to control geographic market segmentation should not be protected because China is a developing country. As Article 32(2) of the Guiding Opinion provides, technological measures used for regional market segmentation based on price

⁵⁴ Emphasis added.

⁵⁵ See Qian Wang, *On the Copyright Law's Regulation of the Abuse of Technological Measures*, 40 MOD. L. SCI. 52 (2018) (in Chinese).

⁵⁶ See Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1114 (2003).

⁵⁷ See, e.g., *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1201 (2004).

⁵⁸ (2006) Lu Gao Min 3 (Zhi) Zhong No. 110.

⁵⁹ See, e.g., *Copyright Act 1968* (Cth) s 10 (Austl.); *Copyright Act 1994*, s 226 (N.Z.).

discrimination should not be considered as TPMs protected under the Copyright Law.

The second way TPMs can be misused is when the manner of their implementation violates the laws or turns out to be inappropriate, such as measures taken to conduct unauthorized surveillance, monitoring, or punishment (e.g., implanting a virus). Under the traditional doctrine of prohibition against rights abuse in China, the manner of exercising rights relating to the TPMs should be legal and appropriate.⁶⁰ For instance, the widely accepted exemption of “protection of personally identifying information” allows users to circumvent a TPM if the measure is “collecting or disseminating personally identifying information reflecting the online activities of a natural person” without any notice or opt-out mechanism.⁶¹ This exemption can be considered as a deterrent against violating laws related to personal information protection. However, as Professor Peter Yu noted, the scope of this exemption is still too limited, and there have been calls for more expansive protection of privacy.⁶² Prohibition against violating the laws based on misuse can serve as a broad means for preventing the legal protection of illegal TPMs.

Moreover, TPMs should only be defensive, not offensive in nature,⁶³ as they should not harm “the public interest, or the lawful rights and interests of others.”⁶⁴ As stated in the *Explanations on the RPRCIN*,⁶⁵ technological measures that threaten the security of a computer system or network — for instance, logic bombs in which a malicious computer algorithm is used to destroy the operating system of the computers of infringing users — would disrupt the normal order of network transmission and should be prohibited. Moreover, Article 32(3) of the Guiding Opinion also specifies that TPMs used to damage the operating systems of the computers of users of works, performances, sound recordings, or video recordings without permission should not be regarded as technological measures protected by the Copyright Law. A misuse doctrine can therefore serve as a supplementary addendum to the otherwise heavily restrictive rules around TPMs.

⁶⁰ 2020 Copyright Law, *supra* note 1, art. 4; Civil Code, *supra* note 17, art. 132.

⁶¹ 17 U.S.C. § 1201(i).

⁶² See Peter K. Yu, *Anticircumvention and Anti-Anticircumvention*, 84 *DENV. U. L. REV.* 13, 39 (2006).

⁶³ See Huijia Xie, *The Regulation of Anti-Circumvention in China*, 54 *J. COPYRIGHT SOC'Y* 545, 553 (2007).

⁶⁴ Civil Code, *supra* note 17, art. 132.

⁶⁵ See *EXPLANATIONS ON THE RPRCIN*, *supra* note 30, at 19.

CONCLUSION

China will find it daunting to realize a well thought out system with a balancing mechanism for anti-circumvention. Until China finds a balanced approach, there are likely few options other than to resign to the fact that the protection of TPMs remains inconsistent. For the time being, however, other liabilities, such as liabilities for copyright infringement and unfair competition, will provide the space for more equity in circumvention cases.