THE STATUS OF THE OBJECT OF COPYRIGHT: RESEARCH ON THE SYSTEM OF WORKS PROTECTED BY THE AMENDED CHINESE COPYRIGHT LAW

by XIAOQING FENG* *and* LIXIAN CONG**

I. INTRODUCTION

The copyright system is the product of science and technology as well as commodity economic development. The copyright system a country adopts is based on copyright legislation and its improvement. The change and reform of that system is a process of modernization in response to technological development, especially the development of information network technology and the social economy.

The establishment and improvement of the Chinese copyright system is no different. The development of that system began with the implementation of reform and opening-up policies in the late 1970s. With the establishment of a planned commodity economy, China finally introduced the first copyright law ("Copyright Law") on September 7, 1990. Implemented on June 1, 1991, that law has played an important role in protecting the interests of authors and other copyright owners, encouraging creations, promoting the dissemination of works, and the development and prospering of Chinese culture and science.

However, with the establishment of a socialist market economy, the development of information network technology, and the accession to the World Trade Organization, some provisions of the Copyright Law 1990 could no longer adapt to the needs of the new realities. In such circumstances, China adopted the first revision of the Copyright Law on October 27, 2001, further improving the copyright system. As for the second revision of the Copyright Law on February 26, 2010, that amendment largely stemmed from the United States' complaint to the World Trade Organization. That revision mainly modified Article 4 and added Article 26 concerning the copyright pledge. After the implementation, China faced a

*Professor and Director of the Institute of Intellectual Property Law, School of Civil, Commercial, and Economic Law, China University of Political Science and Law; Jingtian Scholar Honorary Professor, East China University of Political Science and Law; Vice-President, China Intellectual Property Law Research Association; Visiting Scholar, University of British Columbia, Vancouver, Canada; Doctor of Law, Peking University, Beijing, China. The author can be contacted at fengxiaoqingipr@sina.com.

**Corresponding Author; Professor and Dean of Intellectual Property School, East China University of Political Science and Law. The author can be contacted at conglixian@sina.com.

new economic and social environment, especially regarding the need to strengthen copyright protection.[1] As a result, improvements in the level of protection have become an important focus of the implementation of the Chinese copyright system.

On November 11, 2020, the 13th Standing Committee of the National People's Congress ("Standing Committee") passed the Decision on the Revision of the Copyright Law of the People's Republic of China at its twenty-third meeting. The law was revised based on China's changing national conditions. Entered into effect on June 1, 2021, the amended law optimized the copyright system, improved the level of protection throughout the country, and achieved a better combination of internationalization and localization. Due to its length, this Article mainly discusses the provision regarding the works in the Copyright Law 2020. Where appropriate, the discussion also covers related clauses.

II. THE CONCEPT OF THE WORK

A work is the object of copyright; it is one of the most important concepts in copyright law. Because a work is what copyright law protects, there will be no copyright without a work. This Part discusses some basic issues concerning how the work needs to be stipulated in national copyright laws.

A. The Evolution of the Legislative Models of the Chinese Copyright Law

With regard to the concept of the work,[2] there are generally two legislative models: the formula model and the enumerative model. The former gives a clear definition of the work so that people can master the meaning of the work in the abstract. The latter, by contrast, lists the types of works that are to be protected. Both models have advantages and disadvantages. One possible way to benefit from these advantages while reducing disadvantages is to combine both models. The Chinese Copyright Law has taken this approach.

Before the adoption of the current Copyright Law, the work was defined in the Regulations for the Implementation of the Copyright Law ("Implementing Regulations"),[3] rather than in the Copyright Law. In

[1] *See generally* Lihua Yang, *The Latest Progress of China's Copyright System and Its Judicial Application and Improvement*, ACAD. J. ZHONGZHOU, no.7, 2021, at 56.

[2] *See generally* Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter,* 78 U. PITT. L. REV. 17 (2016).

[3] The Implementing Regulations, promulgated by the State Council, are administrative regulations in legal nature. In judicial practice, they can be used as the basis for applicable law.

China, the legislative effect of the Implementing Regulations is lower than that of the law. The current Copyright Law changes this legislative practice by clearly defining the concept of the work in Article 3. This adjustment was made due to the fact that the work is one of the most important concepts in copyright law and it is necessary to define this concept on a higher legislative level.[4] The next sections will discuss the details of this amended provision.

B. The Definition of the Work

As the object of copyright, the work is the foundation of copyright protection. Therefore, it is important to clarify the definition of "work". As mentioned earlier, the provision on the definition of the work has combined the formula and enumerative models. With respect to the former, Article 3 states: "The work mentioned in this law refers to the intellectual achievements in the fields of literature, art, and science which are original and can be presented in a certain form." From this provision, it can be seen that some essential conditions should be met before a work receives copyright protection: (a) the work belongs to the field of literature, art, or science; (b) has originality; (c) can be manifested in a certain form; and (d) embodies intellectual achievements. This Part analyzes the first requirement, along with the amendment of the Copyright Law 2010. The next three Parts discuss the other requirements.

Under copyright theory, the work protected by copyright should belong to the field of literature, art, or science. Such a requirement is due to the fact that the work comes from the author's creative activities, and these activities come from the fields of literature, art, and science.[5] In fact, this requirement draws a line between the subject matter protected by copyright law and the subject matter protected by other intellectual property laws, such as trademark law and patent law.

It is important to point out that the revision process explored the language concerning "the fields of literature, art, and science." The Copyright Law 2010 extended protection to works in the fields of "literature, art, natural science, social science, and engineering technology."[6] In the

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[4] The revision of other intellectual property laws in China have also reflected the view that "important concepts should be stipulated in the basic laws." For example, in the third revision of the Patent Law in 2008, China, for the first time, moved the definitions of inventions, utility models, and industrial designs from the Regulations for the Implementation of the Patent Law to Article 2 of the Patent Law.

[5] The Berne Convention for the Protection of Literary and Artistic Works also includes provisions on the scope of protection.

[6] The Copyright Law 2010 stated that works fell under the categories of "literature, art and natural science, social science, engineering technology, etc." Such language decomposed the field of "science" into "natural science, social science,

second review conducted by the Standing Committee on August 8, 2020, some of the Committee members proposed that the definition of the work in the proposed modified language, where the protected works were limited to the fields of "literature, art, and science," could not cover works in the field of technology.[7] Based on this opinion, the Draft of the Second Review added the language "and so on" after "the fields of literature, art, and science." The added language means that works in other areas should also receive copyright protection. However, the final version of the Copyright Law did not adopt this language. The Standing Committee believed that the scope of the "fields of literature, art, and science" is broad enough to cover all the works that the Copyright Law is to recognize, and there is no need to add other fields.

As to the enumerative model, Article 3 of the Copyright Law 2020 stipulates that works in the Copyright Law include the following: (1) written works; (2) oral works; (3) music, drama, *quyi* (spoken and singing art), choreographic, and acrobatic art works; (4) works of fine art and architecture; (5) photographic works; (6) audiovisual works; (7) drawings of engineering designs, product designs, maps, sketches, and other graphic and model works; (8) computer software; and (9) other intellectual achievements conforming to the characteristics of the work. Compared with the Copyright Law 2010, the current law introduced two key changes. First, the phrase "cinematographic works to which are assimilated works expressed by a process analogous to cinematography" was modified to "audiovisual works." Second, the last category "other works as provided for in laws and administrative regulations" was modified to "other intellectual achievements conforming to the characteristics of the work." The reasonableness of these modifications will be discussed below.

It is worth pointing out that the categorization of works in the provision on the types of works has changed through the amendments. In the first enacted version in 1990, works of fine art and photographic works were classified into a single category. By contrast, in the 2001 version, photographic works were listed as an independent type of works, while works of fine art were placed in the same category as works of architec-

and engineering technology." Among these sub-fields, "engineering technology" should belong to the category of "natural science." To highlight the unique status of engineering works, such as product design drawings and engineering design drawings, the Copyright Law 2010 categorized engineering works as an independent type of work.

[7] Nat'l People's Cong. People's Republic China, Report of the Constitution and Law Committee of the National People's Congress on the Amendment to the Copyright Law of the People's Republic of China (draft) (Nov. 11, 2020), http://www.npc.gov.cn/npc/c30834/202011/4aae8f3d0293467f889e320e1cbfee13.shtml.

ture. Such modifications were designed to separate works based on their essential attributes while facilitating proper institutional arrangements.

C. Originality Requirements and Their Definition

Originality is recognized as a necessary, or even the most important, condition for copyright protection.[8] Works that do not have original elements cannot obtain copyright protection. Originality reflects the true value of the work protected in copyright law, which encourages cultural innovation, increases incremental knowledge, and promotes cultural progress and development.[9]

In copyright law, the originality requirement has not only theoretical significance but also important practical value. For example, in copyright judicial practice, especially in copyright infringement cases, the originality of the works of both the plaintiff and the defendant is key to determining the outcome of a case.[10] If the plaintiff's work lacks originality, the claim can be immediately rejected. For the defendant, even if his or her work is original, it does not necessarily mean that there will be no infringement. The creation of a derivative work without the permission of the owner of the underlying work still constitutes copyright infringement.

Although originality is of great significance to the recognition of a work under copyright law, there is no definition of originality in copyright legislation. It is generally believed that in copyright theory, countries with a civil law system emphasize the personalized characteristics of the creative works and even a certain degree of creativity. By contrast, countries with a common law system emphasize remunerative efforts and investments, with the doctrine of "sweat of the brow" being cited as one of the best examples. However, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, the United States Supreme Court emphasized the standard of independent creation along with a minimal degree of creativity.[11]

As far as Chinese copyright legislation is concerned, although the current Copyright Law requires originality and recognizes it as a key component of the protected work, the question as to what originality is awaits answers from judicial practice.[12] Based on the importance of originality in

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[8] *See generally* Justin Hughes, *Restating Copyright Law's Originality Requirement*, 44 COLUM. J.L. & ARTS 383 (2021); Lihua Yang, *Reconsidering China's Copyright Object System*, LAW SCI. MAG., no. 8, 2013, at 20.

[9] *See* XIAOQING FENG, COPYRIGHT LAW 48-49 (2010).

[10] For a related case, see Liu v. Baotou People's Gov't, (2008) Min Shen No. 47-1 (Sup. People's Ct.) (disputes over copyright infringement and unfair competition).

[11] 499 U.S. 340 (1991).

[12] *See* (2013) Min Shen Nos. 1262-71, 1275-82, 1327-46, 1348-65 (Sup. People's Ct.), set out in the 2013 Annual Report on Intellectual Property Cases of the Supreme People's Court.

copyright protection, we recommend summarizing judicial practical experience, refining the judicial theory on the identification of originality, and enriching the Copyright Law in the next revision.

D. The External Form of the Work: Fixed, Reproducible, or Presented in a Certain Form?

According to Article 2 of the Implementing Regulations, the works protected under the Copyright Law shall be "reproduced in a tangible form." Under Article 5, Paragraph 1 of the amended draft for review released in June 2014 ("2014 Draft"), the work referred to in the Copyright Law means, *inter alia*, subject matter that can be fixed in a certain form.[13] This definition seems to be drawn from the Implementing Regulations and matches the concept of "reproduction" in those Regulations.[14] Under this definition, it can be considered that the protection for the work is essentially based on the fact that the work can be "reproduc[ed] in a certain form."

Article 3 of the current Copyright Law changes the words "reproduction in a tangible form" to "being presented in a certain form." We tend to think that the rationale behind this modification is that technology determines the form of fixation. The adopted language therefore reflects the recognition that the form of the work cannot be limited to reproduction and may include forms of presentation that go beyond reproduction. This revision indicates the needs and characteristics of efforts to modernize Chinese copyright law. From the relationship between technological development and copyright protection, the copyright system itself is the product of technological development, especially the development of printing and communication technologies. Because technological development will lead to changes in the forms of creation, storage, communication, and utilization, copyright law needs to expand its protection, including the scope of the protected works, in a timely manner.[15]

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[13] Article 3 of the draft amendment to the Copyright Law, published by the National Copyright Administration in 2012, also requires works to be "fixed in a certain form."

[14] The definition of the concept of "reproduction" is indirectly reflected by the provision on the reproduction right. Paragraph 3, Article 13 of the 2014 Draft stipulates that the right of reproduction means the right to fix the work on a tangible carrier by means such as printing, photocopying, recording, duplicating, and digitizing.

[15] From the perspective of comparative law, the general provision on the object of copyright in § 102 of the U.S. Copyright Act requires that the copyrighted work be original and fixed in a tangible medium of expression that is now known or later developed, from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. This provision also makes clear that the form of representation of the work is not limited to the means

In addition, it is worth noting the reason why the current Copyright Law changes the words "reproduction in a tangible form" to "being presented in a certain form". On July 30, 2020, the Constitution and Law Committee of the National People's Congress reconsidered the draft revision of the Copyright Law. Some committee members proposed that oral works protected by the Copyright Law need not be reproduced in a tangible form and thus recommended to revise the phrase. The Committee adopted this opinion. Therefore, the current Copyright Law uses the phrase "being presented in a certain form" instead of "reproduction a tangible form".[16]

E. The Essence of the Work: Intellectual Achievements or Intellectual Expressions?

Based on copyright law principles, works protected by copyright law embody intellectual achievements. Because the so-called intellectual achievements are knowledge products generated from the author's creative acts or intellectual labor, Article 3 of the Copyright Law 2020 defines the concept of the work based on whether the work embodies "intellectual achievements." However, during the revision process, the 2014 Draft defined the legal attributes of the work as "intellectual expressions." The reason why the draft adopted the phrase "intellectual expressions" was due, to some extent, to the idea-expression dichotomy — that is, copyright protection is limited to the expression of an idea in the work, rather than the idea itself. However, the concept of "intellectual expression" is still abstract. In contrast, the phrase "intellectual achievements" covers the essential attributes of the work and better reveals that copyright works are the products of the authors' original labor.

II. THE RE-DEFINITION OF THE TYPES OF WORKS

The types of copyrightable works are clearly enumerated in the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention")[17] and many national copyright and related laws.[18] The advantage of the enumerative model is to provide clear guidelines and norms for determining copyrightability and to avoid divergences in judicial practice due to different understandings of the object of copyright. From the

of fixation. This kind of almost open regulation can keep copyright law flexible enough to respond to technological development.

[16] *See* Introduction and Interpretation of the Copyright Law of the People's Republic of China 310 (Wei Huang & Leiming Wang eds., 2021).

[17] *See* Berne Convention for the Protection of Literary and Artistic Works art. 2(1), Sept. 9, 1886, 1161 U.N.T.S. (revised at Paris July 24, 1971).

[18] *See* French Intellectual Property Code art. L. 112-2, German Copyright Law art. 2(1), Italian Copyright Law art. 2 , and 17 U.S.C. § 102(a).

comparison of various national laws, it can be seen that there are major differences in the classification of works and the specific content of protection even though most countries, as members of the Berne Convention, are obligated to extend protection to the works covered by the Convention. Based on the need to combine localization and internationalization of copyright law, many countries have introduced localized features in defining the object of copyright.

A. Legislative Model for the Types of Works in the Chinese Copyright Law

Apart from the formula model, the Chinese Copyright Law adopts the enumerative model to specify the types of works that enjoy copyright protection. This classification is generally divided according to factors such as the methods of creation and communication and the purpose of creation. For some types, it is difficult to avoid overlaps. As mentioned earlier, works of photography and fine arts were listed in the same category in Article 3 of the Copyright Law 1990 because both are artworks. In subsequent revisions, photographic works were maintained as an independent type, and architectural works, as artworks, were categorized in the same category as works of fine arts, even though this modification did not deny that photographic works are also artworks.

In addition to the incorporation of the list of works provided in the Berne Convention, there are certain local characteristics regarding copyrightable works in the Chinese Copyright Law. Such characteristics are reflected in the protection for *quyi* and acrobatic arts.[19] These two types of works are included in the scope of copyright protection because of China's excellent traditional cultural art and its modern development, which is conducive to promoting traditional culture with modern technology and communication methods and encouraging the creation and dissemination of works with ethnic and local characteristics.

B. The Issue of Independence of Works of Applied Art

Regarding the protection of works of applied art, Article 2 of the Berne Convention clearly includes these works in the object of copyright. Article 2(7) requires Member States to protect this type of work in a certain manner through domestic legislation. Article 7 further stipulates that the term of protection for works of applied art shall last at least twenty-five years. There exists no concrete provision as to the protection of works of applied art in the Copyright Law 1990.

Not long after the implementation of the law, China joined the Berne Convention on October 15, 1991. Because the Copyright Law 1990 did

[19] *See* Implementing Regulations art. 4.

not reach the minimum protection standards specified by the Convention, the State Council, in 1992, issued the Regulations for the Implementation of International Copyright Treaties, which aimed to enable foreign authors in China to enjoy the protection standards provided by the Convention. In relevant areas, including works of applied art, the protection of foreign works exceeds the protection for Chinese nationals. Article 6 of the Regulations states: "The term of protection of foreign works of applied art is twenty-five years. For works of fine art (including animated image design) for industrial products, the provision of the preceding paragraph shall not apply." This kind of "super national treatment" has caused extensive disputes and critiques, and the Regulations can only serve as a temporary means to make up for the gap between domestic law and the international convention.

Since the implementation of the Copyright Law 1990, the status of works of applied art has not been clarified. In view of the increased disagreements in judicial practice, the third revision of the Copyright Law seeks to address the protection for works of applied art. In 2012, the National Copyright Administration announced two versions of the draft of the Copyright Law, in which works of applied art were listed as an independent type of works in parallel with works of fine art.[20] The 2014 Draft adopted the same approach under which works of applied art have been categorized as an independent type of work.[21] However, the Copyright Law 2020 did not adopt the provisions provided in the 2014 Draft. There remains no provision for works of applied art.

The lack of such a provision in the Copyright Law is not only detrimental to the protection of works of applied art and the development of related industries, but will also create divergent standards in judicial practice. From the perspective of protecting works of applied art, although the Chinese Patent Law allows industrial designs to be protected as patents,[22] and therefore offers some protection to works of applied art, such protection cannot replace copyright protection, especially considering the longer term of protection and looser protective conditions under copyright law. With the current economic and social development in China, people's material and cultural living standards continue to rise while the demand for works of applied art increases. Thus, there is a huge market for the industry of applied arts. The recognition of works of applied art in the Copyright Law can therefore better encourage the creation of such works and promote the development of the corresponding industry.

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[20] *See* Copyright Law Amendment in 2012 (first draft) art. 3, ¶ 2(9).

[21] *See* 2014 Draft art. 5, ¶ 2(9).

[22] *See* Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Oct. 17, 2020, effective June 1, 2021), arts. 2, 11, 27.

As far as the judicial protection for works of applied art is concerned, courts have been deeply divided over whether protection should be extended, due to a lack of clear legislation and the different understandings of the classification and the nature of such classification.[23] These differences lie in the nomenclature of the work involved, the different understandings of the relationship between works of applied art and works of fine art,[24] and the conditions for copyright protection for works of applied art.[25]

It is particularly noteworthy that works of applied art are considered as works of fine art in judicial practice and the conditions of copyright protection are made in accordance with those for works of fine art. In some cases, the courts have concluded that "works of applied art are protected in its artistic sense; that is, the original artistic model or art pattern is what the copyright law protects for works of applied art."[26] Since the term of copyright protection for works of applied art is generally shorter than the protection for works of fine art, the term of protection for the former will greatly increase when these works are incorporated into the same category as works of fine art. Thus, it would be unwise to incorporate works of applied art into that category.

Based on the above discussion, we recommend that in the next revision of the Copyright Law, the status of works of applied art needs to be clarified so that those works can be recognized as an independent type of work listed as the object of copyright.[27]

C. From Cinematographic Works and Works Created by a Process Analogous to Cinematography to "Audiovisual Works"

The emergence of cinematographic works is the product of film production and communication technology. With the development and ad-

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[23] *See* FENG, *supra* note 9, at 70-71; CHENGSI ZHENG, COPYRIGHT LAW 105 (1997).

[24] *See* Hu v. Qiu, (2001) Gao Zhi Zhong No. 18 (Beijing High People's Ct.) (civil judgement) (dispute over infringement of fashion design copyright); *see also* Xiaoqing Feng & Jicun Fu, *Independence of Works of Applied Art in Copyright Law*, LEGAL STUD., no. 2, 2018, at 136.

[25] *See* (2016) Yue 20 Min Zhong No. 1574 (Zhongshan City Interm. People's Ct.) (civil judgment); *see also* Feng & Fu, *supra* note 24.

[26] *See* A Wood Indus. (Beijing) Co. v. A Home Appliance (Shanghai) Co., (2018) Min Shen No. 6061 (Sup. People's Ct.) (copyright infringement dispute); *see also* (2019) Chuan Zhi Min Zhong No. 176 (Sichuan High People's Ct.) (civil judgment) (stating that works of applied art are protected only for their artistry).

[27] From the view of foreign legislative examples, some national copyright laws have clearly classified the works of applied art as a kind of independent work. See French Intellectual Property Code, L 112-2, German Copyright Law art. 2(1), and Korean Copyright Law art. 4.

vancement of audiovisual technology, "works created by a process analogous to cinematography," such as television and video works, also emerge. Article 3 of the Copyright Law 1990 extends protection to "cinematographic, television, and video works." When the law was amended in 2001, China borrowed the phrase "works created by a process analogous to cinematography" from Article 2(1) of the Berne Convention. In the latest revision, how to reform the system for protecting cinematographic copyright was a hotly debated topic. In the current Copyright Law, the language "cinematographic works and works created by a process analogous to cinematography" has been modified to "audiovisual works." The rules for the ownership of copyright in this type of work has also been reformed.

In Article 3 of the Copyright Law 2020, the concept of "cinematographic works and works created by a process analogous to cinematography" was replaced by that of "audiovisual works." Although Article 3 of the Copyright Law 2020 adopted the new term, this term will be further defined in the Implementing Regulations, based on the legislative model of Chinese copyright law. During the revision process, the 2014 Draft directly defines the types of works recognized in the law.[28] Compared with the Implementing Regulations,[29] there is no requirement of "being recorded on some material" in the concept of audiovisual works. We find this modification reasonable and believe it should be adopted when the Regulations are amended the next time. With the development of audiovisual technologies, works created by a process analogous to cinematography are not necessarily recorded on some material but can be achieved by other technical means. For example, the currently popular online games can be considered as audiovisual works, which are not filmed on some material.

In addition, it is worth noting that the nomenclature of "audiovisual works" adopted in the Copyright Law 2020 is of great significance. Due to the development of technology, the scope of audiovisual works is expanding. The language "cinematographic works and works created by a process analogous to cinematography" is therefore not sufficient to fully reflect the characteristics of such works, and the concept of audiovisual works can adapt to the needs of the development of audiovisual technology, not to mention the existence of the Treaty on the International Registration of Audiovisual Works.

Finally, the copyright ownership of audiovisual works is an important concern in this revision. Before the promulgation of the current Copyright Law, the ownership of the copyright in audiovisual works was uniformly

[28] *See* 2014 Draft art. 5, ¶ 2.
[29] *See* Implementing Regulations art. 4.

regulated.[30] Article 17 of the current Copyright Law classifies audiovisual works into two categories: (1) film and television works; and (2) audiovisual works other than the former. For the former, this provision stipulates that "the copyright shall be enjoyed by the producer, but such authors as the screenwriter, director, photographer, lyricist, and composer shall enjoy the right of authorship and shall be entitled to remuneration in accordance with the contract signed with the producer." For the latter, Article 17 stipulates that "the ownership of copyright shall be agreed upon by the parties concerned; in the absence of such an agreement or when such an agreement is not clearly prescribed, such ownership shall be enjoyed by the producer, but the author shall enjoy the right of authorship and the right to remuneration." At the same time, this article follows the language in the old provision, which stated that "the author of audiovisual works such as plays, music, and other works that can be used alone shall have the right to exercise the copyright alone." The rationale behind this modification lies in the need to better adapt to the market requirements of audiovisual works, considering the costs and risks involved in the creation of different types of audiovisual works. To be specific, the creation of films and television series often involves huge investments, and the producer needs to bear greater market risks. It is therefore necessary to stipulate in the law that the copyright belongs to the producer. As for other audiovisual works, more consideration should be given to the principle of autonomy of meaning, and the full utilization of such works should be realized through marketization.

III. DISAGREEMENTS OVER AND THE ADOPTION OF THE CATCH-ALL PROVISION

A. The Concept and Significance of the Catch-all Provision

The catch-all provision regarding the types of works in the Copyright Law is the clause placed in the last paragraph following the list of the types of works to cover those works that are not listed and to allow the copyright law to maintain flexibility when facing complex situations. The significance of the catch-all language is to provide guidance on copyright protection in judicial practice. Where there is a dispute over the qualifications for a copyrightable work, the catch-all clause can be used to resolve the problem easily and timely. Therefore, the provision reflects how the amended law responds to the practice of copyright protection. Because of its unique role, the catch-all clause has been included in the provision regarding the types of works since the adoption of the Copyright Law 1990.

[30] *See* 2014 Draft art. 15.

B. Improvement of the Catch-all Clause: From "Other Works Stipulated in Laws and Administrative Regulations" to "Other Intellectual Achievements Conforming to the Characteristics of the Work"

Before the amendment of the Copyright Law, the language used in this area was "other works stipulated in laws and administrative regulations." The Copyright Law 2020 changed the language to "other intellectual achievements conforming to the characteristics of the work."[31] It can be argued that the old language creates limitations for the catch-all clause, because the list of the types of works will be a closed list when other laws or administrative regulations do not prescribe other types of works. Moreover, other laws and administrative regulations generally do not specify what constitutes works protected by copyright. The old language therefore played a limited role.

During the revision process, there was a hot and controversial debate about how to improve the catch-all clause regarding the types of works. In general, there are two opposing views. The first is that this revision is reasonable considering that it can help overcome the shortcomings of the list covering the object of copyright and adapt the law to the needs of judicial practice. Based on the amended law, the judge could, on a case-by-case basis, conclude whether the subject matter in question is qualified to be recognized based on the characteristics of the work. This approach greatly enhances the flexibility of judicial judgment and enables the law to better cope with the problem that the object of copyright is expanding with technological development while the enumerated types of works remain limited.[32] An opposing view believes that the abovementioned language violates copyright law principles, causing inappropriate expansion of the object of copyright and inconsistent decisions on the qualifications for the subject matter involved.[33]

The revision of the original language is not only necessary but also reasonable in theory. If the intellectual achievements conform to the characteristics of the work, they should be deemed to be within the object of copyright. The problem one needs to pay attention to is how to prevent judges from abusing discretion in copyright judicial practice and from arbitrarily expanding the object of copyright. We therefore suggest concluding and refining the basic principles on the application of the catch-all clause by summarizing judicial practice experience. For example, the catch-all

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31 *See* Copyright Law 2020 art. 3(9).

32 For relevant views, see Shan Sun, *The Applicable Mechanism for the Catch-all Provision on the Types of Works in Copyright Law*, INTELL. PROP., no. 12, 2020 at 53.

33 For relevant views, see Yinliang Liu, *The Right and Wrong Choice of the Copyright Catch-All Clause*, LAW. SCI., no. 11 2019, at 118.

clause can only be considered to apply when the subject matter cannot be incorporated into the listed types of works. In the case of other intellectual achievements conforming to the characteristics of the work, the issue concerning copyrightability should be determined based on a combination of both the case and the balance of private rights and the public interest. The reason is that some intellectual achievements are original and are in line with the characteristics of the work, but incorporating them into the scope of covered works will go against the public interest. These works should therefore be excluded from the object of copyright. This is the case of Article 5 of the Copyright Law 2020, which lists those subject matters that are not suitable for copyright protection.

IV. COPYRIGHT PROTECTION FOR TWO TYPES OF SPECIAL WORKS

The Chinese Copyright Law, from the first statute enacted in 1990 to the current version, provides that the State Council separately promulgates regulations for copyright protection for two types of works: folklore and computer software.[34] These two types of works have special features, and it is difficult to make direct regulations under the current Copyright Law.

Folk literary and artistic works involve creations developed gradually and passed down through generations by certain ethnic groups or social communities in a country. Reflecting the history, environment, customs, and psychological features of these groups or communities, these works consist of unique components of traditional cultural heritage and are concentrated expressions of the culture, social characteristics, and value standards of the ethnic groups or social communities.

Compared with general works, folk literature and art are unique. For example, the author is unidentified, but the work is believed to be created by an ethnic or regional social group. The creative process is always continuous and slow, and the work is passed down through generations and thus inheritable. That work is localized and passed on within the internal ethnic group or social community due to the fact that it is affected by elements such as the community's living environment and ideological concepts.

As is known to all, China is an ancient civilization with five thousand years of history. It produces colorful folk literature and art, but because of the lack of protection, the interests of the creators of these works have not been safeguarded enough. In addition, folk literary and artistic works have been impacted by modern communication technology and face po-

[34] *See* Copyright Law 2020 arts. 6, 64. Article 64 also includes the protection measures for the right of information network transmission.

tential dangers. Therefore, a legal system for offering civil protection to folk literature and art should be established without delay.

Folk literary and artistic works are offered copyright protection in the Copyright Law 1990. However, after thirty years of development, the State Council still has not developed administrative regulations. Although the reasons are multifaceted, the need for a greater understanding of these works cannot be ignored,[35] it remains necessary to enact these regulations. While the concept of intangible cultural heritage can cover folk literature and art, which are protected under the Law on Intangible Cultural Heritage, the value of these regulations lies in the public interest rather than the protection of private rights. A further issue that the Copyright Law needs to deal with concerns the clarification and protection of this kind of works as private rights in the Copyright Law.

The second type of work that the State Council separately promulgates regulations is computer software, whose protection is different from that of folk literary and artistic works.[36] As early as June 4, 1991, the State Council issued the Regulations for the Protection of Computer Software Protection ("Software Regulations") in accordance with the Copyright Law 1990. The Software Regulations were amended in 2002 and 2013. According to Article 3 of the Regulations, computer software includes computer programs and documents. The content of the Software Regulations is similar to the Copyright Law in many ways. During the copyright law revision process, there were disagreements over whether the Software Regulations need to be repealed and replaced by provisions in the Copyright Law. Professor Mingde Li of the Chinese Academy of Social Sciences, who was in charge of one of the three expert drafts, proposed to abolish the Software Regulations and introduce relevant provisions on the protection of computer software and its restrictions in the revised Copyright Law.[37] Although the early versions of the amendment draft supported this proposal, the finally adopted Copyright Law maintains the original legislative language — that is, there are no specific provisions on the protection of computer software in the Copyright Law, leaving such protection to the Software Regulations issued by the State Council. Under the current legislative pattern, it is necessary to amend the Regulations thoroughly, deleting the parts that overlap with the Copyright Law and

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[35] *See* Liying Ding, *The Copyright Protection of Folklore and Artistic Expression*, J. XIAMEN U. (PHIL. & SOC. SCI. ED.), no. 3, 2013, at 104.

[36] *See generally* Stacey, L. Dogan & Joseph P. Liu, *Copyright Law and Subject Matter Specificity: The Case of Computer Software*, 61 N.Y.U. ANN. SURV. AM. L. 203 (2005).

[37] *See* MINGDE LI ET AL., EXPLANATIONS ON THE EXPERTS' PROPOSAL FOR THE COPYRIGHT LAW 17-18 (2012).

focusing on the particularity of copyright protection for computer software.

V. CONCLUSION

The third revision of the Chinese Copyright Law started in 2012, taking almost ten years, which is a long time. To a certain extent, the revision process reflects the complexity of copyright legislation and the challenge of making adjustments to accommodate different interests. Overall, this amendment has improved the Chinese copyright system and enhanced copyright protection. Such improvements will help increase the enthusiasm for authoring and disseminating works, breed and develop culture and science with Chinese characteristics, and promote cultural industries. The latest revision covers many issues, including the subject and object of copyright, ownership and protection, usage and restrictions, and protection in the information network environment. From the discussion of Article 3 of the Copyright Law, it can be seen that the amended Copyright Law has further improved the object of copyright by clarifying the definition of the work and by improving the classification of works and the catch-all clause. In view of the importance of the object of copyright, it is believed that by improving Article 3, the Copyright Law has better harmonized the relationship among the author, other copyright owners, and the public. The amended law also better achieves the purpose of copyright legislation. Of course, with the development of technology, the protection of the object copyright in the Copyright Law will face new challenges, especially from artificial intelligence. For example, China's current Copyright Law has not answered whether artificial intelligence-generated works should be included in the scope of copyright protection.[38] In any case, no matter what new objects appear in the future, the copyright systems of various countries and regions, including the Chinese Copyright Law, can effectively deal with these challenges. The historical development of the copyright system has fully proved this point.

[38] *See* Lihua Yang, *Research on the Copyright of Artificial Intelligence Generated Objects*, MOD. L. SCI., no. 4, 2021, at 1021.