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**THE TERM OF PROTECTION FOR PHOTOGRAPHIC WORKS IN  
THE 2020 COPYRIGHT LAW: SOME REMARKS AND A  
PROPOSAL FOR REVISION**

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*INTRODUCTION*

Photographic work is one of eight categories of works clearly enumerated in the Copyright Law of China.<sup>1</sup> As early as the first Copyright Law enacted in 1990, “photographic work” is listed as a protected work.<sup>2</sup> The nature of photographic works as artistic works has been widely recognized today all over the world. However, photographic works have not been explicitly listed as protected works in the Berne Convention for the Protection of Literary Works until the 1948 Brussels text, and the duration of copyright protection for photographs has long been subjected to discriminatory treatment. This treatment can be attributed to the fact that at the early stage of the application of photographic technology, many people believed that “the skill required to produce the final picture may only be the simple manual operation of operating a shutter or pushing a button.”<sup>3</sup> Such a belief resulted in a lower level of protection for photographic works than that for most other works.

In many countries, the term of protection for photographic works used to be only ten to fifty years after the publication or making of the photograph.<sup>4</sup> As a compromise, the Berne Convention provides a term of protection that is significantly shorter than that of most other categories of works. Article 7(4) of the Berne Convention provides: “It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least

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<sup>1</sup> See 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), art. 3.

<sup>2</sup> See Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991), art. 3(4).

<sup>3</sup> SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 443 (2d ed. 2006).

<sup>4</sup> See JÖRG REINBOTHE & SILKE VON LEWINSKI, THE WIPO TREATIES 1996: THE WIPO COPYRIGHT TREATY AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY: COMMENTARY AND LEGAL ANALYSIS 116 (2002).

until the end of a period of twenty-five years from the making of such a work.” It means that a Berne Convention member is only required to provide protection for photographic works for twenty-five years from the time the work is completed. In contrast, Article 7(1) provides protection for works of natural persons for the life of the author plus fifty years. More importantly, Article 7(4) has not been modified and remains applicable today.

When China promulgated its first Copyright Law in 1990, China had not yet joined the Berne Convention.<sup>5</sup> But the legislature must have noticed the shorter term of protection for photographic works in the Berne Convention. Therefore, Article 21(3) of the 1990 Copyright Law provides the term of protection for published photographic works as fifty years after publication and the term of protection for unpublished photographic works as fifty years after the making of the photographs. Although the terms are longer than the minimum term of protection required by the Berne Convention, they are shorter than the term of protection provided in Article 21(1) of the 1990 Copyright Law for most other categories of works of natural persons, which is the life of the author plus fifty years.

In 2001, to join the World Trade Organization, China amended the Copyright Law to make it compliant with the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”). As the TRIPs Agreement does not extend the term of protection for photographic works, the 2001 Copyright Law did not change that term. Article 21(3) of the 2001 Copyright Law provides:

For a cinematographic work or a work created in a way similar to cinematography and a photographic work, the term of protection of the right of first publication and of the rights provided in subparagraphs (5) through (17)<sup>6</sup> of Article 10(1) of this Law shall be fifty years, expiring on December 31 of the fiftieth year after the first publication of such a work. However, any work that has not been published within fifty years after its creation shall no longer be protected by this Law.

This term of protection is usually shorter than the life of the author plus fifty years, except in exceptional cases where the work is not published until after the author’s death.

The WIPO Copyright Treaty (“WCT”), concluded in 1996 as a special agreement under Article 20 of the Berne Convention, provides the new term of protection for photographic works. Article 9 of the WCT, which

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<sup>5</sup> China submitted the letter of accession to the Paris Act of the Berne Convention on July 10, 1992. The Berne Convention took effect in China on October 15, 1992.

<sup>6</sup> Subparagraphs (5) through (17) of Article 10 provide the copyright owner’s property rights, including the right of reproduction, the right of distribution, and the right of performance.

covers the term of protection for photographic works, states: “In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.” Contracting parties shall therefore no longer apply the minimum term of protection of twenty-five years to photographic works. The remaining question is: What term of protection should a contracting party apply to these works? Although a clear answer can be obtained from the legislative history of the WCT (which Part I.A will analyze in greater detail), the treaty does not clearly define the new term of protection. That ambiguity on the face may have misled the Chinese legislature on the term of protection for photographic works.

When China decided to join the WCT in 2006, the legislature failed to revise the 2001 Copyright Law to extend the term of protection for photographic works. The term of protection of fifty years after the first publication remains in the Copyright Law until the newly revised Copyright Law took effect.

On November 11, 2020, the National People’s Congress adopted the Third Amendment to the Copyright Law. Article 23(3) of the 2020 Copyright Law provides a term of protection of fifty years after the first publication, which only applies to audiovisual works. For a photographic work of a natural person, the term of protection of the life of the author plus fifty years provided in Article 23(1) of the 2020 Copyright Law shall therefore apply.

Although the reason for the recent revision was not published with the 2020 Copyright Law, such revision is obviously attributed to the legislature’s realization that the provision on the term of protection for photographic works in the previous Copyright Law did not meet the WCT requirement and that the gap needs to be filled through the law’s revision. The new term of protection for photographic works, which is provided in Article 23, is in conformity with the WCT. Nevertheless, Article 65 of the 2020 Copyright Law qualifies the application of Article 23 to photographic works as follows:

A photographic work shall no longer be protected if the term of protection of its first publication right and the rights provided for in subparagraphs (5) through (17) of Paragraph 1 of Article 10 of this Law has expired before June 1, 2021, even if it is still within the period of protection in accordance with Paragraph 1 of Article 23 of this Law.

June 1, 2021 was the date on which the 2020 Copyright Law took effect, and Article 23(1) provides the term of protection of the life of the author plus fifty years for works of natural persons. The purpose of Article 65 is to achieve a smooth transition from the previous Copyright Law to the revised Copyright Law and to avoid violating the principle of *lex prospicit, non respicit* (the principle of non-retroactivity).

However, in drafting Article 65, the legislature seems to have ignored a key fact that the WCT came into force in China as early as 2007, and China has not extended the term of protection for photographic works since then. The adopted language casts some doubts on whether Article 65 is compliant with the WCT. This Article analyses the term of protection for photographic works in China and discusses the possible ways to revise Article 65.

*I. THE INFLUENCE OF THE WCT ON THE TERM OF PROTECTION FOR PHOTOGRAPHIC WORKS IN CHINA*

Article 9 of the WCT states: “In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.” On the surface, the content of this provision is very vague, since it only requires the contracting parties to cease to apply Article 7(4) of the Berne Convention, which sets a minimum of twenty-five years of protection for photographic works. Article 9 of the WCT, however, does not clearly define what the new minimum term of protection the contracting parties should apply to photographic works. The lack of a specific term of protection for photographic works in Article 9 might have been the main reason behind the Chinese legislature’s misunderstanding.

Although there is no official explanation on why China did not extend the term of protection for photographic works after it decided to join the WCT in 2006, it is possible that the legislature thought that the WCT only requires contracting parties not to apply the term of protection of twenty-five years to photographic works, and a contracting party is free to apply any term of protection if it is longer than twenty-five years. Since the 2001 Chinese Copyright Law provides a term of fifty years after the first publication of photographic works, which in most cases is longer than the term of twenty-five years after the making of photographic works, the legislature might have been convinced that the 2001 Copyright Law had already been fully compliant with the WCT, and there was no need to further revise the term of protection for photographic works.

In 2010, nearly three years after China joined the WCT, China revised the 2001 Copyright Law, deleting the first sentence of Article 4, which the WTO panel declared to be non-compliant with the TRIPs Agreement,<sup>7</sup> while adding a provision on the pledge of the copyright owner’s property rights.<sup>8</sup> The provision on the term of protection for photographic works, however, was not changed. Had the legislature realized that such a provi-

<sup>7</sup> See *Panel Report, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009).

<sup>8</sup> See Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010), art. 26.

sion was not compliant with Article 9 of the WCT, which requires a longer term of protection, it should have extended the term of protection for photographic works in the 2010 amendment.

A. *The Meaning of Article 9 of the WCT*

It is clear from the purpose of Article 9 of the WCT and from the documents and records of the 1996 Diplomatic Conference in Geneva, where the draft treaty was discussed, that photographic works should enjoy the same term of protection as other categories of works. During the negotiation of the draft treaty, “a clear opinion emerged that the protection of the photographic works should be of the same duration as the duration for literary and artistic works in general.”<sup>9</sup> To achieve this goal, Article 11 of the draft treaty (Article 9 in the finally adopted treaty), which covers the duration of the protection for photographic works, provides: “In respect of photographic works, the Contracting Parties shall apply the provisions of Articles 7(1), 7(3), 7(5), 7(6), 7(7) and 7(8) of the Berne Convention and shall not apply the provisions of Article 7(4).” Among the articles listed, Article 7(1) provides that the term of protection is the life of the author plus fifty years. Obviously, Article 11 of the draft treaty no longer requires special rules for photographic works in terms of the duration of protection. For the term of protection calculated on the basis of the life of a natural person, it should be at least the life of the author plus fifty years. At the Diplomatic Conference, the Delegation of Croatia proposed the following wording to replace the previous wording of Article 11 of the draft treaty: “In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.”<sup>10</sup> This wording was accepted by other delegations and became Article 9 of the WCT. The Delegation of Croatia explained that the wording had been changed for formal reasons and for the purpose of clarification and simplification.<sup>11</sup>

The new wording proposed by the Delegation of Croatia was clearly not to shorten the term of protection for photographic works, but to achieve the same effect as the previous wording with simpler language. As Article 7 of the Berne Convention is all about the term of protection, it is obviously too cumbersome to list all the paragraphs contained in Article 7 that may be applicable to photographic works after excluding the application of Article 7(4) to photographic works. From a technical standpoint, it is indeed better to only require contracting parties to not apply Article

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<sup>9</sup> *World Intell. Prop. Org., Summary Minutes, Main Committee I*, ¶ 116, WIPO Doc. CRNR/DC/102 (Aug. 26, 1997) [hereinafter *Main Committee I Minutes*].

<sup>10</sup> *World Intell. Prop. Org., Amendment to Article 11 of Draft Treaty No. 1: Proposed by the Delegation of Croatia*, WIPO Doc. CRNR/DC/35 (Dec. 10, 1996).

<sup>11</sup> See MAIN COMMITTEE I MINUTES, *supra* note 9, ¶ 813.

7(4) so that other paragraphs of Article 7 concerning the term of protection shall naturally be applied as appropriate.

Moreover, the WCT is a special agreement under Article 20 of the Berne Convention,<sup>12</sup> and its purpose is to “grant to authors more extensive rights than those granted by the Convention.”<sup>13</sup> Therefore, the purpose of the WCT to require contracting parties to not apply the shorter term of protection for photographic works granted in the Berne Convention is to make the term of protection for photographic works equal to that of other works, rather than continuing to make it shorter than the term of protection of other works. As the *WIPO Guide to Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms (WIPO Guide)* points out: “Since the application of Article 7(4) is excluded, the Contracting States are obligated to apply the general norms on the term of protection. This means the application of Article 7(1) if there is an individual author (at least, his life and fifty years after his death).”<sup>14</sup>

Some of the most cited treatises on international copyright treaties give the same explanation. For instance, Sam Ricketson and Jane Ginsburg declared: “the preclusion of article 7(4) makes article 7(1) the default position, thus entitling photographs to a minimum term of life plus fifty years . . . . Article 9 of the WCT thus ends the durational discrimination against photographs; one may infer from this a broader reception of photographs as full citizens of the world of literary and artistic works.”<sup>15</sup> Likewise, Jörg Reinbothe and Silke von Lewinski observed: “This means that the general minimum term of protection for photographic works is the life of the author plus fifty years after his death (Article 7(1) Berne Convention).”<sup>16</sup>

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<sup>12</sup> Article 1(1) of the WCT provides that “[t]his Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works.” WIPO Copyright Treaty art. 1(1), Dec. 20, 1996, S. TREATY DOC. No. 105-17, at 1 (1997).

<sup>13</sup> Article 20 of the Berne Convention, which covers special agreements among Union members, provides: “The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.” 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].

<sup>14</sup> WORLD INTELL. PROP. ORG., *WIPO GUIDE TO COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS* 211 (2003) [hereinafter *WIPO GUIDE*].

<sup>15</sup> RICKETSON & GINSBURG, *supra* note 3, at 576-77.

<sup>16</sup> REINBOTHE & VON LEWINSKI, *supra* note 4, at 116.

At the end of 2006, the National People's Congress of China decided to accede to the WCT,<sup>17</sup> and China submitted its instrument of accession to the World Intellectual Property Organization ("WIPO") on March 9, 2007. On June 9, the WCT entered into force in China,<sup>18</sup> and the accession has since had a significant impact on the term of protection for photographic works in the country.

*B. The Term of Protection for Photographic Works in China After Accession to the WCT*

As an international treaty, the Berne Convention requires member states to protect works originating in other member states. Article 5(1) provides: "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention." The "country of origin" for published works refers to the country of first publication; for unpublished works it refers to the country of nationality of the author.<sup>19</sup> Since most authors choose to publish their works in their own countries first, works originating in other member states in most cases refer to works of foreign authors. For brevity, works originating in other member states are hereinafter referred to as "foreign works."

Accordingly, when the WCT came into force in China on June 9, 2007, the country shall, in accordance with Article 9, provide corresponding protection for foreign photographic works. However, according to Article 13, whether a foreign photographic work can enjoy protection for the life of the author plus fifty years in China depends on whether the term of protection for photographic works has expired in accordance with the provisions in the Chinese Copyright Law on June 9, 2007.

Article 13 of the WCT, which covers application in time, provides: "Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty." Article 18(1) of the Berne Convention states: "This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection." Article 18(2) provides: "If, however, through the expiry of

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<sup>17</sup> Decision to Accede to the WIPO Copyright Treaty (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2006).

<sup>18</sup> *WIPO-Administered Treaties: Contracting Parties > WIPO Copyright Treaty*, WORLD INTELL. PROP. ORG., [https://wipolex.wipo.int/en/treaties/ShowResults?start\\_year=ANY&end\\_year=ANY&search\\_what=&code=ALL&treaty\\_id=16](https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=&code=ALL&treaty_id=16) (last visited Apr. 20, 2022).

<sup>19</sup> Berne Convention, *supra* note 13, art. 5(4).

the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.”

Clearly, to determine whether and how China shall provide protection to a foreign photographic work, it is necessary to follow a two-step test. The first step is to check whether or not the foreign photographic work has fallen into the public domain in the country of origin through the expiry of the term of protection. It needs to be noted that the wording of Article 18(1) of the Berne Convention is different from that of Article 18(2). Article 18(1) provides: “This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” However, it does not state: “This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection *that was previously granted by the country of origin.*”<sup>20</sup> This specific language in Article 18(1) means that “the term of protection” refers not to the term of protection granted by the country of origin prior to its accession to the Berne Convention, which might be shorter than the term required by the Berne Convention, but to the minimum term of protection required by the Berne Convention.<sup>21</sup> In accordance with Article 13 of the WCT, Article 18 of the Berne Convention also fully applies to all protections provided by the WCT. As a consequence, if a foreign photographic work has not yet fallen into the public domain in the country of origin through the expiry of the term of protection (the life of the author plus fifty years as required by the WCT) when the WCT entered into force in China on June 9, 2007, the first test for the enjoyment of a term of protection of the life of the author plus fifty years as required by the WCT is passed.

The second step is to check whether the foreign photographic work has entered the public domain in China on June 9, 2007 due to the expiry of the term of protection granted by the 2001 Copyright Law. (That term expires on December 31 of the fiftieth year after the first publication.) If that term of protection has not yet expired, China shall provide protection, and the term of protection shall be extended to the life of the author plus fifty years as required by Article 9 of the WCT.

On the contrary, if the term of protection for a foreign photographic work has expired on June 9, 2007 — for instance, the work was first published in 1950, and its term of protection expired in China in 2000 —

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<sup>20</sup> Emphasis added.

<sup>21</sup> See RICKETSON & GINSBURG, *supra* note 3, at 338; WIPO GUIDE, *supra* note 14, at 98.



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China is not obliged to revive the protection for the work and extend the term of protection to the life of the author plus fifty years. In other words, for a foreign photographic work that has entered the public domain due to the expiry of the term of protection in China before China's accession to the WCT, it will not be protected after the WCT took effect in China.

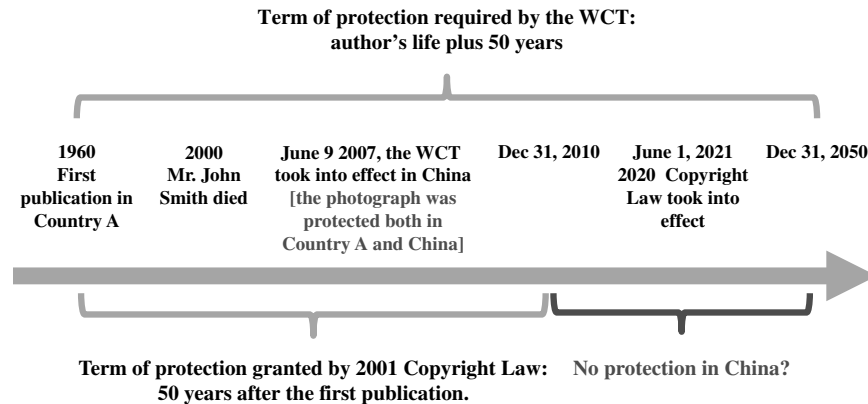
*C. Consequence of China's Failure to Amend the Copyright Law in 2007*

When China joined the WCT, the legislature did not make corresponding amendments to the term of protection for photographic works. The term of protection for photographic works remains fifty years after the first publication. It is not until June 1, 2021, the effective date of the 2020 Copyright Law, that the term of protection extends to the life of the author plus fifty years. The legislature's failure to amend the Copyright Law as soon as the WCT took effect in China in 2007 casts doubts on whether the Chinese Copyright Law fully complies with the WCT.

First of all, suppose on June 9, 2007, a photographic work created by a national of another WCT contracting party was still within the term of protection both in the country of origin and in China according to their respective copyright laws. At that time, the Chinese Copyright Law still set the term of protection for photographic works at fifty years after the first publication. That foreign photographic work, which the WCT protects, could only enjoy the term of protection of fifty years after its first publication, much shorter than fifty years after the author's death as required by Article 9 of the WCT. The discrepancy poses a real question of whether the Chinese Copyright Law was compliant with the WCT at that time.

To illustrate, suppose John Smith, a national of Country A (a WCT contracting party) published his photographic work in 1960 in Country A (the country of origin). He passed away in 2000. On June 9, 2007, the date on which the WCT came into force in China, his photographic work was still under protection in Country A (which lasts for the life of the author plus fifty years). In addition, his photographic work had not fallen into the public domain in China, where protection is claimed, because the term of protection granted by the 2001 Copyright Law did not expire until 2010 (fifty years after the first publication). As a result, on June 9, 2007, his photographic work should be protected in China in accordance with Article 9 of the WCT. It follows that China has the obligation to provide copyright protection to the photographic work for the life of John Smith plus fifty years. That is, the term of protection shall not expire until December

31, 2050, fifty years from the year after Smith's death.<sup>22</sup> If the protection of that photographic work in China ends on December 31, 2010, the fiftieth year after the first publication of the photographic work in 1960 (based on 2001 Copyright Law that was still effective on June 9, 2007), the duration of protection would be forty years shorter than what Article 9 of the WCT requires.



In theory, there exists an approach to resolve the problem resulting from the discrepancy between the 2001 Copyright Law and the WCT on the term of protection for photographic works. Article 142(1) of the General Principles of Civil Law provides: “The application of law in foreign-related civil relations shall be determined in accordance with the provisions of this chapter.” Article 142(2) provides: “Where the provisions of an international treaty concluded or acceded to by the People’s Republic of China differ from those of the civil laws of the People’s Republic of China, the provisions of the international treaty shall apply, except for provisions on which the People’s Republic of China has declared reservations.”

Suppose the sole heir of John Smith came to China in 2015 and filed a lawsuit against the unauthorized use of Smith’s photographic work by means of reproduction and distribution. Despite the fact that fifty-five years had passed since the first publication of the photographic work in 1960 and that the photographic work had exceeded the duration of protection for photographic works as provided in the 2001 Copyright Law (fifty years after the first publication), the court could, at least in theory, avoid

<sup>22</sup> Article 7(5) of the Berne Convention provides: “The term of protection subsequent to the death of the author and the terms provided by paragraphs (2), (3) and (4) shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.” Berne Convention, *supra* note 13, art. 7(5).

China's violation of international treaties in foreign-related litigation by directly applying Article 9 of the WCT and determining that the term of protection for Smith's photographic work in China should be the life of the author plus fifty years (expiring on December 31, 2050), rather than fifty years after the first publication (expired on December 31, 2010). This way, the court would be able to provide protection to Smith's photographic work and determine that the unauthorized use of that work by means of reproduction and distribution constituted copyright infringement.

However, that approach has a negative impact because it puts domestic works (works originating in China) on a disadvantaged position. If a Chinese photographer published his photographic work in China (the country of origin) in 1960 and filed a lawsuit for copyright infringement in 2015 for the unauthorized reproduction and distribution of the photograph by others, by 2015 fifty-five years had passed since the first publication of that photographic work in 1960, and the term of protection for that work expired in 2010 in China. Moreover, the very condition under which a Chinese court applies an international treaty in a civil case in accordance with Article 142 of the General Principles of Civil Law is that the case involves foreign-related litigation, in which the right owner is protected by an international treaty and the applicable law in China is different from the treaty language.

In the hypothetical case just mentioned, in which the right owner is a Chinese photographer who published his photographic work in China, the case is not about the protection of a foreign-related right. International copyright treaties do not provide protection for a work in the country of origin if the author is a national of that country.<sup>23</sup> These treaties only establish obligations for contracting parties to protect works originating in other contracting parties.<sup>24</sup> Because neither the Berne Convention nor

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<sup>23</sup> Article 5(3) of the Berne Convention provides: "Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors." Berne Convention, *supra* note 13, art. 5(3).

<sup>24</sup> See WORLD INTELL. PROP. ORG., GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 34 (1978) [hereinafter BERNE CONVENTION GUIDE] ("In short, the protection in the country of origin of a work where the author is a national of that country is governed exclusively by the national legislation; the Convention offers no protection whatsoever."); RICKETSON & GINSBURG, *supra* note 3, at 278 ("[A] Berne Convention work is not entitled to Berne minimum protections in its country of origin. Under article 5(1) and (3), so long as a member state affords the minimum to authors whose countries of origin are in *other* Union states, it can provide far less to authors whose work originate in that state.").

the WCT provides any protection to the Chinese photographer in China, the court would inevitably reject the Chinese photographer's claim by holding that his photographic work had fallen into the public domain in 2010 through the expiry of the term of protection (fifty years after the first publication). This would lead to "super-national treatment," which would give a foreign copyright owner (John Smith) a longer term of protection than a domestic copyright owner.

*II. THE POSSIBLE DISCREPANCY BETWEEN THE 2020 COPYRIGHT LAW AND THE WCT ON THE TERM OF PROTECTION FOR PHOTOGRAPHIC WORKS IN CHINA*

In the process of revising the Chinese Copyright Law, the legislature clearly realized that the term of protection for photographic works in the previous Copyright Law did not meet the requirements of Article 9 of the WCT. Therefore, in the revised provision on the term of protection for works (Article 23 in the 2020 Copyright Law), the photographic works are not singled out to form a group of works together with audiovisual works, to which a shorter term of protection of fifty years after the first publication is applied. In other words, there is no special treatment for photographic works on the term of protection. It follows that in respect of a photographic work whose copyright belongs to a natural person, the term of protection is the life of the author plus fifty years. This provision is in line with Article 9 of the WCT. However, since the term of protection for photographic works has not been changed since June 9, 2007, when the WCT took effect in China, it remains a key question of great significance whether the new term of protection provided in the 2020 Copyright Law can apply retroactively to photographic works that were protected before June 9, 2007 but that have fallen into the public domain through the expiry of the old term of protection by June 1, 2021 (fifty years after the first publication).

*A. Consequences of Not Protecting Photographic Works Whose Term of Protection Expired Before the 2020 Copyright Law Took Effect*

To the above question, Article 65 of the 2020 Copyright Law gives an explicit answer:

A photographic work shall no longer be protected if the term of protection of its first publication right and the rights provided for in subparagraphs (5) through (17) of Paragraph 1 of Article 10 of this Law has expired before June 1, 2021, even if it is still within the period of protection in accordance with Paragraph 1 of Article 23 of this Law.

Although no official explanation came out when the 2020 Copyright Law was adopted, the purpose of Article 65 is still quite clear. It aims to avoid the retroactive application of the new law to those photographic works whose term of protection has expired under the old law. In accordance with Article 65, if the fifty-year period after the first publication of a photographic work has not expired by June 1, 2021, that photographic work will enjoy the new term of protection granted by the 2020 Copyright Law—that is, the life of the author plus fifty years. On the contrary, if the fifty-year period after the first publication of a photographic work has expired by June 1, 2021, that photographic work has fallen into the public domain and will not be protected. This way, the 2020 Copyright Law will not revive copyright protection for a photographic work that has entered the public domain before June 1, 2021 even if the author of the photographic work is still alive or has not been dead for more than fifty years by June 1, 2021.

There will be no problem for such a provision if it only applies to domestic photographic works (whose country of origin is China). As mentioned before, in the country of origin of a work, neither the Berne Convention nor the WCT provides any protection to that work even if the law of the country of origin provides less protection than what the Berne Convention and the WCT require. Article 65 of the 2020 Copyright Law, however, equally applies to foreign photographic works (whose countries of origin are other WCT contracting parties). That will raise the question on whether Article 65 is in full compliance with the WCT.

The key to this inquiry is that due to the legislature's failure to revise the term of protection for photographic works when China joined the WCT before June 9, 2007 (the date the WCT took effect in China), the term of protection applicable to foreign photographic works is still fifty years after the first publication, which is shorter than what Article 9 of the WCT requires (the life of the author plus fifty years).

Before June 1, 2021 (the date the 2020 Copyright Law took effect), the term of protection for a photographic work remained fifty years after its first publication. It means that the term of protection for a considerable number of foreign photographic works had expired before June 1, 2021. Based on Article 65 of the 2020 Copyright Law, they will not be protected even if the term of the life of the author plus fifty years has not expired by that date.

This problem can be illustrated by the hypothetical example given above, which involves John Smith who first published his photographic work in Country A in 1960 and passed away in 2000. That photographic work cannot be protected by the 2020 Copyright Law. Because more than fifty years have passed since the work's first publication in 1960, the term of protection in China expired before the new law entered into force on

June 1, 2021. Thus, even though the 2020 Copyright Law grants a new term of protection of the life of the author plus fifty years for photographic works and only twenty-one years have passed since Smith's death, that photographic work will not get copyright protection under Article 65 of the 2020 Copyright Law.

When the WCT came into force in China on June 9, 2007, less than fifty years had passed since the first publication of the photographic work. That work was therefore still protected in China. As mentioned above, the combined effect of Articles 9 and 13 of the WCT and Article 18 of the Berne Convention is that Smith's photographic work shall be protected in China for fifty years from January 1, 2001 (the year after the author's death) until 2050, rather than 2010 (fifty years after the first publication of the photographic work in 1960). Therefore, when the 2020 Copyright Law came into force on June 1, 2021, his photographic work should have been protected in China.

*B. The Effect of Abolishing Article 142(2) of the General Principles of the Civil Law*

As mentioned in Part I.C, Chinese courts could, at least in theory, avoid violating international treaties by offering "super national treatment" for the protection of foreign photographic works. This approach is based on Article 142(2) of the General Principles of Civil Law, which allows the conditional application of international treaties. However, when the 2020 Civil Code came into force on January 1, 2021, the General Principles of Civil Law was repealed on the same day.<sup>25</sup> It is noteworthy that Article 142(2) has not been absorbed into the Civil Code. It follows that the only provision authorizing courts to apply international treaty in civil disputes vanished in the civil law system in China.

As a result, the approach to avoid violating the WCT by granting "super-national treatment" is no longer feasible after January 1, 2021, when the Civil Code came into force and when the General Principles of Civil Law was repealed. Article 14(1) of the WCT provides: "Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty." It requires the contracting parties to implement the treaty by transforming the treaty provisions into domestic laws.

If the provision of Article 142(2) of the General Principles of Civil Law were incorporated into the Civil Code and could be applied in judicial

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<sup>25</sup> Article 1260 of the Civil Code provides: "This Code took into effect on January 1 2020, . . . [and] the General Principles of Civil Law of People's Republic of China is repealed on the same day." 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. 1260 [hereinafter Civil Code].

practice in respect of the term of protection of foreign photographic works, it can be regarded as a supplement to Article 65 of the 2020 Copyright Law, as well as a method of implementing the WCT. Nevertheless, due to the repeal of Article 142(2) of the General Principles of Civil Law, the Copyright Law is the only domestic law to implement the WCT, and the question on whether the Copyright Law is fully compliant with the WCT will continue to exist.

*III. POSSIBLE SOLUTIONS TO THE GAP BETWEEN THE CHINESE COPYRIGHT LAW AND THE WCT ON THE TERM OF PROTECTION FOR PHOTOGRAPHIC WORKS*

The above analysis has demonstrated that Article 65 of the 2020 Copyright Law leads to a conflict with the WCT on the term of protection for photographic works. Therefore, Article 65 needs to be revised, and two possible solutions may be taken into consideration.

*A. The Date of the Entry into Force of the WCT in China Is Taken as the Starting Point to Extend the Term of Protection*

A simple and direct solution to the gap between the Chinese Copyright Law and the WCT is to revise Article 65 to replace “June 1, 2021” (the date the 2020 Copyright Law entered into force) with “June 9, 2007” (the date the WCT entered into force in China). The proposed new Article 65 reads as follows:

A photographic work shall no longer be protected if the term of protection of its first publication right and the rights provided for in subparagraphs (5) through (17) of Paragraph 1 of Article 10 of this Law has expired before *June 9, 2007*, even if it is still within the period of protection in accordance with Paragraph 1 of Article 23 of this Law.<sup>26</sup>

The proposed new Article 65 will make the Chinese Copyright Law fully compliant with the WCT on the term of protection for photographic works. But some questions on that proposed revision may arise. The first concerns the application of Article 13 of the WCT and Article 18(1) of the Berne Convention. As mentioned above, the combined effect of the two articles is that at the moment the WCT came into force in China, a foreign work that had entered the public domain through the expiry of the term of protection in the country of origin would not be protected anew in China. But the proposed new Article 65 does not explicitly exclude such a foreign photographic work from copyright protection. Will this lead to undue expansion of copyright protection for a work that should not have been protected in China?

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<sup>26</sup> Emphasis added.

Suppose a WCT contracting party provides the term of protection for photographic works of the life of the author plus fifty years. A national of that country created a photographic work in 1955 and died on the same day. His heirs first published that photograph in that country in 1960. In accordance with the copyright law of that country (the country of origin), the photographic work entered the public domain in 2005 (fifty years after the author's death in 1955). Although less than fifty years had passed since the first publication of the work in 1960, by the time the WCT took effect in China on June 9, 2007, China is not obliged to provide protection for that photographic work. The proposed revision to Article 65 does not address this situation.

This problem could be solved by another way. There was less than fifty years between the date of its first publication (1960) and June 9, 2007, but that work has entered the public domain in the country of origin due to the expiry of the term of protection by 2005 (fifty years after the author's death in 1955). This means that the actual term of protection for that photographic work in the country of origin is shorter than the term of protection in China. The situation is rare since most photographic works are published before the author's death, and the expiry date of the fifty-year term of protection calculated from the time of the author's death will be later than the expiry date of the fifty-year term of protection calculated from the time of first publication. Only when a photographic work is published after the death of the author, the term of protection calculated from the death of the author is shorter than that calculated from the first publication of the work. Even if the scenario does appear as illustrated above, and the proposed new Article 65 does not directly address that scenario, China can still refuse to provide protection in accordance with Article 7(8) of the Berne Convention, which provides: "In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work."<sup>27</sup>

The *WIPO Guide* explains: "It is to be noted that, if a country wants to apply the principle of 'comparison of terms', the Convention does not even require a specific provision in its national law, since, under paragraph (8), this principle is applied, unless the legislation of the country concerned otherwise provides."<sup>28</sup> Clearly, Article 7(8) of the Berne Convention applies automatically and does not need to be implemented by a specific provision in national law. Therefore, in the above situation, China

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<sup>27</sup> RICKETSON & GINSBURG, *supra* note 3, at 570.

<sup>28</sup> WIPO GUIDE, *supra* note 14, at 52.



can refuse protection without the need for special provisions in the Copyright Law.

*B. The Problem of Retroactive Effect*

It might be argued that the proposed revision to Article 65 of the 2020 Copyright Law is the retroactive application of the new law to the previous act of using photographic works back to June 9, 2007. In other words, the unauthorized use of photographic works between June 9, 2007, and the date of entry into force of the proposed new Article 65 might become infringement. Thus, the new law might violate the principle of *lex prospicit, non respicit*.

It should be pointed out that retroactive protection provisions often appear in international copyright treaties, but they only require contracting parties to include in the scope of protection pre-existing works, performances, and phonograms that are created or produced prior to the entry into force of the treaties. After an international copyright treaty comes into force, a contracting party is not, and shall not be, required to treat the previous unauthorized exploitation of such pre-existing works, performances, or phonograms before the effective date of the treaty as copyright infringement and to hold the accused infringers liable.

Therefore, in international copyright treaties, “retroactive protection” refers to the protection of works, performances, and phonograms completed prior to the date of entry into force of an international copyright treaty for a contracting party, rather than to the retroactive application of the treaty to the unauthorized uses of such works, performances, and phonograms prior to that date. In other words, no one will be held liable for the unauthorized exploitation that occurred before an international copyright treaty entered into force in a country where the exploitation took place as long as the national copyright law did not cover such an act before the effective date of the treaty.

For instance, the Beijing Treaty on Audiovisual Performances, which entered into force in China on April 28, 2020, provides retroactive protection in that sense. Article 19(1) of the Treaty states that “Contracting Parties shall accord the protection granted under this Treaty to fixed performances that exist at the moment of the entry into force of this Treaty.” This provision only requires the contracting party to protect audiovisual recordings previously made by nationals of other contracting parties.<sup>29</sup> A previous unauthorized use of an audiovisual recording of performance will not be held as infringement after the treaty took effect. A

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<sup>29</sup> See *World Intell. Prop. Org., Basic Proposal for the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to Be Considered by the Diplomatic Conference*, ¶19.02, WIPO Doc. IAVP/DC/3 (Aug. 1, 2000).

treaty provision like Article 19(1) therefore does not violate the principle of *lex prospicit, non respicit*.

In sharp contrast, the proposed new Article 65 of the 2020 Copyright Law will inevitably have a retroactive effect on the previous use of photographic works. In accordance with the proposed revision, those photographic works that are protected by the WCT on June 9, 2007, shall get protection in China until the end of the fiftieth year after the death of the author. In most cases, that term of protection will last longer than fifty years after the first publication of the photographic work. Therefore, if a photographic work exceeds the term of protection granted by the 2001 Copyright Law after June 9, 2007 (fifty years after the first publication), it should still enjoy protection for the life of the author plus fifty years based on the proposed new Article 65. It follows that the unauthorized use of the photograph after June 9, 2007 will be deemed copyright infringement.

The hypothetical example of John Smith mentioned above may illustrate this effect. Smith first published his photographic work in Country A, a WCT contracting party, in 1960 and passed away in 2000. On June 9, 2007, that photographic work should be protected in China.<sup>30</sup> According to the proposed new Article 65, China should continue to protect that work until the end of 2050 (fifty years after the author's death) instead of 2010 (fifty years after the first publication). The knotty problem of retroactive effect arises because the Chinese Copyright Law was not revised after China acceded to the WCT and the provision on term of protection for photographic works remained intact on June 9, 2007. In other words, Article 9 of the WCT was not transformed into domestic law at that time. It follows that based on the 2001 Copyright Law, Smith's photographic work fell into the public domain in China at the end of 2010 through the expiry of the term of protection (fifty years after the first publication in 1960).

It means that the reproduction and distribution of that photographic work in 2011 without the license of Smith's heir does not constitute copyright infringement. As pointed out in Part II.A, such a conclusion may raise doubts on the compliance of the Chinese Copyright Law with Article 9 of the WCT. The only possible solution to the term of protection issue at that time should be the direct application of Article 9 of the WCT to qualified foreign photographic works in accordance with Article 142(2) of the General Principles of Civil Law. Nevertheless, until now no Chinese court has applied Article 9 of the WCT to determine the term of protection of foreign photographic works. In other words, China has not chosen to grant a longer term of protection according to Article 9 of the WCT until the revision of the Copyright Law in 2020. The inevitable conse-

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<sup>30</sup> See *supra* Part I.C for a more detailed discussion.

quence is that the unauthorized use of Smith's photographic works in China from 2011 is a lawful act, rather than copyright infringement.

In this context, once Article 65 of the 2020 Copyright Law is revised as proposed above, the copyright in Smith's photographic work could be revived from 2011. All the unauthorized uses of that photographic work in following years would constitute copyright infringement. Suppose the legislature accepts the proposal to revise Article 65 of the 2020 Copyright Law and the new Article 65 took effect on January 1, 2022, when Smith's heir filed a lawsuit against someone else for the unauthorized use of his photographic work in 2019, 2020, and 2021, the court should deliver a judgment in favor of the plaintiff and hold the defendant liable for copyright infringement. Having retroactive effects on the past use of photographic works is a clear downside of the proposed revision to Article 65, and such effects might harm the legitimate interests of innocent users who never expected that the photographs could be protected again.

#### *IV. THE FEASIBILITY OF ADDING A NON-RETROACTIVE CLAUSE (TRANSITIONAL CLAUSE)*

Since the negative impact of the proposed revision to Article 65 is the retroactive application of the term of protection for photographic works, which will lead to retroactive liability, is it possible to add a "non-retroactive clause" that clearly exempts the liability for past acts?

To some extent, the "non-retroactive clause" can be viewed as a transitional clause. It provides for a transitional period from June 9, 2007, to the day when the proposed new Article 65 takes effect. During this transitional period, the unauthorized use of a photographic work that was first published more than fifty years ago should not be held as copyright infringement after the end of the transitional period.

##### *A. Consequences of Adding a Non-Retroactive Clause*

In order to avoid retroactive liability, a possible solution is to add a non-retroactive clause as the second paragraph in the proposed new Article 65 as follows:

A photographic work shall no longer be protected if the term of protection of its first publication right and the rights provided for in subparagraphs (5) through (17) of Paragraph 1 of Article 10 of this Law has expired before June 9, 2007, even if it is still within the period of protection in accordance with Paragraph 1 of Article 23 of this Law.<sup>31</sup>

The protection provided by the preceding paragraph shall be without prejudice to any acts committed, agreements concluded, or rights acquired before the entry into force of the preceding paragraph.

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<sup>31</sup> Emphasis added.

The second paragraph of the proposed new Article 65 can effectively resolve the problem of retroactive liability. In the hypothetical example of John Smith, whose photographic work was first published in 1960 and who died in 2000, if somebody else reproduced and distributed that photograph without a license in 2020 in China, that act was lawful at that time since the term of protection for that photograph expired in 2010 (fifty years after the first publication) based on the applicable Chinese Copyright Law in 2011. After the proposed new Article 65 enters into force, his photographic work will get new protection until the end of 2050, but the reproduction and distribution in 2020 will not be held as copyright infringement.

*B. The Compliance of the Non-Retroactive Clause with the WCT*

The new Article 65 with the provision of the non-retroactive clause proposed above addresses the concern of retroactive liability, but doubts may remain on whether it complies with Article 13 of the WCT. Article 13 requires contracting parties to apply the provisions of Article 18 of the Berne Convention to all protection provided for by the WCT. Article 18(3) of the Berne Convention allows member states to set a transitional period for the protection of copyrighted works when they join the Convention. Article 18(3) provides: “The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.” Article 18(4) provides: “The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.”

The “principle” in Article 18(3) refers to retroactive protection and its conditions as provided in Article 18(1) and (2). “The conditions of application of this principle” means “certain temporary provisions, transitional measures which should be limited for the purpose of the protection of certain ‘acquired rights.’”<sup>32</sup> Article 18(3) of the Berne Convention thus allows member states to provide for a transitional period for the application of retroactive protection required by Article 18(1) and (2) of the Berne Convention. If a member of the Berne Union provides a transitional period, such as two years, a bookstore in that country may, within that two-year period following the entry of force of the Berne Convention, continue to sell copies of foreign books published without the foreign author’s authorization before the entry of force of the Convention.

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<sup>32</sup> WIPO GUIDE, *supra* note 14, at 99.

The transitional period is allowed to address the practical need of acceding countries. Before a country accedes to the Berne Convention, it may not be obliged to protect a foreign work. But after the Convention takes effect in that country, it must provide retroactive protection for pre-existing and qualified foreign works in accordance with the provisions of Article 18(1) and (2) of the Convention.

As mentioned above, retroactive protection will not violate the principle of *lex prospicit, non respicit* — that is, a member state cannot deem the previous unauthorized use of a foreign work as infringement or impose legal liability, cannot invalidate a contract previously entered into for the use of such a work without permission, and cannot cause the relevant parties to lose their otherwise lawfully acquired rights. However, after the Berne Convention entered into force, the member state should provide such a foreign work with the protection required by the Convention, which may affect the continuous use of the work that starts before the Convention enters into force in that country in accordance with the then applicable law. The *Report of the Paris Conference in 1896* on the amendment of the Berne Convention pointed out that “[t]here had been a desire to take account of the de facto situation existing in certain countries at the time the Convention came into force, of the interests of those who might have lawfully reproduced or performed foreign works without their author’s authorization.”<sup>33</sup>

To solve this problem, Article 18(3) of the Berne Convention allows member states to provide for a transitional period. During that period, any person who has engaged in lawful acts with respect to a later protected foreign work prior to the entry into force of the Berne Convention in that country, may undertake the same acts after the entry into force of the Berne Convention. In other words, prior to the expiry of the transitional period, unauthorized continuous use of a work that should be protected in accordance with Article 18(1) and (2) of the Berne Convention will not be deemed to be infringing and held liable.

If the legislature adopts the proposed new Article 65 of the 2020 Copyright Law, a question will arise on whether the added second paragraph on the transitional period conforms to Article 18(3) of the Berne Convention. In other words, it is permissible under the Berne Convention and the WCT to provide for a transitional period starting from June 9, 2007 until the entry of force of the above revision to Article 65 of the 2020 Copyright Law (at least fourteen years)?

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<sup>33</sup> *The Report of the Conference in Paris 1896*, in *WORLD INTELL. PROP. ORG., THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS FROM 1886 TO 1986*, at 141 (1986).

Article 18(3) of the Berne Convention does not set the limit on the transitional period that member states may provide. Although the answer to the above question seems to be in the affirmative, the legislative history of the Berne Convention may lead to a different conclusion. The *Report of the Conference in Paris 1896* on the amendment of the Berne Convention stated:

The desire was to urge acceding countries to take measures which were both in their own interest and in that of the other Union countries. To this end it had been proposed stating that “countries which have not taken measures within a period of two years will be deemed to have purely and simply accepted the principle of retroactivity.” It seemed that there were only advantages to be gained from such a proposal since acceding countries were given the option of declining the Convention’s pure and simple application to works published before accession for *two years*. This length of time seemed more than sufficient particularly as, before acceding, a Government will consider the consequences of accession and what measures to take. Nevertheless, doubts arose. It was feared that a fixed time limit might be considered awkward and might dissuade certain States, whose accession to the Union was considered particularly desirable, from doing so. The vast majority of the Committee did not share these fears; however, it did not want to carry on regardless and not take account of the scruples of one of its members. It therefore deleted the sentence in question.<sup>34</sup>

Based on the reason recorded in this report, Article 18(3) of the Berne Convention does not limit the permissible transitional period to two years. The two-year time limit, however, seems to be on solid ground in the interpretation of Article 18(3).

Before the 1908 Berlin text, the Berne Convention did not clearly provide for the so-called “mechanical reproduction right” of musical works or “mechanical performances right.” The Berlin text for the first time provided for these two exclusive rights, but it also provides that the new rights “shall not be applicable in any country of the Union to works which have been lawfully adapted in that country to mechanical instruments before the coming into force of the present Convention.”<sup>35</sup> The 1928 Rome text and the 1948 Brussel text also retained that provision.<sup>36</sup> However, such a provision not only means that new recordings could be made without any payment in countries in which the first recordings had been made, but also that the record producers’ freedom to make records

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<sup>34</sup> *Id.* (emphasis added).

<sup>35</sup> Berne Convention for the Protection of Literary and Artistic Works art. 13, Sept. 9, 1886 (revised at Berlin Nov. 13, 1908).

<sup>36</sup> Berne Convention for the Protection of Literary and Artistic Works art. 13(3), Sept. 9, 1886 (revised at Rome June 2, 1928); Berne Convention for the Protection of Literary and Artistic Works art. 13(3), Sept. 9, 1886 (revised at Brussels June 26, 1948).

of already recorded works without permission.<sup>37</sup> In order to solve this perhaps unforeseen problem, Article 13(2) of the 1967 Stockholm text provides:

Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date *two years* after that country becomes bound by this Act.<sup>38</sup>

Accordingly, the scope of application of Article 13(3) of the Berne Convention (Rome and Brussels texts) was dramatically reduced. After the Stockholm text took effect, no new recordings were allowed to reproduce musical works that had been recorded without the author's permission before the 1908 Berlin text took effect. At the same time, in respect of the recordings of musical works made without the author's permission before the Berlin text took effect, a country bound by the Brussels text may provide a two-year transitional period for continuous reproduction. When the two-year transitional period is over, new acts of reproducing the "old" recordings shall not be allowed by the national law of that country. Article 13(2) of the 1967 Stockholm text remains intact in the 1971 Paris text, to which China acceded.

The two-year transitional period in Article 13(2) of the Berne Convention reflects the consensus of the international community. In December 1994, when Russia submitted to WIPO its instrument of accession to the Berne Convention, it made the following declaration: "It is understood that the effects of the above-mentioned Convention shall not extend to the works which, at the date of entry into force of the said Convention in respect of the Russian Federation, are already in the public domain in its territory."<sup>39</sup>

In this declaration, the works to which the Berne Convention "shall not extend" are not limited to those works that have fallen into the public domain in Russia through the expiry of the previously granted term of protection. A possible interpretation of the declaration is that all of the preexisting works whose origins are other Berne Convention members would be regarded as having been in the public domain in Russia before the Berne Convention took effect (March 13, 1995) and would therefore not be protected in the country after the effective date of the Berne Convention.

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<sup>37</sup> See BERNE CONVENTION GUIDE, *supra* note 24, at 80.

<sup>38</sup> Emphasis added.

<sup>39</sup> *Berne Notification No. 162: Accession by the Russian Federation*, WORLD INTEL. PROP. ORG. (Dec. 13, 1994), [https://www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_162.html](https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_162.html).

Russia's declaration above raised doubt on its conformity with Article 18 of the Berne Convention. In 1996, Shen Rengan, then the Deputy Commissioner of the National Copyright Administration of China, wrote a letter to the Director General of the WIPO expressing this concern.<sup>40</sup> WIPO responded shortly afterwards by attaching the Notes on the Implementation of Article 18 of the Berne Convention on the Retroactive Application of the Convention, which states:

To sum up, it is clear that paragraph (3) of Article 18 does not allow any denial or limitation of the application of paragraphs (1) and (2) of the same Article. It only allows certain "temporary provisions," "transitional measures." . . . No specific deadline is determined by the Convention for such "temporary provisions" and "transitional measures," there seems to be, however, a quite general agreement that such provisions and measures should not be applied, in any case, for a period longer than *two years* from the entry into force of the Convention.<sup>41</sup>

Even though the WIPO document states that "no official interpretation of the Berne Convention is involved, but only the views of the International Bureau, since the interpretation of the Convention is a matter for each country party to the Convention,"<sup>42</sup> this document remains the best reference to understand the retroactive protection required by Article 18 of the Berne Convention. In 2013, Russia withdrew its previous declaration mentioned above.<sup>43</sup> The WIPO document also suggests that transitional measures should be limited to strictly defined duration and that the wholesale denial of the application of the Berne Convention to the preexisting works is not allowed.

Article 13 of the WCT requires contracting parties to apply Article 18 of the Berne Convention to all protection provided for in the WCT, which certainly includes the new term of protection for photographic works. As a WCT contracting party, China may provide a transitional period for the protection of photographic works, but more than fourteen years have already passed since the WCT entered into force in China on June 9, 2007. It seems impossible that the transitional period could be as long as fourteen years even if it is not limited to two years.

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<sup>40</sup> See Xu Chao (trans.), *Notes on the Implementation of Article 18 of the Berne Convention Concerning the Retroactive Application of the Convention*, J. INTELL. PROP., no. 11, 2017 at 89 n.1.

<sup>41</sup> Emphasis added.

<sup>42</sup> Letter from Mihaly Ficsor, Assistant Director General, World Intell. Prop. Org., to Shen Rengan, Deputy Commissioner, National Copyright Administration of China, Accompanying the Notes on the Implementation of Article 18 of the Berne Convention on the Retroactive Application of the Convention.

<sup>43</sup> See *Berne Notification No. 258: Notification by the Russian Federation: Withdrawal of Declaration Concerning Article 18 of the Paris Act (1971)*, WORLD INTELL. PROP. ORG. (Jan. 31, 2013), [https://www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_258.html](https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_258.html).



In addition, a transitional period and any other temporary measures are usually provided for in domestic law when a country is ready to accede to a copyright treaty. In other words, they are added to the legislation before a copyright treaty comes into force in this country. The purpose of such special provisions is to set a “buffer zone” for the previously lawful but unauthorized uses of foreign works, with the expectation that after the entry into the force of a copyright treaty, the uses could be gradually reduced and eventually stopped. These transitional provisions are not designed for the purpose of retroactively legalizing the pre-existing infringing uses of foreign works. The WCT has entered into force in China for more than fourteen years. If the legislature revises Article 65 of the 2020 Copyright Law and adds a transitional period retroactively starting from June 9, 2007, a serious challenge concerning the conformability between the proposed new Article 65 and Article 9 the WCT may arise.

V. *THREE-YEAR RETROACTIVE LIABILITY: THE NECESSARY PRICE FOR COMPLIANCE WITH THE WCT?*

After China decided to join the WCT in 2006, the legislature failed to revise the Copyright Law on time to extend the term of protection for photographic works and provide for a transitional period or other temporary measures in accordance with Articles 9 and 13 of the WCT. The inaction results in a great dilemma fourteen years after the WCT entered into force in China.

As discussed above, the effect of Article 65 of the 2020 Copyright Law is that no protection is provided to those foreign photographic works that fell into the public domain between June 9, 2007 (the effective date of the WCT in China) and June 1, 2021 (the effective date of the 2020 Copyright Law) through the expiry of a previously defined term of protection (fifty years after the first publication). A concern over whether Article 65 conforms to Article 9 of the WCT may arise.

Only two options are available to address this concern. The first is to revise Article 65 just to extend the term of protection to the life of the author plus fifty years for all foreign photographic works that are still protected both in the countries of origin and in China. With such revision, retroactive liability for previously lawful but unauthorized uses of these works is certain to occur. Such liability would clearly violate the principle of *lex prospicit, non respicit*. The second option is to add a “transitional period” to the proposed new Article 65, which starts from June 9, 2007 (the effective date of the WCT in China) and ends on the date of the effective date of the new provision. But whether this option complies with Article 13 of the WCT may be called into question.

The guts of the problem are connected to timing. The legislature should have revised the Copyright Law as soon as China decided to join

the WCT in 2006. Unfortunately, the best chance to address the term of protection for photographic works in China has gone for fourteen years. It is this Author's opinion that the first option is the only right choice for China to make the Copyright Law fully compliant with the WCT. It means that Article 65 of the 2020 Copyright Law should be revised as follows:

A photographic work shall no longer be protected if the term of protection of its first publication right and the rights provided for in subparagraphs (5) through (17) of Paragraph 1 of Article 10 of this Law has expired before *June 9, 2007*, even if it is still within the period of protection in accordance with Paragraph 1 of Article 23 of this Law.<sup>44</sup>

The necessary price to pay for making this choice is the violation of the principle of *lex prospicit, non respicit*, because the revision certainly would result in retroactive liability for the then lawful but unauthorized uses of some foreign photographic works. But the negative impact might be tempered by two factors. The first is the statute of limitations. The Civil Code provides for a three-year period for a right owner to bring action against the infringer.<sup>45</sup> Therefore, copyright infringement litigation is subject to a three-year statute of limitations. In respect of copyright infringement litigation that the copyright owner brings three years after he knew or should have known the infringement, the court may request the infringer to desist the ongoing infringement. But the amount of compensation for damages shall be calculated for only three years dating back from the commencement of the litigation.<sup>46</sup>

The second factor is that the accused infringer's unauthorized use of a foreign photographic work that has fallen into the public domain through the old and shorter term of protection (fifty years after the first publication) was not based on intention or negligence to infringe copyright. Even if the proposed new Article 65 would revive the copyright in that foreign photographic work, the court should take into consideration the fact that the accused infringer (the lawful user at the time of use) had no subjective fault. Article 1165 of the Civil Code provides that a person shall bear infringement liability (for compensation) if he or she, based on fault, has infringed on other's civil rights and interests and caused harm. It follows that a court may exempt the accused infringer from the liability to pay damages to the copyright owner for the unauthorized use that occurred before the new Article 65 takes effect.

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<sup>44</sup> Emphasis added.

<sup>45</sup> See Civil Code, *supra* note 25, art. 188.

<sup>46</sup> See Interpretation of the Supreme People's Court's on Several Issues on the Applicable Law in the Adjudication of Civil Copyright Cases] (最高人民法院关于审理著作权民事纠纷案件适用法律若干问题的解释), Fashi [2002] No. 31 (promulgated by the Judicial Comm. Sup. People's Ct., Oct. 12, 2002), art. 27.

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As time goes by, the problem of retractive liability will gradually fade away. If the legislature adopts the proposed revision to Article 65, potential users of foreign photographic works whose protection the new Article 65 will revive will know that they shall not use the works without permission after the provision enters into force. Three years after the entry of force of the new Article 65, copyright owners of foreign photographic works are unlikely to bring lawsuits against users who used the works without permission before the new Article 65 entered into force as long as the users did not continue to use those works.

As discussed above, either maintaining the status quo of Article 65 of the Copyright Law or revising it with a transitional period starting from June 9, 2007, might create the concern of non-compliance with the WCT. In contrast, the proposed revision to Article 65 could result in retroactive liability, but that is a proper and lower price to pay to fully conform the Copyright Law to the WCT.