THIRD AMENDMENT TO THE CHINESE COPYRIGHT LAW

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INTRODUCTION

Since July 2011, China has actively explored ways to upgrade its copyright law.[1] Although the law was already amended the year before,[2] only two changes were made at that time. The first involved Article 4,[3] which the Dispute Settlement Body of the World Trade Organization ("WTO") had found to be inconsistent with the Berne Convention for the Protection of Literary and Artistic Works[4] ("Berne Convention") and the Agreement on Trade-Related Aspects of Intellectual Property Rights[5] ("TRIPS

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1 *See* Li Mingde, *Intellectual Property Law Revision in China: Transplantation and Transformation* [hereinafter Li, *Intellectual Property Law Revision*], *in* GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 65, 66–67 (Nari Lee et al. eds., 2016) [hereinafter GOVERNANCE OF IPRs].

2 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) (China) [hereinafter 2010 Copyright Law].

3 Before the amendment, Article 4 stipulated that "works the publication and/or dissemination of which are prohibited by law shall not be protected by this Law." Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001), art. 4 (China) [hereinafter 2001 Copyright Law]. For discussions of the United States' challenge to this provision before the Dispute Settlement Body of the World Trade Organization, see generally Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1075–81, 1096–1101 (2011); Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727, 739–43 (2011).

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

5 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

Agreement").[6] The second change concerned a new Article 26 (now Article 28), which covered the use of copyright as a pledge.[7] The last time Chinese copyright law undertook a major overhaul was in October 2001,[8] two months before the country became the 143rd member of the WTO.[9]

Although the latest round of copyright law reform began about a decade ago, and multiple drafts had been circulated for deliberation and public comments,[10] the round did not conclude until two years ago. Amid the COVID-19 pandemic, two amendment drafts were released for public comments in April and August 2020.[11] These drafts included substantial changes to the amendment drafts released a few years ago. The Standing

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[6] Panel Report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009) [hereinafter WTO Panel Report].

[7] 2010 Copyright Law, *supra* note 2, art. 26.

[8] 2001 Copyright Law, *supra* note 3.

[9] China joined the WTO on December 11, 2001.

[10] The National Copyright Administration released three drafts in March, July, and October 2012, respectively. The first two were made available for public comments. Copyright Law of the People's Republic of China (Amendment Draft, Mar. 31, 2012), https://npcobserver.files.wordpress.com/2020/04/copyright-law-mar.-2012-draft-revision.pdf (in Chinese); Copyright Law of the People's Republic of China (Second Amendment Draft, July 6, 2012), https://npcobserver.files.wordpress.com/2020/04/copyright-law-july-2012-draft-revision.pdf (in Chinese); *see also* Tian Xianjin et al., *Copyright Law of China*, *in* IP PROTECTION IN CHINA 151, 157 (Donna Suchy ed., 2015); Wan Yong, *Safe Harbors from Copyright Infringement Liability in China*, 60 J. COPYRIGHT SOC'Y. 635, 654–55 (2013). The National Copyright Administration submitted its finalized draft to the State Council in December 2012. The Legislative Affairs Office of the State Council released an amendment draft for public comments two years later. Copyright Law of the People's Republic of China (Amendment Draft Submitted for Review, June 6, 2014), http://www.gov.cn/xinwen/2014-06/10/content_2697701.htm (in Chinese) [hereinafter 2014 Amendment Draft]. These various drafts attracted debates and controversies in a number of areas, including most notably collective copyright management organizations and copyright limitations and exceptions. *See* He Tianxiang, *Transplanting Fair Use in China? History, Impediments and the Future*, 2020 U. ILL. J.L. TECH. & POL'Y 359, 363 [hereinafter He, *Transplanting Fair Use*]. To address these concerns, the National Copyright Administration rewrote the amendment draft and resubmitted it to the State Council in December 2017. *Explanation on the Amendment to the Copyright Law of the People's Republic of China (Draft)*, NAT'L PEOPLE'S CONG. PEOPLE'S REPUBLIC CHINA (Apr. 26, 2020), http://www.npc.gov.cn/npc/c30834/202011/f254003ab9144f5db7363cb3e01cabde.shtml (in Chinese).

[11] Amendment to the Copyright Law of the People's Republic of China (Draft, Apr. 26, 2020), https://npcobserver.files.wordpress.com/2020/04/copyright-law-draft-amendment.pdf (China) (in Chinese) [hereinafter Draft for First Review]; Amendment to the Copyright Law of the People's Republic of China (Draft for Second Review, Aug. 17, 2020), https://npcobserver.files.wordpress.com/2020/08/copyright-law-2nd-draft-amendment.pdf (China) (in Chinese).

Committee of the National People's Congress of China finally approved the Third Amendment to the Chinese Copyright Law ("Third Amendment") on November 11, 2020.[12] Covering a wide range of issues from eligibility to ownership and from enforcement to anticircumvention protection, the new changes took effect on June 1, 2021.

To foster a deeper understanding of the changes brought about by the Third Amendment, this Special Issue brings together leading Chinese copyright law experts. As an introduction to the Issue, this Article provides a brief but critical appraisal of the recent legislative changes. Part I identifies the major highlights of the Third Amendment. Part II explores the strengths of this Amendment. Part III concludes by noting the limitations of the latest round of copyright law reform.

I. HIGHLIGHTS

The process for developing the Third Amendment took almost a decade, leading some Chinese commentators to refer to the latest round of copyright law reform as "forging a sword in ten years" (*shi nian mo yi jian*).[13] Although many parts of the statute had been amended, the short length of this Article limits the focus of this Part to only a few major highlights.

With respect to copyrightable subject matter, the new amendment broadened the coverage of Article 3.[14] Instead of having a delineated list that includes "works of literature, art, natural science, social science, [and] engineering technology," the amended provision covers all works in the fields of "literature, arts, and sciences," as long as those works are original[15] and have been expressed in a certain form.[16] These two new requirements are similar but not identical to the originality and fixation

12 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) (China) [hereinafter 2020 Copyright Law].

13 *See, e.g.*, China Youth Daily, *Forging a Sword in Ten Years: Where Are the Bright Spots of the New Copyright Law?*, China News Net (Dec. 23, 2020), http://www.chinanews.com/gn/2021/01-13/9385581.shtml (in Chinese).

14 *See* 2020 Copyright Law, *supra* note 12, art. 3; Feng Xiaoqing & Cong Lixian, *The Status of the Object of Copyright: Research on the System of Works Protected by the Amended Chinese Copyright Law*, 69 J. Copyright Soc'y 27 (2022); He Huaiwen, *Audiovisual Works and Their Protection Under Chinese Copyright Law*, 69 J. Copyright Soc'y 43 (2022); Zhang Chenguo, *What Are Works: Copyright Law Subject Matter in the Transition to the Digital Era: Perspectives on the Third Amendment to the Chinese Copyright Act*, 7 Queen Mary J. Intell. Prop. 468 (2017) [hereinafter Zhang, *What Are Works*].

15 The term *duchuangxing* in Chinese is generally translated as originality, even though its literal meaning is closer to "independent creation."

16 *Compare* 2010 Copyright Law, *supra* note 2, art. 3, *with* 2020 Copyright Law, *supra* note 12, art. 3.

requirements in U.S. copyright law.[17] To address questions concerning whether short videos, animations, game contents, or other unconventional audiovisual creations fit within the category of "cinematographic works and works created by a process analogous to cinematography,"[18] Article 3 further replaced this category with a new category of audiovisual works, which includes but is not limited to cinematographic works.[19]

Regarding the different rights under the copyright regime, the new amendment provides clarifications in select situations. Article 12 created a rebuttable presumption of authorship in the individual or entity whose name has been attributed to the work and who has corresponding rights in that work.[20] Article 14 recognizes the freedom of joint authors to exercise rights independently, subject only to an accounting for profits, as long as those rights are not implicated in a transfer, an exclusive grant, or a pledge.[21] This arrangement is similar to what is found in the United States and other jurisdictions.[22] Article 16 makes explicit that anybody using derivative works should obtain authorization from the copyright holders of both the relevant work and the underlying work.[23] Article 17 states that authors hold the copyright in films, television programs, and other audiovisual works involving multiple parties while "screenwriters, directors, cinematographers, lyricists, composers, and so forth" enjoy the right of attribution and, when provided for in contracts, the right to receive remuneration.[24]

To clarify the arrangement for collective copyright management organizations, Article 8 added subprovisions covering the collection, transfer, and allocation of royalties; the arrangements for resolving disagreements between these organizations and their users; the periodic disclosure of information relating to royalties and management fees; and issues relating to

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17 *See* 17 U.S.C. § 102(a).

18 For complications raised by these audiovisual creations, see Li, *Intellectual Property Law Revision*, *supra* note 1, at 71; Zhang, *What Are Works*, *supra* note 14, at 474–75; Gui Hongxia et al., *The Amended Copyright Law and Its Potential Implications*, China Law Insight (Dec. 2, 2020), https://www.chinalawinsight.com/2020/12/articles/intellectual-property/the-amended-copyright-law-and-its-potential-implications/; Savannah Hardingham et al., *Amendments to China's Copyright Law*, Nat'l L. Rev. (Apr. 13, 2021), https://www.natlawreview.com/article/amendments-to-china-s-copyright-law.

19 *Compare* 2010 Copyright Law, *supra* note 2, art. 3, *with* 2020 Copyright Law, *supra* note 12, art. 3.

20 2020 Copyright Law, *supra* note 12, art. 12.

21 *Id.* art. 14.

22 *See* Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 6.08–.12 (perm. ed., rev. vol. 2015).

23 2020 Copyright Law, *supra* note 12, art. 16.

24 *Id.* art. 17.

oversight and management.[25] Although these subprovisions have been scaled back significantly from the amendment draft released by the now-abolished Legislative Affairs Office of the State Council in June 2014,[26] the new subprovisions have advanced the debate on collective copyright management in China.[27] Article 23 extended the term of protection for photographic works from fifty years after first publication to the life of the author plus fifty years.[28]

Beyond the rights for authors, the new amendment enhanced the neighboring rights of broadcasting organizations, performers, and sound recording producers. Article 10 clarifies that the broadcasting right covers the public dissemination and rebroadcast of copyrighted works "by wired or wireless means."[29] Article 47 further extends to broadcasting organizations the right of communication through an information network.[30] These amended provisions not only enable the Copyright Law to better reflect the present-day reality regarding the dissemination of copyrighted content, but also remove the ambiguity concerning whether the broadcasting right covers webcasts and online live broadcasts.[31] To reduce complications between the different and potentially overlapping rights,[32] Article 47 states further that radio and television stations, in exercising the rights granted in the provision, cannot affect, restrict, or infringe upon the copyright or related rights enjoyed by others.[33] With respect to performers, the new amendment added a rental right[34] as well as a new provision covering performances for hire. For those performances, Article 40 grants to performers the rights to be identified and to protect their image in the performance from distortion while allowing performing units to freely use

[25] *Id.* art. 8.

[26] 2014 Amendment Draft, *supra* note 10, arts. 61–67.

[27] For discussions of collective copyright management in China, see generally Wu Weiguang, *China's CMC System and Its Problems from the Copyright Law of 1990 to Its Third Amendment*, *in* GOVERNANCE OF IPRS, *supra* note 1, at 213; Jiang Fuxiao & Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, 15 J. WORLD INTELL. PROP. 221 (2012); Lin Xiuqin & Wang Xuan, *Challenges and Opportunities of China's Copyright Collective Management in the New Era*, 69 J. COPYRIGHT SOC'Y 65 (2022).

[28] *Compare* 2010 Copyright Law, *supra* note 2, art. 21, ¶ 3, *with* 2020 Copyright Law, *supra* note 12, art. 23. *See also* Wang Qian, *The Term of Protection for Photographic Works in the 2020 Copyright Law: Some Remarks and a Proposal for Revision*, 69 J. COPYRIGHT SOC'Y 79 (2022).

[29] 2020 Copyright Law, *supra* note 12, art. 10.

[30] *Id.* art. 47(3).

[31] *See* Gui et al., *supra* note 18; Hardingham et al., *supra* note 18.

[32] *See* Gui et al., *supra* note 18.

[33] 2020 Copyright Law, *supra* note 12, art. 47.

[34] *Id.* arts. 39(5), 44.

such performance within their business scope.[35] The amended provision is consistent with Article 5(1) of the Beijing Treaty on Audiovisual Performances ("Beijing Treaty") of the World Intellectual Property Organization ("WIPO"), which entered into force in China on April 28, 2020.[36] Finally, Article 45 requires remuneration be paid to sound recording producers when their recordings are publicly performed or broadcast.[37]

Pertaining to copyright limitations and exceptions, Article 5 — the provision covering unprotectable subject matter — substituted "news on current affairs" with "purely factual information."[38] Although this substitution seems to reiterate the well-established principle that copyright protection does not extend to facts,[39] the amendment was driven by the growing unauthorized reproduction and dissemination of programs on news or current affairs and the need to protect creative contents in those programs.[40] The amended provision drew on language provided in a 2002 judicial interpretation issued by the Supreme People's Court.[41] Thus, even though Article 5 limits the eligibility of copyright protection, the change to this provision expanded such protection. Taking note of this expanded coverage, Article 18(2) provides for the right of attribution in works-for-hire created by the staff of newspapers, periodicals, news agencies, and radio and television stations.[42]

The preamble of Article 24 elevated the legal status of the three-step test laid down in Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, and Article 10 of the WIPO Copyright Treaty.[43] This change had garnered attention from U.S. rights holders and their industry

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[35] *Id.* art. 40.

[36] Beijing Treaty on Audiovisual Performances art. 5(1), June 23, 2012, S. TREATY DOC. 114-8 (2016).

[37] 2020 Copyright Law, *supra* note 12, art. 45.

[38] *Compare* 2010 Copyright Law, *supra* note 2, art. 5, *with* 2020 Copyright Law, *supra* note 12, art. 5.

[39] *See, e.g.*, TRIPS Agreement, *supra* note 5, art. 9(2); Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344 (1991); Zhang, *What Are Works*, *supra* note 14, at 473.

[40] *See* AFD China Intell. Prop., *China: Third Amendment to China's Copyright Law*, MONDAQ (Jan. 8, 2021), https://www.mondaq.com/china/copyright/1023682/third-amendment-to-china39s-copyright-law.

[41] Interpretation of the Supreme People's Court on Several Issues Concerning the Applicable Law for Adjudicating 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, effective Oct. 15, 2002), art. 16 (China).

[42] 2020 Copyright Law, *supra* note 12, art. 18(2).

[43] *See* Berne Convention, *supra* note 4, art. 9(2); TRIPS Agreement, *supra* note 5, art. 13; WIPO Copyright Treaty art. 10, Dec. 20, 1996, 2186 U.N.T.S. 121.

groups,[44] even though this test has already been incorporated into the Regulations for the Implementation of the Copyright Law for about three decades since their initial adoption in May 1991.[45] Article 24 further added "[o]ther circumstances provided for by laws and administrative regulations" at the end of the list of enumerated circumstances in which a copyrighted work may be used without authorization or remuneration.[46] Although this clause is more restrictive than the proposed language of "other circumstances" in the 2014 amendment draft,[47] the new addition has made Chinese copyright law more responsive to challenges posed by new communication technologies.[48]

In the area of copyright enforcement and remedies, Article 54 greatly increased the amount of pre-established or statutory damages, setting a new floor of RMB 500 (over $78) while raising the ceiling from RMB 500,000 (over $78,000) to RMB 5,000,000 (over $780,000).[49] In cases of serious willful infringement, the provision grants punitive damages of up to five times the compensation amount, which is to be determined based on actual loss, illegal income, or royalties.[50] Compared with copyright law in the United States, Europe, and other jurisdictions, the inclusion of both pre-established and punitive damages is somewhat unusual.[51] Nevertheless, such inclusion shows the Xi Jinping Administration's resolve to provide stronger deterrents against copyright infringement. As President Xi declared before the release of the 2020 amendment drafts, it is important to "put in place a punitive compensation system to significantly raise the

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44 *See, e.g.*, INT'L INTELL. PROP. ALL., IIPA 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 12 (2021).

45 Regulations for the Implementation of the Copyright Law of the People's Republic of China (promulgated by the Nat'l Copyright Admin., May 30, 1991), art. 29 (China); Regulations for the Implementation of the Copyright Law of the People's Republic of China (promulgated by the State Council, Aug. 2, 2002, amended Jan. 30, 2013, effective Mar. 1, 2013), art. 21 (China).

46 2020 Copyright Law, *supra* note 12, art. 24(13).

47 2014 Amendment Draft, *supra* note 10, art. 43(13); *see also* Peter K. Yu, *Customizing Fair Use Transplants*, LAWS, Mar. 2018, no. 9, at 10, http://www.mdpi.com/2075-471X/7/1/9; Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111, 133–34.

48 2020 Copyright Law, *supra* note 12, art. 24(13).

49 *Id.* art. 54; *see also* Lee Jyh-An, *Formulating Copyright Damages in China*, 69 J. COPYRIGHT SOC'Y 185 (2022).

50 2020 Copyright Law, *supra* note 12, art. 54; *see also* Lee, *supra* note 49; Zhang Guangliang, *Punitive Damages for Copyright Infringement in China: Interpretations, Issues and Solutions*, 69 J. COPYRIGHT SOC'Y 201 (2022).

51 *See* Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 718–19 (2010) [hereinafter Yu, *Digital Copyright Reform*].

cost for offenders."[52] The drive to increase penalties for copyright infringement is understandable, considering that the Chinese intellectual property system has been repeatedly criticized for providing inadequate compensation to rights holders.[53] Similar changes can be found in the Fourth Amendment to the Patent Law, which took effect at the same time as the amended Copyright Law, as well as the earlier amendments to the Trademark Law and the Law Against Unfair Competition.[54]

Beyond damages, Article 54 allows the shift of the burden of production from the copyright holder to the accused infringer in cases where evidence production has been challenging.[55] For the purpose of determining compensation, the provision states that once the right holder has met the necessary burden to produce evidence, the court may order the accused infringer to produce the relevant account books or other materials over which he or she has control.[56] Article 55 further strengthened the investigative, inspection, and seizure powers of copyright authorities[57] at both the national and subnational levels.[58] Although copyright holders and their supportive governments and industry groups quickly welcomed the increased enforcement powers, some commentators have registered concerns about potential overzealous enforcement,[59] especially considering that copyright remains a private right.[60]

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[52] *Full Text: Keynote Speech by President Xi Jinping at Opening Ceremony of 1st China International Import Expo*, XINHUANET (Nov. 5, 2018, 6:25 PM), http://www.xinhuanet.com/english/2018-11/05/c_137583815.htm.

[53] *See* INT'L INTELL. PROP. ALL., *supra* note 44, at 12, 22; OFF. OF THE U.S. TRADE REPRESENTATIVE, 2021 SPECIAL 301 REPORT 41–42 (2021) [hereinafter 2021 SPECIAL 301 REPORT].

[54] *See* Law Against Unfair Competition of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, amended Nov. 4, 2017, effective Jan. 1, 2018), arts. 17–18 (China) [hereinafter 2017 Law Against Unfair Competition]; 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), art. 71 (China) [hereinafter 2020 Patent Law]; Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Apr. 23. 2019, effective Nov. 1, 2019), art. 63 (China) [hereinafter 2019 Trademark Law].

[55] 2020 Copyright Law, *supra* note 12, art. 54.

[56] *Id.*

[57] *Id.* art. 55; *see also* Xie Huijia & Chen Liuxi, *The Amendment of Copyright Administrative Enforcement in China*, 69 J. COPYRIGHT SOC'Y 163 (2022).

[58] 2020 Copyright Law, *supra* note 12, art. 7.

[59] *See* Li, *Intellectual Property Law Revision*, *supra* note 1, at 86.

[60] *See* TRIPS Agreement, *supra* note 5, pmbl., recital 4.

In the area of technological protection measures and rights management information, Articles 49 to 51 brought into the Copyright Law[61] the relevant provisions laid down in the Regulations on the Protection of the Right of Communication Through an Information Network.[62] Introduced in May 2006, those regulations had been in force for more than a decade. Not only did the Third Amendment extend the anticircumvention protection regime beyond the right of communication through an information network, Article 50 added new exceptions for encryption research and software reverse engineering.[63]

Finally, to promote consistency and coherence with the recently adopted Civil Code,[64] which took effect on January 1, 2021, the new amendment replaced the terms "citizens" and "other organizations" in multiple articles with "natural persons" and "non-legal-person organization," respectively.[65] The amendment also updated the provisions concerning the responsibilities of national and local copyright authorities,[66] reflecting the relocation of the National Copyright Administration from the State Council to the Publicity Department of the Central Committee of the Communist Party of China (*Zhong Xuan Bu*) in March 2018.[67]

As many highlights as this Part tries to offer, it is worth bearing in mind that the discussion does not fully capture all of the changes in the latest round of copyright law reform in China. Nor can the highlights adequately reflect the specificities and nuances provided by the Third Amendment. Fortunately, many legal analyses and other documents have been published following the release of two amendment drafts in April and August 2020 and the adoption of the Third Amendment in November 2020. For some of the abovementioned legislative changes, other contributions to this Special Issue will provide more in-depth analyses.

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[61] 2020 Copyright Law, *supra* note 12, arts. 49–51; *see also* Xie Lin, *Inconsistent Anti-Circumvention Legislation and Its Future in China: Towards a Harmonized and Balanced Approach*, 69 J. COPYRIGHT SOC'Y 145 (2022).

[62] Regulations on the Protection of the Right of Communication Through an Information Network (promulgated by the State Council, May 10, 2006, effective July 1, 2006) (China).

[63] 2020 Copyright Law, *supra* note 12, art. 50(5).

[64] CIVIL CODE OF THE PEOPLE'S REPUBLIC OF CHINA (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021) (China).

[65] *Compare* 2010 Copyright Law, *supra* note 2, arts. 2, 9, 11, 16, 19, 21, 22, *with* 2020 Copyright Law, *supra* note 12, arts. 2, 9, 11, 12, 18, 21, 23, 24.

[66] 2020 Copyright Law, *supra* note 12, art. 7.

[67] *The Central Committee of the Communist Party of China Published the "Deepening Party and State Institutional Reform Plan,"* GOV'T PEOPLE'S REPUBLIC CHINA (Mar. 21, 2018), http://www.gov.cn/zhengce/2018-03/21/content_5276191.htm (in Chinese) [hereinafter *Institutional Reform Plan*].

II. STRENGTHS

Taken together, all of the legislative changes that the Third Amendment ushered in have provided some promising updates to the Chinese copyright system. Although assessment will vary from expert to expert over the progress China has made in the latest round of copyright law reform, the new amendment has showcased five major strengths.

First, the new amendment marked the first time China amended its copyright law to meet domestic needs and conditions (*guoqing*), as opposed to external demands.[68] To a large extent, this amendment continues the trends[69] set by the Third Amendment to the Patent Law[70] in December 2008 and the Third Amendment to the Trademark Law in August 2013.[71] The Copyright Law was first adopted in September 1990,[72] after years of external pressure from the United States and other developed countries and a year after the negotiation of the 1989 Memorandum of Understanding on Enactment and Scope of PRC Copyright Law,[73] which was negotiated in part to strengthen protection for computer software.[74] A decade later, the Copyright Law was amended for the first time in October 2001, as China made preparation to join the WTO.[75] That statute was amended yet again in February 2010,[76] following the WTO panel's partially unfavorable decision in *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*.[77] This amendment

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[68] *See* Tian et al., *supra* note 10, at 236; He, *Transplanting Fair Use*, *supra* note 10, at 362; Wu Handong & Liu Xin, *Analysis of and Comment on the Revision of China's Copyright Law*, DONGYUE TRIB., Jan. 2020, at 164, 164 (in Chinese).

[69] *See* Guo He, *Patents*, *in* CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS 25, 28 (Rohan Kariyawasam ed., 2011); Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, *in* GOVERNANCE OF IPRs, *supra* note 1, at 27–28.

[70] Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Dec. 27, 2008, effective Oct. 1, 2009) (China) [hereinafter 2008 Patent Law].

[71] Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Aug. 30, 2013, effective May 1, 2014) (China) [hereinafter 2013 Trademark Law].

[72] 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) (China).

[73] *See PRC Agrees to Push for Copyright Law That Will Protect Computer Software*, 3 World Intell. Prop. Rep. (BL) 151 (1989).

[74] *See* ANDREW C. MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 124 (2005); Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1066 (2018).

[75] 2001 Copyright Law, *supra* note 3.

[76] 2010 Copyright Law, *supra* note 2.

[77] WTO Panel Report, *supra* note 6.

brought Article 4 in conformity with Article 5 of the Berne Convention and Articles 9.1 and 41.1 of the TRIPS Agreement.[78]

Unlike the 1990 Copyright Law and the two subsequent amendments, the Third Amendment was introduced without significant external pressure in the copyright area. To be sure, one could debate whether the United States–China Economic and Trade Agreement ("Phase One Agreement") signed during the Trump Administration[79] and the ongoing bilateral trade war have accelerated the final adoption of this amendment.[80] After all, the review of the amendment drafts stalled after the rather intense debate on the 2014 draft. Some of the changes in the Third Amendment, such as the rebuttable presumption of authorship in Article 12 and the shift of the burden of production in Article 54, also closely track the commitments in Article 1.29 of the Phase One Agreement.[81] Nevertheless, many of the issues in the U.S.-China trade negotiations during the Trump Administration focused on trade secrets and technology transfer measures, rather than copyright protection.[82] Article 1.29 remains the only provision in the Phase One Agreement that specifically addresses the protection and enforcement of copyright and related rights.[83]

Second, the recent amendment updated the Chinese copyright system by addressing challenges posed by new communication technologies. Because legal developments tend to lag behind technological change, this

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78 *See* Yu, *The TRIPS Enforcement Dispute*, *supra* note 3, at 1097–98.

79 Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, China–U.S., Jan. 15, 2020, https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text [hereinafter Phase One Agreement].

80 *See* He, *Transplanting Fair Use*, *supra* note 10, at 363.

81 Phase One Agreement, *supra* note 79, art. 1.29. One could even argue that Article 1.27 of the Agreement, which calls for "deterrent-level penalties," has heavily influenced the increase in statutory damages and the addition of punitive damages. *Id.* art. 1.27. Notwithstanding this provision and the related commitments, the United States and its industries have been demanding China to offer deterrent-level penalties for more than three decades.

82 *See* OFF. OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018); OFF. OF THE U.S. TRADE REPRESENTATIVE, UPDATE CONCERNING CHINA'S ACTS, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION (2018). *See generally* Peter K Yu, *The U.S.–China Forced Technology Transfer Dispute*, 52 SETON HALL L. REV. 1003 (2022) (discussing the forced technology transfer dispute between China and the United States).

83 Phase One Agreement, *supra* note 79, art. 1.29. Article 1.22 also mentions copyright and trademark enforcement at physical markets. *Id.* art. 1.22.

type of amendment is quite common in copyright law reform at both the national and international levels. In this round of reform, the amendment broadened Article 3 by introducing more flexible requirements while ushering in the new category of "audiovisual works."[84] Article 24 also made the law more flexible by adding "[o]ther circumstances provided for by laws and administrative regulations" to the list of enumerated circumstances in which a copyrighted work may be used without authorization or remuneration.[85] In addition, Articles 10 and 47 adjusted the neighboring rights of broadcasting organizations, taking note of the challenges posed by streaming, live broadcasts, and other new technological arrangements.[86]

Third, the new amendment increased the penalties for copyright infringement, an item at the top of the list of demands from foreign rights holders and their supportive governments and industry groups. Not only did Article 54 greatly increase the maximum amount of pre-established damages from RMB 500,000 to RMB 5,000,000, but it also provides quintuple punitive damages in cases of serious willful copyright infringement.[87] In addition, the provision gives courts the power to order the destruction without compensation of the infringing copies and the materials and other implements used primarily to create those copies.[88] There is no doubt that Chinese policymakers and commentators have been frustrated with the incessant push by foreign rights holders and their supportive governments and industry groups for heavier copyright penalties and greater criminal enforcement.[89] Nevertheless, the increased penalties for copyright infringement also benefit local rights holders and ensure that copyright remedies evolve with the changing economic and market conditions in China. It is therefore no surprise that similarly enhanced penalties can be found in the Patent Law, the Trademark Law, and the Law Against Unfair Competition.[90] Moreover, the new amendment will help China fight off continuous external pressure from the U.S. government and foreign industry groups. For example, in her *2021 Section 301 Report* released shortly after the adoption of the Third Amendment in China, the United States Trade Representative ("USTR") warned about the "continued gaps in the scope of [intellectual property] protection, incomplete legal reforms, weak en-

84 2020 Copyright Law, *supra* note 12, art. 3.

85 *Id.* art. 24(13).

86 *Id.* arts. 10, 47.

87 *Id.* art. 54.

88 *Id.*

89 *See* Peter K. Yu, *Trade Secret Hacking, Online Data Breaches, and China's Cyberthreats*, 2015 CARDOZO L. REV. DE NOVO 130, 138–42.

90 2017 Law Against Unfair Competition, *supra* note 54, arts. 17–18; 2020 Patent Law, *supra* note 54, art. 71; 2013 Trademark Law, *supra* note 71, art. 63.

forcement channels, and lack of administrative and judicial transparency and independence."[91] In its submission to the USTR as part of the 2021 Section 301 process, the International Intellectual Property Alliance also stated that "persistent and evolving piracy and growing market access concerns hamper, or block altogether, rights holders' ability to distribute copyrighted content and prevent rights holders from seeing their investments reach their full potential in China."[92] The amended provisions on copyright enforcement can therefore serve both internal and external goals — killing two birds with one stone, as a Chinese proverb would put it.

Fourth, the new amendment improved the consistency and coherence between Chinese copyright law and international intellectual property agreements, including those that China has signed but not yet ratified.[93] Consistent with the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled,[94] Articles 24(12) and 50(2) of the amended Copyright Law improved access to copyrighted works by those with print disabilities.[95] These changes moved China a step closer to ratifying the treaty, which took place in February 2022.[96] The changes to performance rights also facilitate the implementation of the Beijing Treaty, which entered into force in China in April 2020.[97] One could even surmise that the retention of neighboring rights for broadcasting organizations will help minimize the changes needed should WIPO member states manage to conclude the Treaty to Protect Broadcasting Organizations and should China express interest in acceding to that instrument.[98] In the early days of the modern Chinese copyright regime, multilateral agreements were not as important

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91 2021 SPECIAL 301 REPORT, *supra* note 53, at 40.

92 INT'L INTELL. PROP. ALL., *supra* note 44, at 12.

93 Notwithstanding this effort, commentators have found inconsistencies with obligations under international intellectual property agreements. *See, e.g.*, Wang Qian, *Copyright Law Revision and International Treaties and Agreements*, ELECS. INTELL. PROP., no. 11, 2020, at 4 (in Chinese).

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

95 2020 Copyright Law, *supra* note 12, arts. 24(12), 50(2).

96 China signed the treaty on June 28, 2013 and has not yet ratified the instrument at the adoption of the Third Amendment. The treaty was eventually ratified on February 5, 2022 and took effect in the country on May 5.

97 *Id.* art. 40.

98 *See Protection of Broadcasting Organizations — Background Brief*, WORLD INTELL. PROP. ORG., https://www.wipo.int/pressroom/en/briefs/broadcasting.html (last visited Apr. 26, 2022). It is worth noting that, despite joining most WIPO-administered international intellectual property agreements, China is not a member of the Rome Convention. International Convention for the Protection of Per-

to China, except for such foundational instruments as the Berne Convention and the TRIPS Agreement.[99] Today, however, China is party to close to twenty WIPO-administered international intellectual property agreements.[100] The country also hosted the diplomatic meeting that led to the successful conclusion of the Beijing Treaty.[101]

Finally, the new amendment consolidated the different legal and regulatory measures in the copyright area, greatly reducing the complexities of the copyright regime. Instead of multiple legal sources ranging from the law to implementing regulations to judicial interpretations, copyright holders, industry groups, and foreign investors can now get a clearer picture of the Chinese copyright landscape from the newly amended statute. To be sure, copyright-related measures will have legal effects in China regardless of whether they reside in a single source or multiple sources. Nevertheless, as is common with civil law jurisdictions, there have been questions concerning the hierarchy, legal effects, and coherence of the disparate legal sources in the copyright area.[102] Foreign rights holders may also be less familiar with normative sources beyond the Copyright Law and its implementing regulations, such as the interpretations and other guidance documents issued by the Supreme People's Court, the Supreme People's Procuratorate, and other state organs.[103]

III. LIMITATIONS

The previous Part has identified the various strengths of the Third Amendment. This Part turns to the amendment's limitations, focusing

formers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 43.

[99] *See* Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209, 212–23 (2011) [hereinafter Yu, *Middle Kingdom*].

[100] *WIPO-Administered Treaties: Contracting Parties > China*, WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=&code=CN&treaty_all=ALL (last visited Apr. 26, 2022).

[101] *See* Peter K. Yu, *Caught in the Middle: WIPO and Emerging Economies*, *in* RESEARCH HANDBOOK ON THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: THE FIRST 50 YEARS AND BEYOND 358, 367 (Sam Ricketson ed., 2020).

[102] *See* Legislation Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Mar. 15, 2000, amended Mar. 15, 2015, effective Mar. 15, 2015) (China); *see also* He, *Transplanting Fair Use*, *supra* note 10, at 387–90. *See generally* CHEN JIANFU, CHINESE LAW: CONTEXT AND TRANSFORMATION 171–206 (2008) (discussing the sources of law and the law-making process in China).

[103] In *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, for example, the WTO panel devoted considerable lengths to explain the normative effects of judicial interpretations. WTO Panel Report, *supra* note 6, ¶¶ 7.417–.424.

particularly on the future development of Chinese copyright law and the country's emerging role in international norm-setting.

First, the new amendment left behind some unfinished business, which likely will have to be taken up in future rounds of copyright law reform. As Li Mingde reminded us, it is not uncommon to find that unfinished reforms reach consensus in future legislative rounds.[104] During the revision process, the 2014 amendment draft released by the Legislative Affairs Office of the State Council included detailed provisions on collective copyright management organizations.[105] Some of those provisions have since been deleted in the final text of the Third Amendment, even though Article 8 still added several subprovisions covering those organizations. Likewise, those favoring broad copyright limitations and exceptions had actively advocated for the adoption of an open-ended list of circumstances in which a copyrighted work may be used without authorization or remuneration.[106] Although Article 24 eventually introduced a new catch-all category of "[o]ther circumstances provided for by laws and administrative regulations" — a compromise with the 2014 amendment draft[107] — policymakers and commentators recognize that there is still much work to do if they are to push for greater flexibility in Chinese copyright law, similar to what is found in the U.S. fair use regime.[108] Finally, the April 2020

104 *See* Li Mingde, *The Process of Intellectual Property Law Reform in China*, 8 QUEEN MARY J. INTELL. PROP. 26, 35 (2018) [hereinafter Li, *Intellectual Property Law Reform*].

105 2014 Amendment Draft, *supra* note 10, arts. 61–67.

106 *See, e.g.*, Wang Jie & He Tianxiang, *To Share Is Fair: The Changing Face of China's Fair Use Doctrine in the Sharing Economy and Beyond*, 35 COMPUT. L. & SEC. REV. 15 (2019); Zhang Chenguo, *Introducing the Open Clause to Improve Copyright Flexibility in Cyberspace? Analysis and Commentary on the Proposed "Two-Step Test" in the Third Amendment to the Copyright Law of the PRC, in Comparison with the EU and the US*, 33 COMPUT. L. & SEC. REV. 73 (2017). Apart from these commentators, the Supreme People's Court stated in a judicial interpretation that, in special circumstances, courts could consider the fair use factors in intellectual property cases when it is necessary to promote technological innovation and commercial development. Opinion of the Supreme People's Court on Several Issues Concerning the Full Exertion of Intellectual Property Adjudicatory Function to Promote Greater Development and Flourishing of Socialist Culture and to Facilitate Coordinated Independent Economic Development (关于充分发挥知识产权审判职能作用推动社会主义文化大发展大繁荣和促进经济自主协调发展若干问题的意见), Fafa [2011] No. 18 (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 16, 2011, effective Dec. 16, 2011), ¶ 8, http://zscq.court.gov.cn/dcyj/201205/t20120509_176751.html (China).

107 *See* 2014 Amendment Draft, *supra* note 10, art. 43(13).

108 17 U.S.C. § 107; *see also* Peter Ganea, *Copyright*, *in* PETER GANEA ET AL., INTELLECTUAL PROPERTY LAW IN CHINA 293, 308 (Christopher Heath ed., 2d ed. 2021). For discussions of Article 24, see generally He Tianxiang, *The Copyright Limitations of the 2020 Copyright Law of China: A Satisfactory Compromise?*, 69 J.

amendment draft included a provision to curb copyright abuse and the disruption of the communication order (*chuanbo zhixu*).[109] To avoid complications with the Civil Code and the Anti-Monopoly Law, that provision was deleted in the August 2020 draft as well as the final text of the Third Amendment.[110]

Second, the new amendment was quite conservative and not particularly forward-looking. As a result, it did not address, or address specifically, many of the hotly debated issues in the copyright arena. These issues include mass digitization and orphan works, the development of user-generated content, exceptions for text and data mining, digital exhaustion of copyright, new approaches to online intermediary liability (including the notice-and-staydown mechanism and the use of website blocking to reduce copyright infringement), and changes brought about by the advent of machine learning and greater use of artificial intelligence.[111] It remains intriguing to see whether we will have to wait for another eight to ten years for the next round of copyright law reform to resolve these unsettled issues.[112] Making transformative changes in the copyright area has never been easy, whether the reform is undertaken in China or other parts of the world. Although former Register of Copyrights Maria Pallante boldly called for a comprehensive review and revision of U.S. copyright law, using the aspirational moniker "The Next Great Copyright

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COPYRIGHT SOC'Y 107 (2022); (Jerry) Jie Hua, *Copyright Exceptions for Text and Data Mining in China: Inspiration from Transformative Use*, 69 J. COPYRIGHT SOC'Y 123 (2022).

109 Draft for First Review, *supra* note 11, art. 50; *see also* Mark Cohen, *Public Interest and Private Rights in the Copyright Law Amendments*, CHINA IPR (June 7, 2020), https://chinaipr.com/2020/06/07/public-interest-and-private-rights-in-the-copyright-law-amendments/.

110 *Second Review of Draft Copyright Law Amendment: Proposed Separate Copyright Protection for Audiovisual Works*, NAT'L PEOPLE'S CONG. PEOPLE'S REPUBLIC CHINA (Aug. 8, 2020), http://www.npc.gov.cn/npc/c30834/202008/867cf1a108904440b57df06ad6b79f57.shtml (in Chinese).

111 *Accord* Lee Jyh-An & Li Yangzi, *The Pathway Towards Digital Superpower: Copyright Reform in China*, 70 GRUR INT'L 861, 869–70 (2021). For comparison, the United States Copyright Office and the United States Patent and Trademark Office have released policy studies or reports in many of these areas. *See* U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS (2015); U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS (2020) [hereinafter SECTION 512 STUDY]; U.S. DEP'T OF COM. INTERNET POL'Y TASK FORCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES: COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2016); U.S. PAT. & TRADEMARK OFF., PUBLIC VIEWS ON ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY POLICY (2020).

112 *See* Li, *Intellectual Property Law Reform*, *supra* note 104, at 31.

Act,"[113] the United States ended up with highly specific legislation, such as the Orrin G. Hatch–Bob Goodlatte Music Modernization Act,[114] the Protecting Lawful Streaming Act of 2020,[115] and the Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act).[116] Likewise, while the European Union embraced the promising and innovative concept of a digital single market for copyrighted works, its Directive on Copyright and Related Rights in the Digital Single Market[117] ended up with provisions that are more limited in scope and that have sparked considerable controversy.[118] To a large extent, the lack of transformative copyright law reform in all of these jurisdictions has raised the question concerning what yardstick to use to evaluate the progress China has made in the latest round of copyright law reform.[119] It also remains an open debate whether the current economic and political realities allow countries — at least those in the developed and emerging worlds — to undertake path-breaking overhauls of their copyright systems.

Third, the new amendment does not reveal much about the positions China will take in future international norm-setting exercises. As noted earlier, the amendment stayed away from many hot and arguably controversial issues in the international copyright debate. A good point of contrast is China's introduction of Article 26 of the Patent Law through the 2008 Amendment and its earlier amendment drafts.[120] Requiring patent applicants to disclose the traditional knowledge and genetic resources used in their inventions, that provision has provided support to not only the free trade agreements between China and its trading partners,[121] but

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113 Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013).

114 Pub. L. No. 115-264, 132 Stat. 3676 (2018).

115 18 U.S.C. § 2319C.

116 17 U.S.C. §§ 1501–1511.

117 Directive 2019/790, 2019 O.J. (L 130) 92 (EU).

118 *See* SECTION 512 STUDY, *supra* note 111, at 63; Martin Senftleben, *Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market*, 41 EUR. INTELL. PROP. REV. 480, 482–85 (2019).

119 *See* Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 13–15 (2010).

120 2008 Patent Law, *supra* note 70, art. 26.

121 *See, e.g.*, Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China art. 165, N.Z.–China, Apr. 7, 2008, http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf; Free Trade Agreement Between the Swiss Confederation and the People's Republic of China art. 11.9, Switz.–China, July 6, 2013, https://www.ige.ch/fileadmin/user_upload/recht/bilateral/e/Switzerland_China_FTA_Main_Agreement.pdf.

also the TRIPS Article 29*bis* proposal before the WTO[122] and the Regional Comprehensive Economic Partnership ("RCEP") Agreement.[123] While it was not particularly important in the past for China to disclose its positions on intellectual property norm-setting, such disclosure has become increasingly important considering the country's growing assertiveness in the international norm-setting environment.[124] In addition to playing a dominant role in the recently concluded RCEP negotiations, which resulted in the adoption of a detailed intellectual property chapter with eighty-three provisions,[125] China has been active at the WTO, WIPO, and other international fora,[126] has worked closely with over sixty countries on the Belt and Road Initiative,[127] and has demanded greater discourse power (*huayuquan*) in the international arena.[128]

Fourth, the new amendment shows, unsurprisingly, that copyright law reform in China lags behind its counterparts in the patent and trademark areas. It is quite revealing that this amendment marked the first time China overhauled the copyright regime following its accession to the WTO. By then, the Patent Law had already undergone two more revisions — in 2008 and 2020, respectively.[129] Indeed, the Fourth Amendment to the Patent Law took effect on the same day as the Third

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122 Communication from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand, and Tanzania, *Doha Work Programme — The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity*, WTO Doc. WT/GC/W/564/Rev.2 (July 5, 2006).

123 Regional Comprehensive Economic Partnership Agreement art. 11.53, Nov. 15, 2020, https://rcepsec.org/wp-content/uploads/2020/11/Chapter-11.pdf; *see also* Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT'L L. 673, 716–17 (2017).

124 For discussions of China's growing assertiveness in the international norm-setting environment, see generally Peter K. Yu, *The Rise of China in the International Intellectual Property Regime*, *in* HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA 424 (Zeng Ka ed., 2019) [hereinafter Yu, *Rise of China*]; Yu, *Middle Kingdom*, *supra* note 99.

125 *See* Peter K. Yu, *The RCEP Negotiations and Asian Intellectual Property Norm Setters*, *in* THE FUTURE OF ASIAN TRADE DEALS AND IP 85, 103–05 (Liu Kung-Chung & Julien Chaisse eds., 2019).

126 *See* Yu, *Rise of China*, *supra* note 124, at 428–29.

127 For discussions of the Belt and Road Initiative, see generally Lee Jyh-an, *The New Silk Road to Global IP Landscape*, *in* LEGAL DIMENSIONS OF CHINA'S BELT AND ROAD INITIATIVE 417 (Lutz-Christian Wolff & Xi Chao eds., 2016); Peter K. Yu, *Building Intellectual Property Infrastructure Along China's Belt and Road*, 14 U. PA. ASIAN L. REV. 275 (2019); Peter K. Yu, *China, "Belt and Road" and Intellectual Property Cooperation*, 14 GLOBAL TRADE & CUSTOMS J. 244 (2019).

128 *See* Wang Jiangyu, *Between Power Politics and International Economic Law: Asian Regionalism, the Trans-Pacific Partnership and U.S.–China Trade Relations*, 30 PACE INT'L L. REV. 383, 428–31 (2018); Peter K. Yu et al., *Transplanting Anti-Suit Injunctions*, 71 AM. U. L. REV. 1537, 1602–03 (2022).

129 2008 Patent Law, *supra* note 70; 2020 Patent Law, *supra* note 54.

Amendment to the Copyright Law. Like the Patent Law, the Trademark Law had also been amended twice — with a major overhaul in August 2013 and further changes in April 2019.[130] To some extent, the slower copyright law developments brought back the historical discussions among policymakers and commentators about the challenge of undertaking copyright law reform in China. While patent law relates to science and technology and trademark law is tied to commerce, copyright law is heavily intertwined with cultural and media control.[131] Politically, it is quite telling that the National Copyright Administration is under the Publicity Department of the Central Committee of the Communist Party of China while the State Administration for Market Regulation governs the National Intellectual Property Administration, which handles patent and trademark matters.[132]

Finally, the new amendment failed to present a complete picture of the fast-changing Chinese copyright landscape, which will be essential to foreign rights holders, policymakers, and commentators. In the past decade, many unique and highly interesting business models have emerged in China to support authors and artists and to help them diversify revenue streams.[133] These models range from tipping and gifting, to target merchandise sales, to karaoke, livestreaming, and other fan interactions. While many of these models are not new,[134] they are quite unique in

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130 2013 Trademark Law, *supra* note 71; 2019 Trademark Law, *supra* note 54. The last round of trademark law reform focused primarily on bad-faith trademark filings.

131 *See* MERTHA, *supra* note 74, at 133–34; Mark Sidel, *The Legal Protection of Copyright and the Rights of Authors in the People's Republic of China, 1949–1984: Prelude to the Chinese Copyright Law*, 9 COLUM. J. ART & L. 477, 493 (1985); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 995 (2006); Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525, 577 (2012).

132 *See Institutional Reform Plan*, *supra* note 67; *Wang Yong: Reorganize the State Intellectual Property Office*, XINHUANET (Mar. 13, 2018), http://www.xinhuanet.com/politics/2018lh/2018-03/13/c_137035637.htm (in Chinese).

133 *See* Connie Chan, *16 Observations on Livestreaming in China*, ANDREESSEN HOROWITZ (Sept. 27, 2016), https://a16z.com/2016/09/27/livestreaming-trend-china; Connie Chan, *Outgrowing Advertising: Multimodal Business Models as a Product Strategy*, ANDREESSEN HOROWITZ (Dec. 7, 2018), https://a16z.com/2018/12/07/when-advertising-isnt-enough-multimodal-business-models-product-strategy/ [hereinafter Chan, *Outgrowing Advertising*]; Jiang Sijia, *Tencent Music, Bound for U.S. IPO, Profits from Social Savvy*, REUTERS (Sept. 27, 2018), https://www.reuters.com/article/us-tencentmusic-ipo/tencent-music-bound-for-u-s-ipo-profits-from-social-savvy-idUSKCN1M718Y.

134 *See* Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 862–63 (2001); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 719–20 (2005).

China because of the different way people have engaged with copyrighted contents, especially via mobile phones.[135] To be sure, these models fall outside the legal field (except for contracts) and go more into social norms, business practices, and industry approaches. Nevertheless, without taking account of these new and ever-expanding developments, rights holders, policymakers, and commentators may not be able to form a holistic view of the Chinese copyright ecosystem and to fully understand what incentive frameworks are available to support authors and artists in China.[136]

CONCLUSION

When China joined the WTO at the turn of this millennium, foreign rights holders and their supportive governments and industry groups were quick to criticize the country for its lack of copyright protection and for providing very limited market access to Western entertainment products.[137] Today, however, China "leads the world in cinemas with over 70,000 movie screens" and has "the seventh largest music market, . . . the fourth largest music streaming market, . . . and the largest market for video games,"[138] even though intellectual property enforcement remains an ongoing challenge. Indeed, the importance of the Chinese market for foreign films has never been more obvious than during the COVID-19 pandemic, when entertainment venues shut down in Europe and the United States while remaining fairly open in China.[139]

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135 *See* Chan, *Outgrowing Advertising*, *supra* note 133.

136 *See* LUCY MONTGOMERY, CHINA'S CREATIVE INDUSTRIES: COPYRIGHT, SOCIAL NETWORK MARKETS AND THE BUSINESS OF CULTURE IN A DIGITAL AGE 105 (2010); Yu, *Digital Copyright Reform*, *supra* note 51, at 766; Peter K. Yu, *The Long and Winding Road to Effective Copyright Protection in China*, 49 PEPP. L. REV. 681, 722 (2022).

137 For discussions of past quota on foreign film importation in China, see generally WANG SHUJEN, FRAMING PIRACY: GLOBALIZATION AND FILM DISTRIBUTION IN GREATER CHINA 61–71 (2003); Mary Lynne Calkins, *Censorship in Chinese Cinema*, 21 HASTINGS COMM. & ENT. L.J. 239, 294 (1998); Carl Erik Heiberg, Note, *American Films in China: An Analysis of China's Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy*, 15 MINN. J. INT'L L. 219, 234–38 (2006).

138 INT'L INTELL. PROP. ALL., *supra* note 44, at 12.

139 *See* Todd Lu, *The Emergence of the Chinese Film Market During COVID-19*, USC ANNENBERG MEDIA (Oct. 5, 2020), https://www.uscannenbergmedia.com/2020/10/05/the-emergence-of-the-chinese-film-market-during-covid-19/; Enoch Yiu, *China's Box Office Expands to World's Largest, Defying a Year of Disastrous Takings as Covid-19 Brings Cinemas to Their Knees*, S. CHINA MORNING POST (Jan. 1, 2021), https://www.scmp.com/business/companies/article/3116128/chinas-box-office-expands-worlds-largest-defying-year-disastrous.

Going forward, it will be interesting to see whether copyright law reform in China can make the same progress the same way as its counterpart in the patent and trademark areas. Based on the latest WIPO statistics, in 2021 China had the world's largest volume of international applications through the Patent Cooperation Treaty and third largest volume of international trademark applications under the Madrid Agreement Concerning the International Registration of Marks and its related protocol.[140] China also ranked twelfth in the 2021 Global Innovation Index.[141] If these achievements are any guide, there is still quite a long way for copyright law reform to catch up with its counterparts in the patent and trademark areas. Nevertheless, the adoption of the Third Amendment indicates that Chinese copyright law has been moving in the same promising direction as patent and trademark laws, even though the pace of reform may have been slower than what rights holders, policymakers, and commentators would like.

[140] Press Release, World Intell. Prop. Org., Innovative Activity Overcomes Pandemic Disruption — WIPO's Global Intellectual Property Filing Services Reach Record Levels (Feb. 10, 2022), https://www.wipo.int/pressroom/en/articles/2022/article_0002.html.

[141] WORLD INTELL. PROP. ORG. ET AL., GLOBAL INNOVATION INDEX 2021: TRACKING INNOVATION THROUGH THE COVID-19 CRISIS 4 (Soumitra Dutta et al. eds., 2021).