COPYING COPYRIGHT CODE: THE RESONANCE OF U.S. COPYRIGHT LAW IN CHINA

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Over the past three decades, China's copyright law has undergone a remarkable transformation, evolving from a skeletal framework into a sophisticated regime that increasingly engages with global copyright norms. A significant portion of this evolution has involved the transplantation of doctrines from U.S. copyright law. Yet the story of this legal borrowing is not one of simple replication. Rather, it is a story of selective adaptation, where imported rules are filtered through domestic institutions, policy priorities, and governance structures.

Using three copyright doctrines—fair use, anti-circumvention rules, and the internet service provider ("ISP") safe harbor—this article examines why, despite drawing from the same foreign source, these three transplants have converged with U.S. models to strikingly different degrees. The fair use doctrine entered China primarily through judicial experimentation and proved the least durable, ultimately retreating from its U.S.-style formulation. The anti-circumvention regime arrived as a selective and streamlined transplant, shaped more by the minimum obligations of the WIPO Internet Treaties than by the finer-grained architecture of the Digital Millennium Copyright Act. The ISP safe harbor, by contrast, traveled as a relatively faithful import of the DMCA's Section 512 model, retaining its core structure of functional service categories, notice-and-takedown procedures, and conditional liability limitations.

Drawing on legal transplant theory and comparative institutional analysis, this article argues that two factors explain this spectrum of fidelity: first, the fit between each doctrine and China's deep-seated preference for administrative, rule-based governance over judicial, standard-based adjudication; second, the channel of importation (judicial versus legislative and voluntary versus obligatory). In doing so, the article not only maps the divergent trajectories of three pivotal copyright doctrines but also sheds light on the broader dynamics of how foreign legal ideas are refashioned when they encounter a new legal system.

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INTRODUCTION

Many observers contend that the United States has occupied a central position in global intellectual property (IP) governance by projecting its IP regime worldwide.[3] That projection has proceeded through multilateral treaties—such as the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement")—as well as through bilateral and regional trade negotiations and enforcement diplomacy.[4] Beyond this deliberate export of norms, the gravitational pull of the U.S. market, the global reach

[3] *See, e.g.*, PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 12 (2002) (contending that a small cohort of U.S. companies—established players in the knowledge economy—came to dominate the U.S. trade agenda-setting process and, in partnership with European and Japanese multinationals, crafted IP principles that became the blueprint for the TRIPS Agreement); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 60 (2003) (arguing that the globalization of intellectual property rights, originating in the United States, was propelled by domestic reforms that both paved the way and supplied much of the substance for the nation's ultimately successful effort to globalize its approach to IP).

[4] SELL, *supra* note 3, at 7, 13, 138.

of American technology and media firms, and the persuasive authority of U.S. courts and agencies have also diffused U.S. IP concepts abroad.[5] This Article takes Chinese copyright law as a case study to trace the influence of the U.S. Copyright Act on the legislation and practice of a foreign legal system, and to contribute to the literature on comparative copyright law—in particular, theory and practice of legal transplant. It bears noting that legal systems in other jurisdictions have also shaped Chinese copyright law[6] and, more broadly, its civil law system in different respects and to varying degrees.[7] For the purpose of this Article, we confine our analysis to legal transplant from U.S. copyright law.

Since opening up and the launch of reform in the late 1970s, China's IP system has interacted continuously with U.S. statutory law and judicial practice in the context of World Trade Organization (WTO) accession, compliance with treaty obligations, and successive rounds of China–U.S. economic and trade negotiations and consultations, and the treaties they produced.[8] Consequently, across patents, trademarks, and copyright, China has engaged with—and, in important respects, converged toward—U.S.

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[5] *See id.* at 1–2 (describing the role of U.S.-based pharmaceutical, entertainment, and software firms in galvanizing support for stronger global IP protection); Niva Elkin-Koren & Neil Weinstock Netanel, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition*, 72 HASTINGS L.J. 1121, 1121 (2021) (discussing the adoption of the U.S. fair-use model abroad and foreign courts' engagement with U.S. fair-use precedent); Jean-Frédéric Morin & E. Richard Gold, *An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries*, 58 INT'L STUD. Q. 781, 790 (2014) (identifying coercion, contractualization, socialization, and regulatory competition as mechanisms of IP-law transplantation and discussing socialization to U.S. norms).

[6] *See, e.g.*, Tianxiang He, *Transplanting Fair Use in China? History, Impediments and the Future*, 2020 U. ILL. J.L. TECH. & POL'Y 359, 362 [hereinafter He, *Transplanting Fair Use in China*] (identifying international copyright treaties and foreign IP systems, including the European Union's, as forces shaping Chinese copyright law); Päivi Hutukka, *Copyright Law in the European Union, the United States and China*, 54 INT'L REV. INTELL. PROP. & COMPETITION L. 1044, 1070–72 (2023) (explaining how the European Union has used soft power to align Chinese IP law and practice more closely with the European model of copyright protection).

[7] *See, e.g.*, John Shijian Mo, *Legal Culture and Legal Transplants: Convergence of Civil Law and Common Law Traditions in Chinese Private Law*, in LEGAL CULTURE AND LEGAL TRANSPLANTS, REPORTS TO THE XVIIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 205, 214, 216 (Jorge A. Sánchez Cordero ed., 2011) (noting that, since 1978, Chinese private law has drawn on German, French, Japanese, and Taiwanese civil-law models and that civil-law concepts, principles, and practices have shaped Chinese legislation, the judiciary, and judicial practice); Wang Jingen & Larry A. DiMatteo, *Chinese Reception and Transplantation of Western Contract Law*, 34 BERKELEY J. INT'L L. 44, 49 (2016) (noting that contemporary Chinese commercial law or private law reflect European civil-law influences, especially the widely respected German tradition).

[8] *See* Agreement on Trade Relations Between the United States of America and the People's Republic of China arts. VI, U.S.-P.R.C., July 7, 1979, 31 U.S.T. 4651; *see also* CHENGUO ZHANG, BALANCE AND LIMITATION OF INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LATEST LAW AMENDMENTS AND JUDICIAL DEVELOPMENT UNDER MICRO-COMPARATIVE PERSPECTIVES 4, 51 (2022) (tracing China's modern IP reforms in relation to WTO/TRIPS obligations and discussing the influence of U.S. statutory and judicial approaches on Chinese copyright doctrine).

approaches in a broad sense.[9] This convergence, however, has been neither linear nor uniform. Different areas of IP law have experienced varying degrees of U.S. influence. Within copyright law itself, distinct doctrines have followed markedly different trajectories of adoption, adaptation, and, at times, rejection.

Beginning with the 1990 Copyright Law and through ensuing revisions, Chinese legislation has, to varying degrees, drawn on the U.S. Copyright Act.[10] China has selectively transplanted several important provisions from the 1976 U.S. Copyright Act and later enactments, including the Digital Millennium Copyright Act of 1998 ("DMCA").[11] Yet the imported rules and practices that developed around them are not mirror images of their counterparts. Chinese copyright law and practice often operate according to a different logic and yield different functional effects.[12] The transplanted doctrines have been localized—in the delineation of rights boundaries, the balancing of competing interests, and the choice of regulatory modalities—so that textual similarities coexist with institutional divergence.[13] In implementation, these rules have undergone functional adjustments and structural reconstructions, reflecting differences between China and the United States in the organization of state power, legal process, administrative priorities, and policy objectives.

Understanding these dynamics requires moving beyond the observation that legal transplants are often modified in transit or upon arrival. A richer inquiry asks *why* some imported doctrines travel more faithfully than others, and *what conditions* enable or constrain convergence with foreign models. Legal transplant theory has long recognized that borrowing is never a matter of simple replication; rather, imported rules are filtered through domestic institutions, cultural frameworks, and political constraints. Yet the literature has devoted less attention to explaining variation *among* transplants originating from the same foreign source. This Article addresses this gap by examining three copyright doctrines that China borrowed from the United States—fair use, anti-circumvention rules, and the internet service provider ("ISP") safe harbor. It asks why, despite sharing a common origin, these doctrines have converged with U.S. models

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[9] Peter K. Yu, *US-China Intellectual Property Trade Wars*, *in* Research Handbook on Trade Wars 271 (Ka Zeng & Wei Liang eds., 2022).

[10] He, *Transplanting Fair Use in China*, *supra* note 6, at 361; Hutukka, *supra* note 6, at 1071–73; Lin Xie, *Inconsistent Anti-Circumvention Legislation and Its Future in China: Towards a Harmonized and Balanced Approach*, 69 J. Copyright Soc'y U.S.A. 145, 154, 158 (2022); Xiao Ma, *Establishing an Indirect Liability System for Digital Copyright Infringement in China: Experience from the US' Approach*, 4 N.Y.U. J. Intell. Prop. & Ent. L. 253, 253 (2015).

[11] Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[12] *See, e.g.*, He, *Transplanting Fair Use in China*, *supra* note 6, at 359, 362 (describing Chinese Copyright Law as quintessentially a product of legal transplantation, which has been continually shaped by domestic legal traditions, evolving international norms, legal developments in advanced jurisdictions, and technological change, with these forces exerting varying influence at different stages and turning the statute into a battleground for norm-setting power that has produced inconsistencies in the legal text and incongruities in Chinese courts' doctrinal interpretation and application of transplanted provisions).

[13] Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, *in* Governance of Intellectual Property Rights in China and Europe 20–21, 41 (Nari Lee, Niklas Bruun & Mingde Li eds., 2016); Liguo Zhang & Niklas Bruun, *Legal Transplantation of Intellectual Property Rights in China: Resistance, Adaptation and Reconciliation*, 48 Int'l Rev. Intell. Prop. & Competition L. 4, 4–5, 7 (2017).

to strikingly different degrees.

To illustrate these dynamics, this Article examines the three doctrines as examples of distinct modes of transplantation and explores the varied outcomes they produce. The fair use doctrine entered China primarily through judicial experimentation and proved the least durable, ultimately retreating from its U.S.-style formulation. The anti-circumvention regime arrived as a selective and streamlined transplant, shaped more by the minimum obligations of the World Intellectual Property Organization (WIPO) Internet Treaties than by the finer-grained architecture of the DMCA. The ISP safe harbor, by contrast, traveled as a relatively faithful import of the DMCA's Section 512 model, retaining its core structure of functional service categories, notice-and-takedown procedures, and conditional liability limitations.

Part I sets the stage by tracing the global diffusion of U.S. copyright law and China's adoption of foreign copyright norms, particularly from the United States, and by explaining the economic incentives that drive both the export and import of copyright rules. Following an introduction to the three above-mentioned copyright doctrines in both countries, Part II analyzes the pathways through which these doctrines were transplanted into Chinese law and the ways in which the resulting regimes depart from their U.S. counterparts. Part III distills the lessons from these trajectories: although the degree and direction of transplantation differ, each has ultimately been implemented in ways that reflect the predominance of administrative enforcement in China.

I. TRANSPLANT OF U.S. COPYRIGHT LAW

Several factors have contributed to China's transplantation of elements from U.S. copyright law. Foremost among these are the economic strategies of the two countries and the nature of their bilateral interactions. The United States has actively leveraged its political influence, economic strength, and technological leadership to promote its IP regime—and the values underlying it—on the international stage. China, by contrast, has sought benchmark models from the developed world to guide its domestic IP reforms, aiming both to support its own economic development and to facilitate more effective engagement with the global economy.

A. The Global Diffusion of U.S. Copyright Legislation

The United States has been able to globalize its copyright regime through three mutually reinforcing channels of institutional export. First, it has leveraged the multilateral treaty system.[14] During the Uruguay Round of Multilateral Trade Negotiations, the United States, alongside other developed economies, successfully advanced the inclusion of IP within the multilateral trade framework, culminating in the TRIPS Agreement.[15] This development transformed copyright norms—previously shaped largely in the United States and Europe—into binding minimum standards for all WTO

[14] *See, e.g.*, Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, 13 PROMETHEUS 6, 15 (1995).

[15] *See, e.g.*, Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 9 (2004).

members.[16] The United States also played a pivotal role in shaping the WIPO Internet Treaties—namely, WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty—championing provisions on digital rights and technological protection measures ("TPMs").[17]

Second, the United States has relied on bilateral, regional, and plurilateral trade agreements. This strategy first emerged in bilateral free trade agreements ("FTAs"), such as those with Australia, Jordan, Morocco, and South Korea. Through these instruments, the United States prompted "TRIPS-plus" copyright standards closely modeled on its domestic law,[18] extending beyond TRIPS requirements in areas such as the scope and duration of protection, TPMs, enforcement mechanisms, and platform liability.[19]

Third, U.S. copyright norms have been diffused through the transnational circulation of legal ideas. Networks of industry actors, academic institutions, nongovernmental organizations, and international organizations have facilitated this process.[20] Mechanisms such as lobbying, strategic litigation, expert reports, and capacity-building programs have amplified the reach of U.S. approaches, making key elements of its copyright system influential reference points in the lawmaking process of many countries.[21]

B. Transplanting Copyright Law in China

Since opening up and the launch of reform, China has repeatedly revised its copyright laws as part of its effort to build a modern IP system. Much of this evolution can be understood as a gradual process of legal transplantation shaped by both external pressures and domestic institutional needs.[22] It unfolds in three broad stages: the introduction of a modern copyright system, the construction of fundamental digital copyright rules, and the subsequent refinement of the existing regime.

This first stage—the introduction of a modern copyright system—began with the 1990 Copyright Law, which established a basic framework in domestic policy terms and linked copyright protection to the promotion of socialist culture and science.[23] A major shift came in 2001, as China prepared to join the WTO: the Copyright Law was revised to

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[16] *See, e.g.*, Hannu Wager, *Copyright: A Nordic Perspective*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 323–24 (Jayashree Watal & Antony Taubman eds., 2015).

[17] *See generally* Mihály Ficsor, *The WIPO "Internet Treaties": The US as the Driver*, 6 J. MARSHALL REV. INTELL. PROP. L. 17 (2006).

[18] *See, e.g.*, Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 985 (2014).

[19] *See, e.g.*, *id*. at 987–91.

[20] *See, e.g.*, Jean-Frédéric Morin, *Paradigm Shift in the Global IP Regime: The Agency of Academics*, 21 REV. INT'L POL. ECON. 275, 278 (2014); Morin & Gold, *supra* note 5, at 786.

[21] *See, e.g.*, CAROLYN DEERE BIRKBECK & SANTIAGO ROCA, AN EXTERNAL REVIEW OF WIPO TECHNICAL ASSISTANCE IN THE AREA OF COOPERATION FOR DEVELOPMENT, at vii (2011), https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_dev_ge_11/wipo_ip_dev_ge_11_ref_2_deere.pdf; SELL, *supra* note 3, at 75, 97, 103.

[22] Peter K. Yu, *The Long and Winding Road to Effective Copyright Protection in China*, 49 PEPP. L. REV. 681, 683, 707 (2022) [hereinafter Yu, *Effective Copyright Protection in China*].

[23] Copyright Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991), art. 1 (China).

strengthen the exclusive rights.[24] However, the delineation of the core internet transmission right—the right of communication through information networks—was left to the State Council.[25]

The second stage focused on building the foundations of digital copyright. By 2005, pressure on China's internet copyright regime had intensified. The United States urged China to accede to the WIPO Internet Treaties and align its rules accordingly, and the Office of the United States Trade Representative ("USTR") criticized China's 2005 draft regulations for copyright protection on computer networks for their treatment of TPMs, limitations, and notice-and-takedown procedures.[26] In response, China issued the Regulations on the Protection of the Right of Communication Through Information Networks ("Information Network Regulations"), which established the core architecture for regulating digital copyright.[27] Effective July 1, 2006, the Regulations set out rules on the right of communication through information networks, TPMs, rights management information, notice-and-takedown procedures, and liability exemptions for network service providers.[28] China acceded to the WIPO Internet Treaties in 2007, and the National Copyright Administration subsequently issued model forms for takedown notices and restoration statements under Articles 14 and 16 of the Regulations.[29]

The third stage involved refining the existing regime, rather than building a new one from scratch, with domestic needs and conditions playing a larger role.[30] It began with the

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[24] Peter K. Yu, *Third Amendment to the Chinese Copyright Law*, 69 J. COPYRIGHT SOC'Y U.S.A. 5, 14 (2022).

[25] Copyright Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, rev'd Oct. 27, 2001, effective Nov. 1, 2001), art. 58 (China).

[26] OFF. OF THE U.S. TRADE REPRESENTATIVE [USTR], 2005 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 67 (2005), https://ustr.gov/archive/assets/Document_Library/Reports_Publications/2005/asset_upload_file293_8580.pdf; USTR, 2006 SPECIAL 301 REPORT 23 (2006), https://ustr.gov/sites/default/files/2006%20Special%20301%20Report.pdf ("The draft only provides legal protections and remedies relating to technological protection measures . . . that prevent or restrict the making available to the public of a work (e.g., passwords). It provides neither legal protections nor remedies to prevent circumvention of copy-control TPMs. Its exception to protection against circumvention remains overbroad. Without such protections and remedies, the United States is concerned that China will not provide effective protection against copyright infringement on the Internet. . . . The notice and take down measures for a copyright holder appear overly burdensome and rigid.").

[27] Regulations on the Protection of the Right of Communication Through Information Networks (promulgated by State Council, May 18, 2006, effective July 1, 2006) (China) [hereinafter 2006 Information Network Regulations].

[28] *Id*.

[29] Notice of the National Copyright Administration on Issuing the Model Formats of the "Notice Requesting Removal or Disconnection of Links to Infringing Online Content" and the "Statement Requesting Restoration of Removed or Disconnected Online Content," National Copyright Administration Notice No. 1 [2007] (issued by the Nat'l Copyright Admin., June 24, 2007) (China).

[30] *See, e.g.*, Yu, *Effective Copyright Protection in China*, *supra* note 22, at 771 (noting that China amended its copyright law to address domestic needs and circumstances, rather than external demands).

2010 amendment to the Copyright Law, which China presented to the WTO as a domestic response to the ruling in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*.[31] China then entered a long period of iterative deliberation in the copyright law revision process. The third round of revision formally began in 2011; the 2012 draft sought not only to amend the statute but also to incorporate into the Copyright Law issues previously handled mainly by administrative regulations, including TPMs and rights management information.[32] Meanwhile, courts and regulators continued to refine the online copyright framework established in 2006. In 2012, the Supreme People's Court issued its interpretation on civil disputes involving the right of communication through information networks.[33] A year later, the State Council strengthened the penalty provisions of the Information Network Regulations.[34] The process culminated in the 2020 amendment, which official explanations framed as a response to new digital technologies, persistent enforcement challenges, and the need to align domestic law with subsequent treaty commitments and developments in civil law.[35]

II. THREE TRANSPLANTS, THREE PATHWAYS

Although China has drawn on doctrines from the U.S. Copyright Act, each transplant has followed its own trajectory. These divergences are a blend of external pressures—such as multilateral treaty obligations and bilateral trade negotiations—and domestic considerations, including China's own policy priorities, administrative governance, and legal tradition and culture. By examining three pivotal copyright doctrines—fair use, anti-circumvention rules, and the ISP safe harbor—we can see how transplants travel through distinct channels and yield rules that echo U.S. models in terminology yet differ in scope, structure, and practical effect.

In analyzing the transplantation of these three doctrines from the United States to China, this Part proceeds in three steps: first, it maps the substance of each doctrine in U.S. and Chinese law; second, it identifies the forces that shaped each transplant; and third, it traces how each doctrine has been recalibrated in China into forms that depart from their U.S. origins. This trajectory illustrates a familiar feature of legal transplantation: once a foreign doctrine enters a new legal system, its meaning is not fixed by the source jurisdiction but is refashioned by domestic institutions, policy

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[31] WORLD TRADE ORG., ANNUAL REPORT 2011, at 92 (2011), https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep11_e.pdf; *see also* Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009).

[32] Copyright Law (Amendment Draft, Mar. 31, 2012), at 40 (China).

[33] Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Involving Infringement of the Right of Communication Through Information Networks, Judicial Interpretation No. 20 [2012] (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 17, 2012, effective Jan. 1, 2013) (China).

[34] Regulations on the Protection of the Right of Communication Through Information Networks (promulgated by the State Council, May 18, 2006, rev'd Jan. 30, 2013, effective Mar. 1, 2013), arts. 18–19 (China) [hereinafter 2013 Information Network Regulations].

[35] Yuan Shuhong, *Explanation of the Copyright Law Amendment Bill of the People's Republic of China*, 2021 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 19, 19–20.

priorities, and interpretive practices.[36]

A. Fair Use

Copyright limitations and exceptions are rules that temper exclusive rights by allowing certain uses of protected works that would otherwise fall within the copyright owner's control.[37] Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works[38] ("Berne Convention") and Article 13 of the TRIPS Agreement provide a three-step test for contracting nations to design their own limitations and exceptions by stipulating that "members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[39]

Across jurisdictions, these rules are typically organized along two archetypes: open-ended models and closed, enumerated models.[40] A prominent open-ended model is U.S. fair use. Section 107 codifies this judge-made doctrine and leaves courts to decide, case by case, whether a use is fair under general factors,[41] guided by an illustrative, nonexhaustive list of purposes. This approach has not remained unique to the United States. Israel, for example, adopted a fair use provision in its 2007 Copyright Act that closely tracks the U.S. framework and is widely discussed as a transplant of that model.[42]

By contrast, closed-list systems rely on predefined statutory categories. The European Union's Information Society Directive exemplifies this design through Article 5, which provides an exhaustive list of exceptions and limitations. The closed character of this list is confirmed by Recital 32 and by the CJEU's interpretation of Article 5 as an exhaustive enumeration.[43] Even within this closed-list family, however, structures vary. One subform is fair dealing: a use must first fit within a listed purpose, such as research, private study, criticism, review, or news reporting, before a court assesses whether it is "fair." Fair dealing regimes can be found in Australia, Canada, and the United

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[36] *See, e.g.*, Holger Fleischer, *Legal Transplants in European Company Law: The Case of Fiduciary Duties*, 2 EUR. CO. & FIN. L. REV. 378, 394 (2005); Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 MAASTRICHT J. EUR. & COMP. L. 111, 115–16 (1997).

[37] *See, e.g.*, Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 12, 12–13 (Ruth L. Okediji ed., 2017) [hereinafter AGE OF LIMITATIONS AND EXCEPTIONS].

[38] Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris July 24, 1971).

[39] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, 1869 U.N.T.S. 299 (1994).

[40] *See, e.g.*, Jyh-An Lee, *Tripartite Perspective on the Copyright-Sharing Economy in China*, 35 COMPUT. L. & SEC. REV. 434, 442–43 (2019).

[41] 17 U.S.C. § 107; H.R. REP. NO. 94-1476, at 66 (1976).

[42] § 19, Copyright Act, 5768-2007, LSI 34 (2007) (Isr.); Elkin-Koren & Netanel, *supra* note 5, at 1122.

[43] Directive 2001/29, art. 5, recital 32, 2001 O.J. (L 167) 10, 13 (EC); Case C-516/17, Spiegel Online GmbH v Volker Beck, ECLI:EU:C:2019:625, ¶¶ 41, 47–48; P. Bernt Hugenholtz, *Flexible Copyright: Can the EU Author's Rights Accommodate Fair Use?*, *in* AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 37, at 275, 283–84.

Kingdom.[44]

Another subform combines an enumerated list of permitted acts with overarching boundary rules. China's 2020 Copyright Law follows this approach. Article 24 covers specific situations in which works may be used without permission, while requiring that the normal use of the work not be affected and that the copyright owner's lawful interests not be unreasonably prejudiced. Article 24(13) specifically leaves room for additional circumstances prescribed by laws and administrative regulations.[45] Moreover, some jurisdictions adopt hybrid designs that pair a general fair use clause with specific statutory exceptions. Singapore is a representative example: its 2021 Copyright Act retains a general fair use provision while creating rules for particular scenarios in which copying is "deemed fair use."[46] These systems occupy a middle ground between a pure open-ended standard and a strictly closed list.

1. U.S. Law

The fair use doctrine in the United States finds its principal statutory expression in Section 107 of the 1976 U.S. Copyright Act. Importantly, this provision was not intended to introduce a new, rigid exception to copyright's exclusive right, but rather to codify and give explicit statutory recognition to a longstanding judge-made common-law doctrine.[47] Recognizing the necessity for flexibility, particularly at a time of rapid technological evolution, Congress sought to ensure that the rigidity of copyright's exclusive rights would not unduly constrain socially valuable and lawful uses of copyrighted work.[48]

Congress described fair use as an equitable "rule of reason," acknowledging that its highly contextual nature defies broad or precise definition.[49] Consequently, rather than attempting to establish an exhaustive list of permissible acts, Section 107 employs an illustrative approach, identifying typical scenarios where fair use might apply, such as criticism, comment, news reporting, teaching, scholarship, and research.[50] Alongside these examples, the statute articulates four nonexclusive factors to guide judicial consideration: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, and (4) the effect of the use

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[44] *Copyright Act 1968* (Cth) ss 40–43 (Austl.); Copyright Act, R.S.C. 1985, c C-42, ss 29–29.2 (Can.); Copyright, Designs and Patents Act 1988, c. 48, §§ 29–30 (UK); Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 McGill L.J. 309, 314 (2008); Raquel Xalabarder, *Study on Copyright Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities in Latin America and the Caribbean*, WIPO Doc. SCCR/19/4, at 33 (Sept. 30, 2009).

[45] Copyright Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, rev'd Nov. 11, 2020, effective June 1, 2021), art. 24 (China) [hereinafter 2020 Copyright Law]; Tianxiang He, *The Copyright Limitations of the 2020 Copyright Law of China: A Satisfactory Compromise?*, 69 J. Copyright Soc'y U.S.A. 107, 108 (2022) [hereinafter He, *The Copyright Limitations*].

[46] Copyright Act 2021 (2020 Rev Ed) ss 190–194 (Sing.).

[47] H.R. Rep. No. 94-1476, at 66 (1976).

[48] 17 U.S.C. § 107; H.R. Rep. No. 94-1476, at 65–66 (1976).

[49] H.R. Rep. No. 94-1476, at 65 (1976).

[50] 17 U.S.C. § 107.

upon the potential market for, or value of, the copyrighted work.[51]

This framework was deliberately designed not to ossify fair use but to maintain it as a dynamic and adaptable limitation on copyright—a preserving and open-ended mechanism through which courts could engage in nuanced, case-by-case balancing.[52] Judicial decisions in fair use cases continue to emphasize the centrality of the first factor, often interrogating whether the use is "transformative,"[53] but recent Supreme Court guidance reaffirms that the analysis cannot end there.[54] The mere alteration of expression or the addition of new meaning is not, by itself, sufficient; courts must weigh all four statutory factors, considering each use's specific purpose, context, and commercial implications.

Fair use tempers the licensing leverage of rights holders by preserving space for activities central to public discourse, such as criticism, commentary, news reporting, teaching, and parody.[55] The Supreme Court underscored this connection in cases such as *Campbell v. Acuff-Rose Music, Inc.*, aligning fair use with such expressive uses.[56] Economically, some scholars argue that fair use responds to licensing frictions and high transaction costs: when permission is difficult to obtain or bargaining too costly, allowing limited unlicensed use helps prevent the burden of right clearance from blocking information exchange and incremental innovation.[57]

In sum, Section 107 of the Copyright Act enshrines fair use as a flexible, judicially balanced doctrine—one that both draws upon and sustains its common law origins, enabling copyright to remain just and workable in the face of continuous technological and societal transformation. It enables courts to strike balance on a case-by-case basis and to recalibrate the boundaries as business models and technologies evolve.[58]

2. Chinese Law

In Chinese Copyright Law, what is often translated as "fair use" (*heli shiyong*) denotes a set of specific statutory limitations and exceptions, rather than an open-ended

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[51] *Id.*
[52] H.R. REP. NO. 94-1476, at 66 (1976).
[53] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111–23, 1127 (1990).
[54] Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 528–33 (2023); *see also* Shyamkrishna Balganesh & Peter S. Menell, *Going "Beyond" Mere Transformation:* Warhol *and Reconciliation of the Derivative Work Right and Fair Use*, 47 COLUM. J.L. & ARTS. 413, 436 (2024) (explaining that *Campbell* cannot be read to hold that the first factor favors any use that merely adds new expression, meaning, or message and so broadly that "transformative use" would swallow the copyright owner's exclusive right to prepare derivative works).
[55] *See, e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 333 (1989).
[56] 510 U.S. 569, 575–79 (1994).
[57] Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149, 151, 159 (2002); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601–05, 1618 (1982).
[58] *See, e.g.*, Leval, *supra* note 53, at 1108–10; Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111, 128.

standard like Section 107 of the U.S. Copyright Act. Article 24 provides that a work may be used without permission and payment in the enumerated circumstances.[59] All listed exceptions are subject to common conditions: the user must specify the author and the title of the copyrighted work, the use must not conflict with the normal exploitation of the work, and it must not unreasonably prejudice the rightsholder's legitimate interests.[60] The latter two mirror the second and third prongs of the three-step test under the Berne Convention and the TRIPS Agreement,[61] while the closed enumerated list satisfies the first prong concerning "certain special cases."[62] Representative limitations and exceptions include personal study or research, appropriate quotation, unavoidable use in news reporting, preservation copying by libraries or museums, nonprofit public performances, and providing accessible formats for people with print disabilities, among others.[63]

3. Transplant Trajectories

Although China has long adhered to a closed, enumerated system of copyright limitations and exceptions, rather than an open-ended fair use model, Section 107 of the U.S. Copyright Act has served as a salient reference point in academic debate, law reform discussions, and, notably, certain strands of judicial reasoning. In a number of decisions, courts had drawn on U.S.-style fair use analysis to adopt more flexible interpretations, particularly in contexts such as news reporting and online secondary creation.[64]

This structured transplantation can be traced, at least in part, to a 2011 judicial policy document of the Supreme People's Court, which instructed courts to consider factors including the nature and purpose of the use, the nature of the copyrighted work, the quantity and quality of the portion used, and the effect of the use on the work's potential market or value.[65] That guidance has provided a direct policy foundation for Chinese courts to employ a structured, factor-based approach closely resembling the U.S.

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[59] 2020 Copyright Law, *supra* note 45, art. 24.
[60] *Id*.
[61] *See, e.g.*, (Jerry) Jie Hua, *Copyright Exceptions for Text and Data Mining in China: Inspiration from Transformative Use*, 69 J. COPYRIGHT SOC'Y U.S.A. 123, 125 (2022); Jyh-An Lee & Yangzi Li, *The Pathway Towards Digital Superpower: Copyright Reform in China*, 70 GRUR INT'L 861, 867 (2021); *see also* Tianxiang He, *Copyright Exceptions Reform and AI Data Analysis in China: A Modest Proposal*, *in* ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY 196, 205 (Jyh-An Lee, Reto M. Hilty & Liu Kung-Chung eds., 2021) [hereinafter He, *Copyright Exceptions Reform*] ("[The] 'two-step' test serves as a complement to the listed exceptions from a doctrinal perspective.").
[62] *See supra* text accompanying notes 38–39.
[63] 2020 Copyright Law, *supra* note 45, art. 24.
[64] Seagull Haiyan Song, *Reevaluating Fair Use in China—A Comparative Copyright Analysis of Chinese Fair Use Legislation, the US Fair Use Doctrine, and the European Fair Dealing Model*, 51 IDEA 453 (2011); Haochen Sun, *Protecting the Public Interest Through Intellectual Property Law: The Creative Approach of Chinese Judges*, 31 MINN. J. INT'L L. 185, 198–203 (2022); Jie Wang & Tianxiang He, *To Share Is Fair? The Changing Face of China's Fair Use Doctrine in the Sharing Economy and Beyond*, 35 COMPUT. L. & SEC. REV. 15, 20–22 (2019).
[65] Opinions on Some Issues Concerning Giving Full Play to the Adjudicative Function of Intellectual Property in Promoting the Great Development and Prosperity of Socialist Culture and Promoting Independent and Coordinated Economic Development, Fa Fa No. 18 [2011] (issued by the Sup. People's Ct., Dec. 16, 2011), ¶ 8 (China).

four-factor fair use analysis.

Some courts had applied the four factors essentially verbatim. For example, in 2011, in *Julia Banner Alexander v. Beijing Haidian Dell Training School*, the Beijing High People's Court assessed whether a for-profit training school's use of the plaintiff's materials in *New Concept English* in online courses constituted fair use by expressly examining four factors: the purpose of the use (whether the use was commercial?), the nature of the work, the amount and proportion used, and the effect on the work's potential market value.[66] In 2013, in *Wang Xin v. Google Inc.*, the same court evaluated Google's unauthorized full-text scanning of the plaintiff's book *Acid Lover*.[67] Under the same four factors, the court rejected Google's fair use defense for lack of sufficient evidence. Scholars note that the court's interpretation of "transformative use" in this case largely aligns with American judicial practice.[68] In 2014, in *Liu Bokui v. Li Xia*, the Shanghai No. 2 Intermediate People's Court applied a four-factor analysis to determine whether the defendant's quotation of a passage from the plaintiff's work in a textbook qualified as a reasonable quotation.[69] In 2016, in *Shanghai Animation Film Studio v. Zhejiang New Image Age Cultural Communication Co.*, the Shanghai Intellectual Property Court used the four-factor framework to assess whether the use of copyrighted animated character images in a film poster constituted fair use.[70] The Guangdong High People's Court adopted the same approach in 2019 to evaluate whether game livestreaming qualified as fair use.[71] Two years later, the Beijing Intellectual Property Court applied the same framework to assess whether the use of audiovisual clips through an audio-recognition function constituted fair use.[72]

Other courts had adopted the framework more selectively. Some decisions considered only three of the four factors—for example, omitting an explicit discussion of the nature of the copyrighted work or examining it within other considerations.[73] In still other cases, courts evaluated fair use without addressing the amount and substantiality of

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[66] Julia Banner Alexander v. Beijing Haidian Dell Training Sch., (2008) Gao Min Zhong Zi No. 185 (Beijing High People's Ct. Aug. 29, 2011) (China).

[67] Wang Xin v. Google Inc., (2013) Gao Min Zhong Zi No. 1221 (Beijing High People's Ct. Dec. 19, 2013) (China).

[68] He, *Transplanting Fair Use in China*, *supra* note 6, at 386.

[69] Liu Bokui v. Li Xia, (2013) Hu Er Zhong Min Wu (Zhi) Chu Zi No. 115 (Shanghai No. 2 Interm. People's Ct. Jan. 22, 2014) (China).

[70] Shanghai Animation Film Studio v. Zhejiang New Image Age Cultural Commc'n Co., (2015) Hu Zhi Min Zhong Zi No. 730 (Shanghai Intell. Prop. Ct. Apr. 25, 2016) (China), *aff'g* (2014) Pu Min San (Zhi) Chu Zi No. 258 (Shanghai Putuo Dist. People's Ct. Sept. 8, 2015) (China).

[71] Guangzhou NetEase Comput. Sys. Co. v. Guangzhou Huaduo Network Tech. Co., (2018) Yue Min Zhong No. 137 (Guangdong High People's Ct. Dec. 10, 2019) (China).

[72] Xi'an Jiayunshe Digit. Ent. Distrib. Co. v. Shanghai Xiaoming Enter. Dev. Co., (2020) Jing 73 Min Zhong No. 1775 (Beijing Intell. Prop. Ct. Aug. 22, 2021) (China).

[73] *See, e.g.*, China Pictorial Publ'g House v. Yang Luoshu, (2007) Lu Min San Zhong No. 94 (Shandong High People's Ct. Nov. 27, 2007) (China) (evaluating the reasonable quotation defense); Wu Rui v. Beijing Century Duxiu Tech. Co., (2008) Yi Zhong Min Zhong Zi No. 6512 (Beijing No. 1 Interm. People's Ct. June 5, 2008) (China), *aff'g* (2007) Hai Min Chu Zi No. 8079 (Beijing Haidian Dist. People's Ct. Dec. 11, 2007) (China) (analyzing whether the defendant's display of the copyright pages, prefaces, tables of contents, and a small number of text pages from the plaintiff's books constituted fair use).

the portion used.[74] There are also some decisions that focused on just two factors, most commonly the amount and substantiality of the portion used and the effect of the use on the market for, or value of, the copyrighted work.[75]

What is most striking about this line of cases is the de facto transplantation of U.S.-style fair use reasoning in the absence of any explicit statutory basis in China's Copyright Law. Drawing on Section 107 and related U.S. judicial practice, Chinese courts had employed the fair use factors—whether in full or in part—to craft a more flexible analytical framework responsive to technological change and market realities,[76] even as the formal structure of Chinese copyright exceptions remains closed and enumerated.

4. Divergence Trajectories

Although Chinese courts had, at times, applied or invoked all or part of the U.S. four-factor fair use analysis, scholars observed that judicial determinations in this area tend to shift with national policy priorities.[77] The 2012 Second Draft for Comment of the Copyright Law proposed adding an open-ended catch-all subprovision (covering "other circumstances") to the enumerated list of limitations, but that proposal never became law.[78] The cases above suggest that explicit reliance on the four-factor analysis clustered between 2011 and 2019. Notably, American-style fair use has largely receded—particularly since the Third Amendment to the Copyright Law was approved

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[74] Yang Lin v. Sun Jianguo, (2006) Wu Zhi Chu Zi No. 120 (Wuhan Interm. People's Ct. Sept. 6, 2007) (China) (examining whether the use of an image of a publicly displayed outdoor sculpture on product packaging qualified as fair use); Shaoxing Water Conservancy Bureau v. Wang Juxian, (2013) Min Ti Zi No. 15 (Sup. People's Ct. Dec. 24, 2014) (China) (reviewing Wang Juxian v. Shaoxing Water Conservancy Bureau, (2010) Zhe Shao Zhi Chu Zi No. 39 (Shaoxing Interm. People's Ct. Nov. 13, 2010) (China)) (analyzing whether using photographs depicting sculptures situated in public outdoor spaces in a tourism brochure amounted to fair use); Beijing Youtu Jiashi Imaging Network Tech. Co. v. Foshan Zhongshan Hosp., (2015) Fo Zhong Fa Zhi Min Zhong No. 159 (Foshan Interm. People's Ct. May 25, 2016) (China) (appraising whether the hospital's use of photographs in online medical explainer articles constituted fair use).

[75] *See, e.g.*, China Educ. Television v. Film Satellite Channel Program Prod. Ctr., (2006) Yi Zhong Min Zhong Zi No. 13332 (Beijing No. 1 Interm. People's Ct. Dec. 20, 2006) (China) (considering whether an educational television station's unauthorized broadcast of copyrighted works constituted fair use); Hu Haobo v. Nat'l Educ. Examinations Auth., (2007) Hai Min Chu Zi No. 16761 (Beijing Haidian Dist. People's Ct. Nov. 20, 2007) (China) (analyzing whether the performance of duty by state organs was fair use); He Ping v. Nat'l Educ. Examinations Auth., (2007) Hai Min Chu Zi No. 26273 (Beijing Haidian Dist. People's Ct. Dec. 20, 2007) (China) (appraising whether the unlicensed use of copyrighted material by a government-run examination center constituted fair use).

[76] *See, e.g.*, Lee, *supra* note 40, at 442.

[77] Tianxiang He, *Online Content Platforms, Copyright Decision-Making Algorithms and Fundamental Rights Protection in China*, 14 L. Innovation & Tech. 71, 93 (2022); *see also* Jyh-An Lee & Jingwen Liu, *A Tale of Two Fashion Nations: Comparative Fashion IP Laws in the United States and China*, 47 Colum. J.L. & Arts. 207, 220–21 (2024) (explaining that policy considerations have played a part in shifting the Chinese courts' attitude in IP cases).

[78] Copyright Law (Second Amendment Draft, July 6, 2012), art. 42(13) (China); 2020 Copyright Law, *supra* note 45, art. 24(13); *see also* Lee, *supra* note 40, at 444.

by the Standing Committee of the National People's Congress on November 11, 2020, and took effect on June 1, 2021.[79] In addition to specific, enumerated limitations and exceptions, the Third Amendment recognizes "other circumstances as prescribed by laws and administrative regulations."[80] While this delegation allows copyright authorities to expand the scope of permissible uses through administrative rulemaking, it is not a judicial catch-all that courts may freely expend on a case-by-case basis.[81] In summary, although Chinese legislators have consistently adopted a closed list of enumerated copyright limitations and exceptions, the judiciary, for roughly a decade, sought to import U.S.-style fair use analysis beyond the statutory framework.[82] Those efforts effectively ended in 2020, when the Standing Committee of the National People's Congress declined to adopt a fair use doctrine in the Third Amendment, and courts virtually have not conducted such analysis since.[83]

Several factors help explain why, despite a period in which some courts experimented with U.S.-style fair use reasoning, Chinese law continued to follow a civil-law-style model of enumerated exceptions. First, consistent with a civil law tradition that prizes stability and predictability, China favors enumerated exceptions. The statute's structure, reinforced by common boundary language, reduces uncertainty and lowers governance costs that might otherwise arise from doctrinal spillover.[84] Second, the two systems allocate institutional roles differently. In the United States, fair use is refined primarily through judicial reasoning and appellate precedents, allowing the doctrine's contours to evolve iteratively across cases.[85] By contrast, China's 2020 Copyright Law explicitly delegates discretion and flexibilities to administrative authorities,[86] which may expand the scope of limitations and exceptions via regulations. This design both narrows the space and diminishes the incentive for courts to adopt open-ended balancing in judgments, underscoring the central role of administrative bodies in copyright enforcement. Third, commentators often point to ideological and political factors. China has neither embraced U.S.-style free speech principles—often invoked as a normative basis for fair use—nor shown an appetite to transplant the U.S. fair use doctrine amid recent geopolitical tensions between the two countries.[87]

B. Anti-Circumvention

Anti-circumvention rules bar the bypassing of TPMs—tools that regulate access to, and the exercise of rights in, copyrighted works. These measures also restrict the

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[79] 2020 Copyright Law, *supra* note 45, art. 24.
[80] *Id*.
[81] He, *The Copyright Limitations*, *supra* note 45, at 119; Lee & Li, *supra* note 61, at 867.
[82] *See supra* text accompanying notes 65–75.
[83] To the authors' knowledge, there has been only one case applying U.S.-style fair use analysis since the Third Amendment. Xi'an Jiayunshe Digit. Ent. Distrib. Co. v. Shanghai Xiaoming Enter. Dev. Co., (2020) Jing 73 Min Zhong No. 1775 (Beijing Intell. Prop. Ct. Aug. 22, 2021) (China).
[84] He, *Transplanting Fair Use in China*, *supra* note 6, at 366, 374.
[85] Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated*, *1978–2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 11–12 (2020); Leval, *supra* note 53, at 1127.
[86] *See supra* text accompanying note 80.
[87] He, *Copyright Exceptions Reform*, *supra* note 61, at 206–18.

manufacture, distribution, and provision of devices or services that facilitate such bypassing. Anti-circumvention regimes trace to the 1996 WIPO Internet Treaties, which require contracting parties to furnish "adequate legal protection and effective legal remedies" against the circumvention of TPMs.[88] Legislatures adopted such measures to preserve the effectiveness of digital locks in an environment where TPMs are widely deployed yet readily defeated. This doctrine marks a shift in copyright protection from ex post remedies for infringement to the legal reinforcement of rightsholders' TPMs. Anti-circumvention rules operate alongside, but independently of, traditional infringement doctrines: it protects the integrity of the technological measures to reduce the risk of unauthorized access and copying in digital markets.

1. U.S. Law

In the United States, anti-circumvention rules are codified in Section 1201 of the U.S. Copyright Act. The statute prohibits the act of circumventing technological measures that control access to copyrighted works[89] and bans trafficking in tools or services that circumvent technologies for both access controls and copy- or right-controls[90]—liability that attaches irrespective of whether any underlying infringement is proven.[91] The act of circumventing a TPM includes decrypting, descrambling, or otherwise avoiding, bypassing, removing, deactivating, or impairing a TPM. A measure "effectively controls access" to the copyrighted work if, in the ordinary course of its operation, it requires the application of information or a process to gain access.[92] By contrast, for copy- or rights-control measures, Section 1201 principally targets trafficking in circumvention tools; the statute does not separately outlaw the bare act of circumventing such measures.[93] Congress adopted this framework to foster a lawful digital marketplace and to implement U.S. commitments under the WIPO Internet Treaties by assuring right holders that encryption, password systems, and similar technologies could reliably support new online distribution models.[94]

Like traditional exclusive rights in copyright law, Section 1201's prohibitions are tempered by limitations and exceptions. First, the DMCA established a triennial rulemaking process under which the Librarian of Congress, on the Register of Copyrights' recommendation, may exempt particular "classes of works" from the ban on the act of circumventing access controls; these temporary exemptions do not extend to the anti-trafficking provisions.[95] Second, Congress provided specific statutory exceptions, including for nonprofit libraries, archives, and educational institutions; law enforcement

[88] *See* WIPO Copyright Treaty art. 11, Dec. 20, 1996, 2186 U.N.T.S. 121; WIPO Performances and Phonograms Treaty art. 18, Dec. 20, 1996, 2186 U.N.T.S. 203.
[89] 17 U.S.C. § 1201(a)(1)(A).
[90] *Id.* § 1201(a)(2), (b)(1).
[91] *Id.* § 1201(a)(1)(A), (a)(2), (b)(1); *see* MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 949–50 (9th Cir. 2010).
[92] 17 U.S.C. § 1201(a)(3)(A)–(B).
[93] *Id*. § 1201(b)(1) (2024); *see* Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 547–50 (6th Cir. 2004).
[94] H.R. REP. NO. 105-551, pt. 2, at 20, 23 (1998); Section 1201 Rulemaking, 85 Fed. Reg. 37,400, 37,400–01 (June 22, 2020).
[95] 17 U.S.C. § 1201(a)(1)(B)–(E); 37 C.F.R. § 201.40 (2024).

and intelligence activities; reverse engineering to achieve interoperability; for encryption research; preventing the collection of personally identifying information; and good-faith security testing.[96] Each of these exceptions is subject to defined conditions.

2. Chinese Law

China first introduced anti-circumvention rules into its Copyright Law in the 2010 amendment, which expressly prohibited defeating TPMs.[97] Although the 2010 statute contained only a single provision on circumvention, most operative rules then resided in the State Council's Regulations on the Protection of the Right of Communication Through Information Networks, enacted in 2006 and amended in 2013.[98] The Third Amendment to the Copyright Law largely internalized and refined those rules, bringing them into the statute itself.[99]

Article 49 of the 2020 Copyright Law defines TPMs and expressly forbids anyone, without the right holder's permission, to circumvent such measures or traffic in devices, components, or services designed to circumvent or damage TPMs.[100] Article 50 sets out narrowly tailored limitations and exceptions that permit circumvention in specified circumstances: limited classroom or research use of otherwise unavailable published works; nonprofit provision of accessible formats for persons with print disabilities when works are otherwise unavailable; performance of official duties by state organs under administrative, supervisory, or judicial procedures; security testing of computers, systems, or networks; and encryption research or reverse engineering of software.[101]

The Information Network Regulations supplement these provisions with civil and administrative liabilities for intentionally circumventing or destroying TPMs. Remedies include eliminating adverse effects, making a public apology, and compensating for damages.[102] Where public interests are also harmed, the copyright administrative authority may order the cessation of the infringing conduct, confiscate illegal gains, and impose fines. If the illegal business turnover is RMB 50,000 or more, the fine will be not less than the turnover and not more than five times that amount. If there is no illegal turnover or if the turnover is under RMB 50,000, a fine of up to RMB 250,000 may be imposed, depending on the circumstances.[103] In serious cases, the authority may confiscate computers and other equipment primarily used to provide the network services.[104]

3. Transplant Trajectories

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[96] 17 U.S.C. § 1201(d)–(j).
[97] Copyright Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, rev'd Feb. 26, 2010, effective Apr. 1, 2010), art. 48(6) (China) [hereinafter 2010 Copyright Law].
[98] 2013 Information Network Regulations, *supra* note 34, arts. 4, 12, 18–19.
[99] *See infra* text accompanying notes 100–101.
[100] 2020 Copyright Law, *supra* note 45, art. 49(2)–(3).
[101] *Id*. art. 50.
[102] 2013 Information Network Regulations, *supra* note 34, art. 18(2).
[103] *Id*.
[104] *Id*.

While most jurisdictions have incorporated anti-circumvention provisions into their domestic copyright laws to fulfill obligations under the WIPO Internet Treaties,[105] it is essential to recognize that the core elements—including the prominent anti-circumvention measures—are rooted in the United States's digital agenda advanced at WIPO.[106] The impetus behind these provisions originated largely from the U.S. motion picture industry, which, for many years, has championed regulation of technologies that facilitate copyright infringement. After several unsuccessful attempts to persuade Congress to enact broad legislation enabling copyright owners to sue manufacturers of circumvention technologies, the industry joined forces with other stakeholders in the copyright sector.[107] Together, they successfully convinced the Clinton Administration to include such provisions in the White Paper published by the Information Infrastructure Task Force in September 1995, which notably advocated for the technological protection of creative works (such as through encryption) and the prohibition of circumventing such protection.[108]

A substantial portion of this White Paper formed the basis of the digital agenda submitted to WIPO by the United States.[109] Ultimately, close to 120 countries, including the United States, ratified the WIPO Internet Treaties,[110] making it fair to conclude that the U.S. government effectively exported its position on anti-circumvention protection globally through these treaties. Unsurprisingly, the United States was the first country in the world to implement the treaties.[111]

China introduced its anti-circumvention provisions first in the 2006 Information Network Regulations and later in the 2010 Amendment to the Copyright Law.[112] During the legislative process, the head of the State Council's Legal Affairs Office indicated that China had indeed drawn upon anti-circumvention legislation from other jurisdictions.[113] Although the government did not specify which countries served as primary references, it is reasonable to infer that the United States's DMCA was a major influence for two reasons. First, only a handful of jurisdictions, including Australia, the European Union, Japan, Singapore, and the United States, had enacted anti-circumvention laws prior to

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[105] *See supra* text accompanying note 88.
[106] Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 375–82 (1997).
[107] *Id*. at 379.
[108] *Id*. at 379–81.
[109] *Id*. at 410.
[110] *See* S. REP. NO. 105-190, at 5 (1998).
[111] *See, e.g*., Terri Branstetter Cohen, *Anti-Circumvention: Has Technology's Child Turned Against Its Mother?*, 36 VAND. J. TRANSNAT'L L. 961, 981 (2003).
[112] 2006 Information Network Regulations, *supra* note 27; 2010 Copyright Law, *supra* note 97, art. 48(6).
[113] 国务院法制办公室负责人就《信息网络传播权保护条例》答记者问 [*Official of the Legislative Affairs Office of the State Council Answers Reporters' Questions on the Regulations on the Protection of the Right of Communication Through Information Networks*], MINISTRY CULTURE & TOURISM PEOPLE'S REPUBLIC CHINA (May 30, 2006, 3:17 PM), https://www.mct.gov.cn/whzx/bnsj/zcfgs_bnsj/201111/t20111128_821526.html [hereinafter Legislative Affairs Office Q&A].

China.[114] Among these jurisdictions, the legislators in Australia,[115] the European Union,[116] and Singapore[117] explicitly cited the DMCA as their principal legislative model. Second, and more importantly, trade negotiations between China and the United States had extensively broached these issues prior to China's legislative action.

From 2004 to 2006, China faced sustained external pressure from the United States regarding the WIPO Internet Treaties. In its *2004 Special 301 Report*, the USTR urged China to expedite its accession to and implementation of these treaties, expressly asserting that enacting the necessary legislation would markedly enhance China's legal framework for combating online piracy.[118] At the April 2004 meeting of the Joint Commission on Commerce and Trade ("JCCT"), China agreed to ratify and implement the WIPO Internet Treaties at the earliest opportunity.[119] By July 2005, China committed to submitting the legislative package to the National People's Congress by June 2006.[120] Earlier that year, the USTR's *Special 301 Report* specifically criticized China's draft internet copyright regulations for inadequate legal protection and remedies against the circumvention of copy-control TPMs as well as for having overly broad exceptions.[121] Shortly thereafter, on May 18, 2006, the State Council promulgated the Information Network Regulations.[122] Article 4, in particular, expressly prohibited circumvention activities, thereby addressing, at least in part, the concerns raised by the United States.[123]

In sum, although China is not alone in adopting anti-circumvention provisions derived from the DMCA, the trajectory and influences underlying its legislative developments are obvious.

4. Divergence Trajectories

Although both the U.S. and Chinese copyright laws regulate the behavior of circumventing TPMs through the definition of circumvention, restricted behaviors (circumventing and trafficking), and limitations and exceptions, the details of their rules differ in certain aspects. First, the U.S. Copyright Act distinguishes access controls from copy (or rights) controls as two distinct types of TPMs. Whereas circumvention of access

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[114] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860; Directive 2001/29, *supra* note 43, art. 6; Copyright (Amendment) Bill 2004, Bill No. 48/2004, Explanatory Statement, at 12 (Sing.); World Intell. Prop. Org., Standing Comm. on Copyright & Related Rts., *Current Developments in the Field of Digital Rights Management*, WIPO Doc. SCCR/10/2 Rev., at 86, 91 (May 4, 2004).
[115] World Intell. Prop. Org., *supra* note 114, at 86.
[116] Directive 2001/29, *supra* note 43, art. 6.
[117] Copyright (Amendment) Bill 2004, *supra* note 114, Explanatory Statement, at 12.
[118] USTR, 2004 Special 301 Report 12 (2004), https://ustr.gov/sites/default/files/2004%20Special%20301%20Report.pdf.
[119] USTR, 2004 Report to Congress on China's WTO Compliance 62 (2004), https://ustr.gov/archive/assets/Document_Library/Reports_Publications/2004/asset_upload_file281_6986.pdf.
[120] USTR, 2005 Report to Congress on China's WTO Compliance, *supra* note 26, at 67.
[121] USTR, 2006 Special 301 Report, *supra* note 26, at 23.
[122] 2006 Information Network Regulations, *supra* note 27.
[123] *Id.* art. 4; USTR, 2006 Special 301 Report, *supra* note 26, at 23.

controls is independently prohibited under Section 1201, circumvention of copy-control measures by individuals is not; liability may still arise under the anti-trafficking provisions or through ordinary copyright infringement.[124] Copy controls are regulated only under the behavior of trafficking, not circumvention. In contrast, Chinese Copyright Law does not have that distinction. In other words, Chinese Copyright Law treats access controls and copy controls indifferently.[125] As a result, while bypassing copy controls is not itself unlawful under U.S. law, the same conduct can constitute copyright infringement in China.[126]

Second, in the United States, although government agencies are in charge of triennial rulemaking for limitations and exceptions, they are not involved in the enforcement of anti-circumvention rules. By contrast, China couples the anti-circumvention regime with administrative enforcement and penalties, such as warnings, confiscation of illegal gains, and fines, and, in serious cases, confiscation of equipment used to provide network services[127]—an approach that imparts a distinctly Chinese character to the regime. For example, in the *Beijing Yidaixinyuan* case, selected by the National Copyright Administration of China as one of the 2022 national top ten anti-infringement and anti-piracy cases, the Beijing Municipal Comprehensive Law Enforcement Unit on Cultural Market ordered the confiscation of illegal gains and equipment used for infringing activities and imposed a fine of RMB 592,484 (approximately USD 86,800) on a company that installed hardware-cracking modules in Nintendo Switch consoles.[128] A Guangzhou official case report similarly recorded an administrative penalty against the alleged infringer for installing mod chips that enabled users to bypass Nintendo's TPMs and run unauthorized Switch games.[129] These enforcement practices have attracted attention abroad, including from the UK Intellectual Property Office.[130]

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[124] *See supra* text accompanying notes 89–93; *see also* 17 U.S.C. § 501(a).
[125] *See supra* text accompanying notes 100–104.
[126] *See, e.g.*, Shanghai Dichuang Network Tech. Co. v. Beijing Wanhu Mingmei Tech. Co., (2008) Pu Min San (Zhi) Chu Zi No. 453 (Shanghai Pudong New Area People's Ct. Feb. 5, 2009) (China); Guangzhou Qiuzhi Educ. Tech. Co. v. Beijing Sina Internet Info. Serv. Co., (2016) Yue 73 Min Chu No. 1387 (Guangzhou Intell. Prop. Ct. Apr. 27, 2018) (China); Wei Qinghua v. Deli Fu Enter. Co., (2020) Zui Gao Fa Zhi Min Zhong No. 1206 (Sup. People's Ct. Nov. 4, 2020) (China).
[127] *See supra* text accompanying notes 102–104.
[128] 2022年度全国打击侵权盗版十大案件 [*Top Ten National Anti-Infringement and Anti-Piracy Cases of 2022*], Nat'l Copyright Admin. China (Dec. 22, 2023), https://www.ncac.gov.cn/xxfb/ywxx/202312/t20231222_864066.html (listing as number 1Beijing Yidaixinyuan Trading Co., Ltd.'s Destruction of Technological Protection Measures Case [北京亿代鑫源商贸有限公司破坏技术保护措施案]).
[129] 2021年度广州市文化市场综合执法队伍打击侵权盗版十大案 [*Top Ten Anti-Infringement and Anti-Piracy Cases of Guangzhou's Cultural Market Comprehensive Law Enforcement Team in 2021*], Guangzhou Mun. People's Gov't (Apr. 27, 2022), https://www.gz.gov.cn/xw/zwlb/bmdt/swhgdlyj/content/post_8215022.html (listing as number 3 Chen's Circumvention of Copyright-Protecting Technological Measures and Infringement of Nintendo's Copyright Case [陈某规避保护著作权技术措施、侵犯任天堂公司著作权案]).
[130] UK Intell. Prop. Off. & China-Britain Bus. Council, *Administrative Enforcement of Copyright in China* 1 (2020) https://assets.publishing.service.gov.uk/media/5f5b4f488fa8f5106910058d/Administrative_Enforcement_of_Copyright_-_IP_in_China_Factsheet.pdf ("Administrative enforcement is available for all types of copyright works . . . . It is also available to protect TPM . . . circumvention and RMI

Third, the limitations and exceptions to anti-circumvention rules in the DMCA are much more comprehensive and flexible than their counterparts in China. While both countries exempt liabilities for circumvention arising from educational, nonprofit, governmental, security testing, and reverse engineering purposes, the U.S. exemption is broader to protect other acts (such as those pertaining to personal data protection) and is more flexible (owing to the triennial rulemaking).[131] These exemptions, which supplement the statute's permanent allowances (for example, for reverse engineering to achieve interoperability, encryption research, and security testing), have evolved to address new technologies and public-interest needs.[132] Recent cycles have authorized circumvention for device repair and maintenance (including in automobiles and agricultural equipment); accessibility for persons with disabilities; good-faith security research on consumer and industrial systems; preservation and research by libraries, archives, and museums; unlocking and jailbreaking of smartphones and other connected devices; access to patient data from medical devices; the operation of obsolete software reliant on defunct authentication servers (including certain video games); and other privacy- and competition-oriented uses.[133]

By contrast, China relies on a fixed, enumerated set of statutory and regulatory exceptions that are more circumscribed in scope and lack a mechanism akin to the U.S. petition-and-review process. Chinese law recognizes certain narrow categories—such as specific educational, nonprofit, governmental, research, and interoperability-related contexts—but does not provide a general safety valve that can be periodically updated to accommodate emerging technologies, evolving repair practices, or novel forms of security testing and accessibility. As a result, Chinese decisionmakers have less flexibility to weigh free-expression, privacy, accessibility, and competition concerns against the anti-circumvention mandate, and litigants have fewer avenues to invoke public-interest defenses. Reflecting this difference, American courts and regulators more frequently confront—and sometimes accommodate—limitations and exceptions grounded in interoperability,[134] accessibility, security research, and right-to-repair rationales, whereas comparable arguments appear less often and succeed less readily in China's more rule-bound system.

C. ISP Safe Harbor

The ISP safe harbor regime, established under the DMCA's Section 512 model, shields ISPs and online platforms from copyright liability arising from user-generated content, provided that certain conditions are met. These conditions include adherence to notice-and-takedown procedures, registration of a designated agent with the U.S.

(rights management information) removal.").

[131] Xie, *supra* note 10, at 155–82.

[132] *See* Arielle Singh, *Agency Regulation in Copyright Law: Rulemaking Under the DMCA and Its Broader Implications*, 26 BERKELEY TECH. L.J. 527, 541, 544–45 (2011).

[133] *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 89 Fed. Reg. 85,437, 85,446–50 (Oct. 28, 2024).

[134] Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178 (Fed. Cir. 2004); *Lexmark*, 387 F.3d at 522.

Copyright Office, and the implementation of policies to terminate repeat infringers. As one of the first and most influential comprehensive statutory frameworks governing intermediary liability, the DMCA's safe harbor provisions have served as a foundational model for analogous regimes abroad—most prominently, the European Union's E-Commerce Directive (which provides conditional exemptions for "mere conduit," caching, and hosting and has since been supplemented and partially reoriented by the EU Directive on Copyright and Related Rights in the Digital Single Market)[135] and Canada's notice-and-notice system[136] (which reflects a different policy choice but likewise structures online copyright enforcement through intermediaries).

1. U.S. Law

Section 512 of the U.S. Copyright Act establishes conditional limitations on liability for online intermediaries, but only when these intermediaries satisfy a structured set of cooperation duties and procedural requirements.[137] Enacted amid uncertainty about the exposure of network service providers for infringing acts committed by their users,[138] Congress did not use Section 512 to codify or displace liability for contributory or vicarious infringement. Instead, it allowed secondary liability doctrines to continue developing in the courts and created targeted safe harbors for common intermediary functions.[139]

The immediate policy aim was twofold: first, to give service providers greater certainty about their legal exposure to the internet ecosystem, including ISPs, online platforms, and e-commerce; and second, to furnish copyright owners with a workable, standardized mechanism to address online infringement.[140] The safe harbors therefore confer significant protection from monetary liability and limit the scope of injunctive relief, but they do not immunize providers in all circumstances.[141]

Structurally, Section 512 is organized around four function-specific safe harbors: transitory digital network communications; system caching; storage of material at the direction of users; and information-location tools, such as directories, indexes, references, pointers, and hyperlinks.[142] Across these safe harbors, Section 512 imposes common threshold conditions. A service provider must adopt, reasonably implement, and inform its subscribers and account holders of a policy for terminating repeat infringers in appropriate circumstances, and it must accommodate and not interfere with standard

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[135] *See* Directive 2000/31 arts. 12–15, 2000 O.J. (L 178) 1 (EC); Directive 2019/790 art. 17, 2019 O.J. (L 130) 92 (EU).
[136] Copyright Act, R.S.C. 1985, c C-42, s 41.25 (Can.).
[137] 17 U.S.C. § 512.
[138] H.R. REP. NO. 105-551, pt. 2, at 49 (1998); Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81,862 (Dec. 31, 2015) [hereinafter Section 512 Study Notice]; U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 18 (2020).
[139] *See* Pub. L. No. 105-304, 112 Stat. 2860 (1998); H.R. REP. NO. 105-551, pt. 2, at 49–53 (1998); S. REP. NO. 105-190, at 19–20.
[140] H.R. REP. NO. 105-551, pt. 2, at 21, 49–50 (1998); Section 512 Study Notice, *supra* note 138, at 81,862.
[141] *See* 17 U.S.C. § 512(a)–(d), (j).
[142] *Id.* § 512(a)–(d).

technical measures used by copyright owners to identify or protect copyrighted works.[143] Failure to reasonably implement a repeat-infringer policy can defeat safe harbor eligibility.[144]

For caching, hosting, and information-location services, safe harbor protection is further conditioned on notice-and-takedown procedures. Upon receipt of a compliant takedown notice from a copyright owner or its authorized agent, the provider must act expeditiously to remove or disable access to the allegedly infringing material and take reasonable steps to notify the affected user. Providers relying on the safe harbors for hosting and linking must also designate an agent with the U.S. Copyright Office and publish that agent's contact information.[145] The statute creates a counter-notification mechanism: if the user believes the removal was the result of a mistake or misidentification, the user may submit a counter-notice, and the provider must restore the material within the statutory period unless the copyright owner files an action seeking a court order.[146] Parties who materially misrepresent infringement or noninfringement in this process may face liability.[147]

Safe harbor eligibility also depends on the provider's knowledge and posture toward direct financial benefit and the right and ability to control. A provider loses protection if it has actual knowledge or "red flag" awareness of specific infringing material and fails to act expeditiously to remove or disable access, or if it receives a direct financial benefit from infringing activity that it has the right and ability to control, which requires more than the mere ability to remove or block access to infringing content.[148]

At the same time, Section 512 disclaims any general duty to monitor or affirmatively seek information indicating infringement activity as a condition of safe harbor protection.[149] It preserves operational space for intermediaries while channeling enforcement through the notice-and-takedown procedures. In sum, Section 512 is best understood as a carefully calibrated, liability-limiting framework within private law. It conditions substantial protection for intermediaries on cooperation with standardized procedures and baseline policies, thereby making online copyright enforcement more workable without sacrificing the legal certainty necessary for internet services and e-commerce to flourish.

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[143] *Id.* § 512(i)(1)–(2).
[144] *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1109–13 (9th Cir. 2007); BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc., 881 F.3d 293, 302–11 (4th Cir. 2018) (citing only for the point about safe-harbor eligibility, not the separate question of Cox's liability for users' infringement); *cf.* Cox Commc'ns, Inc. v. Sony Music Ent., 146 S. Ct. 959 (2026) (addressing secondary liability rather than safe-harbor eligibility, but not disturbing BMG's separate safe-harbor-eligibility analysis).
[145] *See* 17 U.S.C. § 512(c)(2); Designation of Agent to Receive Notification of Claimed Infringement, 81 Fed. Reg. 75,695 (Nov. 1, 2016).
[146] 17 U.S.C. § 512(b)(2)(E), (c)(1)(C), (c)(3), (d)(3), (g)(1)–(3).
[147] *See id*. § 512(f); Lenz v. Universal Music Corp., 801 F.3d 1126, 1134–37 (9th Cir. 2015), *cert. denied*, 579 U.S. 901 (2016).
[148] *See* 17 U.S.C. § 512(c)(1)(A)–(B), (d); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 30–41 (2d Cir. 2012); UMG Recordings, Inc. v. Shelter Cap. Partners LLC, 718 F.3d 1006, 1029–33 (9th Cir. 2013); Capitol Recs., LLC v. Vimeo, LLC, 826 F.3d 78, 94–103 (2d Cir. 2016).
[149] 17 U.S.C. § 512(m); H.R. REP. NO. 105-551, pt. 2, at 64–65 (1998).

2. Chinese Law

In China, safe harbor rules for online copyright liability took shape primarily through the 2006 Information Network Regulations and subsequent legislation and judicial interpretations. The Regulations delineate network service providers by technical function and impose different conditions on different types of services. Articles 20 to 23 respectively address automatic access or transmission (conduit), automatic storage (caching), information storage (hosting), and search or link services.[150] For comparatively passive technical intermediaries, such as conduits and caches, eligibility for liability limitations turns chiefly on whether the provider performs a purely technical function without selecting or altering the transmitted or stored material.[151] By contrast, for higher-risk services such as hosting and search/link services, the safe harbor hinges more directly on the provider's knowledge and its response to rights holders' notices.[152] In particular, a hosting provider may invoke protection only if it does not know and has no reasonable grounds to know that the stored work is infringing, does not obtain a direct economic benefit from that work, and removes the work promptly upon receiving a notice from the right holder.[153]

The Regulations also establish a notice-and-takedown and counter-notice procedure. A right holder may send a written notice requesting removal of allegedly infringing material or disconnection of the relevant link.[154] Upon receipt of such a notice, the provider must act expeditiously to remove the material or disconnect the link and promptly forward the notice to the service recipient.[155] The recipient may then submit a written statement asserting noninfringement, after which the provider may restore the material or link in accordance with the statutory procedure.[156] If an erroneous notice causes loss to the service recipient, the right holder bears liability for compensation.[157]

This copyright-specific regime later converged with broader rules on online tort liability and platform governance. The Civil Code and the E-Commerce Law restate the notice-and-action model in general terms, employing the concepts of "notification" and "necessary measures," including deletion, blocking, and link disconnection. The Civil Code and the E-Commerce Law are not limited to copyright-specific safe harbors. They generalize the mechanism across online civil liability and embed it within a wider framework of intermediary liability, under which providers that know or should know of unlawful content must take appropriate measures or risk incurring liability.[158]

3. Transplant Trajectories

[150] 2013 Information Network Regulations, *supra* note 34, arts. 20–23.
[151] *Id.* arts. 20–21.
[152] *Id.* arts. 22–23.
[153] *Id.* art. 22.
[154] *Id.* art. 14.
[155] *Id.* art. 15.
[156] *Id.* arts. 16–17.
[157] *Id*. art. 24.
[158] Civil Code (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), arts. 1195–1197 (China); E-Commerce Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2018, effective Jan. 1, 2019), arts. 42–45 (China).

China's safe harbor regime for online copyright liability reflects a relatively direct transplantation of the DMCA's Section 512 model, adapted to the local context and adopted through the 2006 Information Network Regulations.[159] The timing and rhetoric point to a pressure-and-response dynamic: before the regulations were issued, the USTR criticized China's online copyright enforcement for being undermined by "loopholes in existing regulations and implementing rules" and noted that additional Internet-related regulations were being drafted.[160] In 2006, the USTR linked the issue to China's planned accession to the WIPO Internet Treaties and characterized the 2006 Information Network Regulations as an important internet-related copyright measure.[161] By 2007, the USTR called the Regulations as a "welcome step," while continuing to press for clarification on deep linking and stronger obligations for ISPs.[162]

The borrowing is clearest along three dimensions. First, China adopted a functional taxonomy of intermediary services that mirrors Section 512. The Regulations classify network service providers by technical function and attach distinct conditions to each category, covering automatic access or transmission, automatic storage, information storage, and search/link services.[163] Second, China embraced a threshold-plus-action design akin to the DMCA's knowledge-and-response logic. For higher-risk services such as hosting and search/link services, eligibility for limitation of liability turns on the provider's knowledge status and its timely reaction to the rights holder's notices, combining a "know or should know" standard with a notice-based obligation to remove content or disconnect links.[164] Third, China instituted a notice-removal and counter-notice process comparable to the DMCA's notice-and-takedown procedures. A right holder may request removal of allegedly infringing material or disconnection of the relevant link, the service recipient may respond with a written statement of noninfringement, and the provider may restore the material or link under the statutory procedure.[165] As in the DMCA, there is a remedy for wrongful notices with the Chinese rules imposing compensatory liability on right holders when their erroneous notices have caused loss.[166] Both regimes also incorporate conditions regarding financial benefits in certain categories, although the Chinese safe harbor for web hosting states the condition more directly by requiring that the provider receive no direct economic benefit from the

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[159] *See, e.g.*, Ma, *supra* note 10, at 253, 279 (explaining that China's 2006 Regulations were shaped in significant part by lessons drawn from the United States's DMCA safe harbor regime).
[160] USTR, 2005 SPECIAL 301 REPORT 19 (2005).
[161] USTR, 2006 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 74 (2006).
[162] USTR, 2007 SPECIAL 301 REPORT 20 (2007).
[163] 17 U.S.C. § 512(a)–(d); 2013 Information Network Regulations, *supra* note 34, arts. 20–23.
[164] 17 U.S.C. § 512(c), (d); 2013 Information Network Regulations, *supra* note 34, arts. 14–17, 22–23; *see also* Qian Tao, *The Knowledge Standard for the Internet Intermediary Liability in China*, 20 INT'L J.L. & INFO. TECH. 1, 2 (2012) (noting that the internet clause adopts a notice-and-takedown procedure in paragraph 2 and a knowledge-based standard in paragraph 3, mirroring Section 512 of the U.S. Copyright Act).
[165] 17 U.S.C. § 512(c)(1)(C), (c)(3)(A), (g)(2)–(3), (d)(3); 2013 Information Network Regulations, *supra* note 34, arts. 14–17, 22(5), 23.
[166] 17 U.S.C. § 512(f); 2013 Information Network Regulations, *supra* note 34, art. 24.

infringing work.[167] By contrast, the DMCA ties a "direct financial benefit" to situations where the provider has the right and ability to control the activity.[168] Taken together, these features show a close structural alignment with Section 512.

It should be noted that China's 2006 transplantation of ISP safe harbor rules served a distinctively declaratory and systematizing function. By the time the 2006 Information Network Regulations took effect, Chinese courts and judicial interpretations had already begun to grapple with ISP liability. The new rules therefore operated not only as limitations on liability but also as a statutory reorganization of when an ISP's conduct would be attributed to the user, thereby immunizing the provider.

The Supreme People's Court's 2000 judicial interpretation concerning copyright protection on computer networks first recognized that a network service provider could bear joint liability when it participated in, instigated, or assisted another person's online copyright infringement.[169] This interpretation also made knowledge and notice-based inaction legally salient: a content-service provider could be jointly liable if it knew of a user's infringement or if it failed to remove infringing content after receiving a substantiated warning from the copyright owner.[170]

Before the 2006 Information Network Regulations, courts were already addressing the liability of ISPs or ISP-like online actors, but they did so by adapting general infringement doctrines, rather than applying a settled, statutory safe harbor. As a result, decisions ranged across theories of direct infringement,[171] assistance-based or indirect liability,[172] and complete exemption. For example, in *College Student Magazine v. Jingxun*, the court declined to impose liability on a neutral internet hosting service that supplied server space and acted upon notice, while acknowledging that such a provider could incur liability if it failed to take timely technical measures after a reasonable request from the right holder.[173] Courts also weighed whether the provider remained a neutral technical intermediary or instead became an active organizer of access to

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[167] 17 U.S.C. § 512(c)(1)(B), (d)(2); 2013 Information Network Regulations, *supra* note 34, art. 22(4).
[168] 17 U.S.C. § 512(c)(1)(B), (d)(2).
[169] Interpretation of the Supreme People's Court on the Application of Laws in the Trial of Computer Network Copyright Disputes (Interpretation No. 48 of 2000) (promulgated by the Sup. People's Ct., Dec. 19, 2000, effective Dec. 21, 2000), art. 4 (China).
[170] *Id.* art. 5.
[171] Wang Meng v. Century Internet Commc'ns Tech. Co., (1999) Hai Zhi Chu Zi No. 57 (Beijing Haidian Dist. People's Ct. Sept. 28, 1999) (China); Shanghai Push Sound Music & Ent. Co. v. Beijing Baidu Netcom Sci. & Tech. Co., (2005) Hai Min Chu Zi No. 14665 (Beijing Haidian Dist. People's Ct. Sept. 16, 2005) (China); Beijing Century Yuebo Tech. Co. v. Sony Music (H.K.) Ltd., (2004) Gao Min Zhong Zi No. 714 (Beijing High People's Ct. Dec. 12, 2005) (China).
[172] Liu Jingsheng v. Sohu Aitexin Info. Tech. (Beijing) Co., (2000) Er Zhong Zhi Chu Zi No. 128 (Beijing No. 2 Interm. People's Ct. Dec. 19, 2000) (China); Zhengdong Records Co. v. Beijing Century Yuebo Tech. Co., (2004) Yi Zhong Min Chu Zi No. 400 (Beijing No. 1 Interm. People's Ct. Apr. 23, 2004) (China); Beijing Century Yuebo Tech. Co. v. Warner Records Co., (2004) Gao Min Zhong Zi No. 1303 (Beijing High People's Ct. Dec. 2, 2004) (China).
[173] College Student Mag. v. Beijing Jingxun Pub. Info. Tech. Co., (2000) Er Zhong Zhi Chu Zi No. 18 (Beijing No. 2 Interm. People's Ct. Nov. 28, 2000) (China).

protected works;[174] whether it had knowledge or notice of infringement;[175] whether it had the technical capacity or practical control to remove content, disconnect links, or assess the legality of linked materials;[176] whether it failed to act expeditiously after notice;[177] whether its service facilitated, prolonged, or expanded the underlying infringement;[178] and whether the service operated on a commercially organized or profit-oriented basis.[179]

The 2006 Information Network Regulations codified these responsibility factors within a DMCA-inspired ISP safe harbor framework. Many factors coincided with those in Section 512, while others reflected China's civil law principles of fault and duty of care. This blend helps explain why, compared with fair use and anti-circumvention, China's safe harbor regime most closely resembles its U.S. counterpart: it both absorbed the DMCA's structural logic and integrated longstanding domestic doctrines on intermediary responsibility.

4. Divergence Trajectories

Although China drew heavily on Section 512's basic architecture, it did not simply replicate the DMCA's ISP safe harbor regime. Several core features were recast, streamlined, or folded into a broader platform-liability framework.

First, the disqualifying condition concerning profit and control is framed differently. Under Section 512, the storage safe harbor is unavailable where a provider both receives a financial benefit directly attributable to the infringing activity and has the right and ability to control that activity,[180] while the safe harbor for search or link services carries a comparable condition regarding financial benefits.[181] Chinese law states the condition more directly: to invoke the safe harbor for information storage, a provider must not obtain a direct economic benefit from the work.[182] This formulation makes the profit element explicit but does not pair it with a control requirement, which is equally important.[183] In practice, issues akin to control are addressed through the analysis of fault and actual or constructive knowledge, rather than as a separate threshold condition.[184]

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[174] *See College Student Mag.*, (2000) Er Zhong Zhi Chu Zi No. 18; *Liu*, (2000) Er Zhong Zhi Chu Zi No. 128; *Warner Records*, (2004) Gao Min Zhong Zi No. 1303; *Beijing Century Yuebo*, (2004) Gao Min Zhong Zi No. 714; *Shanghai Push Sound*, (2005) Hai Min Chu Zi No. 14665.
[175] *See College Student Mag.*, (2000) Er Zhong Zhi Chu Zi No. 18; *Liu*, (2000) Er Zhong Zhi Chu Zi No. 128; *Warner Records*, (2004) Gao Min Zhong Zi No. 1303.
[176] *See Liu*, (2000) Er Zhong Zhi Chu Zi No. 128; *Zhengdong Records*, (2004) Yi Zhong Min Chu Zi No. 400; *Warner Records*, (2004) Gao Min Zhong Zi No. 1303.
[177] *See College Student Mag.*, (2000) Er Zhong Zhi Chu Zi No. 18; *Liu*, (2000) Er Zhong Zhi Chu Zi No. 128.
[178] *See Liu*, (2000) Er Zhong Zhi Chu Zi No. 128; *Warner Records*, (2004) Gao Min Zhong Zi No. 1303.
[179] *See Warner Records*, (2004) Gao Min Zhong Zi No. 1303; *Zhengdong Records*, (2004) Yi Zhong Min Chu Zi No. 400; *Sony Music*, (2004) Gao Min Zhong Zi No. 714; *Shanghai Push Sound*, (2005) Hai Min Chu Zi No. 14665.
[180] 17 U.S.C. § 512(c)(1)(B).
[181] *Id*. § 512(d)(2).
[182] 2013 Information Network Regulations, *supra* note 34, art. 22(4).
[183] 17 U.S.C. § 512(c)(1)(B); 2013 Information Network Regulations, *supra* note 34, art. 22(4).
[184] Provisions on Several Issues Concerning the Application of Law in the Trial of Civil Dispute

Second, China's procedural design is leaner than the DMCA's detailed machinery. China created a user-statement-and-restoration mechanism that resembles the DMCA's counter-notice procedure,[185] but it does not reproduce Section 512(g)'s "put-back" structure. Under the DMCA, restoration follows a waiting period and hinges on whether the right holder files an action seeking a court order.[186] By contrast, Chinese rules generally call for restoration upon receipt of the user's noninfringement statement, without a litigation-linked timetable.[187] China also does not institute the DMCA's designated-agent system for receiving notices[188] and lacks the detailed injunctions provisions in Section 512(j).[189] Another procedural divergence lies in identifying alleged infringers: Section 512 provides a court-based subpoena route for copyright owners to obtain identifying information,[190] whereas China does not create an equivalent subpoena mechanism within the ISP safe harbor rules. Instead, copyright administrative authorities may, in the course of investigating infringement, require network service providers to disclose names, contact information, and network addresses.[191] The same enforcement need is met, but through a more administrative pathway and with lower procedural density. Through administrative guidance, administrative authorities have also strengthened the enforcement of ISP safe harbor rules. The National Copyright Administration has directed short-video platforms not to misuse the safe harbor by disguising infringing content as user-generated uploads, to enhance their notice-and-takedown procedures, to take firm action against repeat infringers, and to promptly report serious cases to competent enforcement authorities.[192]

Third, China did not entrench some of the DMCA's general eligibility conditions in parallel form. Section 512 requires, as threshold conditions, that service providers adopt and reasonably implement a repeat-infringer policy and accommodate standard technical measures.[193] These requirements do not appear as freestanding eligibility requirements in the Chinese ISP safe harbor provisions.[194] Repeat infringer handling is instead absorbed

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Cases Involving Infringement of the Right of Dissemination on Information Networks, Judicial Interpretation No. 20 [2020] (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 17, 2012, rev'd Dec. 29, 2020, effective Jan. 1, 2021), arts. 8–12 (China) [hereinafter Network Dissemination Provisions].

[185] 17 U.S.C. § 512(g)(2)–(3); 2013 Information Network Regulations, *supra* note 34, arts. 16–17.

[186] 17 U.S.C. § 512(g)(2)(B)–(C), (g)(3).

[187] 2013 Information Network Regulations, *supra* note 34, arts. 16–17; Baiyang Xiao, *Making the Private Public: Regulating Content Moderation Under Chinese Law*, 51 Comput. L. & Sec. Rev. 105893, at 11 (2023) (claiming that without a substantive negotiation stage, the Civil Code's notice-and-counternotice process fails to fully convey complaints to content publishers, thereby encouraging malicious users to abuse the right to report illegal content).

[188] 17 U.S.C. § 512(c)(2)–(3); 2013 Information Network Regulations, *supra* note 34, arts. 14–17, 23–24.

[189] 17 U.S.C. § 512(j).

[190] *Id*. § 512(h).

[191] 2013 Information Network Regulations, *supra* note 34, art. 13.

[192] 国家版权局约谈15家短视频平台企业［*The National Copyright Administration Holds Regulatory Talks with Fifteen Short-Video Platforms*], Cyberspace Admin. China (Sept. 15, 2018), https://www.cac.gov.cn/2018-09/15/c_1123432727.htm.

[193] 17 U.S.C. § 512(i)(1)(A), (i)(1)(B), (i)(2).

[194] 2013 Information Network Regulations, *supra* note 34, arts. 20–23; Yong Wan, *Safe Harbors from Copyright Infringement Liability in China*, 60 J. Copyright Soc'y U.S.A. 635, 639 (2013)

into analysis regarding fault and constructive knowledge. Under the Supreme People's Court's judicial interpretation, whether a provider has taken reasonable measures against repeat infringement by the same user can inform whether the provider "should have known" the infringement.[195] The result is a shift from a bright-line statutory threshold condition to one factor in a broader duty-of-care inquiry.[196]

Fourth, the monitoring boundary is articulated differently. Section 512 explicitly provides that eligibility is not conditioned on a general duty to monitor or affirmatively seek information indicating infringement.[197] By contrast, China's copyright law does not enshrine an equivalent no-duty-to-monitor principle at the same level in its final statutory framework. Although a similar provision appeared in a 2014 draft Copyright Law amendment, it was not enacted.[198] Chinese courts instead address monitoring questions through fault, obviousness of infringement, and constructive knowledge:[199] failure to conduct proactive review does not, by itself, establish fault, but a provider, under a broader duty-of-care analysis, may still be found to have met the "should-have-known" standard where the infringement was obvious and reasonable measures were not taken.[200] The Chinese approach is thus less checklist-driven and more fault-based than Section 512.

Finally, the notice-and-takedown logic did not remain confined to copyright. The Civil Code and the E-Commerce Law restate the mechanism in broader terms—"notification" and "necessary measures," including deletion, blocking, and link disconnections.[201] These restatements move the mechanism from a copyright-specific liability shield to a more general system of online civil liability and platform governance.[202]

In short, China's safe harbor converges with Section 512 at the level of core elements but diverges in institutional placement, procedural density, and platform duties. The result is not an incomplete transplant so much as a selective structural adoption followed by institutional re-coding. China imported the basic ISP safe harbor architecture but situated it within an administrative governance matrix, reinforced by judicial, fault-based analysis and a more duty of care–oriented conception of platform responsibility. This trajectory accords with legal transplant theory: foreign precedents may remain persuasive, yet

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(explaining that under Section 512(i) of the U.S. Copyright Act, a network service provider may claim safe harbor only if it adopts and reasonably implements a repeat-infringer termination policy and accommodates standard technical measures, whereas the Information Network Regulations in China impose no such preconditions).

[195] Network Dissemination Provisions, *supra* note 184, art. 9(6).

[196] 17 U.S.C. § 512(i)(1)(A); Network Dissemination Provisions, *supra* note 184, arts. 8(1)–(2), 9(6); Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 COLO. TECH. L.J. 101, 104 (2007); *see also* Tao, *supra* note 164, at 5 (explaining that service providers may be at fault if they induce or assist internet users' misconducts and knew—or, under a specific duty of care, should have known—its unlawfulness).

[197] 17 U.S.C. § 512(m)(1).

[198] Copyright Law (Amendment Draft Submitted for Review, June 6, 2014), art. 73 (China).

[199] Network Dissemination Provisions, *supra* note 184, arts. 8(1)–(2), 9; Tao, *supra* note 164, at 5.

[200] Network Dissemination Provisions, *supra* note 184, arts. 8(1)–(2), 9(6).

[201] Civil Code, *supra* note 158, arts. 1195–1197; E-Commerce Law, *supra* note 158, arts. 42–45.

[202] Tao, *supra* note 164, at 2, 17–18.

domestic institutions can recontextualize the borrowed concept and attach a different meaning to it.[203]

III. COMPARATIVE STUDY OF THE THREE TRANSPLANTS

Taken together, the three transplantation pathways display both a familiar resemblance and marked divergence. Across fair use, anti-circumvention rules, and the ISP safe harbor, localization has been mediated, and at times decisively constrained, by the centrality of administrative authorities within China's copyright enforcement architecture. This institutional backdrop favors rule designs that are readily administered by agencies, emphasize ex ante compliance, and can be operationalized through regulatory procedures.

At the same time, the pathways differ in their degrees of fidelity to U.S. models. The ISP safe harbor traveled as a relatively faithful import of the DMCA's structure. The anti-circumvention regime arrived in a more selective, streamlined form, guided primarily by the minimum obligations of the WIPO Internet Treaties, rather than the DMCA's finer-grained architecture. Fair use proved the least durable transplant: never fully codified and subsequently retrenched.

A. Salience of Administrative Governance

Although the three pathways of legal transplantation—and the extent to which each has been adapted—differ, they all underscore the pivotal role of administrative authorities in copyright enforcement, a defining feature of China's copyright system. Incorporating key administrative functions has been central to localizing these doctrines.

Consider copyright limitations and exceptions. In 2020, China declined to adopt the U.S. fair use model, which relies on courts to determine ex post what constitutes fair use. Instead, to keep pace with rapidly evolving technologies and business models, the law expands enumerated exceptions and delegates authority to refine them through administrative regulations.[204] This design reflects a level of trust in administrative agencies to make critical copyright policy decisions that exceeds the reliance placed on courts in the United States, such as calibrating limitations and exceptions. By contrast, the U.S. approach reflects greater confidence in judicial, case-by-case adjudication.

The transplantation of anti-circumvention and ISP safe harbor rules further illustrates the centrality of administrative enforcement in Chinese IP practice. In enforcing anti-circumvention measures, copyright administrative authorities may order the cessation of infringing conduct, confiscate illegal gains, and impose fines[205]—a distinctive design that has attracted international attention for its benefits to rights holders.[206] In the ISP safe harbor regime, rather than relying on court-issued subpoenas for rights holders to obtain identifying information, Chinese law empowers copyright administrative authorities to investigate suspected infringement and require network

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[203] *See* Fleischer, *supra* note 36, at 378, 394.
[204] *See supra* text accompanying note 80.
[205] *See supra* text accompanying notes 103–104.
[206] *See supra* text accompanying note 130.

service providers to disclose names, contact details, and internet protocol addresses.[207] At times, these authorities have also facilitated compliance through administrative guidance to stakeholders, including major platforms.[208] More broadly, the prominence of IP administrative authorities is not limited to these three transplanted doctrines. China's IP protection operates on a dual track in which administrative enforcement and judicial protection run in parallel.[209] In 2025, market regulation authorities handled 37,000 patent, trademark, and related violation cases; IP authorities concluded 9,341 administrative adjudication cases involving patent infringement disputes and guided 62,000 IP mediation cases; copyright enforcement authorities addressed 2,713 infringement and piracy cases in physical markets; customs authorities detained 38,000 batches of suspected infringing imports and exports involving 75.75 million items; and public security authorities investigated 26,000 criminal cases involving IP infringement and counterfeit goods.[210] Administrative bodies are tasked with investigating alleged violations, imposing sanctions, ordering the cessation of infringement, and, in some instances, initiating enforcement ex officio.[211] In practice, copyright administration blends routine supervision, targeted enforcement campaigns, software legalization initiatives, and criminal referrals.[212] Recent scholarship likewise characterizes online copyright enforcement in China as top-down, campaign-style administrative governance.[213]

In sum, administrative authorities play an unusually consequential role in IP enforcement and practice in China. This has become a distinctive feature of the Chinese legal system and will continue to shape the transplantation of copyright doctrines and broader IP reform.

B. How Far Each Rule Traveled: A Spectrum of Transplant Fidelity

As explained above, China has transplanted fair use, anti-circumvention rules, and the ISP safe harbor from the U.S. Copyright Act into its Copyright Law. Although their channels of importation differ, so too does the extent of their transplantation. This section examines why the degree of convergence varies across the three doctrines.

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[207] *See supra* text accompanying notes 190–191.
[208] *See supra* text accompanying note 192.
[209] *Overview of China's Copyright Undertaking*, NAT'L COPYRIGHT ADMIN. CHINA (Apr. 20, 2017), https://en.ncac.gov.cn/aboutus/overviewofncacwork/202201/t20220119_57101.html; *Judicial Administration Structure for IP Disputes: China*, WORLD INTELL. PROP. ORG., https://www.wipo.int/en/web/wipolex/judicial-administration-structure/cn (last visited June 3, 2026).
[210] 我国知识产权保护社会满意度再创新高［*China's Social Satisfaction with Intellectual Property Protection Reaches a New High*], SUP. PEOPLE'S CT. (Apr. 24, 2026), https://www.court.gov.cn/zixun/xiangqing/498301.html.
[211] 2020 Copyright Law, *supra* note 45, arts. 53, 55; *see also* U.S. PAT. & TRADEMARK OFF., ADMINISTRATIVE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA: AN INTRODUCTION FOR RIGHTS HOLDERS AND PRACTITIONERS 1–2 (2024) (explaining the administrative IP enforcement in China).
[212] *Overview of China's Copyright Undertaking*, *supra* note 209.
[213] Baiyang Xiao, *Looking Backward, Moving Forward: Copyright Administrative Enforcement in China*, 55 INT'L REV. INTELL. PROP. & COMPETITION L. 1437, 1455–57 (2024).

1. Fair Use

The fair use doctrine has been the least durable transplant.[214] One reason is institutional: whereas anti-circumvention and ISP safe harbor rules were introduced through legislation,[215] the U.S.-style fair use entered primarily through judicial practice.[216] Transplants anchored in statute tend to be more stable than those affected by courts alone. Absent a clear legislative mandate, courts' deployment of a U.S.-style four-factor analysis can appear to exceed conventional interpretative authority,[217] raising separation-of-powers and legitimacy concerns about importing substantive foreign rules without domestic enactment.[218] Judicial transplants without legislative support are therefore more vulnerable to retrenchment, which helps explain why the legislative transplants of anti-circumvention and platform safe harbors have proven more resilient.

A second reason concerns the political economy of transplantation. The fair use transplant was largely voluntary;[219] it served as an interpretive experiment by Chinese courts seeking a more flexible tool to resolve hard cases and to probe the optimal configuration of limitations and exceptions. By contrast, the anti-circumvention and ISP safe harbor transplants were shaped by external pressures, including trade negotiations and multilateral commitments under the WIPO Internet treaties,[220] which left less discretion over whether to adopt them. It is correspondingly easier for policymakers to scale back or abandon a discretionary judicial experiment than to unwind rules adopted to satisfy international obligations.

A third, related consideration is systemic fit. Fair use is an open-ended balancing standard that relies on case-by-case adjudication, whereas China's administrative governance and civil law orientation favor legislatively specified, ex ante rules that provide clearer guidance to markets and regulators. Technocratic, rule-like transplants such as anti-circumvention obligations and intermediary safe harbors mesh more readily with that architecture than does a broad, standard-based fair use clause. Taken together, these dynamics help explain why anti-circumvention and ISP safe harbor rules have traveled further and more securely than fair use in the Chinese legal system.

2. Anti-Circumvention and ISP Safe Harbor Rules

Compared with the ISP safe harbor, China's anti-circumvention regime reflects a far more limited transplantation from U.S. law. China did import core elements of Section 1201—most notably, prohibitions on direct circumvention and on the manufacture, import, distribution, and provision of circumvention devices, components, and services.[221] The borrowing stops there, however. The U.S. framework is anchored in two structural

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[214] *See supra* text accompanying notes 77–87.
[215] *See supra* text accompanying notes 97–104 and 150–157.
[216] *See supra* text accompanying notes 64–76.
[217] He, *Transplanting Fair Use in China*, *supra* note 6, at 389–90.
[218] *Cf*. Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 653, 658 (2009) (indicating that judicial application of foreign law is at odds with democratic self-governance as embodied in the legislative process).
[219] He, *Transplanting Fair Use in China*, *supra* note 6, at 390.
[220] *See supra* text accompanying notes 105–121 and 160–162.
[221] *See supra* text accompanying notes 89–91 and 100.

pillars that China chose not to replicate: a categorical distinction between access controls and copy (or rights) controls, and the triennial rulemaking process that regularly calibrates exemptions.[222] China reproduced neither. As a result, Chinese law treats access and copy controls alike and lacks a periodic, formal mechanism for updating exceptions.[223] By contrast, the ISP safe harbor in China hews closely to Section 512's architecture: a functional taxonomy of intermediary services—for example, conduit, caching, hosting, and information location tools—a threshold-plus-action design that couples baseline eligibility conditions with category-specific duties, and notice-and-takedown procedures with counter-notice and put-back mechanisms.[224] In short, China's safe harbor is a relatively faithful import of the DMCA model, whereas its anti-circumvention rules are more selective, and thus a less comprehensive transplant.

The divergences likely reflect the different sources that informed each legislative project. Although the DMCA influenced both areas, China's anti-circumvention provisions were drafted primarily to implement obligations under the WIPO Internet Treaties. Treaty texts, as negotiated consensus instruments, are deliberately general: they require contracting parties to provide "adequate legal protection and effective legal remedies" against the circumvention of effective technological measures, but they leave the choice of mechanisms and many design details to domestic law.[225] China's own interpretation of the 2006 Information Network Regulations placed those rules explicitly against the background of the WIPO Internet Treaties, emphasizing consistency with treaty minima while selectively borrowing foreign practices suitable to local conditions.[226] Unsurprisingly, China, like the European Union,[227] adopted a streamlined anti-circumvention regime aligned with the treaties' general obligations, rather than the DMCA's finer-grained architecture (including the access-control-versus-copy-control distinction and the triennial exemption process).

The ISP safe harbor followed a different path. Here, there was no multilateral treaty supplying broad, high-level directives. The United States was the principal external reference point, and the DMCA was the canonical model. That context made it natural for China to import the safe harbor in a fuller form—complete with the DMCA's categorical service-provider framework, baseline conditions (such as repeat-infringer policies and accommodation of standard technical measures), and a notice–counter-notice workflow. Consequently, whereas the safe harbor regime in China closely tracks the structure and logic of Section 512, the anti-circumvention provisions represent a more modest transplant shaped primarily by the general mandates of the WIPO Internet Treaties.

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[222] *See supra* text accompanying notes 125–126 and 131.
[223] *Id.*
[224] *See supra* text accompanying notes 163–165.
[225] *See* WIPO Copyright Treaty, *supra* note 88, arts. 11, 14(1); WIPO Performances and Phonograms Treaty, *supra* note 88, arts. 18, 23(1).
[226] Legislative Affairs Office Q&A, *supra* note 113.
[227] *See* Directive 2001/29, *supra* note 43, art. 6(1)–(4).

CONCLUSION

This Article has traced the divergent trajectories of three copyright doctrines with U.S. origins—fair use, anti-circumvention rules, and the ISP safe harbor—as they have been transplanted into Chinese law. Despite sharing a common foreign source, each doctrine has followed a distinct path, yielding a spectrum of transplant fidelity that ranges from retrenchment (fair use), to partial and indirect adaptation through treaty implementation (anti-circumvention), to relatively faithful importation (ISP safe harbor). Three interrelated sets of dynamics explain these variations. First, the institutional channel of transplantation matters: legislatively anchored transplants have proven more stable than judicially introduced ones. Second, the political economy of transplantation—whether adoption was driven by voluntary experimentation or binding international obligations—shapes the ease with which a rule can later be modified or abandoned. Third, and perhaps most fundamentally, systemic fit between a borrowed doctrine and China's prevailing governance architecture has been decisive. The Chinese copyright system is characterized by the centrality of administrative authorities, a preference for ex ante, rule-based standards, and a civil law orientation that prizes legislative specificity over open-ended judicial balancing. Doctrines that align with this architecture, such as the rule-like anti-circumvention prohibitions and the procedurally structured ISP safe harbor, have traveled further and more securely than standard-based, judicially administered doctrines like fair use.

At the same time, the comparison between anti-circumvention and the ISP safe harbor reveals that fidelity to U.S. models varies even among legislatively enacted transplants. The presence or absence of a binding multilateral treaty framework proved critical: where treaty obligations supplied only general mandates (as with anti-circumvention), China adopted a streamlined regime tailored to treaty minima, where no such treaty existed (as with the ISP safe harbor), the United States stood as the principal reference point, enabling a fuller importation of the DMCA model. These findings contribute to the legal transplant theory by showing that convergence is not a binary outcome but a matter of degree, shaped by the interactions between institutional, political, and systemic factors.