The Copyright Law of China in Knowledge Revolution and Economic Globalization: Modernization, Internationalization and Localization

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Since the ‘Copyright Law of Qing Dynasty’ was promulgated in 1910, history of China’s copyright legislation has been a century long. However, the copyright law has not been well implemented in a fairly long period of time. After entering the second half of the 20th century, the development of science and technology and the advance of economic globalization make copyright law more important than ever before. Taking China’s legislative history as route, this article discusses the themes of times of China’s copyright legislation in the circumstance of knowledge revolution and economic globalization, which are modernization, internationalization, and localization. Taking changes in the relevant provisions of the copyright law as foundations, this article explores the theoretical researches of China’s copyright legislation. Taking relevant legislative materials and the social, economic, and historical background as clues, this article studies the choice and process of China’s copyright legislation. In addition, the third modification of China’s Copyright Law is also dealt with in detail.

Keywords: Copyright legislation, modernization, internationalization, localization

According to the International Monetary Fund’s summary, globalization refers to the core of economic globalization, involving cross-border exchanges and cooperation in all aspects of political, legal, scientific, technological, cultural, and social life. Some scholars considered the sailing discovery in 15th century as the starting point of globalization, and some believed that the industrial revolution in Europe in the 18th century was the beginning of globalization. However, it can be confirmed that knowledge innovation provided the necessary material basis and fundamental driving force in the process of globalization. The compass invented in ancient China helped to solve the technical limitations of sailing in the 15th century, removing the geographical barrier between the Eastern and Western countries. The steam engine technology was improved in the 18th century, solving the problem of power in industrial production and transportation, breaking the inefficient shackles of hand-made industry.

From the end of the last century till today, the ‘knowledge revolution’ has been sweeping the world, giving economic globalization a new meaning. Unlike agricultural revolution and industrial revolution, the knowledge revolution is a revolution in information technology with computer and network. If the nature of agricultural revolution and industrial revolution refers to the use of tangible resources such as land, fossil fuels and so on, together with the application of knowledge for these tangible resources, the characteristic of the knowledge revolution is the use of the intangible resources of information technology (IT). IT has changed the personal life, government operation and the mode of social production. The online shopping transactions in China reached 784.9 billion yuan in 2011 (ref 3). The e-government coverage of main business of the central and provincial government departments, has reached 70% during the eleventh five-year period. At present, IT technologies, Social Networking Services (SNS) are promoting economic and trade cooperation and personnel exchanges further more. Economic globalization has propelled the knowledge revolution, and has been changed by it at the same time.

The Copyright Law Transformation of China in Knowledge Revolution and Economic Globalization

Knowledge revolution and economic globalization have brought innovation and global dissemination on the form of cultural products, from the ‘printing works’ in eighteen and nineteenth century to ‘simulation works’ and ‘electronic works’ in

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twentieth century, then to ‘digital works’ and ‘network works’ today. The cultural and creative industry whose core industries are software, film, animation and network industry, not only cover people’s spiritual life and material life, but also become a new economic growth point. Taking the United States as an example, in 2010, the value added to Gross Domestic Product (GDP) from total copyright industries is 1626.9 billion dollars, accounting for 11.10% of GDP.\(^5\)

The knowledge revolution has a significant impact on the copyright industries, and put forth new requirements on the relevant laws. Intangible characteristics of the essence of knowledge makes it ‘public goods’ in economics. This means that the outcome of the knowledge revolution cannot be transformed into the commodities of the market economy, and bring economic benefits without protection of law. Therefore, intellectual property law is the guarantee of the outcome of the knowledge revolution and the cornerstone of economic globalization. This is also reflected in the development of the cultural and creative industries, taking copyright as foundation, copyright transactions as link and copyright protection as support, so copyright legislation is essential for cultural and creative industries. In the perspective of knowledge revolution and economic globalization, the construction of China’s copyright system reflects three different but relevant themes of current times.

The first is the modernization of copyright legislation. Modernization means the historical process by which economically backward countries catch up with the advanced level through technical revolution in economy and technology, in the particular environment of international relation after modern capitalism’s rising.\(^6\) China’s modernization started in early twentieth century, but incorporated all aspects of modernization in 1980s. When civil law legislation was to adapt to the economic development and the social need, literary and art circles proposed the copyright legislation bill several times, as the cultural industries developed prosperously in 1980s.\(^7\) Therefore, China needed copyright system to meet the requirements from modern cultural industry development.

The second is the internationalization of copyright legislation. The internationalization of law refers to the process and phenomenon that the international exchanges and communication of law endow it the features of international.\(^8\) This includes generation and transplantation of international legal rules, which are also the legislative requirements to countries all over the world for the international economic and trade cooperation in the era of economic globalization. The internationalization of copyright legislation means that China constructs the copyright system within the needs of international goods trade, investment and intellectual property exchange through the adoption of the copyright related international treaties and international rules, so as to promote international trade and economic cooperation.

The third is the localization of the copyright legislation. This is not the global legal localization, which refers to the rules of United Nations, international organizations and the international community acknowledged or accepted by countries in whole or in part, becoming a part of law of each country.\(^9\) The localization of the copyright legislation here is the process of copyright law legislation under the need of the country development, through the absorption of foreign legal theory and experience on the basis of the local practice.

Modernization, internationalization and localization are manifested in the logic of history upon the country’s copyright legal system construction. Therefore, this paper would take China’s legislative history as the route, and discuss the choice and process of the copyright legislation of China, in the circumstance of knowledge revolution and economic globalization.

The Establishment of Market Economy and the Modernization of Copyright Legislation

In 1980s, the new communication technology had created new art forms, which broadened the scope of the object of copyright and various kinds of copyrights, and helped copyright owners to open up new ways for creating interests. Hitherto, it threatened the exclusive use of copyright by providing various means to copy, record and communicate. The United States, France, Japan, Britain and other countries revised their copyright law to cope with the new technology. Besides, legal counter measures of new technology were also absorbed in the relevant international conventions, such as database copyright, neighbouring rights for the organization engaged through the cable transmission program, copyright protection for software as written works.
China then just carried out the reform and opening up, so it faced the economic system transition and law reconstruction. After 1949, China only protected benefits of the writer through some administrative regulations and practices. Thus, copyright as a private right did not exist in the legal system of China for a fairly long time. However, after entering market economy, copyright has been important for the modern industry development and the individual needs. The deficiency of right system brought many obstacles to industrial development and product trade, such as radio, film, television, publishing, art and other industries. What’s more, lack of copyright increased legal risks and hindered international goods and technology trade. Although trade agreement between China and USA gave copyright protection to legal person and natural person in 1980s, it was a trade agreement between the two countries, not a third country and did not set regulations on domestic copyright in China. Therefore, the copyright law is consistent with the domestic and foreign demand.

After the establishment of diplomatic relations with the United States in 1979, China started copyright law drafting. In 1990, this work was finished, but it was full of controversies, for example, on economic issues, there was the government’s consideration on whether it would have a significant impact on foreign exchange expenditure. And on the legislation issues, there were disputes on the name of the law, the relationship of copyright law and publication law, neighbouring rights, copyright transfer and inheritance. The 1990 copyright law only covered the right of publication, the right of authorship, the right of revision, the right of integrity, and the right to exploitation and remuneration. Compared with Berne Convention and Universal Copyright Convention, the variety of rights were less, but complied with these two conventions substantially. Copyright law means confirmation of copyright as private rights, in order to meet needs of the market economy. In addition, China formulated the ‘International Copyright Treaties Rules’ in 1992, improving the system of protection of foreign works and foreign copyright owners.

The Participation in WTO and the Internationalization of Copyright Legislation

In 1990s, after copyright law was enacted, China’s import and export trade volume increased from 722.58 billion yuan in 1991 to 39.2742 trillion yuan in 2000, which reached the goal that Wu Yi, the former deputy prime minister announced in 1995 that total volume of trade reached or exceeded 4 trillion dollars. The economy of the country became comprehensively export-oriented. Therefore, China and other countries needed to sign bilateral trade agreements to gain permanent most-favoured-nation treatment, and joined the World Trade Organization (WTO). As a result, the two copyright law amendments are related to the WTO: the first modification was to join the WTO, for a comprehensive revision of the copyright law according to the TRIPS’s demand; the second modification was to perform the WTO on Sino-US intellectual property dispute rulings, against the provision ‘works, the publication or distribution of which is prohibited by law shall not be protected by law.’ In the past 20 years, the standard of the legislation and modification of the copyright law of China is TRIPS compliant and the relevant international conventions. The causes of change mainly came from the requirement of WTO and the pressure of international society. The two amendments of the law have improved as follows:

The Improvement in the Protection Level

The 2001 copyright amendment incorporated the ‘International Copyright Treaties Implementing Rules’ into copyright law, so as to meet the national treatment of the Berne Convention. In order to implement the Berne Convention and Universal Copyright Convention in China, the central government issued ‘International Copyright Treaties Implementing Rules’ in 1992, awarding foreign copyright owners higher treatment than the Chinese citizen. For example, foreign works of applied art, foreign computer program, foreign video works can be protected in China. China as the member country of Berne Convention had the obligation to modification of its copyright law according to the requirements of the Convention, to improve the treatment of its citizens, and eliminate unequal status.

The works created by virtue of an analogous method of film production, maps, sketches and other graphic works and model works and other works are protected by the 2001 amendment, which expanded the scope of copyright objects. The class of works under 1990 Copyright Law did not meet the needs of the development of new technologies. First of all, the 1990 Copyright Law only provided protection for three types of works, cinematographic works, film,
television and video. Secondly, the 1990 Copyright Law regulated computer software as a special work outside the scope of written works. However, protection of computer software was far below the protection level of written works in the ‘Regulations on Computer Software Protection’. Thirdly, the 1990 Copyright Law did not set clear provisions on compilations for the protection of database. These shortcomings have been revised in the 2001 amendment. In addition, the 2010 amendment, amended the Article 4, the works and part of the work which failed by examining cannot be provided protection by copyright law, which expand the scope of the works.

The Expansion of the Right System

The expansion of copyright rights system included increase of right type, relaxation of the right use, and refinement of limitations and improvement of right relief.

On the types of right, the 2001 amendment includes the right of communication through information network, the right of rental and expands the scopes of the right of performance and the right of distribution, to reflect characteristics of new technologies. Firstly, the right of reproduction and the right of distribution in 1990 Copyright Law failed to include information transmission on network. Secondly, the rental was treated as a way to use, not a right, which did not comply with the TRIPS regulations on the right of rental for computer programs and cinematographic works. Thirdly, the right of performance does not include the right of indirect and public presentation of works by projectors, video recorders, tape recorders and other mechanical equipment. Fourthly, the right of broadcasting does not include the right to broadcast a work by radio, television and other machinery for the purpose of profit publicly. Finally, the right of making cinematographic work included only the rights to film, television and video works, rather than the right to fixate work on the carrier by virtue of an analogous method of film production.

On the usage of right, the 1990 Copyright Law only permitted copyright licensing. However, the 2001 amendment provides transfer contracts, and the abolition of restrictions on the term of the contract, the 2010 amendment set the rule on the copyright pledge.

On the limitation of right, the 2001 amendment increased statutory licensing. Since the 1990 copyright law was drafted in the late 1980s, new ways of using a work in copy, film and network transmission had not been largely applied, so the copyright restrictions were appropriate then. In the 1990s, the original rights restrictions became redundant with the endless new ways of work use, which did not meet principles of limitation on fair use from the Article 11bis of the Berne Convention and the Article 13 of TRIPS.

On the administrative protection of right, the 2001 amendment clearly stipulated statutory compensation for the infringer, and specified that copyright administration department may subject administrative penalties to cease the infringing act, confiscate unlawful income from the act, confiscate and destroy infringing reproductions, impose a fine and confiscate the materials, tools, and equipment mainly used for making the infringing reproductions.

In the perspective of the legislative motivations, the two amendments were ‘passive adjustments’ rather than ‘proactive arrangements’. Especially the modification in 2010, which mainly responded to the WTO dispute settlement judgment of the expert group, not a comprehensive adjustment. Therefore, China’s copyright law was not modified for 12 years, which was not consistent with the international trend. From the end of last century to the beginning of this century, copyright law modification activities became more frequent in many countries with the development of modern communication technologies and formation of international conventions and bilateral agreements on copyright. In the United States, since the beginning of this century, the new amendments have been submitted to Congress almost every year after the introduction of the Digital Millennium Copyright Act. The French Intellectual Property Code in 1992 has been modified according to the EU instruction on the database, the droit de suite, information society copyright and intellectual property law enforcement and TRIPS, the World Intellectual Property Organization Internet Convention during the period of nearly 20 years.

Thus, compared to the copyright modification activities of developed countries, the changes of China’s copyright law are relatively lagging behind, and thus there is a need to absorb international rules and practice of other countries.
The Needs for Country Development and the Localization of the Copyright Legislation

The third modification of the copyright law is neither based on the need to accede to international conventions, nor from the international society’s aspirations. It is proactive modification based on the local conditions. According to statistics from WIPO, the copyright industry’s GDP contribution rate has exceeded 7% in China. It can be said that the copyright industry is gradually becoming an important part of the national economy and an important way for transition in China’s economic development mode. Meanwhile, the input of foreign cultural products of the cultural market will bring great impact, due to the deepening of globalization and expansion of cultural influence from the developed countries. In order to safeguard national culture, enhance the soft power of culture, promote cultural prosperity and development, a strong and sound legal mechanism must be provided for cultural innovation activities, cultural products trade and cultural industry growth. Therefore, in addition to meeting the minimum standards of international conventions, and learning from the legislative experience of developed countries, the amendment of the Copyright law should be based on China’s national conditions, to reflect China’s characteristics and solve China’s problems. The copyright legislation should get rid of the passive transformation, from passive adjustment to proactive arrangement, so as to boost the strategic goal of building an innovative country. The National Copyright Administration has released two amendment drafts for the public to discuss and develop a third draft for the discussion of Legislative Expert Committee, after absorbing the views of the community. Therefore, the drafts adopted the opinions of the public and the relevant industry especially the Internet industry, and literary and art circles. In addition, the drafts absorbed the content of ‘Beijing Treaty on Audiovisual Performances’ in time. The amendment drafts contain the following key points:

The Style Arrangements and Legislative Technologies of the Modification

The current copyright law system includes one law and six regulations. The style arrangement of the copyright law takes the law as the backbone and copyright regulations as the supplements, complemented by judicial interpretation and administrative rules, which form a relatively independent and sound copyright rule system. This modification involves style arrangements of copyright law and relevant regulations. In addition to the ‘Regulations on Computer Software Protection’ and the ‘International Copyright Treaties Rules’, whose content exist in the copyright law and can be abolished at an appropriate time, the other four regulations can be dealt with the following three options: (i) the ‘one without four’ plan which integrates the four regulations into the copyright law completely for a uniform copyright law, (ii) the ‘one plus four’ plan that not only modifies the provisions of the copyright law, but retains the integrity of the four regulations, and (iii) the ‘one with four’ plan, that is, adding some relatively mature provisions and the general issues of regulations, into the copyright law, and then gradually amending the relevant regulations after the copyright law amendment draft passes.

The amendment draft of copyright law, published in March 2012 seems to uphold the ‘one with four’ plan. Some provisions of the administrative regulations are added to the copyright law, which are mainly related to the date of copyright occurrence, the right of communication through information network, works of applied art and so on. These provisions are principal and mature in relevant regulations, and are appropriate to be reflected in the amendment draft. From the social response, the industries’ controversy is on the relevant supplemented provisions of the copyright collective management. In the authors’ opinion, as some major issues have not yet formed a broad consensus, they can be included in the relevant regulations, instead of being set in the copyright law. According to the level of the effect, the changes of the legal provisions can be completed by law and regulations amended respectively.

The structure of the copyright law, takes the common practice of the normative files, including three parts (general provisions, sub-provisions and supplementary provisions). Each chapter of sub-provisions involves substantial adjustments of copyright relations, including on the subject, object, behaviour, events and results of specific provisions. The modifications of sub-provisions are related to the logical structure of the arrangement of each chapter, and also involved scientific representation of the relevant sections. The amendment drafts place ‘the limitations on rights’ in the Section 4 of chapter II on
'Copyright' in current law as a separate chapter placed behind the chapters of copyright and related rights chapter, so that the limitations of rights cover copyright and related rights. In addition, the current chapter IV, ‘Publication, Performance, Sound Recording, Video Recording and Broadcasting’, is renamed as ‘Related Rights’ in accordance with usual name of international conventions. Chapter III, ‘Copyright Licensing and Transfer Contracts’ is renamed as ‘Exercises of Rights’, which is not limited to licensing and transfer.’

In the aspect of legislative mechanism, modification of copyright law is mainly related to change, deletion, and supplement. The change of law is rational and scientific changes modify the content, structure and text of the rules, for example, adjustment of the ‘limitations of rights’ section to ‘related rights’. The deletion of law refers to the suitable and appropriate deletion of outdated and unnecessary content and related forms of laws and regulations, for example, deletion on the supplementary provision, ‘Measures for the protection of computer software and the right of communication through information network shall be formulated by the State Council’. To supplement in law is to improve on the shortcomings of current law for the purpose of integrity and suitability. This is a technology commonly used by legal changes, also the primary method of modification. The foregoing copyright term, technological protection measures and rights management information, right of rental, registration copyrights and related rights and so on, all fall into this category.

The Expansion of Copyright Objectives

Under the enumerative legislative model of the current copyright law, the provisions of the works cannot cover all situations of unclear areas and unknown types. This modification adopts the summary model and enumerative model like the United States, Germany, France, Japan and other countries. The first provision is the definition of ‘work’, and then the enumerated types of works. The works defined in ‘Implementing Regulations of the Copyright Law’ is applied to legal provisions, with changes to the current type of works involving architectural works and works of applied art. In addition, defined idea/expression dichotomy excluded elements of unprotected works; unprotected abstract ideas and unprotected applied factors such as method of operation, applied program, applied function are newly added. In combination with the works definition provision, these provisions could accurately define ‘works’ in the context of copyright law.

On the definition of specific works, major changes are on the works of applied art, audiovisual works, and computer program, as compared to the provisions of the ‘Implementation Regulations of the Copyright Law’. Firstly, making a work of applied art not subject to super national treatment in the ‘International Copyright Treaties Implementing Rules’, and strengthen protection of the works. According to the Berne Convention, works of applied art are deemed as a single class of works and protection period is twenty-five years. Secondly, drafts change the ‘cinematographic works and works created by a process analogous to cinematography’ to ‘audiovisual works’, in accordance with international conventions; and finally, the main reason of converting ‘computer software’ to ‘computer programs’ is that software document can be protected as a written work directly. However, the computer program includes not only sequence of instructions, but also related data in the third draft, which is not consistent with the provisions of existing law and regulations, as well as former two drafts, since the definition expands scope of protection on computer program.

The Breakthrough in Copyright Content

The first is the definition of copyright. The amendment draft modifies the Article 10 of the current copyright law. It is separated into three parts, including general clause, clause of personal rights and the clause of property rights. By referring to the legislative experience of United Kingdom, United States, France, Germany, Italy and other countries, the personal rights and property rights are separated at the same level of effects, and included under the concept of copyright.

The second is the modification of personal rights. The right of authorship is changed, including deciding whether to claim authorship or not. In addition, the right of revision is deleted and its contents are merged into the right of integrity. There is reservation about this, for the right to revision belongs to proactive enforcement of their rights. However, the right of integrity belongs to passive protection.

The last is revision of property rights. The scope of copy is enlarged with the digitized form and other
The right of rental contains sound recording within works. The right of broadcasting becomes the right of dissemination. The right of presentation is merged into the right of performance. And the right of communication through information network is modified from interactive dissemination to live broadcasting, broadcasting and other forms, under the title, ‘the right of communication through network’.

The improvement of the copyrights responds to the challenges of network technology, fulfilling the requirements of international treaties, protecting interests of authors, and promoting healthy development of China’s cultural industry. However, there is disagreement with the new provisions on droit de suite. Droit de suite refers to a high level of copyright protection that only existed in the copyright laws of France, Germany and Italy. But the United States, Japan and most other countries did not formulate this right. As per Article 14ter of the Berne Convention, it is optional that the union countries of Berne Convention are free to decide whether to introduce it or not. China’s copyright law is not obliged to introduce this right at present. In addition, from the third draft and the second draft, it is improper to merge the right of revision into the right of adaptation. The reasons are not only different natures of these two rights, where one is mainly related to the content, the other is related to the styles, but also that the right of adaptation is confined to the right to revise the computer program, which is far from comprehensive.

The Ownership of Copyrights
The important modifications in ownership of copyrights in the draft are the following: Firstly, the drafts increase an element in the identification of the work of a legal entity or organization, investment of the legal entity or other organization. Secondly, in accordance with the requirements of Beijing Treaty of Audiovisual Performances, the authors of the audiovisual work is determined by the director, screenwriter, and the writer of musical works; created specifically for the audiovisual works. In ownership of copyright, the author shall enjoy the right of authorship, and could enjoy property rights with the producers through contracts. In the absence of such a contract or of an explicit agreement in such a contract, the property rights belong to producers. In addition, the ‘secondary right to remuneration’ is assigned to the author on the subsequent use of audiovisual works. Finally, the digitized usage of ‘orphan works’ whose author or owner of the original works are unknown is recognized in the drafts. From the drafts, the right to remuneration of the authors has been taken into consideration so as to achieve a balance between the interests of authors and property rights owners.

The Refinement of the Limitations of Rights
Firstly, the amendment drafts add the ‘three-step test’ into fair use as determining elements, and stipulate the fair use of the computer program. Since Judge Joseph Story created the three elements of fair use in 1841, it has been accepted by many countries, and formed a basic criterion, for judicial practice for more than a century. However, the process of copyright law transformation did not focus on the absorption of the criteria of ‘three-step test’. And with enumerative model it is difficult to avoid deviations from practice and cannot solve new problems from the new technology effectively. Therefore, the abstract criterion is added on the basis of enumerative legislation in the amendment draft, in order to facilitate outcome of the uniform judicial standard.

Secondly, a statutory copyright licensing institution is systematized. The amendment draft stipulates obligations that the statutory licensing must be recorded before use, remuneration paid through copyright collective management organization in time and the sources demonstrated, as well as the administrative penalties imposed when the user does not pay timely. This adjustment not only meets the objective needs of the users, but also ensures fundamental benefits to the right owner. To the copyright statutory licensing system, the first amendment draft to Articles 46 and 48 caused a widespread suspicion among the music industry. Especially, Article 46 entitles the other producers of sound recordings the right to make recordings without permission of the right owners. But this article has been deleted in the latter two drafts. In fact, the statutory licensing of sound recordings is an international provision and accepted by various countries, which ensures profit of the right owners and expands the scope of work. The origin of critique comes from the current absence of the statutory licensing fee paying mechanism and royalty distribution mechanism, which prevents music copyright owners, from gaining remuneration according to the statutory licensing.
The Update of Related Right System

According to the interpretation of WIPO, the rights of performers, the rights of sound and video recording producers and the rights of broadcasting organizations could be named as ‘related rights’ or ‘neighbouring rights’ which parallel copyrights. The civil law countries and China take this legislation model. The revisions in the draft are as follows:

Firstly, the heading of chapter V is ‘related rights’, the provisions of Section 26 of the Implementing Regulations of the Copyright Law are upgraded to the copyright law, which link to the chapter II, ‘copyright’, and unify the contents of each section in this chapter so as to enhance internal logic and identification of copyright law.

Secondly, the type of related rights is improved. The first instance is to increase secondary rights of performance for performers. Current copyright law only provides the copyright owners with the rights of broadcasting and mechanical performance. It is unbalanced that the performers have no rights of remuneration when radio and television stations broadcast their recordings of performances. The other is to improve the right of broadcasting organizations. The main changes include program signals specified as the object of right, the right of public dissemination of recorded radio and television programs, and the right of public dissemination in commercial places.

The Strengthening of Collective Copyright Administration

There are five articles for collective copyright administration in Section 2, chapter V of the first amendment draft, involving definition of collective copyright administration organization, criterion of licensing fees, dispute settlement mechanisms and other issues. Comparing with one general article in current copyright law, the amendment draft has progressed on protecting the right to implement, providing channels for licensing, and promoting dissemination of works. However, the industries widely blamed these rules for use without permission the right owners. Given the views of industries, the regulations were changed in the latter two drafts, such as the exercise of collective copyright administration to represent the right owners directly is confined to ‘disseminate published written works, music and audiovisual works in self-service on demand or other ways. The drafts continued the spirit of the ‘Regulations of Collective Copyright Administration’. It tried to implement the rights of non-members through ‘extended collective management’ by official and unique collective copyright administration organization. However, ‘official’ means creation and operation of collective administration organization is not really controlled by the right owners, which does not reflect the interests and demand of the right owners. It will deprive owners the rights of permission and pricing to a certain extent, and strengthen monopoly of copyright collective administrative organization. Therefore, in order to realize advantages of the mechanism, official and monopoly of China’s copyright collective administrative organization should be excluded first.29

The Improvement of Copyright Protection

Firstly, on the basis of the Tort law and the ‘Regulations on the Right of Communication through Information Network’, the draft contains liability provisions of the Internet users and service providers, excluding obligations of examination of Internet service providers on simple technical services, which achieves the balance of interests to some extent. Secondly, maximum amount of statutory compensation for copyright in the draft to infringement increases to 1 million yuan. The statistics shows that from 2000 to 2009, law enforcement agencies investigated and dealt with 83,000 cases and confiscated more than 710 million pieces of pirated products.30 Therefore, in order to curb increasing infringement the draft creates a strict liability mechanism.

In addition, the draft introduces punitive compensation system for copyright infringement. For more than two intentional infringements, the right owner has the right to claim one to three times the amount of compensation. This draws on the legislation of Brazil, the United States and other countries. The aggravated liability is consistent with the judicial policies on building an innovative country, increasing tort costs, and enhancing intensity of combating infringement, which is also consistent with the industrial policies on the promotion of cultural development and prosperity and upgrading the copyright industries contribution rate to economic development.

The localization of copyright legislation embodies two characteristics in this modification of copyright law. Firstly, the characteristic of Chinese legal system has been taken into consideration. Because the cases
have not been included in the sources of law in China, therefore, the law must be able to make a guide for the current application of law, and adapt to future legal issues. This requires the copyright law to provide both specific types and abstract conceptions. Taking the definition of work for example, the amendment drafts have abandoned enumerative type model of current law and have made a general definition of work. In addition, the drafts made definitions for the specific types of works to facilitate application of law. For fair use as well, the drafts have made a principle provision for fair use, which deviated from the Berne Convention, and referred to the rule of US copyright law, in response to technological developments that may constitute fair use. However, the arrangement of fair use provision requires that the judge must consider the existing types firstly. If these types cannot be applied, the principal provision could be applied. To some extent, this can avoid the abuse of power by judges. Secondly, needs of the industry in China have been taken into consideration. At present, there are two most urgent problems in China’s copyright industries, the construction of copyright licensing and trading rules and improvement to the relief granted in case of copyright infringement. The former problem is mainly reflected in the construction of copyright collective administration system. In the drafts, after obtaining the authorization of the right holder and representing the interests of right holders across the country, the collective administration organizations can represent all rights holders to exercise the copyright or related rights to the public dissemination or otherwise use of music or audiovisual works on self video on demand system. This not only safeguards the interests of numerous copyright holders, but also overcomes the dilemma of users’ access to massive authorization of works. The latter problem is mainly concerned with affirmation of infringement and the amount of compensation. As the drafts show, the current copyright infringement law has been modified from enumerative type to general description, which thus expands the scope of right claim. The drafts have changed the current ordinal rule about the amount of compensation for damages to a selective one, which allows right holders choose the amount of compensation from among actual losses, the infringers’ illegal income, a reasonable multiple of the transaction costs and an amount below one million yuan. This modification would help infringers to confirm their compensation and recover their loss. The localization stands for the responses of the efforts to summarize judicial experiences and the need of the copyright industries, which would become two main approaches in the future modification of copyright law in China.

Conclusion

The modernization of copyright legislation has happened during the period of 1980s and 1990s, which was during building a market economy in China. Under the guiding ideology of ‘feeling stone to cross a river’, the main mission of copyright legislation is to construct basic rules, in order to meet requirements of the foreign trade partners and needs of the cultural industries. The internationalization of copyright legislation has corresponded to a period of fifteen years of the last century and the beginning of this century, in which foreign trade developed rapidly. The objective of copyright modification was to achieve internationally accepted standards, obtain more intimate trade opportunities with developed countries. The localization of the copyright legislation is self-adjustment under the current economic environment, rapid development of China’s cultural and creative industries, as well as policy environments of national independent innovation capacity building, cultural development and prosperity. On the basis of international conventions and domestic demand, this modification is to build a copyright system in accordance with current industry development, with an open mind to legislation and through detailed study of the legislation. Therefore, in the process of copyright legislation, there is the logic of economics beneath the logic of history, and establishment of industry policy under the construction of a private right system.

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15 For example, the ‘Family Entertainment and Copyright Act, the Copyright Royalty Distribution Reform Act and others’.


17 When the word ‘drafts’ is used in this paper, it indicates the same content in the three amendment drafts.

18 They are the copyright law drawn up by the NPC Standing Committee and six related regulations drawn up by the State Council.


24 For example, there are two sections for personal rights and property rights in Germany copyright law, and two chapters in the French intellectual property code.

25 From the legislative examples, the scope of reproduction is expanded in international society. For example, ‘Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner of form’ in Article 9 of Berne Convention, which is also in Article 16 of Germany copyright law.


29 For example, the Germany law for collective administration organization amended in 2007 includes licensing, rights, obligations and supervision of the collective administration organization.