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Preface

China is now making significant headway in cultural and high-tech industries, where copyright is the key. One example is the book industry, with sales increasing by over 30% from 2013 to 2014. Another new industry is the mobile app industry, now worth over $8.7 billion in 2015, with small domestic start-ups relying on copyright to safeguard them in a market where less cautious foreign app developers have been overtaken by copycats.[1]

Copyright is a form of intellectual property right (hereinafter IPR) that protects a creator's exclusive right to control who reproduces or alters the product of their original creative effort. Copyright protects the producers of any original work and is relevant to almost all businesses, not just those in the creative industry. Adequate copyright protection can form an important part of an IPR protection strategy. Businesses regularly create articles, photographs, drawings, designs, models, websites, and computer software, which all enjoy copyright protection. Copyright is an automatic right that arises the moment a work is created.

Once the work is created, in most cases, the creator will automatically enjoy copyright protection in all 164 member countries of the Berne Convention for the Protection of Literary and Artistic Works, including all of China. Voluntary registration for copyright is available in China. China received more than 2 million new copyright registrations in 2016, an increase of 22 percent, according to official figures revealed on February 22, 2017. Registrations for copyright works accounted for nearly 80 percent of total registrations in 2016, according to the National Copyright Administration of China. New software copyright registrations in 2016 doubled from 2014 to 400,000. The administration said China's copyright registra-

S.J.D., Tulane University, USA, 1991; LLM, Cornell University, USA,1989; MCL, Dickinson School of Law, USA,1983; Bachelor of Law, National Taiwan University, Taiwan, 1980. Professor, School of Law, Xiamen University, PRC.

[1] Jurgenson, Helika. Back to the Basics Series: Copyright Protection in China [EB/OL]. http://www.youripinsider.eu/basics-series-copyright-protection-china, 29–Aug–2016.

tions in a single year hit 1 million for the first time in 2013 and totaled 1.64 million in 2015.[2]

Though European Small & Medium Enterprises' (SMEs') work is automatically protected by copyright the moment it is created, voluntary registration will provide proof of ownership, which can save the SME time and money in case of a dispute later on. Copyrights that are particularly important to the livelihood of the business are strongly advised to be registered.[3]

It is said that copyrighting is the child of the printing press. Thus, perhaps it is the great German inventor, Gutenberg, who can be considered its father. As most Germans should recall, it was Gutenberg's printing press, in 1450, which made it possible for large volumes of literary work to be reproduced in Europe. An estimate at the time of Gutenberg claims that in Continental Europe, there existed 30,000 volumes of literary works. By the end of 1500, there were 300 printing presses, not in Europe, but in Venice alone. Moreover, the number of books had increased 500 times, from 30,000 to 15 million. It is believed that copyright law actually developed in Venice around 1500 as a set of monopolies or patents. One early example is that of Ludovico Ariosto, who was granted the exclusive lifetime right to print his famous novel *Orlando Furioso*. It was from these early laws in Venice that sprung up the very first official copyright law in England, commonly known as the Act of Anne.[4]

As inventors of printing technology, the Chinese began official copyright protection in 1068 when the Emperor of the North Song Dynasty issued an order forbidding reproduction of the "Nine Books" without authorization. Guo Zi Jian, an official publisher of the Tang Dynasty, published the books in 932. The publishers of the Song Dynasty first became aware of copyright protection. For example, when a certain Mr. Cheng of Meishan, Sichuan, printed the book *Stories of the East Capital*, the "copyright page" of those days said, "Printed by Cheng of Meishan, who applied protection from the superior, any reproduction is prohibited."[5] Later on, international treaties between China and other countries during the Qing Dynasty also stipulated for copyright protection.[6]

In 1949, the founders of the People Republic of China (hereinafter PRC) declared that all existing laws and legally constituted authority should be abrogated. Articles that confirmed rights and freedoms of art and literature can be found in the new PRC Constitution as early as 1954. However, the first law to protect artists' substantive rights did not come into being until 1990 when the *Copyright Law of the People's Republic of China* was passed.

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[2] See China sees upsurge in copyright registrations in 2016[N]. Xinhua, http://english.cri.cn/12394/2017/02/22/4383s952389.htm, 2017–02–22.

[3] Ibid.

[4] Zhou,Lin. Copyright Law in China, http://www.iolaw.org.cn/showArticle.aspx?id=60.

[5] The copy of the stamp can be found in the book: *The Historical Documents of China's Copyright Law*, edited by Zhou, Lin and Li, Mingshan, published by China Fang Zheng Publishing House in November, 1999. Adapted from Zhou,Lin. supra note 1.

[6] China Copyright Protection Rules and Regulations Insight, http://www.chinalawblog.org/law-topics/intellectual-property/120-china-copywrite-protection-rules-and-regulations-insight?start=1, 20 April 2011.

Chinese Copyright Law,[7] in its 27-year history, has only been revised twice, in 2001 and 2010, respectively. From its initial enactment to two revisions, foreign trade had always been an important consideration. In the 1980s, several rounds of Sino-US intellectual property negotiation in the ambit of bilateral trade negotiation were the pushing force for the promulgation of the Copyright Law in 1990. In 2001, the Copyright Law was completely revised to comply with the Agreement on Trade--Related Aspects of Intellectual Property Rights (hereinafter TRIPs Agreement) before China's accession to the World Trade Organization (hereinafter WTO). In 2010, the Copyright Law was revised for the second time to comply with the WTO Dispute Settlement Body (DSB) Panel Report regarding US-China intellectual property dispute. Since the second revision merely covered the limited provisions addressed in the WTO dispute, the 2001 Copyright Law was largely kept intact.

The third revision, against the background of Chinese national strategy of indigenous intellectual property and arising economic power, will be comprehensive. After 2 years' preparation, a draft of the third revision was officially released by the National Copyright Administration of China (hereinafter NCAC) for public consultation on March 31, 2012.[8]

On June 6, 2014, the State Council Legislative Affairs Office (hereinafter SCLAO) released the entire draft and explanation of the copyright law revision that had previously been submitted by the NCAC to the SCLAO for public comment. This presumably is the draft that had been submitted to the SCLAO in late 2012, although the public comment period was on or before July 5, 2014. After the State Council reviewed the draft, it would of course need to be submitted to the Standing Committee of the National Peoples Congress for consideration;[9] further amendment procedure would certainly go beyond 2016.

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[7] Adopted in the 15th meeting of the Standing Committee of the Seventh National People's Congress on September 7, 1990, and revised in the 24th meeting of the Standing Committee of the 9th National People's Congress on October 27, 2001, in accordance with the Decision on Revision of the Copyright Law of the People's Republic of China for the first time and in the 13th meeting of the Standing Committee of the 11th National People's Congress of the People's Republic of China on February 26, 2010, in accordance with the Decision on Revision of the Copyright Law of the People's Republic of China for the second time.

[8] For brief explanation, see A Brief Explanation concerning the "Copyright Law of the People's Republic of China" (Revision Draft) [EB/OL]. Posted on April 6, 2012, updated on October 4, 2012, https://www.hg.org/article.asp?id=35620.

[9] State Council Legislative Affairs Office Releases NCA Draft of Copyright Law for Public Comment [EB/OL]. https://chinaipr.com/2014/06/09/state-council-legislative-affairs-office-releases-nca-draft-of-copyright-law-for-public-comment/, June 9, 2014. Regarding the content and comment, may see Xue, Hong. A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law [EB/OL]. http://infojustice.org/wp-content/uploads/2012/04/hongxue042012.pdf; You, Yunting. Introduction to 3rd Revision Draft of China Copyright Law [EB/OL]. http://www.chinaiplawyer.com/introduction-3rd-revision-draft-china-copyright-law/ April 6, 2012; You, Yunting. Better or Worse? Comments on the Exposure Draft of Copyright Law [EB/OL]. http://www.chinaiplawyer.com/worse-comments-exposure-draft-copyright-law/ April 11, 2012; Luo, Yanji**.** What Change on Information Communication by Network in Exposure Draft of China Copyright Law [EB/OL]. http://www.chinaiplawyer.com/change-information-communication-network-exposure-draft-china-copyright-law-ii/, May 18, 2012; Guo, Yimeei and Hu, Weiwei. "Digital Music Copyright Protection Dilemma: A Discussion on Draft Amendments of China's Copyright Law" [A]. Guo, Yimeei ed. *Research on Selected China's Legal Issues of E-Business* [M]. Springer, 2015: 239–245.

Nevertheless, the so-called copyright indicates that civil subject enjoys the exclusive right of the work and its related carrier according to the law. Copyright can be differentiated into narrow and broad sense. The narrow sense copyright only indicates the right of the created work enjoyed by its author. The broad sense copyright also includes the right of the work of the disseminator, e.g., performer, producers of phonograms, and broadcasting organizations. It is called neighboring right or related right. The performer, producers of phonograms, and broadcasting organizations enjoy the right of their own fruits of creative labor during the process of disseminating the work.[10]

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Contents

Chapter 1
Copyright Object

According to Article 6 of the *Implementing Regulation of the Copyright Law of the People's Republic of China* (hereinafter *Implementing Regulation*), copyright shall be protected from the date on which the creation of a work is completed. A copyright work must be an original intellectual creation that subsists in tangible form. Copyright protects the way in which the thought, idea or feeling is expressed and not the thought, idea or feeling itself. Therefore, an idea that does not subsist in tangible form will not be protected by copyright.

In *Zhang Qingwei vs. Shenjun Subway Ltd. case (2006)*,[1] (involving propaganda slogan call for a prize), Guangdong High People's Court made it very clear in the judgment: "China's Copyright Law protects creative expression, but does not protect idea, technology, operation methods or mathematical concepts. Creativity (such as Plaintiff's slogan for election) belongs to the category of idea and does not fall within the range of protection by China's Copyright Law."[2]

The protected object of copyright i.e. the object of copyright is work. The term-"work"referred to in *China's Copyright Law* (hereinafter *CCL*) shall mean intellectual creations in the literary, artistic and scientific domain, insofar as they are of originality and capable of being reproduced in a certain tangible form (see Art.2 of the *Implementing Regulation*). Accordingly, the works under *CCL* should be equipped with the following four essential factors[3]:

1. Expression of works

A work is the expression of idea or emotion. Any work expressing certain idea, emotion, viewpoint, love and hatred emotion etc. and subjective knowledge, is by

[1] See Civil Judgment of Guangdong Province High People's Court (2006) Yue Gao Fa Min San Zhong Zi No.44 (广东省高级人民法院民事判决书<2006>粤高法民三终字第44号).

[2] Ibid.

[3] For detailed discussion, see WU, HANDONG, WANG, YI. A Comment on Copyright Object (Chinese version) [EB/OL]. http://www.civillaw.com.cn/article/default.asp?id=16244, May–27–2004.

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means of certain expressive method, thus forms various types of work such as text, art and photography etc. But it should be notified that idea and viewpoint belong to subjective field, they themselves do not belong to works and are not protected by copyright law either.

2. Creativity of works

Creativity is also called originality, which means that the work is selected, arranged, conceived and created by the author (including one or more cooperative authors) and is not reproduced, imitated and plagiarized.

Creativity is different from novelty required by patent law. It neither asks for advanced level to what extent, nor asks for a work not existing before. It only requires the composition of creation. Creativity has nothing related to the factors such as whether or not a work is a masterpiece; whether or not the theme of a work is novel and well-known; whether or not a work can bring profit and so on. Besides, in copyright area, there are many works expressing the identical theme, which have the same subject or art form, but their performance practices and design layouts are different. Therefore, those works own their creativity separately and may enjoy their copyright.

In *NIKE, Inc. and NIKE(Suzhou)Sports Co. Ltd. and .Zhu Zhiqiang copyright Infringement dispute appeal case* (2005),[4] from April 2000 to September 2001, Zhu Zhiqiang cobtinually created and completed the works of "Uncontested Top Dog", "Overcome All the Difficulties in the Way", "Little 3", "Little 5"and "Little Cop"and so on containing ***"match stick homunculi"*** image (see Fig. 1.1) and made works of art regietration on Jilin Provincial Copyright Bureau. The image of the hero of these FLASH works created by him was ***"match stick homunculi"***. The image features of ***"match stick homunculi"*** created by Zhu Zhiqiang were the head was black sphere, no face, the torso, limbs and feet were made of black lines and the homunculi's head and body was connected with each other.

In October 2003, Nike Inc. and Nike (Suzhou) Sports Goods Co. held "2003 NIKE—Freestyle the King of Cool Search" launched propaganda and promoted their new product "NIKE SHOXSTATUSTB", separately distributed advertisement on Sina etc. websites, main streets, subway station and TV station. The image features of ***"black stick homunculi"*** (see Fig. 1.2) under those advertisements were the head was black, there was no face, the torso, limbs and feet were made of black lines; the homunculi's head and body were in a state of separation and the homunculi's limbs were elongated.

Zhu Zhiqiang claimed that Nike Incorporation's ***"black stick homunculi"*** plagerized his image of ***"match stick homunculi"***. In December 2003, Zhu Zhiqiang accused Nike Inc., Nike (Suzhou) Sports Goods Co., ad operators Beijing Yuanstai Century Advertising Co. and distributor Sina Infurmation Technology Inc. to the

[4] See Civil Judgement of Beijing High People's Court(2005)Gao Min Zhong Zi No. 538 (北京市高级人民法院民事判决书<2005>高民终字第538号).

Fig. 1.1 Plaintiff's "Match stick homunculi" image (Source: http://www.chinacourt.org/article/detail/2004/12/id/145554.shtml)

Fig. 1.2 Defendants' "Black stick homunculi" image (Source: http://www.chinacourt.org/article/detail/2004/12/id/145554.shtml)

court, asked to order them stop broadcasting ads and bear RMB 2 million yuans compensation liability.

Defendant Nike Inc. argued that Zhu Zhiqian's ***"match stick homunculi"*** and Nike Incorporation's ***"black stick homunculi"*** were not the same. Zhu Zhiqian's ***"match stick homunculi***" was thick, rough and connected the head and torso, gave a person a kind of plane effect. Nike Incorporation's ***"black stick homunculi"*** was designed as an "Ultimate Athlete", the limbs of the little man were stretched to fit the smooth movement. Zhu Zhiqian's image of ***"match stick homunculi"*** did not have originality, should not be protected by *Copyright Law*. The image of ***"match stick homunculi"*** was merely an abstract representation of a character, this too simple image clearly belonged to the common pattern of public domain, could not meet the requirements of the "originality" of *Copyright Law*. To produce the ad, Nike Inc. specially invited to participate in the creation of a large number of stars including Brazil soccer star Ronaldo to participate in performance creation, simply did not know that Zhu Zhiqiang spread the network animation ***"match stick homunculi"*** on the Internet. Nike Inc. asked the court to refute Plaintiff's claim.

During the hearing process of Beijing First Intermediate People's Court, both parties mainly focused on the following four issues of Zhu Zhiqiang's ***"match stick homunculi"*** image copyright and its visibility, whether Nike company was charged with infringement or not, lines villain image was to enter the public domain and the differences and similarities of the image between ***"match stick homunculi"*** and ***"black stick homunculi"*** to make vigorious debate.

Beijing First Intermediate People's Court decided that ***"match stick homunculi"*** designed by Zhu Zhiqiang had constituted "plane or three-dimensional plastic art works" in the sense of China's *Copyright law*. The ***"black stick homunculi"*** image series used by Nike Inc. simulated or plagerized against the animation image of ***"match stick homunculi"*** which Zhu Zhiqiang enjoyed the copyright. Without permission, Nike Inc. arbitrarily used the ***"black stick homunculi"*** image product similar to the animation image of ***"match stick homunculi"***, constituted tort on Zhu Zhiqiang's right to use the work and obtain renumeration. The animation imag of ***"black stick homunculi"*** used by Nike Inc., modified the animation work of ***"match stick homunculi"*** which Zhu Zhiqiang enjoyed the copyright and didn't sign his name, such conduct infringed Zhu Zhiqiang's right of authorship and modification.

On December 29, 2004 Beijing First Intermediate People's Court made the judgment, ***"black stick homunculi"*** under Nike Incorporation's ad infringed the copyright of ***"match stick homunculi"*** originally created by Zhu Zhiqiang. The court held Nike Inc. cease tort, publicly apologize on the Internet and compensate Plaintiff Zhu Zhiqiang RMB 300,000 yuans.[5]

After the first instance judgment, Nike Inc. appealed to Beijing High People's Court. On November 9, 2005, Beijing High People's Cour made the second trial of this case. During the hearing process, Zhu Zhiqiang's agent while answering the question of "what was the concept and range of***'match stick homunculi'*** claimed the right by Zhu Zhiqiang" stated: "We claim that the scope of the cartoon characters is static."

Therefore, the focus of second instance court was whether or not static ***"match stick homunculi***"image was protected by *Copyright Law* and whether or not ***"black stick homunculi"***infringed ***"match stick homunculi"***static image.

On June 15, 2006 Beijing High People's Court decided that anyone could create homunculi image based on it, the originality degree of the image of***"match stick homunculi"***was not high. Hence, the court should not give too high protection to of the image of "***match stick homunculi"***, simultaneously it should exclude the part of public domain from protective scope.

Compared between the image of ***"match stick homunculi"*** and ***"black stick homunculi"***, both had something in common, but the identical part mainly existed in the part which had already entered into public domain and should not be protected by *Copyright Law,* the different part just realized the independent creation of separate creators. Thus, the court could not decide that the image of ***"black stick homunculi"*** used the original labor of the image of ***"match stick homunculi"***. The image of ***"black stick homunculi"*** didn't infringe Zhu Zhiqiang's copyrighy of the image of ***"match stick homunculi"***. Nike Inc. should not bear tort liability.

Viewing that Nike Inc. and Nike (Suzhou) Sports Goods Co. used ***"black stick homunculi"*** didn't constitute tort, the conducts of Beijing Yuanstai Century Advertising Company's operation and Sina Incoporation's distribution of ad

[5] See Civil Judgement of Beijing First Intermediate People's Court(2004)Yi Zhong Min Chu Zi No.348 (北京市第一中级人民法院民事判决书<2004>一中民初字第348号).

Fig. 1.3 The work of art **"Bracelet (10)"** (Source: China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016–7–13)

involved also did not constitute infringement on Zhu Zhiqiang's copyrighy of the image of ***"match stick homunculi"***, should not bear tort liability.

To summarize, the fact finding of first instance court's judgment was not clear, and applied law wrongly. The appeal reason of Nike Inc. and Nike (Suzhou) Sports Goods Co. was established, its claim of appeal was supported by Beijing High People's Court.

The court held as follows:

- Repeal Beijing First Intermediate People's Court's (2004) Yi Zhong Min Chu Zi No.348 Civil Judgment; and
- Refute the litigation claim of Zhu Zhiqiang.

The acceptance fee of first instance RMB 20,010 yuans should be born by Zhu Zhiqiang (which has been paid); The acceptance fee of second instance RMB 20,010 yuans should be born by Zhu Zhiqiang (which has to be paid within 7 days of the judgment entering into force).

This is the final instance judgment.[6]

In *Weng Guoyang v. Shenzhen Jincheng Domain Silver Jewelry Co. Ltd. infringing copyright dispute case (2015)*[7] (involving public domain image non infringement case), Plaintiff created the work of art ***"Bracelet (10)"*** (see Fig. 1.3) on October 26, 2012. Such bracelet was a fish shaped bracelet and non convergence of its head and tail, no figure was inside, the fish scales were full of fish and fish outside and the fin and fish body were the same long, the fish's head was triangular with eyes and mouth, the Fish's mouth was sharp, the upper and lower tail existed symmetric bifurcation. Plaintiff claimed that Defendant's manufacturing mouth opening fish bracelet infringed his copyright of ***"Bracelet (10)"***, asked the court to order Defendant compensate loss and offer apology.

[6] See Civil Judgement of Beijing High People's Court(2005)Gao Min Zhong Zi No. 538 (北京市高级人民法院民事判决书<2005>高民终字第538号).

[7] See Civil Judgement of Shenzhen City Intermediate People's Court(2015)Shen Zhong Fa (Zhi) Min Zhong Zi No. 1546(深圳市中级人民法院民事判决书<2015>深中法<知>民终字第1546号).

After examination, comparing the accused commodity with ***"Bracelet (10)"*** claimed for protection by Plaintiff, both were fish shaped bracelets with non convergence of their heads and tails, the fish scales were full of fish outside and the fin and fish body were the same long, the upper and lower tail existed symmetry bifurcation, but the fishes' head and mouths shapes were different, and the accused commodity inside had the fish and lotus leaf and lotus pattern. Viewing on the whole, the accused commodity's shape, structure and proportion of lines, body and tail shape were all similar with Plaintiff's work of art ***"Bracelet (10)".***

In this case, viewing from the creation process and expression form of ***"Bracelet (10)",*** such image indeed included Plaintiff's choice and judgment and has creator self's personality, Plaintiff tried to express his thoughts through the image, therefore, ***"Bracelet (10)"*** image had originality, simultaneously also reflected a certain artistic beauty, complied with Article 2 and Item (8), Article 4 of *Regulations for the Implementation of the Copyright Law of the People's Republic of China*, which provides the requirement for originality and artistic beauty of works of art, belonged to works of art in the sense of Copyright Law in China, should be protected by *China's Copyright Law*. But the originality of the work of art ***"Bracelet (10)"*** was in the public domain and should be excluded from the scope of protection.

According to Defendant's proof, the image of the mouth opening fish shaped Bracelet has entered into the public domain foe a long time, hence the image of ***"Bracelet (10)"*** had already entered into the public domain. Therefore, even though the image of ***"Bracelet (10)"*** and the one of the accused commodity had something in common, yet such identical parts mainly existed in the public domain and were the ones which should not be protected by Copyright Law, their different parts precisely reflected the independent creation of their own creators, thus the accused commodity could not be determined using the independent part of the image of ***"Bracelet (10)".*** Hence, the court held that Defendant's work didn't infringe Plaintiff's copyright of ***"Bracelet (10)"*** and refuted all Plaintiff's claims.[8] The first instance court's judgment was upheld by the second instance court later on.

In this case, although the fish shaped bracelet claimed for protection by Plaintiff belongs to works of art protected by Copyright Law, yet compared with the one manufactured and sold by Defendant, the essence of the same part is only the part of mouth opening that the fish shaped bracelet, there are differences in the remaining details. In view of Defendant has the same part of the evidence to prove both identical parts i.e. the fish shaped bracelet with opening mouth is not created by Plaintiff and such part has already entered into the public domain, then it should be excluded from the scope of protection.

This case involves the legislative purpose of copyright that is encouraging innovation, in one aspect, it is necessary to protect intellectual achievement to protect and encourage innovation, in another aspect, if giving excessive protection to intellectual achievement will stop the follow-up on the basis of the re-innovation. Hence, the protection of intellectual achievement must have a good grasp of the "degree".

[8] See Civil Judgment of Shenzhen Luohu District People's Court(2015)Shen Luo Fa (Zhi) Min Chu Zi No. 168 (深圳市罗湖区人民法院民事判决书<2015>深罗法<知>民初字168号).

Viewing that the originality of the fish shaped bracelet claimed for protection by Plaintiff is not high, it can not be protected beyond the "degree", otherwise Plaintiff may prevent all the competitors in the market not to use the type of mouth opening fish shaped bracelet and will impede new innovation. Therefore, the court overruled Plaintiff's claims while in the text of the judgment explicitly decided his intellectual achievement constituting work, other people could not infringe it. This judgment not only protects Plaintiff's innovation but also on this basis encourages other people to further make innovation, thus complies with the ultimate purpose of China's Copyright Law.[9]

3. Fixed nature of works

Fixed nature of works means that a work can be fixed by some kind of substance type and be utilized by other people. In fact, most of works are fixed on carriers naturally e.g. books, magnetic taps, album etc. Thus, to emphasize this condition shall not be too harsh. As to some oral products such as speech, lecture etc. may be deemed as the exceptions to this basic requirement.

4. Replicability of works

A work should be reproduced from one copy to many copies by way of printing, reproducing, sound and video recording and so on.

From the discussion above we can see that a work is the "work" proscribed by *CCL*, thus it may be protected by copyright so long as it has creativity, expresses the author's idea or emotion by the form of legal recognition and can be reproduced by a tangible form.

In *Shanghai Pafuluo Stationery Co., Ltd. vs. Shanghai Art Imagine Stationery Co., Ltd., et al. for appeal of dispute over infringement of copyright case(2015)*,[10] set against a dark red background, the homepage of Shanghai Pafuluo Stationery Co., Ltd. (Plaintiff) was added white starlight dynamic effect, copper bell magic sound as well as background music. The company filed a lawsuit as it found that Shanghai Art Imagine Stationery Co., Ltd. and Shanghai Europe Crocodile Stationery Co., Ltd. (Defendants) had plagiarized its website and infringed its copyright, requesting the court to hold those two defendants stop the infringement, eliminate adverse effects and compensate for loss total RMB 223,000 yuans.

Shanghai Minhang District People's Court after the first trial determined that those two Defendants had infringed the webpage copyright of Shanghai Pafuluo Stationery Co., Ltd. and requested the two defendants stop the infringement and compensate Shanghai Pafuluo Stationery Co., Ltd. for economic loss and reasonable cost of RMB 30,000 yuans.[11] Those two defendants did not agree with the

[9] See China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016–7–13.

[10] See Civil Judgment of Shanghai Intellectual Property Court (2015) Hu (Zhi) Min Zhong Zi No. 14 (上海知识产权法院民事判决书<2015> 沪<知>民终字第14号).

[11] See Civil Judgment of Shanghai Minhang District People's Court (2014) Mi Min San (Zhi) Chu No. 154 (上海市闵行区人民法院民事判决书 <2014>闵民三<知>初字第154号).

judgment and filed an appeal. After the second trial, Shanghai Intellectual Property Court rendered a judgment to reject the appeal and affirm the judgment in the first trial.

This case was about whether or not the content arrangement of a website constituted a work in the *Copyright Law*. The trial court decided that though the webpage of the site in dispute contained a lot of elements known to the public domain, the homepage of the website in dispute reflected the unique design in color, content selection, ways of presentation and overall arrangement and other aspects apart from the columns and structural elements commonly contained by general company homepage. Presenting the visual artistic effects to some extent, the involved homepage had the originality and reproducibility and was a work in the copyright law. The standards on protecting the copyright of webpage works determined in this case had referential significance in the trials of similar cases.[12]

1.1 Types of Works

What types of works is protected by copyright? Under Art.3 of *CCL*, the so-called "works" include works of literature, art, natural science, social science, engineering technology and the like made in the following forms:

1. Written works;

In *Beijing Haidian District Private New Oriental School and (U.S.) Educational Testing Service infringement of copyright and trademark rights dispute case (2003),*[13] as the developer and sponsor of the widely recognized "Test of English as a Foreign Language" (TOEFL) and "Graduate Record Examination" (GRE), two examinations that students from non English-speaking countries are required to take before applying to graduate schools in the United States, the New Jersey-based Educational Testing Service (ETS) has registered the copyright of TOEFL and GRE test questions with the American Copyright Bureau, and has registered "TOEFL" and "GRE" as trademarks in China. The Virginia-based Graduate Management Admission Council (GMAC), developer and sponsor of the "Graduate Management Admission Test" (GMAT), has also done the same procedures.

However, the New Oriental School, a well-known private English training center, has been selling copies of TOEFL, GRE and GMAT test questions for years to Chinese students who want to study overseas without ETS and GMAC permission. Internet surfers can also access the test questions by logging onto the New Oriental website. In 1997, the local industry and commerce administration confiscated the

[12] Typical cases of IP courts of Beijing, Shanghai and Guangzhou [EB/Ol]. http://www.hshfy.sh.cn:82/gate/big5/
www.hshfy.sh.cn/css/2016/04/14/20160414154856828.pdf, 2015–10–09.

[13] See Civil Judgment of Beijing High People's Court(2003)Gao Min Zhong Zi No.1393 (北京市高级人民法院民事判决书<2003>高民终字第1393号).

illegal copies of ETS and GMAC test questions produced by New Oriental, which admitted its infringement of ETS and GMAC copyrights upon the confiscation but continued to sell the illegal copies.

On Sept. 27, 2003, Beijing First Intermediate People's Court found the activities of the New Oriental School infringed the rights of ETS and GMAC and ordered the immediate termination of the illegal activities.

The New Oriental School was also ordered by the court hand in all illegal copies of ETS and GMAC materials and publish an apology to the two American institutions in the Chinese newspaper "Legal Daily". In addition, New Oriental have to pay RMB 8.9 million (US$1.1 million) and 410,000 yuans (US$49,580) to ETS and GMAC respectively for economic losses as well as shoulder the lawsuit fees of RMB 1.016 million yuans (US$122,900).[14]

New Oriental launched an appeal later on. On December 27, 2004 The Beijing High People's Court has held in favour of GMAC and ETS for copyright infringement and ordered Beijing New Oriental Language School pay compensation of RMB 6.4 million Yuans (US$ 774,000) in damages and destroy all of its infringing course materials. New Oriental was also ordered to publish a public apology in the Chinese newspaper, Legal Daily.[15]

The case is the first intellectual property cases to be litigated in China since China's admission to the WTO and has been closely watched as an indicator of the extent to which intellectual property rights will be enforced in China.

In *Mr. Wang v. Mr. Bei, China's Social Science Publishing House and Shanghai Tianyi Books Co., Ltd. copyright infringement case(2014)*[16] (involving written work plagiarism), Mr. Wang, professor of Fudan University, is one of the author of ***"The Grand Sight of Chinese Architectural Culture***"(hereinafter ***"The Grand Sight"***), which was published and distributed in 2001. In 2004 from Tianyi Co., Mr. Wang bought ***"The History of Urban Development in China"*** (hereinafter ***"The History Development"***) distributed by Social Science Publishing House in 2004.

Mr. Wang claimed that Part Three of ***"The History Development"*** written by Mr. Bai was highly consistent with the part written by him in article structure and words expression of ***"The Grand Sight"***, this plagiarizing behavior infringed his copyright, Social Science Publishing House didn't fulfill his reasonable duty of care obligation and Tianyi Co. sold infringing work. These two defendants also infringed his copyright. Mr. Wang asked the court to order Mr. Bai and Social Science Publishing House stop infringement, destroy books involved, apologize on the newspaper and compensate economic loss RMB 100,000 yuans and reasonable fee RMB 20,000 yuans, Tianyi Co. stop selling ***"The History Development"***.

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[14] See Civil Judgment of Beijing First Intermediate People's Court(2001)Yi Zhong (Zhi) Chu No. 35 (北京市第一中级人民法院民事判决书<2001>一中<知>初字第35号).

[15] See Civil Judgment of Beijing High People's Court(2003)Gao Min Zhong Zi No.1393 (北京市高级人民法院民事判决书<2003>高民终字第1393号).

[16] See Civil judgment of Shanghai Pudong New Area People's Court(2014)Pu Min San (Zhi) Chu No. 532 (上海市浦东新区人民法院民事判决书<2014>浦民三<知>初字第532号).

Mr. Bai contended that both identical and similar contents belonged to public known knowledge or common sense comment, the consistency of article structure didn't belong to the protection scope of Copyright Law and the identical or similar part originated from third party survey project. Mr. Wang's claiming of compensation amount lacked factual basis.

Social Science Publishing House argued that the right of ***"The Grand Sight"*** was not exclusively enjoyed by Plaintiff. He had fulfilled the examination obligation. He had paid fee for using the intellectual property right of the work, should not assume any paying obligation. If part of the book truly belonged to Plaintiff, it should let the author bear compensation liability. Tianyi Co. argued that he only sold two pieces of ***"The History Development".***

After hearing the case, Shanghai Pudong New Area People's Court decided that the book ***"The Grand Sight"*** was cooperation work; each chapter of such book had certain independence in the structure. Mr. Wang independently enjoyed copyright of its signed chapter of ***"The Grand Sight"***, was not necessary to obtain other coauthor's permission and could bring tort litigation alone concerning such part. Upon comparison with the part (including some figures) solely written by Mr. Wang, the entire page of Part Three of ***"The History Development"*** had the same or basically the same place about 8000 words, it not only used the public known knowledge or common sense knowledge, but also fully copied creative content of ***"The Grand Sight".*** It was different in details and did not produce any substantial shadow on the content of the article, thus constituted substantial similarity.

The publication of ***"The Grand Sight"*** was far more earlier than ***"The History Development"*** and Mr. Bai had the opportunity to contact ***"The Grand Sight"*** while joining to write the survey project, he could not prove to have legitimate resource regarding the identical and similar content of ***"The History Development"***, did not qualify for fair use.

Thus, without Plaintiff's permission, Mr. Bai plagiarized, modified his work which was sent and submitted for publication, infringed Plaibtiff's right of authorship, right of revision, reproduction right and distribution right; Social Science Publishing House failed to fulfill the required examination obligation i. e. published infringing book, infringed Plaintiff's reproduction right and distribution right; Tianyi Co. sold infringing book, infringed Plaibtiff's distribution right. Therefore, the court held that Mr. Bai and Social Science Publishing House cease infringement; Tianyi Co. cease selling ***"The History Development"***; Mr. Bai apologize and compensate Plaintiff economic losses RMB 30,000 yuans and reasonable expenditure RMB 11,488 yuans; Social Science Publishing House bear joint and several liability for compensation obligation and refuted Plaintiff's all other litigation claims.

"Contact plus substantial similarity" is the basic method to determine copyright infringement; the judgment of this case fully realizes the application of this standard. When determining whether or not constituting substantial similarity, the court compared two works' litigation part in detail esp. the creative part and paid attention to differentiate idea and expression, used the form shape to record the identical and similar part of the works in judgment. Simultaneously, under the circumstance that

Plaintiff had evidence to prove Defendant Mr. Bai had the opportunity to contact Plaintiff's work previously, the court finally held that Defendant Mr. Bai constituted plagiarizing other person's written work.[17]

In *Beijing LOCOJOY Science Co.Ltd. v. Beijing Kunlun Yuexiang Network Technology Co.Ltd. et al. computer software copyright belonging case (2014)*,[18] LOCOJOY enjoys the copyright of the mobile terminal game ***"I'm MT"***on line and ***"I'm MT 2"***(hereinafter refers as ***"I'm MT"***), which adapted from the serial 3D comic ***"I'm MT"***. LOCOJOY Company enjoys the exclusive licensee right to use the game name and character name as well as the artwork copyright of the character image. LOCOJOY claimed that the three Defendants infringed his copyright because they used the names and characters in the game ***"Super MT"***, among which, the names and characters were similar to those in the game ***"I'm MT"***. In addition, the three Defendants plagiarized the name of the game ***"I'm MT"*** in their game ***"Super MT"*** and the character names in the two games were extremely similar. The terms relevant to the game ***"I'm MT"*** was used in the promotion. The acts of the three defendants have constituted unfair competition act, which violated Item (2), Article 5 and Para. 1, Article 9 of *the Anti-unfair Competition Law*.

Beijing Intellectual Property Court held that because the involved game name and character name did not constitute artwork and the involved game did not use the original expression in the adapted work of LOCOJOY, the acts of the three defendants did not infringe the copyright of LOCOJOY; being aware of that the game name and character name of LOCOJOY constituted unique name of the service under the class of mobile game, the three defendants provided the download and promotion of the accused game, which constituted the act of using the unique name of the well-known service of Plaintiff without authorization. Kunlun Yuexiang, Kunlun Online and Kunlun Web made false promotion because the contents were not factual at all. Accordingly, the Court made judgment that the three defendants shall cease the acts of unfair competition and compensate economic loss and reasonable expense totaling RMB 535,000 yuans.

As the branch of emerging cultural industry, mobile game is the combination of culture and technology, thus receiving extensive attention because of huge development space and broad market prospect. This case is indeed a dispute over copyright infringement and unfair competition involving mobile game. The Accused infringing game ***"Super MT"*** was similar to the game ***"I'm MT"*** in respects of the game name, character name, promotion of the game and head portrait of App., so this case included trivial and complicated facts with various and difficult legal issues. This case made elaborate and delicate analysis of the following issues: the allocation of responsibility concerning the copyright ownership of the mobile game, whether or not the short phrases of game names and character names could constitute literary

[17] See supra note 9.

[18] See Civil Judgment of Beijing Intellectual Property Court (2014) Jing (Zhi) Min Chu Zi No. 1 (北京知识产权法院民事判决书<2014>京<知>民初字第1号).

Fig. 1.4 Source: Jiang, Xu. "Kai Xin Xiao Xiao Le" wants to delete annoyance [N]. China Intellectual Property News, http://www.shzgh.org/zscq/yasf/u1ai16227.html, 2016–10–26

works, the copyright protection of the adapted works, the determination of the efficacy of the notarial certificate containing defects, whether or not the name of mobile game could constitute the unique name of well-known commodity and the determination of the act of false promotion. Concerning the civil liability, the Court took the market share of the game (which enjoyed the copyright) and the subjective fault of the accused infringer into consideration, therefore protected the interests of the copyright owner of the game at the highest level. Defining the idea and direction of the intellectual property legal protection of the mobile game, this case had significant influence and exemplary effects by promoting healthy and orderly development of the industry of mobile game.[19]

Also, there is a most recent "Kai Xin Xiao Xiao Le" Case (see Fig. 1.4) involving copyright and trademark right infringement and unfair competition. Le Yuanssu Technology (Beijing) Co. Ltd. (hereinafter Le Yuanssu Co.) enjoyed the copyright of "Kai Xin Xiao Xiao Le" and trademark right of the words of "Kai Xin Xiao Xiao Le", he found out that Defendant Zhejiang Gu Chuan Technology Inc. (hereinafter Gu Chuan Inc.) also developed a similar kind of San Xiao kind game, and used the game name similar with "Kai Xin Xiao Xiao Le", in both game propaganda and downloading interface used the words of "Kai Xin Xiao Xiao Le 2015" similar with Plaintiff's name and "Kai Xin Xiao Xiao Xiao" etc. Le Yuanssu Co. claimed that Gu Chuan Inc. infringed his copyright and trademark right and constituted unfair competition, thus asked the court to order Gu Chuan Inc. issue announcement on various media platforms and Defendant's official website to apologize to Plaintiff for his conduct of infringing Plaintiff's right and eliminate effects for his conduct of unfair

[19] See Ten typical intellectual property cases in Beijing during 2015 [EB/OL]. http://www.ciplawyer.com/article.asp?articleid=2824, 2016–4–14.

competition, at the same time asked the court to order Defendant compensate economic losses and reasonable fee more than RMB 3,200,000 yuans.

Gu Chuan Inc. contended that he neither developed relevant game, nor existed infringing act, "Xiao Xiao Le" had become generic term, therefore he asked the court to refute all of Plaintiff's litigation claims.

In late November 2016, after hearing the case, Beijing Haidian District People's Court decided that Le Yuanssu Co. enjoyed the copyright of "Kai Xin Xiao Xiao Le" game, Le Yuanssu Co. in this case claimed that Gu Chuan Incorporation's 5 games-"Kai Xin Xiao Xiao Le 2015", "Kai Xin Xiao Xiao Xiao", "Kai Xin Xiao Xiao Xiao 2015", "Kai Xin Xiao Xiao Le· Jewelry Edition" and "Kai Xin Xiao Xiao Le· Candy Legemd" constituted tort. Gu Chuan Inc. contended that he enjoyed the legitimate operation right toward the game involved and he was only responsible to operation and promotion, was Internet service provider (ISP) not the owner and copyright holder and should not bear direct tort liability. Combined with the evidence of this case, Gu Chuan Inc. was the copyright holder of "Kai Xin Xiao Xiao Le 2015" and "Kai Xin Xiao Xiao Xiao", and he uploaded and operated the accused games on Music.com, Yoyou.com, 47,473 website, Suning App. Store, 7k7k, Mumayi, Paojiao.com, Game Dog, Bachelor Game, Android Mall, yy138, Iqiyi etc. The court made a comparative analysis of the different pictures advocated by the plaintiff, decided that "Kai Xin Xiao Xiao Le -the splash screen", "Kai Xin Xiao Xiao Le -the graphic character" and "Yellow Chicken series" art works used by Gu Chuan Inc. constituted the same and similar with Le Yuanssu Co., infringed the copyright of Le Yuanssu Co.

Regarding the registered trademark's exclusive right, without Plaintiff's permission, using the same or similar trademark with Plaintiff's trademark on the same commodity, constitutes infringement of the registered trademark's exclusive right. Besides, to determine whether or not constituting a trademark infringement must use whether or not it is sufficient to cause the relevant public confusion as the condition. In considering whether or not it is sufficient to cause confusion to the relevant public, the degree of approximation between the trademark of the trademark owner and the accused infringing mark and the distinctiveness and popularity of trademark and the specific circumstances of the use of the alleged infringing mark etc. should be taken into account. Gu Chuan Inc. in his games used "Kai Xin Xiao Xiao Le 2015", "Kai Xin Xiao Xiao Xiao", "Kai Xin Xiao Xiao Xiao 2015", "Kai Xin Xiao Xiao Le· Jewelry Edition" and "Kai Xin Xiao Xiao Le· Candy Legend" as the games' name, and highlighted in the game publicity to use the words "Kai Xin Xiao Xiao Le 2015" and "Kai Xin Xiao Xiao Xiao· Candy Legend", the way of use explicitly identified the resource of the relevant game, had the function of identifying the source, was the use of trademark. Inter alia, "Kai Xin n Xiao Xiao Le 2015", "Kai Xin Xiao Xiao Le· Jewelry Edition" and "Kai Xin Xiao Xiao Le· Candy Legend" trademarks' main part to have the function of identifying the source was "Kai Xin Xiao Xiao Le" and was the same as Plaintiff's trademark, "2015", "Jewelry Edition" and "Kai Xin Xiao Xiao Le· Candy Legend" were used as different editions of game, and "Kai Xin Xiao Xiao Le" and "Kai Xin Xiao Xiao Xiao" 5 words have the same 4 words, those 5 trademarks accused infringement were identical

with Plaintiff's trademark involved, was easy to make the relevant public mistakenly believe that Defendant's 5 games were different editions of Plaintiff's game, confused the public with the source of service. Plaintiff also submitted a notarized document displaying that there existed users downloading Defendant's game and in the game there were malicious chargeback phenomenon to make consumers mistakenly believe that the installation was installed in Plaintiff's game and make them generate mistake, then expressed relevant comment to cause damage on Plaintiff's good will.

Gu Chuan Inc. contended that "Kai Xin Xiao Xiao Le" contained the generic term "Xiao Xiao Le", trademark owner has no right to prohibit other's due use and the constituted composition of "Kai Xin Xiao Xiao Le" lacks distinctive characteristic. The court decided that Gu Chuan Inc. didn't provide sufficient and valid evidences to prove "Xiao Xiao Le" had become the name of goods or services of national standard, industry standard or convention, esp. didn't provide sufficient and valid evidences to prove that elimination kind games are equivalent to "Xiao Xiao Le". From relevant report submitted by Le Yuanssu Co., it had mentioned many times the unified name of elimination games as "San Xiao Kind" or "elimination Kind" and there was no evidence that "Xiao Xiao Le" can mean elimination kind games.

Although the words "Kai Xin" indicated happy emotion, "Xiao Xiao Le" according to general understanding might realize that such kind of game was elimination kind game, but the composition of "Kai Xin Xiao Xiao Le" was exclusively created by Le Yuanssu Co., had distinctiveness, and through long time and mass propaganda and use by Le Yuanssu Co., relevant trademark in game sector had higher publicity and distinctiveness, therefore the court did not accept Defendant's argument that "Kai Xin Xiao Xiao Le" contained the generic term "Xiao Xiao Le" and such trademark did not have distinctiveness. Without the permission of Le Yuanssu Co., Gu Chuan Inc. used identical or similar trademark with Plaintiff's trademark, constituted infringing Plaintiff's registered trademark's exclusive right.

Regarding unfair competition, the court decided that Gu Chuan Incorporation's related conduct constituted infringing the specific name of Le Yuanssu Company's famous service, violated Item (2), Art. 5 of Anti-Unfair Competition Law, constituted unfair competition conduct. But the court did not support Le Yuanssu Company's litigation claim that the page directly used in the game's propaganda by him constituted his special decoration. Regarding whether or not the accused conduct constituted unfair competition conduct of false advertisement, Para. 1, Art. 9 of Anti-Unfair Competition Law stipulates that:"Undertakings shall not use advertisement or the other methods to make a false propaganda for the quality, composition, function, usage, producer, time of efficacy and place of production of commodities." It means that while doing propaganda for their services, undertakings should not adopt false description so as to obtain the business interests which should not be obtained.

In this case, Plaintiff claimed that the way of Defendant's conduct of false propaganda was mainly divided into the following two kinds:first, the propaganda words toward users' number and ranking situation was false; second, the propa-

ganda words toward the game's resource and content was false. The captioned propaganda of Gu Chuan Inc. constituted false advertisement conduct,violated Para. 1, Art. 9 of Anti-Unfair Competition Law, constituted unfair competition conduct.

In Conclusion, the court decided that Gu Chuan Incorporation's conduct infringed Le Yuanssu Company's copyright toward relevant work, infringed the trademark right of "Kai Xin Xiao Xiao Le" trademark, and simultaneously violated Item (2), Art. 5 and Para. 1, Art. 9 of Anti-Unfair Competition Law, constituted the unfair competition conduct, should bear legal liability of ceasing tort and compensation according to law. Comprehensively considering the factors of Defendant's subjective fault degree, mobile phone's profit characteristic etc., the court discretionarily decided the compensation amount. Viewing from the evidences submitted by Plaintiff, those games involved indeed existed the situations of long lasting time, obvious tort intention, various tort performance and possibly higher profit, thus comprehensively considering the captioned factors; the court discretionarily decided the compensation amount. Regarding Plaintiff's payment of notary and attorney fee, the court combined the notarized situation of this case, the attorney's larger workload and the more complex fact of this case, discretionarily supported it. Ultimately, the court determined that Defendant compensate Plaintiff economic losses RMB 2 million yuans, reasonable expenditure RMB 20,000 yuans, and at the same time considered the unfair competition conduct involved implemented by Defendant indeed misled the relevant public, damaged Plaintiff's corresponding commercial interests and disrupted the normal market competition order, should eliminate the corresponding influence, ordered Gu Chuan Inc. continue 48 h to publish announcement to delete influence.

The captioned case involved several issues, its evidences were more than 3,000 pages, the court analyzed the tort situations of copyright, trademark right and unfair competition conducts separately by 20,000 word judgment document, finally determined the high amount compensation RMB 2 million and 20,000 yuans. It has significant meaning toward hearing of mobile phone's tort cases.

However, from the captioned case study we may know that following mobile Internet's rapid development, mobile game becomes the industry's hot stuff, tremendous economic benefit makes tort frequently occur in network game's field. Tort cases occur frequently in network game's market means the lack of innovation awareness of the current market.

Combating tort act in the network game's market not only needs perfecting legal provisions, popularizing legal knowledge, enhancing people's IPR awareness, but also in the meantime needs vigorously develop the cultural and creative industry economy so as to sufficiently guarantee healthy development of network game market.[20]

In *Hangzhou Kuai Ban Technology Co., Ltd. v. Ning Tui (Hangzhou) Network Technology Co. Ltd. Infringement of the right of information network dissemination*

[20] Guo, Yimeei. Network Game's IPR Infringement and Unfair Competition Problems-Discussing from "Kai Xin Xiao Xiao Le"Case [C]. Proceeding of 2017 2nd International Conference on Design, Materials and Manufacturing (ICDMM 2017), 2017–6–23.

of the work dispute case (2015),[21] Plaintiff claimed that Liu Qianqian was the original right owner of the written work ***"Why Bestie and Boyfriend Are Easy to Come Together"***. On March 16, 2015 Liu Qianqian transferred the right of information network dissemination to Hangzhou Fengxian Cultural Information Consulting Co. Ltd. On October 15, 2015 Hangzhou Fengxian Co. transferred again the captioned right to Plaintiff, and authorized that Plaintiff may adopt legal nethod of filing complaint and bringing the lawsuit etc. against the tort act before transferring under his name.

Plaintiff found out that Defendant's WeChat public number "Love Collection" (ID:zzxxcc25) spread the work involved in the public on June 24, 2014. Unauthorized copying of Defendant's act violated the legitimate rights and interests of Plaintiff, and caused some damage to the Plaintiff. Thus, Plaintiff brought the lawsuit, asked the court to order Defendant immediately delete the work involved; compensate plaintiff economic loss RMB 7,000 yuans and the reasonable cost 3,000 yuans; and assume to pay the litigation fee. During the trial, Plaintiff clarified that the reasonable cost included attorney fee RMB 2000 yuans and forensic copying etc. RMB 1000 yuans.

During the trial, viewing the fact that there was no work involved in Defendant's WeChat public number, Plaintiff withdrew the litigation claim to ask for deleting the work involved. Plaintiff paid RMB 2000 yuans for attorney fee.

The court decided that according to Article 11 of *China's Copyright Law*, in the absence of the contrary, the citizen, legal person or any other organization that is signed on the work was the author.

In this case, the evidence provided by Plaintiff could prove that the author of the work involved was Liu Qianqian, hence Liu Qianqian enjoyed the copyright of the work involved according to law. Liu Qianqian transferred the right of information network dissemination to Hangzhou Fengxian Cultural Information Consulting Co. Ltd., Hangzhou Fengxian Co. transferred again the captioned right to Plaintiff.

Therefore, Plaintiff obtained the legitimate right and benefit via transference should be protected by law. Without the right owner's permission, Defendant didn't pay renumeration, his conduct to use the work involved on his WeChat public number "Love Collection" (ID:zzxxcc25), infringed the right of information network dissemination of the work involved enjoted by Plaintiff, should bear the civil liability of tort according to law.

Because there was no work involved in Defendant's WeChat public number, Plaintiff's litigation claim to withdraw that he asked Defendant to stop infringement was not against the law, the court approved it. As to the amount of compensation, because Plaintiff had no evidence to prove his losses due to infringement or the interests of Defendant for infringement, the court would comprehensively considered the factors of the number of words of the work involvrf, Defendant's subjective fault degree, the nature of Defendant's tort, the reasonable expenses of Plaintiff's rights and so on, discretionarily made the decision.

[21] See Civil judgment of Hangzhou Xihu District People's Court(2015)Hang Xi (Zhi) Min Chu Zi No. 763 (杭州市西湖区人民法院民事判决书<2015>杭西<知>民初字第763号).

Defendant after the court's several time subpoenas didn't come to the court to respond litigation without sound reason; the court could make default judgment. The court held as follows:

- Ning Tui (Hangzhou) Network Technology Co. Ltd. compensate Hangzhou Kuai Ban Technology Co., Ltd. economic losses (including reasonable expenditure) RMB 2,300 yuans within 10 days from the date of entry into force of the judgment;
- All other Plaintiff's litihation claims be overruled.[22]

2. Oral works;
3. Musical, dramatic, quyi[23], choreographic and acrobatic art works;
4. Works of fine art and architecture;

Whether or not a "cloned" sculpture was count as infringement? We may look at an early case. In *Liu Zhengde v. Huian Chongfa Travel Services Co., Huian Chongwu Defa Stone Craft Factory and He Ronghui copyright infringement dispute case (2003)*, in the country enjoying a certain degree of visibility, Hubei Province sculptor Liu Zhengde had created "Lord Ye Was Very Fond of Dragons"、"Three Monks"and "Skill Comes of Practice" (i.e. "Archer and the Oil Seller") fable sculptures. In 1986, Liu Zhengde exhibited the three pieces of sculptures in East Lake Fable Sculptures Park, Wuhan, Hubei Province till now.

After 1997, China Stone Carving Technology Expo located in the Chongwu, Huian City, Fujian Province also showed almost identical sculpture works with "Lord Ye Was Very Fond of Dragons", "Three Monks"and "Archer and the Oil Seller" created by Liu Zhengde.

Liu Zhengde brought the lawsuit to Quanzhou Intermediate People's Court and claimed that in November 1997, first Defendant Huian Chongfa Travel Services Co. during establishing China Stone Carving Technology Expo, accepted second Defendant Huian Chongwu Defa Stone Craft Factory and third Defendant He Ronghui's donation and put the donated sculpture work of "Lord Ye Was Very Fond of Dragons", "Three Monks" and "Archer and the Oil Seller" in the Fable Garden for the vast number of Chinese and foreign tourists to enjoy sightseeing, collected tickets, engaged in profit-making business activities. Huian Chongfa Travel Services Co in its China Stone Carving Technology Exposition Park, said in the introduction of its China Stone Carving Technology Expo Park: "The garden is a famous China fable Stone Town with Chongwu town and other famous craftsman sculptures." Three defendants's fable sculptures were reproduced without Liu Zhengde's permission and the replication process was rough, the proportion disordered, looked sluggish, infringed the right of use and obtaining renumeration from his works and the right of authorship, modification and protecting the integrity of works.

[22] Ibid.

[23] Quyi refers to Chinese traditional art forms such as ballad singing, storytelling and comic dialogues, which have a long tradition in the region.

Liu Zhengde asked the court to order Huian Chongfa Travel Services Co. stop tort, dismantle the Expo Park Introduction and infringing sculpture, and make an apology in the media, to order the captioned three defendants conpensate Liu Zhengde economic loss RMB 500,000 yuans and various fee occurring by virtue of resolving the dispute RMB 20,000 yuans and to order three defendants assume joint and several compensation liability and bear the litigation fee of this case.

After the court inspected the scene, the three stone works placed in the Chinese Stone Carving Craft Expo landscape, from the creation idea and the material, the work component's emission, and large surface modeling techniques, horizontal and vertical lines' application and the concise style of sculpture all came from Liu Zhengde's works of "Three Monks", "Archer and the Oil Seller"and "Lord Ye Was Very Fond of Dragons".

Huian Chongfa Travel Services Co in its China Stone Carving Technology Exposition Park, said in the introduction of its China Stone Carving Technology Expo Park: "The garden is famous of China fable Stone Town, having Chongwu town and other famous craftsman sculptures including four big famous works-'The Journey to the West','The Water Margin', 'A Dream of Red Mansions'and 'The Romance of Three Kingdoms'and 'Fable Park','Huaxia Gods','Huian Paradise','Twelve Zodiac Garden'and 'Black and White Cat' more than 20 topics and 5 hundred stone sculpture works. The scenic spot was an area for toll and so on."

Liu Zhengde was the creator of the three works of "Three Monks", "Archer and the Oil Seller" and "Lord Ye Was Very Fond of Dragons", enjoyed the copyright. Huian Chongwu Defa Stone Craft Factory and Mr. He, without Liu Zhengde's permission reproduced, plagerized and tampered Liu Zhengde's works and donated them to Huian Chongfa Travel Services Co.; Huian Chongfa Travel Services Co. for the purpose of obtaining profit, in his operating China Stone Carving Technology Expo exhibited the infringing works, neither signed Liu Zhengde's name, nor paid the renumeration to Liu Zhengde. The captioned three defendants' conducts jointly infringed the right of authorship, modification, protecting the integrity of works, reproduction and obtaining renumeration of Liu Zhengde's work. Liu Zhengde's asking for three defendants to stop tort, eliminate influence, apologize and compensate loss complied with the law, should be supported. But Liu Zhengde asked for three defendants to compensate the fee occurring by virtue of resolving the dispute, because he could not provide the corresponding evidence within the time limit of proving, should not be adopted by the court.

The evidence provided by Huian Chongfa Travel Services Co. could not support his litigation arguments. Owing that China Stone Carving Technology Expo was an open tourist attraction, Huian Chongfa Travel Services Company used that its Expo was not operated for profit as the defensive reason could not be established. Huian Chongwu Defa Stone Craft Factory and He Ronghui contended that their donated sculture works of the Fable Garden involved were provided the design drawings by Huian Chongwu town government, they commissioned other sculture factory to process and produce those works, then made the payment, but they did not provide the corresponding evidence, the court did not adopt such contention.

Therefore, the court held as follows:

- Defendant Huian Chongfa Travel Services Co. within 10 days from the date of the judgment entering into force shall destroy three stone sculture- "Lord Ye Was Very Fond of Dragons"、 "Three Monks"and"Skill Comes of Practice" placed at the Fable Garden of China Stone Carving Technology Expo and modify part of the content regarding the Fable Garden in the introduction of China Stone Carving Technology Expo;
- Defendants Huian Chongfa Travel Services Co., Huian Chongwu Defa Stone Craft Factory and He Ronghui within 10 days from the date of the judgment entering into force shall publish announcement on"Quanzhou Evening News"and "Changjiang Daily", apologize to Plaintiff Liu Zhengde, delete influence, the content of announcement should be examined by the court;
- Defendants Huian Chongfa Travel Services Co., Huian Chongwu Defa Stone Craft Factory and He Ronghui within 10 days from the date of the judgment entering into force jointly compensate Plaintiff Liu Zhengde economic losses RMB 90,000 yuans; and
- Overrule Plaintiff Liu Zhengde's all other litigation claims.

The acceptance fee of this case is RMB 10,010 yuans, Plaintiff Liu Zhengde bear RMB 1,010 yuans. Defendants Huian Chongfa Travel Services Co., Huian Chongwu Defa Stone Craft Factory and He Ronghui jointly bear RMB 90,000 yuans, the inspection fee RMB 3034 yuans is born by Defendants Huian Chongfa Travel Services Co., Huian Chongwu Defa Stone Craft Factory and Mr. He. Due to the above acceptance fees and inspection fees has been prepaid by Plaintiff Liu Zhengde, this part should be born by three defendants and should be paid to Liu Zhengde in the implementation of the judgment.[24]

Regarding whether hairstyle design belongs to the category of copyright or not, here is a case worth to be discussed. In *He Ji and Hangzhou Tiancan Culture Communication Co. Ltd. Copyright ownership, copyright infringement dispute case (2011)*,[25] Plaintiff and his friend had a tour to visit Sun Moon Lake in Taiwan in early 2009, abruptly generated creative inspiration, made the conception of the woman's hairstyle to the interpretation of Hangzhou "Ten Scenes of West Lake" (indicating the famous tourist attractions in West Lake of the ten characteristics in Hangzhou City, Zhejiang Province, the most common speaking are Suti Chunxiao, Quyuans Fenghe, Pinghu Qiuyue, Duanqiao Canxue, Liulang Wenying, Huagang Guanyu, Leifeng Xizhao, Shuangfeng Chayun, Nanping Wanzhong and Santan Yinyue). After going back to Hangzhou, Plaintiff placed himself into the library,

[24] See Whether or not a "cloned" sculpture was count as infringement (Chinese version) [N]. http://www.qzwb.com/gb/content/2003-06/16/content_897833.htm, 2003–6–16. For detailed discussion and comment, see DING, LIYING, WANG LINGSHI ed. Intellectual Property Case Detailed Interpretation (Chinese version) [M]. Xiamen University Press, 2004: 34–39.

[25] See Civil Judgment of Zhejiang Province Hangzhou City Intermediate People's Court (2011) Zhe Hang (Zhi) Zhong Zi No. 54 (浙江省杭州市中级人民法院民事判决书<2011>浙杭<知>终字第54号).

museum and multi searched information; went to West Lake Ten Scenes doing sketch on spot many times, considered the style; afterwards he continuously practiced on women's hair, modified and improved. During this process Plaintiff also specially painted the shape figure sketch, attached a plan, briefly explained the model form requirements, selection and collocation of clothing, headwear and so on. Several months later, the "Ten Scenes of West Lake" image show was finally completed. On April 22, 2009 it was formally showed to the public at Hangzhou Canal Culture Square. On April 23, 2009 the "Youth Times" did publicity and presentation in a special edition for it.

Later on, on May 1, 2009 the "Ten Scenes of West Lake" image show was formally exhibited in the "Fifth China International Animation festival", afterwards also was publicly performed in the opening ceremony of "Guqin Music Festival" of "China West Lake Hangzhou International Fair", obtained leaders and audiences' unanimous praise. The "Ten Scenes of West Lake" image show through broad report by province, city and CCTV, has become a "golden name card" of Hangzho recognized by all Chinese people.

Defendant was a professional model company, provided part of the assistance during the time of Plaintiff and his friend's creation. The president of Defendant Co. watched most part of the process of Plaintiff's creation and deduction, and made shooting and record. On October 12, 2010, in the "Second Hangzhou Beautiful Festival Night Awards" broadcasted by Hangzhou TV channel, Defendant launched the "Ten Scenes of West Lake" style show under his name, and published on his website. After Plaintiff discovered, claimed that Defendant plagiarized, and simulated and adapted to use his own original works, and made vilification and distortion.

On December 7, 2010, Plaintiff sued Defendant to Xihu District People's Court of Hangzhou City, Zhejiang Province, claimed that the "Ten Scenes of West Lake" image show created by him, including the overall shape of hair style (containing headdress), clothing and props, was three-dimensional art work, Defendant's act of plagiarism, alteration and distortion of Plaintiff's work infringed his right of authorship, modification, integrity of work protection and reproduction, constituted tort, asked the court to order Defendant immediately stop infringing act on Plaintiff's copyrighted work of art of the "Ten Scenes of West Lake" image show, i.e. stop infringing Plaintiff's copyright act by distributing and publicly deducting, and compensate economic losses, publicly apologize, eliminate bad influence and bear the litigation fee of this case and other reasonable fee.

After hearing the case, Xihu District People's Court of Hangzhou City, Zhejiang Province decided that the right of image style claimed by Plaintiff was with exaggerated hairstyle and arrangement in pairs with dress etc., its purpose was to exhibit the "Ten Scenes of West Lake" in the form of catwalk show, with the nature of art performance, had aesthetic meaning, was different from the style with ordinary practical meaning, should belong to art field. The "Ten Scenes of West Lake" image style had already showed by stylish expression, and no longer stayed in the stage of creativity, might do reproduction via the tangibile form of shooting and videography etc., hence had replicability,

The protected object of copyright of works, creativeness is not appeared in the creation of idea but appeared in the outer expression of physical works. Creativeness may be differentiated into two aspects of "independent creation"and "innovativeness". In this case, there was no evidence showed that Plaintiff had the situation to plagiarize other person's work, complied with the requirement of "independent creation". Looking from design sketches and photos provided by Plaintiff, he had made individual choice and judgment on the hairstyle and headwear etc. specific collocation and layout according to his thinking of how to embody the "Ten Scenes of West Lake" into image style, the intellectual achievement arising from it had certain creativeness. Therefore, the "Ten Scenes of West Lake" image style belonged to the three-dimensional art work.

Regarding the problem of whether or not Defendant's style plagiarized, altered and distorted Plaintiff's style, it was necessary to decide whether or not Defendant's style constituted similarity with Plaintiff's style, this similarity should be similar to the specific external expression, but not the similarity in creativity. Plaintiff claimed that its image style was a three-dimensional art work, the accused infringing image style was also three-dimensional, then Plaintiff bore the burden of proof, should provide the evidence material that can clearly reflect the whole solid modeling, but Plaintiff only provided a graphic design sketch map and a few photos taken from a point of view. The design sketch was only a brief description of the model body, just hair ornaments and clothing collocation, needed through the hair stylist, the specific operation of the clothing designer to form a specific style, and the physically shaped style was inconsistent with design sketch.

The right of image style claimed by Plaintiff and the accused infringing image style picture were both shot from one certain angle, could not clearly reflect three dimension detail and part form and so on. Limited by the evidence provided by Plaintiff, the court's investigation of image style involved was only restricted within one angle of the planar photo and not overall three-dimensional modeling, Plaintiff should assume the unbeneficial result of being unable to prove. Moreover, even if the plaintiff had provided the comparison material to judge, the Defendant's form was not similar to the Plaintiff's, did not constitute plagiarization, alteration and distortion. The judgment rebutted Plaintiff's litigation claim of stopping tort and compensating loss.[26]

Plaintiff dissatisfied with such judgment, appealed to Hangzhou City Intermediate People's Court, Zhejiang Province. The fact examined by the second instance court was consistent with the original instance court's, decided that the "Ten Scenes of West Lake" image style belonged to the intellectual achievement in art field and had creativeness and replicability, constituted the work in the sense of *Copyright Law*, its work category was three-dimensional work of art, and further decided as follows:

First, the work of the right claimed by Plaintiff which could be one to one correspondence with the accused work, were only 4 photos. Compared to the two sides

[26] See Civil Judgment of Hangzhou Xihu District People's Court (2010) Hang Xi (Zhi) Chu Zi No. 466 (杭州市西湖区人民法院民事判决书<2010>杭西<知>初字第466号).

of the four photos can be seen, the expression forms of both works were not identical.

Second, concerning the problem that in both styles i.e. the expression of the work, had some certain factors, the specific scene corresponding to the "Ten Scenes of West Lake", had a long history. Therefore, using it to be the topic of performance, using hair style etc. as the way for expression, the expression of the work, would be restricted by the "Ten Scenes of West Lake" corresponding specific scenery. Thus, we could not say that there were some specific elements in the form of expression and decided that tort was established.

Finally, regarding whether or not Defendant Co. referred to Plaintiff's creation, the second instance court determined that current evidence showed that Defendant Co. contacted Plaintiff's style, both parties once closely cooperated, and both parties' style used the "Ten Scenes of West Lake" as the subject of performance, hence, might decide that Defendant Company's style referred Plaintiff's creation. Although the form of Defendant Co. was different from Plaintiff's work in the form of expression, such as style, layout, and other specific expression of different ways, Defendant Co. had in its own form of reference to Plaintiff's idea, used Plaintiff's creativity, yet this kind of reference was not adaptation in the sense of *Copyright Law*.

Simultaneously, owing that *Copyright Law* protects the expression way of works does not protect idea and expression. Therefore, Defendant Company's reference conduct did not constitute infringement of Plaintiff's copyright. The court made the final instance judgment and maintained the original verdict.[27]

Although Plaintiff's cause of action of this case was not supported by the court, yet no matter first or second instance court both made clear that the "Ten Scenes of West Lake" image show belonged to the "three dimensional work of art", should be protected by *Copyright Law*. Previously, law did not make clear that whether or not the image composed by hairstyle and headwear etc. was protected by the range of *Copyright Law*.

In *Liu Jinmi v. Beijing Feirui Jia Trading Company, City Liyuans Beauty Salon et a; copyright infringement dispute case (2005)*,[28] it involved that whether or not hair style belonged to the protected object of *Copyright Law.* Beijing Haidian District People's Court made the following statement:"[T]he hair style claimed by Liu Jinmi is composed by a series technique and steps. *Copyright Law* has no right to prohibit imitating and using the technique and steps, thus it is not the protected object of *Copyright Law.* But regarding the specific results of the skills and procedures, i.e. the hair itself, can be described as a sculpture, yet the shape of the fixing is obviously different from the sculpture; adding that the body's own hair due to using on the human body, in shape, length, straight or curly hair etc. choice, must be in accordance with the requirements of the human body's natural law, style has not

[27] See Civil Judgment of Zhejiang Province Hangzhou City Intermediate People's Court (2011) Zhe Hang (Zhi) Zhong Zi No. 54 (浙江省杭州市中级人民法院民事判决书<2011>浙杭<知>终字第54号).

[28] See Civil Judgment of Beijing Haidian District People's Court (2005) Hai Min Chu Zi No. 8065 (北京市海淀区人民法院民事判决书<2005>海民初字第8065号).

exceeded the public domain; and the combination of hair style and the human body itself and the characteristics of manual labor, all the communication is limited to imitate and can not achieve complete replication, therefore the line and the shape of the human hair cut by hand technique itself does not belong to the works of the copyright law."[29]

The captioned judgment explicitly negated that hair style was protected object of copyright, but in *He Ji case*, it affirmed for the first time that the image of hair style with originality and replicability constituted the work in the sense of *Copyright Law*, was protected by *Copyright Law.* Its work category was the three dimensional work of art, thus, this case has very important meaning, has very huge encouraging function toward encouraging innovation and developing and promoting culture and creation enterprise. Naturally, this case not only involved much more complicate problem of law application, that is the understanding and definition of whether or not hair style belonged to the three dimensional work of art under *Copyright Law,* but also involved much more difficult fact finding and judgment problem, that is how to decide whether or not Plaintiff and Defendant's both image styles constituted similarity, and whether or not the "Ten Scenes of West Lake" used by Defendant on models was adapted from Plaintiff's work constituted tort and so on.

In this case, the second instance judgment's holding of similarity was the same as the first instance court, decided that both image styles did not constitute similarity. Besides, regarding whether or not Defendant Company's work referred Plaintiff's creation, the second instance court presented unique viewpoint, finally also determined that Defendant Company's style referred Plaintiff's creation. But owing that such kind of reference was adaptation in the sense of *Copyright Law;* and the law protects the expression way of works, does not protect idea and creation, thus, the referring conduct did not constitute infringement of Plaintiff's copyright. Accordingly, it raises the thinking of how to effectively protect the creativity of culture and creativity enterprise.

Just as stating by the second instance court, the dichotomy of idea and expression is the basic principle of *Copyright Law,* and creativity is only one kind of idea*,* must be demonstrated through a certain form and the carrier to be protected. If it was not performed or other people performed inconsistently, then the court could not decide that the work was to be protected and constituted tort. Contacting the case, Plaintiff based on the "Ten Scenes of West Lake" which is a well-known attractions element, had a brainwave on such basis, for interpretation of women's hair and clothing style and made practice and fixation. To Plaintiff, the most and critical content was "in women's hair and clothing and other comprehensive way to interpret the 'Ten Scenes of West Lake'", this is the creativity of Plaintiff himself, and Defendant knew this creativity's core and benefit during the process cooperating with Plaintiff, further interpreted in other form. The second instance judgment restated that to use the "Ten Scenes of West Lake" as performing topic, to use hair style etc. as the expressing way, his work's expression definitely was restricted by the corresponding

[29] See Civil Judgment of Beijing Haidian District People's Court (2005) Hai Min Chu Zi No. 8065 (北京市海淀区人民法院民事判决书<2005>海民初字第8065号).

scenery of the "Ten Scenes of West Lake". Defendant Co. made creation based on referring creativity, if adding his understanding and intellectual achievement, had shaped new work, finally can only lead to the court's making the judgment that both image styles were inconsistent and refuted Plaintiff's appeal.

Conclusively speaking, to IPR protection for culture and creativity enterprise, we should do something as follows:

First, as the creator of the work, he/she should clarify his/her work, as detailed as possible, completely fixes the form of the work of the performance, esp. the creation factors among them, in addition to exclude public known information, should deal with its elements in a specific way;

Second, when the court decides whether or not it belongs to protected works by law, standards should be relaxed appropriately, because culture and creativity enterprises' results are based on the public known information, creativity focuses on "ideas", in the process of the "ideas" transferred into the form of expression, they are constantly adjusted and interpreted by creators. Therefore, when according to the performance of the works to determine the composition of the elements of the work, the court should suitably relax the standard. The first and second instance judgments of this case also indicated such kind of attitude;

Finally, to judge whether or not constituting tort, the court should link the type of work, the creative process, whether or not Plaintiff and Defendant contact each other and the density of contact together to make comprehensive judgment. It may say that Defendant of this case had already maken close contact with Plaintiff, Defendant made recreation on the basus of referring Plaintiff's creativity. If the degree of the recreation was not high, then it could completely fall into the protected range of Plaintiff's work.

Although this case has been settled, yet the first and second instance judgment regarding the determination of works of *Copyright Law* and the evaluation standard of the three dimensional works of art, have stepped further to deepen and enriched the understanding of *Copyright Law*. The first and second instance court reasonably applied rules of proof in the process of hearing the case, found out the truth and solved the problem, have much stronger referring meaning toward the hearing of the like cases. We may say the judgments of this case have important navigation function toward the copyright of image style category.[30]

In *Zhao Menglin v. "Democracy and the Rule of Law" magazine case (2007)*,[31] Beijing Xicheng District People's Court held that:"Plaintiff created and accomplished *"Facial Makeup of the Peking Opera of China"* (published in 1992) (see Fig. 1.5), as the author of works of fine art of Beijing opera facial masks in such album of paintings, Plaintiff has devoted creative labor. Because works have creativity, the copyright of the captioned works enjoyed by Plaintiff is protected by China. Without Plaintiff's permission, Defendant used two pieces of Beijing opera facial

[30] Hu,Weiwei Lu,Yinghua. Can Hair Style Be Protected by China's Copyright Law [C]. Proceeding of 2017 Int'l Technology & Management (ITM2017), pp. 504–508, 2017–1–15.

[31] See Civil Judgment of Beijing Xicheng District People's Court(2007) Xi Min Chu Zi No.7084 (北京市西城区人民法院民事判决书 <2007> 西民初字第7084号).

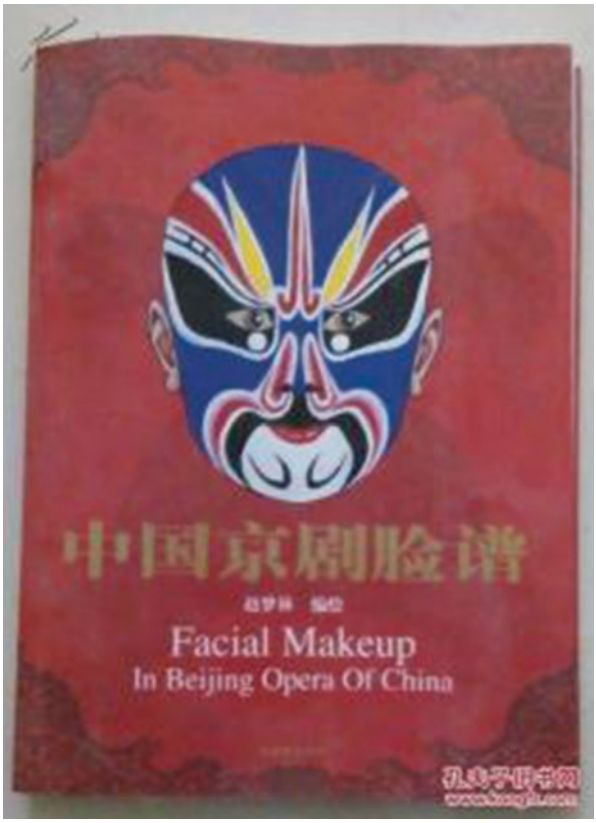

Fig. 1.5 Book- "Facial Makeup of the Peking Opera of Chuna" (Source: http://pic.sogou.com/pics?query=%D5%D4%C3%CE%C1%D6&p=40230500&st=255&mode=255)

masks identical with the works of fine art of Plaintiff's album of paintings in the cover page of "Democracy and the Rule of Law" magazine, neither signed the author's name nor paid to the author, infringeed the right of authorship, reproduction and remuneration, thus should bear the corresponding legal liability."

In *Huang Shizhong vs. Wu Jianfeng & Chen Xu case (2009)*,[32] Fuzhou City Intermediate People's Court held that:"Works of fine art are works of two-dimensional or three-dimensional works created in lines, colors or other media, which being viewed, impart aesthetic effect, such as painting, works of calligraphy and sculptures. The works involved (two paintings relate to tiger, one painting related to Tibetan Mastiff) are constituted by way of lines and colors and have certain aesthetic sensibility and creativity. Thus, they belong to the works of fine art protected by China's Copyright Law."

In *Shenzhen Tongtaifu Jewelry Co., ltd v. Guangzhou Xideer Jewelry Co., Ltd. copyright infringement dispute case (2013)*[33] determining jewelry design copyright

[32] See Civil Judgment of Fuzhou City Intermediate People's Court (2009) Rong Min Chu Zi No.1858 (福州市中级人民法院民事判决书<2009>榕民初字第1858号).

[33] See Civil Judgment of Guangzhou Intermediate People's Court (2013) Sui Zhong Fa (Zhi) Min Zhong Zi No. 920(广州市中级人民法院民事判决书<2013>穗中法<知>民终字第920号).

Fig. 1.6 The "**disputed works**" (Source: Luo, Yanjie. Could Jewelry Design be Protected by the China's Copyright Law]EB/OL]. http://www.chinaiplawyer.com/jewelry-design-protected-chinas-copyright-law/, August 7, 2014)

Fig. 1.7 The "**reference works**" (Source: Luo, Yanjie. Could Jewelry Design be Protected by the China's Copyright Law]EB/OL]. http://www.chinaiplawyer.com/jewelry-design-protected-chinas-copyright-law/, August 7, 2014)

protection mode),Shenzhen Tongtaifu Jewelry Co., Ltd. (**TTF**) is renowned to be a local jewelry brand in Shenzhen with international influence power. In 2012, TTF hosted the Zodiac Year of the Snake Jewelry Design Exhibition 2013. The *"Victory's V"*, a wining works, was published through TTF's official website and Weibo on November 4, 2012 and was authorized to enjoy the copyright of the *"Victory's V"* (see Fig. 1.7, the "**reference works**"). On December 8, 2012, Guangzhou Xideer Jewelry Co., Ltd. (XDE) launched its new jewelry called "Pretty Snake" (see Fig. 1.6 the "**disputed works**"), constituting its 12 Zodiacs, through its official Weibo and Tmall shop. Afterwards, the TTF found that the disputed works was highly similar to its reference works. Therefore, the TTF thought XDE constituting copyright infringement against its reference works and then brought the DXE to the court in requiring the XDE to immediately cease the infringement and make compensation of RMB 500,000 yuans.

Guangzho Yuexiu District People's Court heard the case and held that the disputed works manufactured and sold by the XDE plagiarized and copied the copyrighted reference works. Therefore, Guangzho Yuexiu District People's Court held that the XDE shall immediately cease manufacturing and selling the disputed works, which infringed the copyright of the reference works, and compensate RMB 150,000 yuans to the TTF within 10 days from the date of entry into force of the

judgment.[34] After trial, XDE filed appeal to Guangzhou Intermediate People's Court. On July 1, 2014, Guangzhou Intermediate People's Court rejected the appeal and upheld the original verdict.

This case was reported by many media as "China's first case to maintain right of Jewelry original design". Precisely speaking, this case should be the first case of copyright infringement dispute concerning China's Jewelry design and began judicial precedent to protect China's Jewelry design as art work.

There are two aspects to be taken notice as follows[35]:

- **The Jewelry itself can be protected as works of fine arts under the *Copyright Law* but in the Amendment of the Copyright Law (Manuscript), it is more appropriate that the jewelry can be protected as works of applied art**

Pursuant to the *Copyright Law* and related judicial interpretations, there is no clear provision about whether or not the jewelry can be protected under the *Copyright Law*. Even so, the jewelry has such major characters as imparting appreciation and aesthetic effect, consistent with the features of the object as regulated in the *Copyright Law*. Pursuant to the *Implementing Regulations of the Copyright Law*, the "Works of fine art" refer to two-dimensional or three-dimensional works created in lines, colors or other media which, when being viewed, impart aesthetic effect, such as works of painting, calligraphy and sculpture. Thus it can be appropriate that the jewelry of certain design shall be categorized into the works of fine art. Since it is considering that the jewelry belongs to works of fine art, this is undoubtedly logical that the court decided Defendant's copyright infringement.

Although the jewelry can be protected as works of fine art in current legislation, it is still quite different between the practical products and the works of fine art. However, fortunately, the Amendment of the Copyright Law (Manuscript) has regulated an independent works, more clearly putting the products similar to the jewelry into the protection scope of the *Copyright Law*, i.e., "Works of applied art refer to two-dimensional or three-dimensional works which impart practical functions, and aesthetic effect, such as toys, furniture and decorations". Therefore, in the future, the jewelry with the sense of aesthetic design can be protected under the full range of clear legislations.

- **The design drawing of the jewelry can be protected as graphic works in the *Copyright Law* but only an original jewelry itself can be under the protection of the *Copyright Law*.**

It should be clear that, the afore-mentioned stating that the jewelry belongs to the works of fine art is on condition that the jewelry shall be imparted aesthetic effect and designing elements. If the jewelry has a simple design, such as the common necklace, the aesthetic effect of the jewelry comes from the materials of the jewelry itself, not the jewelry design, and thus the jewelry shall not be original far from the protection of the *Copyright Law*.

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[34] See Civil Judgment of Guangzho Yuexiu District People's Court (2013) Sui Yue Fa (Zhi) Min Chu Zi No. 204 (广州市越秀区人民法院民事判决书<2013>穗越法<知>民初字第204号).

[35] Luo, Yanjie. Could Jewelry Design Be Protected by the China's Copyright Law]EB/OL]. http://www.chinaiplawyer.com/jewelry-design-protected-chinas-copyright-law/, August 7, 2014.

Fig. 1.8 J-10 Aircraft (single-seat)" model (Source: http://www.fydmodel.com/2007fyd/junmo/JM240B.htm)

However, under the condition that the jewelry is not original, it does not mean that the design drawing of the jewelry is not original. Since the graphic works refer to drawings of engineering designs and product designs for the purpose of actual construction or manufacture, and maps and sketches showing geographic phenomena and demonstrating the fundamentals or structure of a thing or an object pursuant to the *Implementing Regulations of the Copyright Law*, the laws do not require the graphic works imparting aesthetic effect.

Comparatively speaking, the *Implementing Regulations of the Copyright Law* is designed to protect the works itself from being copied by others, rather than extending the protection of the jewelry. For example, in today's case, if Plaintiff published the design drawing of the jewelry which does not have too many design elements, copying the design drawing of the jewelry shall constitute copyright infringement but using the design drawing to manufacture the jewelry may not constitute copyright infringement.[36]

In *Shenzhen Feippengda Manufacturing Co., Ltd. and Beijing AVIC Zhicheng Co., Ltd. copyright dispute appeal case (2015)*,[37] "J-1 Air*craft (single-seat)*" (referred to as *"J-10"*) (see Fig. 1.8) is a new type of aircraft. In November 2007, AVIC Zhicheng was authorized to manufacture *"J-10"* model and advocate the intellectual property rights on their own behalf. With authorization obtained, AVIC Zhicheng started to manufacture scaled-down *"J-10"* models, based on *"J-10"* original blueprint and current design. Feipengda started to manufacture and sell "J-10" models since June, 2011. AVIC Zhicheng claimed that the alleged infringing product caused infringements on AVIC Zhicheng's right to reproduce and distribute the graphic work, artwork or model works of *"J-10"* design blueprint and model.

The court held that: firstly, AVIC Zhicheng claimed that *"J-10's"* design constituted an artwork, but failed to demonstrate what component was pure artistic expression which was independent to the aircraft performance, in addition to the components determined by aircraft's utility. Therefore, the court couldn't decide

[36] Ibid.

[37] See Civil Judgment of Beijing High People's Court(2014)Gao Min (Zhi) Zhong Zi No. 3451(北京市高级人民法院民事判决书<2014>高民<知>终字第3451号).

"J-10's" design as an artwork. Secondly, albeit the model was scaled down from the aircraft, but it was still ingenious and a model work according to *Copyright Law* and relevant regulations. Thus, Feipengda infringed the copyright of AVIC Zhicheng.

This case is a typical one involving the question of ***whether or not a military aircraft's designs and its model constitute an artwork and model work in the sense of China's Copyright Law***. First, the court did not rule out the eligibility of *"J-10's"* design to be protected by *Copyright Law* as an artwork. However, the court held that it can be regarded as an artwork and protected if it did bear ingenious artistic expression in addition to designs determined by its utility. Although AVIC Zhicheng claimed that the design was an artwork, they did not manage to come up with evidence or reasonable explanation. Therefore, the design of *"J-10"* couldn't be decided as an artwork. The second point is about whether or not *"J-10"* model constitutes an art work. The verdict started from Copyright Law's definition on model work, and found that a model has better ingenuity as it has higher resemblance to the original article or can better satisfy the practical need. The *"J-10"* model is a scaled down from the *"J-10"* aircraft, but that's where its ingenuity is according to *the implement regulations of Copyright Law*. It is a model work and shall be protected.[38]

In *Hangzhou Da Tou Son Culture Development Co., Ltd. and CCTV Animation Co., Ltd. copyright ownership and infringement dispute appeal case(2015)*,[39] the classic cartoon "***Big Head Son and Small Head Dad"*** (see Fig. 1.9, ***"Da Tou Son and Xiao Tou Dad")*** was a joint production of a popular cartoon by CCTV and Shanghai Eastern Tv Station in 1995. The author of its main characters' style is Liu Zedai.

In 2012, Liu Zedai transferred "Big Head Son"、"Small Head Dad"and "Apron Mom" three characters' copyright of the 1995 edition cartoon to Mr. Hong in Hangzhou. On March 10, 2014, Hangzhou Da Tou Son Culture Development Co., Ltd. obtained three characters' copyright from Mr. Hong via transference.

In 2013, CCTV Animation Co. launched a new "***Big Head Son and Small Head Dad"*** animated TV series and movie, making adaptation and creation toward this story and the image of ***"Big Head Son and Small Head Dad"***.

It was claimed at the court in the aspect of Hangzhou Da Tou Son Co. that without his permission and paying him renumeration, in 2013 CCTV Animation Co. adapted the characters' image into new characters' image, launched new "***Big Head Son and Small Head Dad"***, and made exhibion and propaganda toward new characters' image, infringed the copyright of work of art enjoyed by such company, asked RMB 1,560,000 yuans compensation.

But CCTV Animation Co denied tort on spot, his representing attprney argued that what Liu Zedai designed then were just three positive design sketches of the

[38] Ten innovation intellectual property cases in Beijing during 2015 [EB/OL]. http://www.ciplawyer.com/article.asp?articleid=2825

[39] See Civil Judgment of Zhejiang Province Hangzhou City Intermediate People's Court (2015) Zhe Hang (Zhi) Zhong Zi No. 358 (浙江省杭州市中级人民法院民事判决书<2015>浙杭<知>终字第358号).

Fig. 1.9 "Big Head Son and Small Head Dad" image (Source: http://baike.baidu.com/link?url=1GUL_gp1fnsWzqIw0GWjvCJE6orKNzE-I-F3DCKsrLS--FypI9yZdi3bMndbcJC334ln-hwKOp4Ux4tJIt8zddiVw5xuY_5eZVYxBQ6xDuAoyZcXkj8LPO44jPGbld1SbWgwuXFlVAPDfUI1ke40HrbPSbFVRCwbD2SyS-P5tN5N3xFqfJspTxa6h8-D1RSgiabnA41JZTmcRbd-p62bNq)

image of the animation, not the finalized end product. Later on, Liu Zedai orally agreed with CCTV that the copyright of this cartoon style owned by CCTV.

CCTV Animation Co. stated in the trial: "[A] concept of creativity can not be directly used, and need pass several afterward steps. The launched cartoon was created by many persons based on teacher Liu Zedai's creativity, should belong to collective creation." CCTV Animation Co. contended that the copyright always belonged to CCTV.

Hangzhou City Intermediate People's Court, Zhejiang Province decided that in 1994 commossioned by the dtrector Cui Shiyu of 1995 edition cartoon, Liu Zedai indepently created "Big Head Son"、"Small Head Dad" and "Apron Mom" three pieces of works of art. Because both parties did not sign commissioned creation contract to agree copyright belonging, Liu Zedai as the fiduciary enjoyed complete copyright toward those three pieces of works of art.

It was found by the court that Liu Zedai transferred the copyright of works which he enjoied complete copyright to Mr. Hong, both parties expressed their true meaning, did not violate the laws and regulations, and both parties expressly recognized the authenticity of the contract and the inscribed time, the contract between Liu

Zedai and Mr. Hong was valid, Mr. Hong enjoyed the copyright of those three pieces of works of art except the moral right. Later on, Hangzhou Da Tou Son Co. also obtained the copyright of those three pieces of works of art except the moral right.

The court decided that without Plaintiff Hangzhou Da Tou Son Company's permission, CCTV Animation Co. in 2013 edition new "***Big Head Son and Small Head Dad***" cartoon and relevant's exhibition and propaganda used Hangzhou Da Tou Son Company's work through adaptation and obtained profit, infringed the copyright of Hangzhou Da Tou Son Co., should bear corresponding tort liability.

But to determine whether or not to stop the infringement should also take into account the principle of fairness. The production of animated cartoons not only needed the character modeling, but also needed to show the creation of the story of the script, music and voice, etc. Only because that playing characters lacked the original author's permission to stop the whole cartoon's broadcast, would cause the other creative staff labor cast to waste, violated fairness principle. Hence, viewing the actual situation of this case, the court decided that it should use the way to raise compensation amount to be the liability replacement method of CCTV Animation Company's stopping tort act.

On June 30, 2015 the court held as follows[40]:

- CCTV Animation Co. compensate Hangzhou Da Tou Son Co economic losses RMB 400,000 yuans within 10 days from the date of entry into force of the judgment;
- CCTV Animation Co. compensate Hangzhou Da Tou Son Co. reasonab;e fee to maintain right RMB 22,040 yuans within 10 days from the date of entry into force of the judgment; and
- Rebuttle other litigation claim of Hangzhou Da Tou Son Co..

Later on, both parties dissatisfied the judgment, appealed to Hangzhou City Intermediate People's Court, Zhejiang Province.

On February 22, 2016, Hangzhou City Intermediate People's Court, Zhejiang Provinc maintained the first instance judgment, held that CCTV Animation Co. constituted tort and shall compensate Hangzhou Da Tou Son Co. economic losses RMB 126,000 yuans.

The second instance court decided that in this case, according to the evidences provided by each party and the witness's testimony, after Liu Zedai was commissioned by the director Cui Shiyu, he had indepentantly accomplished three pieces of work of arts, by drawing a line, the shape of the outline of the characters with personalized features, reflected the choice and judgment of Liu Zedai's own picture of the characters, belonged to the achievement of intellectual creation, which was independent of its completion. No matter Cui Shiyu as an animated film director, or Zheng Chunhua as the author of the original novel, they did not have a detailed description of the character's graphic design, guidance and reference, thus it should be recognized that Liu Zedai had a complete copyright on the concept design of the

[40] See Civil Judgment of Hangzhou Binjiang District People's Court (2014) Hang Bin (Zhi) Chu Zi. No. 636 (杭州市滨江区人民法院民事判决书 <2014> 杭滨<知>初字第636号).

three characters. In the meantime, the original instance court at the time on the comprehensive consideration of the creative background, the actual situation of such case, bakancing the original author, follow up work and social public interest and fair principle bases, held that CCTV Animation Co. not stop tort, but used the way to raise compensation amount to be the liability replacement method be appropriate, not only complied wtth the objective reality of this case, but also was within the scope of its reasonable discretion, therefore made the captioned judgment.[41]

There are many details in this case and are very worthy to analyze and learn. It involves several aspects of problems of static character image of animation, their respective rights of animation and role commercialization and assumption way of tort liability.

General animation production process is as follows: the making of an animated cartoon, before the split shot, needs to create character feature of the facial appearance, body, clothing and so on of the relatively fixed animation role image, that is static character modeling, at the same time on this basis, forms the face map, dynamic map, expression and so on. These figures' style image forms the shape of the overall shape of the figure, in the form of lines, shapes, colors and other forms fixed the unique features of the animation chararacter, and later on in the production of animated cartoons, with the unique image appears in various scenes i.e. one principle runs through all the screen. Even if the animation characters in the expression, action, posture and other aspects will be a variety of changes, but will not break away from the role of the image of the basic features of significance and recognition.

From the animation production process point of view, animation of the static character of the image itself is an independent work of art. For example, the image of the inverted gourd shaped head and cover hairstyle, these belong to the expression of figurative features through the art of painting, complies with the requirement regarding the originality and reproduction of works of *Copyright Law*, may be protected as the work of art. "Cartoon" itself is through the animation in the plot, lines, music and other forms of expression to give a comprehensive embodiment, is protected as a film and a method of producing a film, the right belongs to the producer. The production and dissemination of cartoons should be authorized by the right owner of the work of art.

Role commercialization forms animation industry product. Animation industry products not only include the core products, that is the direct broadcast of the distribution of animation market, and includes ancillary products (such as books, audio and video products, etc.) and peripheral derivative products (such as clothing, toys, food, etc.) Animation industry products can not be separated from the characters in the original works of art, but it is usually the production of the commercial value of the animation role, often not entirely bases on the aesthetic feeling of of the character image itself, simultaneously also contains character traits of the characters in the

[41] See Civil Judgment of Zhejiang Province Hangzhou City Intermediate People's Court (2015) Zhe Hang (Zhi) Zhong Zi No. 358 (浙江省杭州市中级人民法院民事判决书<2015>浙杭<知>终字第358号).

character name for having heard it many times, animation through the story, language, action and so on and the popularity and influence of cartoon.

When consumers see the animation role of derivative products, out of love or preference for the character of the animation to generate purchase desire and choice tendency will bring the commercial competitiveness of the suppliers. The production of such commercial value is often attributed to the producer of the animated film, and it's not just the creator of the static character of the character of the animation.

Therefore, it is suggested that animation producers obtain the authorization of the works of art and should agree in writing with the right owner of such works of art, otherwise they will jointly enjoyed the right.[42]

When the animation infringes the right of the works of art, regarding the way of bearing tort liability, the court normally holds to stop tort. But, in excetion circumstance, for the consideration of the public interest and the balance of the interests of both parties, the court may hold not to stop tort, in order to increase the amount of compensation as a substitute for liability, makes remedy for the injured party. This case is a typical case to hold not to stop tort.

In *Lowe European Entertainment Co. Ltd. and Zhongshan cakeking Food Co. Ltd., Jianghai District Central East Bread Bakery copyright infringement, tort dispute case(2015)*,[43] Plaintiff Lowe European Entertainment Co. Ltd. claimed that it was established in 2003 which was a globally famous entertainment media Co.. It successfully created world well-known ***"Angry Birds"*** image. As one type of smart phone touch screen based on the casual puzzle game, ***"Angry Birds"*** after a few months on the line has become a global phenomenon, so far has still ranked in the first place to pay the application. As one of the important images of ***"Angry Birds"*** series works, ***"YELLOW BIRD"*** (see Fig. 1.10) was registered copyright in National Copyright Administration (NCA) of the People's Republic of China by Plaintiff as the copyright holder on December 10, 2009. Plaintiff authorized the captioned copyright to famous coffee cake chain "85 °C" to use on its merchandises such as cake etc. ***"YELLOW BIRD"*** was welcomed by the vast number of consumers, with high visibility and reputation.

Those ***"YELLOW BIRD"*** accessories involved in this case were purchased by Defendant Zhongshan Cai Dei Xuan Bakery Co. Ltd. from Suzhou Goethe Food Co. Ltd. at the single price RMB 0.40 yuans/1 piece. Defendant Cai Dei Xuan Co. bought 16,800 pieces in October 2014 with the amount of RMB 6,720 yuans, 19,200 pieces in October 2014 with the amount of RMB 7,680 yuans. Later on Defendant Cai Dei Xuan Co. provided ***"YELLOW BIRD"*** accessories involved in this case to Defendant Jianghai District Central East Bread Bakery which decorated such acces-

[42] Dong, Shilian. A Comment on Hangzhou Da Tou Son Culture Development Co., Ltd. and CCTV Animation Co., Ltd. Copyright infringement Dispute Case (Chinese version) [EB/OL]. http://blog.sina.com.cn/s/blog_6285b9b50102wj3h.html, 2016–04–11.

[43] See Civil Judgment of Guangdong Province Jiangmen City Jianghai District People's Court (2015) Jiang Hai (Zhi) Fa Min Chu Zi No. 2 (广东省江门市江海区人民法院民事判决书<2015>江海法<知>民初字第2号).

Fig. 1.10 "Angry Birds" image (Source: https://www.amazon.co.uk/Gear4-Angry-Tweeters-Stereo-Headphones/dp/B005MYEDMK/ref=sr_1_22?s=network-media&ie=UTF8&qid=1488969100&sr=1-22)

sories on its cakes to sell. The cake's retail price was RMB 3 yuans one piece (***"YELLOW BIRD"*** accessories included). Two defendants stated that they had sold cakes with ***"YELLOW BIRD"*** accessories involved in this case from November 2014 till January 2015.

The court found that this case was a copyright dispute. The main issues of this case were as follows:

First, whether or not Defendant Cai Dei Xuan Co. and Jianghai District Central East Bread Bakery existed the conduct of infringing copyright enjoyed by Plaintiff Lowe European Co.?

Second, which kind of civil liability shall be born by those two defendants?

Regarding the problem whether or not Defendant Cai Dei Xuan Co. and Jianghai District Central East Bread Bakery existed the conduct of infringing the copyright enjoyed by Plaintiff Lowe European Co., Plaintiff Lowe European Co. enjoyed the copyright of ***"YELLOW BIRD"*** work of art as the identity of legal person's work copyright owner. Its legitimate right and benefit should be protected by law. Without the permission of Plaintiff Lowe European Co., Defendant Cai Dei Xuan Co. and Jianghai District Central East Bread Bakery decorated ***"YELLOW BIRD"*** accessories on the cakes to sell had already infringed the property right of copyright enjoyed by Plaintiff Lowe European Co., and should bear the relevant civil liability. Therefore, the court supported Plaintiff's litigation request to order two defendants cease tort and rejected two defendants' counterclaim that they didn't constitute infringement.

Plaintiff Lowe European Co. requested Defendant Cai Dei Xuan Co. and Jianghai District Central East Bread Bakery to compensate economic loss and reasonable fee total RMB 200,000 yuans. According to Article 49 of *China's Copyright Law,* "The infringer shall, when having infringed upon the copyright or the rights related to copyright, make a compensation on the basis of the obligee's actual losses; where the actual losses are difficult to be calculated, the compensation may be made on the basis of the infringer's illegal gains. The amount of compensation shall also include the reasonable expenses paid by the obligee for stopping the act of tort. Where the obligee's actual losses or the infringer's illegal gains cannot be determined, the

People's Court shall, on the basis of the seriousness of the act of tort, adjudicate a compensation of RMB 500,000 yuans or less."

Owing that Plaintiff didn't provide evidence of the concrete amount of damage caused by two defendants' infringement or two defendants' benefit from infringement, the court comprehensively considered the factors of the visibility of ***"YELLOW BIRD"*** works of art published by the plaintiff, the degree of fault of two defendants, the nature, circumstances and consequences of the tort, duration of infringement and the reasonable expenses paid by the plaintiff to stop the infringement etc., discretionarily held that two defendants compensate Plaintiff's economic losses including the reasonable expenses paid to stop the infringement RMB 30,000 yuans. The court found two defendants' counterclaim that even if they constituted infringement, they only bore legal liability to stop selling and only Defendant Cai Dei Xuan Co bore the compensation liability, had insufficient evidence and rejected such counterclaim.

Plaintiff's claim that two defendants should publish an apology statement on "Zhongshan Daily", "Nan Fang Daily" and "Southern Metropolis Daily" to eliminate the impact. The court decided that viewing that "apology" was mainly born as one kind of civil liability while moral right was infringed. In this case, what two defendants infringed was the economic right of copyright. Plaintiff didn't provide any evidence to prove that his good will was damaged due to the infringement of two defendants and the court had discretionarily decided two defendants compensate economic losses. Thus, the court didn't support Plaintiff's above-mentioned claim because of lacking factual and legal basis.

Therefore, the court held as follows:

- Defendant Cai Dei Xuan Co. and Jianghai District Central East Bread Bakery immediately cease infringing conduct on copyright of Plaintiff Lowe European Company's published ***"YELLOW BIRD"*** work of arts in the day of the legal effect of the judgment;
- Defendant Cai Dei Xuan Co. and Jianghai District Central East Bread Bakery immediately jointly compensate Plaintiff Lowe European Co. economic losses including the reasonable expenses RMB 30,000 yuans paid to stop the infringement within 10 days from the date of the legal effect of the judgment and
- All other claims of Plaintiff Lowe European Co. are overruled.

In *Yongfu Co. Ltd. v. Mr. Huang and Shanghai Duyi Trading Co., Ltd. infringing the right to reproduce the work and the distribution right dispute case(2014)*[44] (involving copyright protection of foreign practical works of Art), Plaintiff Yongfu Co. is Japan's well-known toy's developer, manufacturer and seller. According to law, he enjoys copyright of 8 items of ***"Forest family toys"*** work (including toy house, children amusement park, carriage house, toy carriage etc., see Fig. 1.11) In September 2007 and September 2009, Defendant Mr. Huang encountered administrative punishment separately by Copyright Bureau of Shantou City, Guangdong

[44] See Civil Judgment of Shanghai First Intermediate People's Court(2014)Hu Yi Zhong Min Wu (Zhi) Zhong Zi No.107(2014)上海市第一中级人民法院民事判决书<2014>沪一中民五<知>终字第107号

Fig. 1.11 "Forest family toys" (Source: China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016–7–13)

Province because Wanqixiang Factory operated by Mr. Huang manufactured and sold products suspiciously infringing Plaintiff"s works of rights.

In July 2013, Plaintiff found out again Wanqixiang Factory implemented the conduct of infringing Plaintiff"s works of rights. He bought 8 pieces of accused of infringing products ("Happy Family" series toy) in Defendant Shanghai Doyi Trading Company's place and brought the lawsuit to the court and asked the court to order two defendants stop infringement and compensate economic loss and reasonable fee RMB 1 million yuans, During the trial, Plaintiff withdrew the claim of right of Terrace House.

After hearing the case, Shanghai Pudong New Area People's Court decided that:"[T]he country of the plaintiff is Japan, Japan and China are the Berne Convention member states, therefore, China has the obligation to protect citizen's work of member states. Even though China's Copyright Law doesn't stipulate the work category of works of applied art, yet the'Berne Convention'clearly stipulates that the protected objects of the'Convention'include works of applied art. China's 'Provisions on the Implementation of the International Copyright Treaties'also clearly stipulates that the protection of Chinese copyright laws and regulations of foreign works of applied art in China should be completed in 25 years. Thus, the author's works of applied art of the 'Berne Convention'member states should be protected by Chinese law. Plaintiff's claimed works of rights complies with the constituents of originality, replicability, practicability and artistic quality, should be

protected as works of applied art. According to the determining standard of'contact plus substantial similarity', the conduct of Wanqixiang Factory manufacturing and selling the accused infringing products constitutes infringement of the reproduction and distribution right of Plaintiff's works of right."

Therefore, the court held that two defendants immediately cease infringement and Defendant Mr. Huang compensate Plaintiff's economic loss and reasonable fee RMB 20 million yuans.[45] After appeal, the second instance court rejected the appeal and sustained the original verdict.

The Plaintiff of this case is the well-known enterprise of developing, manufacturing and selling toys in Japan and even in global range. His designing and selling ***"Forest family toys"*** has won many big prizes in Japan and abroad. Owing that *China's Copyright Law* doesn't stipulate the work category of works of applied art and Plaintiff is foreign related enterprise, this case received widespread attention during the trial. The court based on the "Berne Convention" and China's "Provisions on the Implementation of the International Copyright Treaties", clarified foreign works of applied art belonging to the protected work category of *China's Copyright Law* and also clarified the constituents of originality, replicability, practicability and artistic quality of works of applied art. The work of rights claimed by Plaintiff complied with the captioned constituents, should be protected as works of applied art.[46]

In *Blue Box Toy Factory Ltd. v. Dumex Baby Food Co., Ltd., Shanghai Lovehome Household Goods Co., Ltd., Shanghai Aishitu Trade Development Co. Ltd. and Zhejiang Krupp Machinery Co. Ltd. infringing the right to reproduce the work and the distribution right dispute case (2015)*[47] (involving copyright protection of practical works of Art), Plaintiff designed and completed ***"Bear play luggage cart"*** (see Fig. 1.12) in January 2010. Such cart is composed by two parts of faceplate with a little bear facial figure and four wheel housing. Faceplate is the face of the panel bear cartoon, when bearing faceplate, putting flat box, it may be used as pulley trunk.

The product involved attended Beijing Toy Exhibition in April 2012. In January 2013, Plaintiff found out that there was activity of giving "Children's walking aid vehicle" when buying Dumex milk powder in the market, then Plaintiff notarized the purchase process. Such "Children's walking aid vehicle" was almost identical with Plaintiff's ***"Bear play luggage cart"*** except color matching. The gift box marked on the supplier for Lovehome Co., the manufacturer was Krupp Co.. The salesman of Aishitu Co. had obtained the sample of the product involved from Plaintiff's product agency; Lovehome and Aishitu were related companies. Plaintiff claimed that he enjoyed copyright on the whole product involved and four defendants jointly committed infringement. Plaintiff asked the court to order four defen-

[45] See Shanghai Pudong New Area People's Court(2013)Pu Min san (Zhi) Chu Zi No. 537 (上海市浦东新区人民法院民事判决书<2013>浦民三<知>初字第537号).

[46] See supra note 9.

[47] See Civil Judgment of Shanghai First Intermediate People's Court(2015)Hu Yi Zhong Min Wu (Zhi) Zhong Zi No. 30 (上海市第一中级人民法院民事判决书<2015>沪一中民五<知>终字第30号).

Fig. 1.12 "Bear play luggage cart" (Source: China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016–7–13)

dants stop infringement and jointly compensate economic loss and reasonable expense.

Shanghai Pudong New Area People's Court found that the product involved complied with the feature of works of applied art. Plaintiff's evidence proved that he owned the copyright of the product involved. The protected scope of the product involved by the *Copyright Law* should be bear face faceplate i.e. bear face figure. Krupp Co., without permission from Plaintiff, reproduced and distributed Plaintiff's work, directly infringed Plaintiff's copyright. Based on Lovehome Company and Aishitu Company's closely related relationship, it might be determined that Lovehome Co. knew Plaintiff's product information and still bulkily purchased and sold, infringed Plaintiff's distribution right, but it was not enough to determine that he and Krupp Co. jointly conspired to infringe. Krupp Co. had fault on Lovehome Company's tort conduct, should bear joint and several liability. Aishitu Company's conduct of letting Lovehome Co. know Plaintiff's product information did not constitute copyright infringement. Dumex Co. purchased infringing product as gift, infringed Plaintiff's distribution right, should stop infringement, but his argument of the gift having legal resource was established.

Shanghai Pudong New Area People's Court held as follows[48]:

- Dumex Co., Lovehome Co. and Krupp Co. immediately cease their conducts of infringing Plaintiff's reproduction and distribution right separately;
- Lovehome Co. compensate economic losses RMB 50,000 yuans and reasonable expenditure RMB 15,000 yuans; Krupp Co. compensate economic losses RMB 200,000 and reasonable expenditure RMB 60,000 yuans, and bear joint and several liability for Lovehome Company's compensation part; and
- All other Plaintiff's claims are overruled.

[48] See Civil Judgment of Shanghai Pudong New Area People's Court(2014)Pu Min San (Zhi) Chu Zi No.67(上海市浦东新区人民法院民事判决书 <2014> 浦民三<知>初字第67号).

After the first instance judgment, Krupp Co. dissatisfied and filed the appeal. The second instance court held to refute the appeal and maintain the original verdict.

This case involved the protection problem of works of applied art. *China's Copyright Law* does not clearly stipulate whether or not protects works of applied art. In *China's Copyright Law* administrative enforcement and judicial practice, there are some cases applying *Copyright Law* to protect but just protect with some restrictions. Restriction one appears in the protection condition of works of applied art i.e. the determining conditions of works of applied art. Restriction two appears in the protection scope of works of applied art. This mainly wants to further comply with the basic principles of *Copyright Law* and strictly shows function boundary of various legal system. This case's judgment makes much more detailed analysis on the conditions and scope to protect works of applied art, investigates doers' subjective fault and concrete behavior of jointly infringing copyright conduct. This case will have certain referring and guiding meaning toward handling similar cases.[49]

In *Comfort (Beijing) Film Distribution Co., Ltd.v. Zhejiang Tmall Network Co., Ltd. and Yangzhou city Ruisixinnuo trade Co., Ltd. copyright infringement dispute case (2016)*,[50] Plaintiff Comfort Co. claimed that it was the copyright holder of ***"Monster Hunt-HUBA"*** (see Figs. 1.13 and 1.14) series work of art, enjoyed such work's copyright according to law. Any third party without Plaintiff's permission shall not use relevant work of art. ***"Monster Hunt-HUBA"*** series work of art image was the most prominent image in movie ***"Monster Hunt"*** which ran in China on July 16, 2015. At the time of this case's prosecution the film was still in the stage of running. Till then, Cumulative box office had more than RMB 2 billion 400 million yuans, ranked No. 1 in China's film history mainland box office. After the film ran, the image of ***"Monster Hunt-HUBA"*** series work of art was deeply rooted among the people and had a high visibility and market value.

After verifying,Plaintiff discovered that during the public running period of the movie ***"Monster Hunt"***, Ruisixinnuo Co. without Plaintiff's permission and without payment, established a web store named "Ruisixinnuo Flagship Store" through an e-commerce platform-Tmall owned and operated by Tmall Co., arbitrarily and largely sold the infringing products of ***"Monster Hunt-HUBA"*** series work of art image and used the photograph containing ***"Monster Hunt-HUBA"*** series work of art image in shop promotion and product introduction.

Plaintiff claimed that for profit, Ruisixinnuo Co. during the public running period of the movie ***"Monster Hunt"*** largely sold the infringing products of ***"Monster Hunt-HUBA"*** series work of art image and used the photograph containing ***"Monster Hunt-HUBA"*** series work of art image in shop promotion and product introduction. The above-mentioned behavior violated relevant regulations of

[49] See supra note 9.

[50] See Civil Judgment of Hangzhou City Yuhang District People's Court (2016) Zhe 0110 Min Chu 4684 (杭州市余杭区人民法院民事判决书<2016>浙0110民初4684号).

Fig. 1.13 Movie- "Monster Hunt" (Source: https://www.dunung-hd.com/monster-hunt-2015-%E0%B8%A8%E0%B8%B6%E0%B8%81%E0%B8%96%E0%B8%A5%E0%B9%88%E0%B8%A1%E0%B8%9F%E0%B9%89%E0%B8%B2-%E0%B8%AD%E0%B8%AA%E0%B8%B9%E0%B8%A3%E0%B8%99%E0%B9%89%E0%B8%AD%E0%B8%A2%E0%B8%88/)

Fig. 1.14 "Monster Hunt-HUBA" image (Source: http://www.netbian.com/desk/13582-1920x1080.htm)

China's Copyright Law and laws and regulations, subjective malignancy is extremely bad, heavily damaged Plaintiff's copyright of ***"Monster Hunt-HUBA"*** series work of art according to law, got a huge illegal income and caused significant economic loss to Plaintiff. As Internet transaction platform, Tmall Co. failed to fulfill the obligation to review and provided convenience for Ruisixinnuo Company's

sale conduct and got advantage there from, should bear joint and several liability for tort liability with Ruisixinnuo Co. Therefore, Plaintiff sued to the court requesting the court to order as follows:

First, two defendants immediately cease the infringement i.e. cease selling the infringing products using ***"Monster Hunt-HUBA"*** series work of art image and delete infringing messages related to work of art image involved in "Ruisixinnuo Flagship Store" on Tmall;
Second, two defendants jointly compensate Plaintiff economic losses of RMB 55,000 yuans;
Third, two defendants jointly bear Plaintiff's reasonable fee of RMB 5,000 yuans paid to stop the infringing conduct and
Fourth, two defendants jointly bear total litigation fee for this case.

During the trial, affirming infringing messages' non existence, Plaintiff applied to withdraw the first request and was approved by the court without violating regulation of law.

The court found that Comfort Co. was the copyright holder of ***"Monster Hunt-HUBA"*** series work of art involved. In this case, the image of plush toys involved sold in Ruisixinnuo Company's "Ruisixinnuo Flagship Store" in Tmall were consistent with the involved work of art's expression style in the overall image, body shape, hair, facial features combination, there were subtle differences in facial features, constituted a substantial similarity. Comfort Co. made sure that the products involved were not produced or authorized to produce by it. Ruisixinnuo Co. can not submit evidence to prove its selling products involved had legitimate source either. Thus, Ruisixinnuo Company's conduct of selling products involved infringed the right of distribution of the work of art involved enjoyed by Comfort Co., should bear the civil liability to compensate for losses. Regarding the compensation amount, the actual losses of Comfort Co. and the tort income of Ruisixinnuo Co. were difficult to calculate. Comfort Co. claimed for statutory compensation. Therefore, the court would comprehensively consider the factors of the visibility of the work involved, the nature of the defendant's tort, subjective fault degree and Comfort Company's reasonable expenses paid to stop the tort etc. to discretionarily decide the compensation amount. In the meantime, the court observed the following facts:

- The sale price of products involved was RMB 19,168 yuans, total sale volume was 95 pieces, and monthly sale volume was 81 pieces.
- Comfort Co. paid notary fee to maintain its right for this case was RMB 87 yuans and entrusted the lawyer to appear in court.

Comfort Co. at the same time claimed that Tmall constituted contributory infringement. Because Comfort Co. didn't complain to Tmall against Ruisixinnuo Company's accused infringing conduct, and those messages involved released by Ruisixinnuo Co. in Tmall.com didn't exist the situation of vivid violation or tort as well. Therefore, Tmall didn't exist the situation to know or should know the existence of violations and not to take the necessary measures in time. Tmall did not

Fig. 1.15 Plaintiff's "Beijing Porsche Center" (Source: PEI, XIAOLAN. Car modification shop too much alike Porsche building was sentenced to rebuild [N]. Beijing Times, http://news.qq.com/a/20071220/001573.htm, 2007–12–20)

Fig. 1.16 Defendant's "Taihe Astra Center" (Source: PEI, XIAOLAN. Car modification shop too much alike Porsche building was sentenced to rebuild [N]. Beijing Times, http://news.qq.com/a/20071220/001573.htm, 2007–12–20)

have fault. The reason of Tmall's response of not constituting infringement was set up and was accepted by the court.[51]

In China's judicial practice, copyright disputes involving works of architecture are few. For example, in *Beijing Taihe Astra Auto Sales & Service Co., Ltd. and Porsche AG Copyright infringment dispute appeal case(2008)*,[52] Plaintiff claimed that it was ***Beijing Porsche Center***'s architecture (see Fig. 1.15) copyright owner. Defendant's architecture of ***"Taihe Astra Center"*** (see Fig. 1.16) is very similar to the one of ***"Beijing Porsche Center"***. Defendant's conduct was reproduction of Plaintiff's works of architecture without authorization, thus infringed Plaintiff's copyright. After trial, both the First and Final Instance Court found that the whole design of Plaintiff's works of architecture had unique appearance and modeling,

[51] See Civil Judgment of Hangzhou City Yuhang District People's Court (2016) Zhe 0110 Min Chu 4684 (杭州市余杭区人民法院民事判决书<2016>浙0110民初4684号).

[52] See Civil Judgment of Beijing High People's Court (2008) Gao Min Zhong Zi No. 325. (北京市高级人民法院民事判决书<2008>高民终字第325号).

had aesthetic feeling and creativity belonging to the works of architecture protected by *China's Copyright Law*.

Although Defendant's ***"Taihe Astra Center"*** and Plaintiff's works of architecture had minor difference in the location of hath pace, railing, exhibition hall and work area, partial arc-shaped appearance and the whole color depth, yet both centers were identical in basic features. Defendant's ***"Taihe Astra Center"*** still belonged to architecture similar to the one involved in this case. The First Instance Court- Beijing Second Intermediate People's Court held that Defendant have to reconstruct its architecture involved to be not identical or similar to the features of Plaintiff's prefabricated one and the reconstruction effect should be examined by the court. Besides, Defendant should pay RMB150,000 yuans damage and RMB 17,079 yuans reasonable fee for litigation to Plaintiff.[53] On December 19, 2008, the Final Instance Court- Beijing High People's Court rejected Defendant's appeal and maintained the first trial.

5. Photographic works;

In *Getty Images (Beijing) Technology Co. Ltd. and Guizhou Qiaoxin Real Estate Development Co., Ltd., Guizhou Quanlin Enterprise Group Real Estate Development Co., Ltd. copyright infringement dispute retrial review case (2012)*,[54] in 2011, Getty Images (Beijing) brought a lawsuit to the court, alleging that Guizhou Quanlin Real Estate Development Co. and Guizhou Qiaoxin Co. constituted copyright infringement due to their publication of Getty Images (Beijing)'s photo (the "disputed photo") on its brochure without permission.

The court of first instance decided that Getty had enjoyed copyright of the disputed photo because there was a copyright registration in U.S Copyright Office and a watermark on the disputed photo which considered as a signature of Getty. Therefore, the court of first instance held that the defendant constitute copyright infringement and compensate RMB 800 yuans to Getty Images (Beijing).[55] Dissatisfied with the judgment of first instance court, both Getty Images (Beijing) and Guizhou Qiaoxin Company appealed.

Guizhou Qiaoxin Co. in its appeal argued that, where there was a signature of Steve Cole on the disputed photo, Getty shall, if claimed as the owner of the disputed photo, prove a license agreement between Getty and Steve Cole, or that this disputed photo was a service work, or a certificate of copyright registration. However, Getty failed to prove the afore-mentioned evidence. Therefore, based on following reasoning, Getty did not enjoy copyright for the disputed photo and could not authorize Getty Images (Beijing) to exercise its copyright.

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[53] See Civil Judgment of Beijing Second Intermediate People's Court (2007) Er Zhon Min Chu Zi No. 1764.(北京市第二中级人民法院民事判决书<2007>二中民初字第1764号).

[54] See Civil Ruling of Supreme People's Court (2012) Min Shen Zi No. 413 (最高人民法院民事裁定书 <2012> 民申字第413号).

[55] See Civil Judgment of Guizhou Province Guiyang City Intermediate people's Court (2011) Zhu Min Chu Zi No. 56 (贵州省贵阳市中级人民法院民事判决书<2011>筑民初字第56号).

The court of the second instance heard the case and held that, considering digital photos does not eliminate one to own others' works and claim for rights due to its characters, such as ease of duplication, storage and modification, in order to balance the interests between the public and the copyright holder, under the doubt of Guizhou Qiaoxin Co. on its truth for copyright on the disputed photos, Getty Images (Beijing) shall further provide Getty to be the copyright holder of the disputed photo by providing more evidence, such as information of copyright registration, publication and authorization from Steve Cole. In this case, considering Getty Images (Beijing)'s failure of proving Getty to be the holder of disputed photo, therefore, the court of second instance repealed judgment of the first instance court and rejected all claims of Getty Images (Beijing).[56]

Dissatisfied with the judgment of second instance court, Getty Images (Beijing) applied for retrial to the Supreme People's Court. The Supreme People's Court affirmed the judgment of second instance and rejected all Getty Images (Beijing)'s claims on the grounds of insufficient evidence, Getty Images (Beijing) had to prove Getty to be right holder of the disputed photo.

In conclusion, in an expert's opinion, in relation to Getty who owns large amount of photos, Getty shall be obliged to do mass submission for copyright registration in considering government efficiency. However, one cannot deny that such preferential treatment from U.S government may not reduce Getty's burden of proof against copyright infringement. If one doubt other's right of the photo and provides preliminary evidence, Getty is obliged to prove further perfection of the burden of proof to own the right of the disputed photo from legitimate sources.[57]

In *Poly Plaza Co., Ltd. and Beijing Beauty View Photo Co., Ltd. copyright belonging anf tort dispute appeal case(2015),*[58] during first trial, Beauty View Photo Co. claimed that it was a professional photo company, obtained reasonable income from permitting to pay to use their operated photographic works. It found out Poly Plaza Co. on the webpage of its operated website www.polyhotel.com, without authorization used Beauty View Photo Company's 4 pieces of photo works (those number were Bv-0663,Bv-0820, Bv183–04 and dspd0965) which Beauty View Photo Co. enjoyed copyright and was collected in its website and product sample catalog "scene photo gallery". Poly Plaza Company's conduct infringed the captioned works' right of information network dissesmination, authorship and obtaining renumeration enjoyed by Beauty View Photo Co., thus it suited to ask the court to order Poly Plaza Co. as follows:

- Immediately stop using 4 pieces of photo work which Beauty View Photo Co. enjoyed copyright;

[56] See Civil Ruling of Guizhou Province High People's Court (2011) Qian Gao Min San Zhong Zi No. 22 (贵州省高级人民法院民事裁定书 <2011> 黔高民三终字第22号).

[57] See You, Yunting. What Is the Weakness of Getty Images China's Protection Litigation against Photo Infringement [EB/OL]. http://www.chinaiplawyer.com/weakness-getty-images-chinas-protection-litigation-photo-infringement/ December 12, 2013.

[58] See Civil Judgment of Beijing Intellectual Property Court (2015) Jing (Zhi) Min Zhong Zi No. 488 (北京知识产权法院民事判决书<2015>京<知>民终字第488号).

- Publicly apologize to Beauty View Photo Co., the method is to publish apology announcement on its website www.polyhotel.com;
- Compensate Beauty View Photo Co. economic losses RMB 32,000 yuans and
- Bear Beauty View Photo Company's reasonable fee for stopping the infringement RMB 2,000 yuans, including attorney fee RMB 1,000 yuans and notary fee RMB 1,000 yuans.

Poly Plaza Co. at the first trial contended that www.polyhotel.com was the website operated and managed by it, which usd four pieces of photos involved in the websie. But such website's system was made custom development by the third party Harbin Institute of Technology Science and Technology Software Limited by Share Ltd. for Poly Plaza Co. in September 2005, the third party Harbin Institute of Technology Science and Technology Software Ltd. owned the IPR of such system software. Poly Plaza Co. had the right to use such software through paying consideration, and the photos involved originated from such software, had nothing to do with Poly Plaza Co. At the same time, the third party Harbin Institute of Technology Science and Technology Software Ltd. kept the softwaer's source code, Poly Plaza Co. could not delete the photos involved. Because the third party Harbin Institute of Technology Science and Technology Software Ltd. owned the IPR of Poly Plaza Company's website system, under the contract signed by Poly Plaza Co. and the third party Harbin Institute of Technology Science and Technology Software Ltd. clarified that the latter enjoyed the photos's copyright, Beauty View Photo Co.could not provide original film of the work involved in the case, thus it had objection to Beauty View Photo Company's enjoying the copyright of the photos involved, and argued Beauty View Photo Company's claiming the amount of compensation was too high. To summarize, it did not agree with Beauty View Photo Company's litigation claim.

The first instance court decided that the photo works involved were collected in "scene photo gallery" and when published on "scene photo gallery" (its web address was www.viewstock.com) were all indicated the copyright enjoyed by Beauty View Photo Co. The copyright registration certificate, "Commissioned Creation Agreement" and "Commissioned photography works Explanation" also indicated Beauty View Photo Co. enjoyed the copyright of the photo works involved. Therefore, in the absence of evidence to the contrary, the first instance court determined that Beauty View Photo Co. was the copyright owner of the photo works involved.

Unless otherwise provided by law, to use other's works should obtain authorization. Poly Plaza Co. without permission, used Beauty View Photo Company's photo works on the webpage of its operated website www.polyhotel.com in order to promote the business of the company, its act infringed Beauty View Photo Company's copyrihjt. Poly Plaza Co. contended that the photos involved was made and used on its website by the third party Harbin Institute of Technology Science and Technology Software Ltd., but lacked evidence to prove; and even though its claiming the photos involved were made by the third party Harbin Institute of Technology Science and Technology Software Ltd. was true, Poly Plaza Co. as the website operator and

beneficiary didn't examine whether or not the resource was leigitimate, then put other person's photo works into use, also should bear the corresponding tort liability.

Poly Plaza Co. on its website without obtaining legitimat authorization and without paying renumeration to Beauty View Photo Co., this behavior infringed the right of authorship, information network dissemination and obiaining renumeration because of authorizing others to use the photo works involved of Beauty View Photo Co., should bear the civil liability of ceasing tort, apologizing and compensating loss. Regarding the compensation amount, Beauty View Photo Co. could not prove its loss amount suffered from this case, and Poly Plaza Company's illegal gain also was difficult to verify, thus the first instance court discretionarily decided the compensation amount according to the details of the quantity, method, time used by Poly Plaza Co. and the nature of such company and so on. Concerning the reasonable payment, the first instance court discretionarily made the decision according to reasonableness and necessity principle.

In summary, the court held as follows[59]:

- Within 7 days of the judgment entering ino force, Poly Plaza Co. compensate Beauty View Photo Co. economic losses RMB 3,200 yuans and reasonable fee RMB 1,500 yuans by virtue of litigation, the captioned 2 items totaled RMB 4700 yuans;
- Within 10 days of the judgment entering ino force, Poly Plaza Co. on the home page of its website www.polyhotel.com continuously 72 h publish apology announcement(the announcement content need to be examined and verified by the first instance court. Once overduely execute, the first instance court will publish the main content of the first instance verdict in the relevant media, and the required fee should be born by Poly Plaza Co.)and
- Refute other litigation claims of Beauty View Photo Co.

Poly Plaza Co. dissatisfied with the first instance verdict, appealed to Beijing Intellectual Property Court, asked to repeal the first instance verdict and reject all Beauty View Photo Company's first instance litigation claims. Its appeal reasons mainly were that the first instance court did not find out whether or not the actual infringement occurred, the fact finding was not clear; the first instance court falsely recognized the order of alleged infringing photos and their appearing in Beauty View Photo Company's website, and illegimately distributed proof of liability; and Beauty View Photo Co. didn't fulfill legal obligation of examination against whether the third party works under use infringed right or not.

Beauty View Photo Co. replied that it insisted on the first instance prosecuting opinion, the fact finding of the first instance was clear and applied law correctly. Poly Plaza Co. had no evidence to prove the liability of the third party Harbin Institute of Technology Science and Technology Software Ltd., and Poly Plaza Co. had corresponding examination obligation toward the third party Harbin Institute of

[59] See Civil Judgmentof Dongcheng District Beijing people's court(2014)Dong Min (Zhi)Chu Zi No. 15798 (北京市东城区人民法院民事判决书<2014>东民<知>初字第15798号).

Technology Science and Technology Software Ltd., thus it asked to refute Poly Plaza Company's appeal and maintain the original verdict.

During the second trial, both Poly Plaza Co. and Beauty View Photo Co. didn't submit any evidential materials. Beijing Intellectual Property Court affirmed the facts examined by the first instance court.

On May 13, 2015 Beijing Intellectual Property Court decided that according to item (1) and (4) of Article 11 of *China's Copyright law*, copyright belonges to the author, except as otherwise provided in this Law. If there is no proof on the contary, any citizen, legal person or any other organization that is signed by the works is the author. Article 7 of *"Supreme People's Court 's Interpretation of Several Issues Concerning the Application of Law in the Trial of Copyright Dispute Case"* provides that the parties to provide copyright related manuscripts, original, legal publications, copyright registration certificate, the certificate issued by certification authority and the contract to obtain right etc., may be used as evidence. A natural person, legal person, or other organization signed on a work or product was deemed as the right holder of the copyright and copyright related right and benefit, but it has the opposite proof exception. In this case, Beauty View Photo Co. submitted the "scene photo gallery", printed copy of the home page of the photo involved, (2002) Jing Zheng Jing Zi No.03245, (2002)Jing Zheng Jing Zi No.12625, (2002)Jing Zheng Jing Zi No.03243 and (2002)Jing Zheng Jing Zi No.12629 notary papers, "Commossioned Creation Agreement" and "Commossioned Photo works Creation Explanation" etc. which had indicated Beauty View Photo Co. enjoyed the copyright of the 4 pieces photo works involved.

Poly Plaza Co. claimed that "the third party had the possibility to legimitately obtain the right to pay to use the photos involved", in accordance with the proof liability distribution principle of "who advocates, who proves", Poly Plaza Co. bore the liability to prove the third party legimitately obtained the right to pay to use the photos involved, but it didn't provide legal and effective evidence to prove for such claim, hence the court did not accept such claim of Poly Plaza Co. It said by appeal that the first court 's expression of "the third party made the photos involved" was not in conformity with the facts, it argued that the suspiciously infringing photos and Poly Plaza Company's website appeared at the same time, not as decided by the first instance cour that after the website made them to use. To this argument, the court decided that the first instance court 's expression of "the third party made the photos involved" was not inappropriate, and did not diffifficienate the order of use of the time to establish the website and the photos involved, and even though the first instance court diffifficienate the order of use of the time to establish the website and the photos involved, might not also influence the determination of tort fact of Poly Plaza Company's without copyright holder's authorization to use other person's works.

Thus, regarding such litigation reason of Poly Plaza Co., the court did not accept. Besides, Poly Plaza Co. contended that it did not have the legal obligation against whether or not the third party's works under use infringed the right, to this contention, the court did not accept, the reasons were as follows:

Although Poly Plaza Company's hotel website system was developed by the third party Harbin Institute of Technology Science and Technology Software Ltd., and under the contract between Poly Plaza Co. and the third party Harbin Institute of Technology Science and Technology Software Ltd. clarified that the latter enjoyed the copyright of those photos, but the contract had relativity, its effectiveness restricted only to the parties to the contract, and the content of the contract could not be against third party in good faith.

Therefore, the contract signed between Poly Plaza Co. and the third party Harbin Institute of Technology Science and Technology Software Ltd. could not generate any effect. Poly Plaza Co. as the webwite's owner, operator and manager, had the obligation to gurantee that its website's content and material source were legal and did not infringe other person's legitimate right and benefit. In this case, that Poly Plaza Co. did not obtain the right holder's legal license to use the works involved on the website, had already constituted infringing the right of the works involved of copyright holder, and should bear the corresponding tort liability.

As to the compensation amount and reasonable expenditure of this case, that the first instance court comprehensively considered the details of the quantity, method, time of Poly Plaza Company's using the photo works involved and the nature of such company's website and scale etc. to discretionarily decide the compensation amount was not inappropriate, and was affirmed by the court.

To summarize, the first instance judgment's facts finding was clear, its applicable law was correct, should be maintained in accordance with the law. Poly Plaza Company's each appeal reason could not be established, its appeal claim was not supported by the court. Beijing Intellectual Property Court held to refute the appeal and maintain the original verdict.[60]

6. Cinematographic works and works created in a way similar to cinematography;

Since China is a civil law country, works of those kinds that are original and contain a degree of aesthetic merit are usually indisputably recognized as enjoying copyright protection.

As to folk literary and art works, any protection of them will be provided by a separate regulation to *CCL*. China has not promulgated any regulation on protection of folk literary and art works. The draft of the regulation is still under discussion.[61]

7. Drawings of engineering designs and product designs, maps, sketches and other graphic works as well as model works;

In *Beijing Changdi Wanfang Mapping Technologies Co., Ltd. vs. Careland Technology (Shenzhen) Co.,Ltd. et al case (2008)*[62] (involving a copyright dispute

[60] See Civil Judgment of Beijing Intellectual Property Court (2015) Jing (Zhi) Min Zhong Zi No. 488 (北京知识产权法院民事判决书<2015>京<知>民终字第488号).

[61] See Copyright Protection in China (updated in April 2010) [EB/OL]. http://www.ipr2.org/roadmap

[62] See Civil Judgment of Guangdong High People's Coourt(2008)Yue Gao Fa Min San Zhong Zi No. 290 (广东省高级人民法院民事判决书<2008>粤高法民三终字第290号).

on alleged plagiarism of the ***"Dao Dao Tong"*** (GPS Electronic Map), Foshan City Intermediate People's Court, Guangdong Province decided that according to the evidence provided by Changdi Wanfang Co., it might be sure that Changdi Wanfang Co was the copyright holder of 4th edition ***"Dao Dao Tong"*** GPS electronic map (hereinafter simply named ***"Orbit Plot"***). The completed time of the accused work involved was before December 21, 2006, The completed and published time of Changdi Wanfang Co was obviously earlier than the accused work. Compared the accused infringing ***"362 Plot"*** product with 4th edition ***"Orbit Plot"***, its copyright was enjoyed by Changdi Wanfang Co., both had many aspects in common. Under the circumstance that the evidence provided by Careland Co. was not sufficient enough to prove it was self creation, his behavior obviously belonged to plagerization, Careland Co. constituted tort, should bear the corresponding tort liability according to law.

The copyright holder and producer of the accused product ***"362 Plot"*** was Careland Co., the accused product bought by Changdi Wanfang Co. with notarization from Foshan Jinli auto supplies Co. Ltd. Nanhai Branch indicated the copyright and producer was Careland Co., combined with the propaganda and introduction on Careland Company's website, it might be decided that Kailidexin Technology (Shenzhen) Co., Ltd. and Careland Co. jointly produced and sold "Zhong Jia Xun" GPS navigator containing infringing product ***"362 Plot"***, Jinli Co. sold "Zhong Jia Xun" GPS navigator containing infringing product ***"362 Plot"***, also constituted tort,

Therefore, Foshan City Intermediate People's Court held as follows[63]:

- Jinli Co. from the date of the judgment entering into force immediately cease sales conduct to infringe Changdi Wanfang Company's copyright of 4th edition ***"Orbit Plot"***, destroy the infringing products that have not yet been sold;
- Shenzhen Zhong Jia Xun Polytron Technologies Inc. from the date of the judgment entering into force immediately cease production and sales conduct to infringe Changdi Wanfang Company's copyright of 4th edition ***"Orbit Plot"***, destroy the infringing products that have not yet been sold;
- Careland Co. and Kailidexin Technology (Shenzhen) Co., Ltd. immediately cease production and sales conduct to infringe Changdi Wanfang Company's copyright of 4th edition ***"Orbit Plot"***, including desyroying the infringing products that have not yet been sold;
- Careland Co. and Kailidexin Technology (Shenzhen) Co., Ltd. within 30 days from the date of the judgment entering into force publish announcement on"China Surveying and Mapping Report", publicly apologize to Changdi Wanfang Co.;
- Careland Co. and Kailidexin Technology (Shenzhen) Co., Ltd. within 10 days from the date of the judgment entering into force compensate economic losses RMB 10 Millioms yuans; and
- Overrule Changdi Wanfang Company's other litigation claims.

[63] See Civil Judgment of Guangdong Province Foshan City Intermediate People's Court(2007)Fo Zhong Fa Min Zhi Chu Zi. No. 219 (广东省佛山市中级人民法院民事判决书<2007>佛中法民<知>初字第219号).

In the appeal trial, Guangdong High People's Coourt decided that navigation electronic map was mainly integrated text, pictures, graphics, sound, animation, video and other multimedia means to display the comprehensive information of urban, rural, tourist attractions and other objects. It not only included geographic information database, but also used the point, line, geometric figures, notes, and other map symbols for the database to do three-dimention or flat display. Its originality was mainly reflected in the process of the specific features, topography, inforrmation point etc. to be measured on the map, according to the purpose of map use, map scale and related measurement specifications and other requirement of measurement, made a choice on the features, landform, information point, etc. This process of choice, in fact, is the process of the creation of the mapping. Even when a person would choose the features and topography to do measurement, it also existed different choice of measurement ways. Therefore, the electronic navigation map was the same as other maps, belonged to the work with originalty, and could be protected as map work according to the regulation of *China's Copyright Law*.

In view of the case that both the actual losses of Changdi Wanfang Co. and the apecific amount of infringement of Careland Co. and Kailidexin Technology (Shenzhen) Co., Ltd. could not be made sure, the court couldn't support the compensation amount provided by Changdi Wanfang Co.

According to many relevant factors, the court comprehensively clarify that Careland Co. and Kailidexin Technology (Shenzhen) Co., Ltd. compensate Changdi Wanfang Co. economic losses RMB 1 million yuans. Changdi Wanfang Co. paid the reasonable fee in the process of maintaining right of this case definitely occurred, actual loss which could be verified to be true, also should be compensated together by Careland Co. and Kailidexin Technology (Shenzhen) Co.

As to Zhong Jia Xun Company's civil liability problem, the original insatance court held that he bore civil liability of immediately ceasing tort was in accordance with the law, should be supported. Jinli Co. received legal summons, refuses to appear in court, neither influenced hearing of the case, nor influenced deciding of its civil liability. The original insatance court held his bearing civil liability to cease tort also should be supported.

To summarize, part of the original insatance court's fact finding was wrong and was corrected by the court. It held as follows[64]:

- Maintain items 1,2,3,4 and 6 of the determination of the original insatance court; and
- Change item 5 into "Careland Co. and Kailidexin Technology (Shenzhen) Co., Ltd. within 10 days from the date of the judgment entering into force compensate economic losses RMB 1 Millioms yuans and reasonable maintainence fee RMB 821,870 yuans", the first instance hearing fee RMB 82,800 yuans, the cost of preservation RMB 5,030 yuans, the acceptance fee of the injunction RMB 1,000 yuans and case acceptance fee of second instance RMB 82,800 yuans total 171,630 yuans all be born by Careland Co. and Kailidexin Technology (Shenzhen) Co., Ltd.

[64] See Civil Judgment of Guangdong High People's Coourt(2008)Yue Gao Fa Min San Zhong Zi No. 290 (广东省高级人民法院民事判决书<2008>粤高法民三终字第290号).

This case is significant because it clarified the relationship between judicial copyright protection and administrative procedures for the publication of GPS maps. Further, the case illuminates the judicial process for determining whether or not an electronic map has been plagiarized.

Drawings of engineering designs and product designs are categorized as "graphic works" under *CCL* and are copyrightable in China. Work of applied art is also protected by *CCL* as work of fine art, as long as the aesthetic natures can be physically or conceptually separated from the utilitarian features. In some cases, China's *Anti-Unfair Competition Law* can also protect such industrial designs. For example, in a major civil ruling,[65] the Supreme People's Court held that the product configuration element of a product which is subject to an expiring design patent is in fact susceptible of protection under the *Anti-Unfair Competition Law*.

In practice, certain kinds of 3-D designed objects which have a strong eye appeal such as jewelry, toys and furniture can be protected under *CCL*. Additionally, some models such as models of buildings may be protected under *CCL* as model works. Three-dimentional representation of a two-dimentional design or drawing of a work of fine art can be considered to be infringements of the right of reproduction. For instance, producing a 3D Mickey Mouse toy in accordance with a Mickey Mouse cartoon picture without license constitutes a copyright infringement. However, engineering industrial products exploiting utilitarian features embodied in the design does not constitute a copyright infringement of the right of reproduction, although it may constitute an infringement on another IP right.[66]

Notably, there is no provision in *CCL* that precludes multiple protections of certain types of copyrighted works under other IP regulations: e.g. designs can also be patented, distinctive designs and logos can be protected as a trademark when they are used as such and so on. Resorting to patent/trademark laws and regulations other than copyright law gives an IP right owner more enforcement alternatives when an infringement occurs.[67]

8. Computer software;

Computer software is recognized as a copyrightable work under *CCL* and more specifically under *Regulation on the Protection of Computer Software*.[68] "Computer software" means "computer programs" (such as the source code program and its object code program) and "the documentation thereof" (written materials and diagrams to describe the contents, design, functions, and method of use of the program,

[65] See Civil Ruling of Supreme People's Court (2010) Min Ti Zi No 16 (最高人民法院民事裁定书<2010>民提字第16号).

[66] See Copyright Protection in China (updated in April 2010) [EB/OL]. http://www.ipr2.org/roadmap

[67] Ibid.

[68] First promulgated by Decree No. 84 of the State Council of the PRC on June 4, 1991 and repealed in 2012. Then promulgated by Decree No. 339 of the State Council of the PRC, and effective as of January 1, 2002, and revised by Decree No.632 of PRC State Council and effective as of March 1, 2013. Para.2, Art. 24 were amended.

such as program design explanations, flowcharts, user manuals, etc.). Once again, protection on computer software does not extend to ideas, concepts, processing methods, algorithms or operation designs, although some of the above may be protected in China as patents.

The Copyright Protection Centre of China(CPCC)is the official body responsible for software registration in China.

The following is required for software registration (see Art.9 and 11, *Registration of Computer Software Copyright Procedures*):

1. Bibliographical details of the owner, including name and address.
2. Copy of proof of identification of owner, for example business registration certificate of a company.
3. Details of the software programme including:

   - Date of establishment.
   - Operating environment, including details of hardware requirements and operating system.
   - Programming language used.
   - IF the software is not developed by the owner: how the rights to the software are derived, for example by assignment or inheritance, and related documentary proof.
   - Substance of the software, which can be submitted in either the form of ordinary deposition or exceptional deposition, as described below (see Art. 12, *Registration of Computer Software Copyright Procedures*).

   Ordinary deposition First and last 30 pages of:

- Source code.
- Specification/operation manual or entire documents if these have less than 60 pages each.

Exceptional deposition (any one of the below)

- First and last 30 pages of source code with confidential portions concealed, but the total concealed portions not exceeding 50% of the submitted source code.
- 2. First 10 pages of source code, plus any consecutive 50 pages of any other portion of the source code.
- 3. First and last 30 pages of target code, plus any consecutive 50 pages of any other portion of the source code.

The above rules are also applicable to the submitted specification/operation manual and it should be noted that each page of the source code must have at least 50 lines.[69]

The China Copyright Protection Center released "*'The Twelfth Five year' China Software Copyright Registration Analysis Report"*. According to the report, a total

[69] See Registration of Computer Software Copyright Procedures (2002) – HFG, EB/OL].http://www.hfgip.com/sites/default/files/law/registration_of_computer_software_copyright_procedures_2002_english.pdf

number of 924,000 software copyrights have been registered with an average annual increase of 28.96%, showing the rapid increase of software registrations in China. In 2011, the registrations broke the number 100,000; in 2014 it broke 200,000 while in 2015 it is nearly 300,000. New software copyright registrations in 2016 doubled from 2014 to 400,000.[70]

The copyright registration in hot industrial areas like Internet of things (IoT), APP and game software increased dramatically. For the APP software, the registration in 2015 reached 57,417, up 86.77% from 2014, up 800% from 2012.[71]

Where a foreign individual or entity receives any computer software work from a Chinese citizen or entity by way of licensing or transfer, the licensing or transfer is subject to registration or approval with the Ministry of Commerce ("MOFCOM") and MOFCOM offices at the local level under China technology import and export regulations(see Art. 22 of *Regulation on the Protection of Computer Software*).

9. Other works as provided in laws and administrative regulations.

This is a "catch all" clause mainly focusing on those works which are not regulated by *CCL* but are protected by other laws or regulations. The purpose of this clause is to response to the new works arising from technology and economy's development and the works which are not suitable to be provided in *CCL*.

For example, in *Wangmeng et al. v. Century Internet Communications Technology Co. Ltd.case(1999)*,[72] before China's 2001 Copyright Law amendment, the First Instance Court, Beijing Haidian District People's Court, interpreted that then existing copyright laws covered online publications and distributions. It held: "[P]aragraph 5 of Article 10 of the Copyright Law of China does not exhaust or enumerate all means of exploiting works. With the development of science and technology, new media of works will emerge and the range of exploiting works will be expanded. …".[73]

1.2 Unprotected Works by CCL

According to Article 5 of *CCL*, this Law shall not be applicable to:

1. Laws, regulations, resolutions, decisions and orders of state organs; other documents of legislative, administrative or judicial nature; and their official translations;
2. News on current affairs;

[70] See China sees upsurge in copyright registrations in 2016[N]. Xinhua, http://english.cri.cn/12394/2017/02/22/4383s952389.htm, 2017–02–22

[71] See China copyright registration for software soars in 2015 [N]. http://www.lexology.com/library/detail.aspx?g=23ca6f8d-c275-45e4-86f1-a35f51c7b619, July 13 2016.

[72] See Civil Judgment of BeiJing Haidian District People's Court (1999) Hai (Zhi) Chu Zi No. 57 (北京市海淀区人民法院民事判决书<1999>海<知>初字第57号).

[73] Ibid.

Whether or not news on current affairs is protected by copyright? Here is a case to pay attention. In *"Beijing News" News on current affairs involving copyright infringement case (2015)*,[74] Plaintiff obtained authorization from "Beijing News", enjoyed copyright on news report by "Beijing News". Defendant's operated mobile phone news report periodically sent news to mobile phone users. Plaintiff found out Defendant's sending mobile phone news report including works infringing his copyright. Therefore, Plaintiff brought the lawsuit to the court.

Defendant contended that the articles in "Beijing News" belonged to news on current affairs should not be protected by Copyright Law. Even they should be protected by *Copyright Law*; Defendant's use conduct also belonged to "fair use" behavior. Besides, the part in the accused infringing articles being identical with the one in the articles in "Beijing News" all belonged to using other's prior works. Hence, Defendant argued that his conduct did not constitute infringement of Plaintiff's copyright.

After hearing the case, Beijing Dongcheng District People's Court decided that the articles in "Beijing News" were not the news on current affairs provided by *Copyright Law*, which should be protected by copyright. Defendant's using such articles did not constitute "fair use" behavior, but because the part in the accused infringing articles being identical with the one in the articles in "Beijing News" all belonged to other's prior works, therefore, Defendant did not infringe Plaintiff's copyright. The court held to overrule Plaintiff's litigation claim[75] and was supported bt the second instance court.

This case is the typical case of determining news on current affairs involved, not only involves the protected object under Article 5 of *Copyright Law*, but also involves the interpretation and application of "fair use" under Item (3), Para. 1, Article 22 of Copyright Law.

In ordinary circumstance, if the reporter's report only involves such incident's basic constituents, and his/her use is the simplest langue and word, other people's report regarding such incident surely will use identical or basically identical langue or word, then such news report belongs to news on current affairs under Article 5 of *Copyright Law*, does not be protected by copyright.

In this case, because the articles of "Beijing News" involves neither only used the simplest langue and word, nor just involves basic elements, but to engage in classification summary, processing (including according to different criteria for the evaluation results of charitable organizations to classify and conclude, an interview with the person in charge of the evaluation organization etc.). It is thus clear that such articles have not belonged to pure fact news, does not constitute news on current affairs under Article 5 of Copyright Law.

The "fair use" situation indicated under Item (3), Para. 1, Article 22 of *Copyright Law* is the use of the "objective appearance of others" in the process of the event. If

[74] See Civil Judgment of Beijing intellectual Property Court(2015)Jing (Zhi) Min Zhong Zi No.1697(北京知识产权法院民事判决书 <2015> 京<知>民终字第1697号).

[75] See Civil Judgment of Beijing Dongcheng District People's Court(2015)Dong Min (zhi) chu Zi No. 7634 (北京市东城区人民法院>2015>东民<知>初字第7634号).

such use or reappearance conduct is "inevitable" for reporting news on current affairs, then such conduct need not obtain the copyright owner's permission, so as to encourage broadcasting news, and promote information exchange. Owing that the accused articles and the ones in "Beijing News" are both the reports on the same incident; the articles in "Beijing News" do not belong to works objectively appearing during the process of such incident's occurrence. Thus, the use of such works in the accused articles does not belong to "fair use" situation regulated by this provision.[76]

3. Calendars, numerical tables, forms of general use and formulas.

For instance, in *Zhang's orthopedic successor and Orthopaedic Dean Yang Tianpeng copyright infringment appeal case(2008)*,[77] after trial Sichuan Province Chengdu City Intermediate People's Court determined that *"dry Jun powder"* prescription was a kind of technology information to treat bone fractures by traditional Chinese medicine. It did not fall within the range of "work" of *China's Copyright Law*. Therefore, it can not be protected by such law.[78] Plaintiffs felt dissatisfied and filed the appeal to Sichuan Province High People's Court. On December 15, 2008, Sichuan Province High People's Court held to reject the appeal and uphold the original verdict.

In most cases, however, those exclusions apply only to purely factual works and work generated for public information by government agencies. Private works of translation and compilation, such as news features, would normally be considered copyrightable.

Besides, works out of term of protection shall not be protected by *CCL* either(see Article 21).

Notably, the amendment to Article 4 contained in the *CCL* (2nd Revision[79]) were adopted primarily in response to a findings by a WTO panel that China's denial of copyright protection of certain censored works was inconsistent with its TRIPs

[76] See supra note 9.

[77] See Civil Judgment of Sichuan Province High People's Court (2008) Chuan Min Zhong Zi No. 94 (四川省高级人民法院民事判决书<2008>川民终字第94号). For relevant comment, see Pu Dong Lawyer: Why Intellectual Property Right Doesn't Protect Secret recipe(Chinese version [EB/OL]. http://www.hao-lawyer.com/Content.aspx?NewsID=2038&Category=10&id=82, Apr.2,2011.

[78] See Civil Judgment of Sichuan Province Chengdu City Intermediate People's Court (2007) Cheng Min Chu Zi No. 883 (四川省成都市中级人民法院民事判决书<2007>成民初字第883号).

[79] China's Copyright Law (CCL) was adopted in the 15th meeting of the Standing Committee of the 7th National People's Congress of the PRC on Sep. 7, 1990 and revised in the 24th meeting of the Standing Committee of the 9th National People's Congress on Oct. 27, 2001 in accordance with the Decision on Revision of the CCL for the first time and in the 13th meeting of the Standing Committee of the 11th National People's Congress of the PRC on Feb. 26, 2010 in accordance with the Decision on Revision of CCL for the second time. The second revised CCL went into effect on Apr.1, 2010. This time is a minor amendment, including taking down the content of "a work was not eligible for protection under *China's Copyright Law* if it was prohibited from publication or distribution" from Article 4 and clearly stipulates "[I]n case of pledge of copyright, the pledger and the pledgee shall go through registration of the pledge with the copyright administration under the State Council" in Article 26.

Agreement obligations.[80] Copyright protection is now extended to all "works", without regard to restrictions on publication and distribution that are imposed by PRC authorities under other laws and regulations (these restrictions are unaffected by the amendments).

Previously, a work was not eligible for protection under *China's Copyright Law* if it was "prohibited from publication or distribution," which excluded from copyright protection all works that (1) contained objectionable content or (2) had not gone through required prepublication or pre-distribution censorship review (which also entails content-based review) (see Art. 4). This represented a significant obstacle to copyright protection because of the vagueness and broad reach of the applicable standards.

The types of content considered objectionable under Chinese law include those that: to violate the basic principles of China's Constitution; to jeopardize the unification, sovereignty and territorial integrity of the country; to disclose state secrets or jeopardize national security, honor or interests; to incite national enmity or discrimination; to jeopardize national solidarity or infringe national customs and habits; to preach evil religion [and/or] superstition; to disturb social order and stability; promote pornography, gambling or violence or abet crime; to insult or slander others or infringe others' legal rights; to jeopardize social morality or national cultural traditions; or are otherwise prohibited by law.[81]

Owners of the copyrights for works that fall into one or more of the foregoing categories are now entitled to pursue all remedies available under *China's Copyright Law* for copyright infringement, including injunctive relief, public apology and monetary damages. Nevertheless, a judge in Beijing's Second Intermediate People's Court pointed out that the content of copyright of illegal work required to be further specified is a key problem. After infringement, the remedy means for copyright owner of illegal work, the claimed amount of economic damage and the way to determine such amount still need enacting implementation rules or judicial interpretation for further clarification. Only in this way can guarantee *Copyright Law*'s logical self-consistency and normative operation.[82]

In practice, how effective the enforcement of copyright protection for these works will be, however, remains to be seen. It is unclear whether or not a copyright owner will be able to obtain damages if its work cannot be published or distributed in China, because the calculation of damages is based on "actual losses" under *CCL*, and China's courts have been reluctant to acknowledge actual losses where the right

[80] See Report of the Panel-CHINA ¨C MEASURES AFFECTING THE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS [EB/OL]. at 41,WT/DS362/R, http://www.worldtradelaw.net/reports/wtopanels/china-iprights(panel).pdf., January 26, 2009.

[81] See e.g. Art.26, Regulations on Publication Administration.

[82] See Zhou, Duo. A Research on Copyright of Illegal Work [EB/OL]. http://www.chinaipmagazine.com/journal-show.asp?id=568, visited on July 8, 2011.

holder has not obtained permission to publish or distribute the work in China. Accordingly, without further legislative (or judicial) clarification, the remedies available to these right holders might be limited to injunctive relief and/or a public apology from the infringer.

On balance, however, the amendments are an indication that *China's Copyright Law* is moving in the right direction and should benefit foreign right holders whose works are subject to censorship in China.

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Chapter 2
Copyright Subject

2.1 The Subject of Copyright in General Condition

2.1.1 Author

Para. 1, Article 11 of *CCL* provides that except otherwise provided in this Law, the copyright in a work shall belong to its author. The author of a work is the citizen who has created the work (Para.2, Art.11). Only natural person is the author de facto.

Where a work is created according to the intention and under the supervision and responsibility of a legal entity or another organization, such legal entity or organization shall be the author of the work (Para.3, Art.11). The citizen, legal entity or organization whose name is affixed to a work shall, without the contrary proof, be the author of the work (Para.4, Art.11).

In *Xiamen Nature Caring Products Co.,Ltd.vs. Kingmate(Xiamen) Import & Export Trading Co., Ltd. et al. coptright belonging case(2010)*,[1] Fujian Province Xiamen City Siming District People's Court held that:"[P]laintiff- Nature Caring Co. researched and developed independently bath gift sets and posted their pictures in Autumn Fair 2005, Spring Fair 2009 and the product ordered of 2009, including 6 pieces of No. A9CR80 products and 21 pieces of samples of goods. During the trial, Defendants -Kingmate and Xiamen Ri Yi Technology Co. Ltd. admitted Plaintiff was the researcher and developer of the captioned products. According to Article 11 of *China's Copyright Law*, if there is no evidence to the contrary, the citizen, legal entity or organization whose name is affixed to a work shall be the author of the work. Therefore, it may be presumed that Plaintiff is the author of the pictures involved. Defendant-(Xiamen) ChineTrading Co. Ltd. argues that Plaintiff can not prove the sources of those pictures and feels suspicious about the pictures' copyright,

[1] See Civil Judgment of Fujian Province Xiamen City Siming District People's Court (2010) Si Min Chu Zi No.2574 (福建省厦门市思明区人民法院民事判决书<2010>思民初字第2574号).

Y. Guo, *Modern China's Copyright Law and Practice*,
DOI 10.1007/978-981-10-5352-8_2

but still can't provide relevant evidences to overthrow it. Thus the court shall not accept such defense."[2]

2.1.2 Successor

Successor indicates the person who acquires the economy rights of copyright owing to those legal facts of inheritance, gift, bequeath, assignment and so on. The persons who inherit copyright include heir, donee, legatee, assignee, lawful holder of original work and the state. Successor can only become the succeeding subject of the economy rights of copyright, because the moral rights of copyright is not transferable.

For example, Article 15 of the *Implementing Regulation* stipulates that:"The rights of authorship, alteration and integrity of an author shall, after the death of the author, be protected by the heir in title and other bequeathed beneficiary."

In *Sungari International Auction Co. Ltd. and Yang Jikang et al. copyright belonging and tort dispute appeal case (2014)*,[3] on December 19, 2013, the judgment of the auctioning of Qian Zhongshu's letters and manuscripts was released. Beijing Second Intermediate People's Court held that Sungari International Auction Co. cease the conduct of infringing the letters and manuscripts' copyright, compensate Yang Jikang economic losses RMB 100,000 yuans. Sungari International Auction Co. and Li Guoqiang cease the conduct of invading privacy, jointly pay Yang Jikang mental distress compensation RMB 100,000 yuans and publish a statement to apology to Yang Jikang on "Beijing Youth Daily". Besides, Sungari International Auction Co. should publish a statement to apology to Yang Jikang on its official web site.[4]

On April 10, 2014, Beijing High People's Court heard the case and decided that according to relevant legal regulations, Yang Jikang as Qian Zhongshu's widow and Qian Yuans's mother, was those two persons' close relative. After those two persons passed away, Yang Jikang had the right to ask the infringer to bear tort liability, and inherit according to law Qian Zhongshu and Qian Yuans's economic right of the copyright, protect according to law those two persons' right of authorship, modification, integrity and exercise according to law the right of publication.

Sungari International Auction Co. as the auctioneer could not prove that it had fulfilled the obligations to sign an auction contract with the client required by law, review the identity certificate of the client and require the client to provide other information related to copyright and privacy, had subjective fault, thus should bear corresponding tort liability.

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[2] Ibid.

[3] See Civil Judgment of Beijing High People's Court (2014) Gao Min Zhong Zi No. 1152 (北京市高级人民法院民事判决书<2014>高民终字第1152号).

[4] See Civil Judgment of Beijing Second Intermediate People's Court (2013) Er Zhong Min Chu Zi No. 10113 (北京市第二中级人民法院民事判决书<2013>二中民初字第10113号).

Sungari International Auction Co. held seminar, provided identification experts the letters and manuscripts involved, but did not agree with the experts that it would not be allowed to provide the letter and manuscripts involved to the public, did not make such expression to the experts and reproduced media related articles through his website etc., infringed Yang Jikang and other persons' right of publication, reproduction, distribution, information network dissemination, remuneration and Yang Jikang and other persons' right of privacy. Therefore, the court held to reject the appeal of Sungari International Auction Co. and maintain the original verdict.

In conclusion, in this case, due to the non-disclosure of these letters and manuscripts, Yang Jiang acting as a successor of these letters and manuscripts could prevent the auctioning on the ground of copyright infringement. Therefore, the result of such a judgment is correct.

2.1.3 Foreigner or Stateless Person

According to Article 2 of *CCL*, any work of a foreigner or stateless person which enjoys copyright under an agreement concluded between the country to which the author belongs or in which the author permanently resides and China, or under an international treaty to which both countries are parties, shall be protected by this Law (Para.2., Art.2).

Any work of a foreigner or stateless person published for the first time and within the territory of China shall enjoy copyright in accordance with this Law (Para.3, Art.2).

Any work of an author from a country not having concluded an agreement with China or entered into an international treaty jointly with China or of a stateless person, which is published for the first time in a country as a member of the international treaty into which China has entered or published in a member country and non-member country at the same time, shall be protected by this Law (Para.4, Art.2).

2.2 Copyright Owner of Derivative Work

"Derivative work" is a work based upon one or more preexisting works and is produced by way of creative labor such as adaptation, translation, annotation and arrangement etc.

Since derivative activity is the creative labor of the adapter, translator, annotator or arranger and is an important creation method, he/she shall enjoy the copyright of new work arising from derivative creation but shall not infringe the copyright of original work while exercising the copyright (see Art.12).

2.3 Copyright Owner of a Work of Joint Authorship

A work of joint authorship is a work created cooperatively by two or more persons.

Where a work is created jointly by two or more co-authors, the copyright in the work shall be enjoyed jointly by those co-authors. Co-authorship may not be claimed by anyone who has not participated in the creation of the work (Para.1. Art.13, *CCL*).

If a work of joint authorship can be separated into independent parts and exploited separately, each co-author shall be entitled to independent copyright in the parts that he/she has created, provided that the exercise of such copyright does not infringe upon the copyright in the joint work as a whole (Para. 2, Art.13, *CCL*).

Where a jointly created work is not able to be used separately, the copyright of the work shall be jointly enjoyed by the joint authors, and exercised by unanimous agreement; where the joint authors fail to reach an agreement and without justified reasons, any party may not prevent any of the other parties from exercising the copyright except the right of assignment, but the gaining from the exercising shall be reasonably distributed between or among all joint authors (Art.9, *Implementing Regulations*).

In *Shanghai Animation Film Studio vs. Qu and Publishing House of Electronics Industry for appeal of dispute over possession of copyright case (2015)*[5], Shanghai Xuhui District People's Court after the first trial held that prior to the proceeding of the case, both Shanghai Animation Film Studio (Plaintiff) and Qu (Defendant) were exercising the copyright of the work- a classic comics and story selection of ***"Afanti"*** (See Fig. 2.1) in dispute and both parties were informed and had no objection. For a long time, both parties had reached a tacit agreement that "both parties had the right to control the work in dispute" by actual practice, so the economic right in the art work in dispute was determined as owned by both Plaintiff and Defendant.[6] After the second trial, Shanghai Intellectual Property Court viewed that if either had the economi right in the work based on the actuality of the case; it apparently would lead to imbalance of interests and go against the equity principle. Hence, the court determined that the economic right in the work should be shared by Plaintiff and Defendant pursuant to the principle of honesty and credibility, and the verdict of the first trial was affirmed.[7]

This case involves the attribution of the copyright in the special historical period, and ***Afanti***'s classic comics and stories featured has a certain social impact. Shanghai Intellectual Property Court comprehensively considered the social background of the planned economy when the work is completed, combined the fact that the two

[5] See Civil Judgment of Shanghai Intellectual Property Court (2015) Hu (Zhi) Min Zhong Zi No. 200 (上海知识产权法院(2015)沪<知>民终字第200号).

[6] See Civil Judgment of Shanghai Xuhui District People's Court (2013) Xu Min San (Zhi) Chu Zi No. 1048 (上海市徐汇区人民法院民事判决书 <2013>徐民三<知>初字第1048号).

[7] See Civil Judgment of Shanghai Intellectual Property Court (2015) Hu Zhi Min Zhong Zi No. 200 (上海知识产权法院(2015)沪知民终字第200号).

Fig. 2.1 "Afanti" image (Source: http://www.6xw.com/qqyule/2640.html)

sides knowing that in their use of the work involved in the period of up to 30 years neither expressed objection nor started the relief procedure to explore the true meaning of the parties, measured the contribution of the parties to the promotion of role modeling art works, used fair and honest credit principle to hold Shanghai Animation Film Studio and Qu Jianfang jointly enjoyed the work's economic right.

The judgment of the case comprehensively measures the history, status and other factors, according to the principle of "history, fairness and reality", fairly and reasonably settles disputes, balances the interests of individuals and groups, is a powerful exploration of the court to determine the issue of the right to the animation role created in the special historical period.[8]

2.4 Copyright Owner of Compilation Works

A work created by compilation shall refer to the work which is compiled of some works, fragments of works or the data or other materials not constituting a work, and the choice or layout of the contents of which embodies the original creation (former section of Art.14).

[8] See Shanghai Animation Film Studio, Qu Jianfang and Publishing House of Electronics Industry for Appeal of Dispute over Possession of Copyright Case (Chinese version) [EB/OL]. http://www.cnsymm.com/2015/1231/21603.html, 2015–12–31.

The copyright of the compilation work shall be enjoyed by the compiler, provided that the exercise of such copyright does not infringe upon the copyright of the pre-existing works included in the compilation (latter section of Art.14).

Here, *Zheng Lin vs. Beijing Zhongguancun Book Building Co. Ltd. et al. copyright belong dispute case (2010)*[9] can be viewed for some reference. In August 2008, one of the defendants- Shandong Science and Technology Publishing House Co. Ltd. published *"Zhang Daozhen University English Grammar"* which indicated "edited by Zhang Daozhen" and printed words of "the work of force dumping by leading authority of grammar-Prof. Zhang Daozhen" without the author's signature. During the trial, Defendants argued that the content of involved book was compiled by Shandong Spark Media Group Co. Ltd. and such book was a service work. Zhang Daozhen's labor was presenting idea and conducting review, did not participate in drafting and revision.

After trial, Beijing Haidian District People's Court identified that "'[E]ditor' is not the prescribed method of signature required by legal principle of copyright, whose meaning is compilation, cooperation, interpretation or otherwise, but the signing editor should invest creative intellectual labor. Creation indicates the whole process from idea to expression. Zhang Daozhen did not invest creative intellectual labor, thus should not sign."

Therefore, databases and compilations such as dictionaries and textbooks are recognized as works of compilation in China and can enjoy copyright protection if the compilations embody intellectual creation by the compilers in the selection and/or arrangement of the content. The compiler owns the copyright of the compilation work, provided that the exercise of such copyright does not infringe upon the copyright such as the right of publication, the right of authorship, the right of integrity and the right of receiving remuneration etc. of the pre-existing works included in the compilation.

In *Chu Xiaowei vs. Xiamen Cheng Quang Network Co.Ltd. copyright belonging and infringement case(2010)*,[10] Fujian Province Xiamen City Siming District People's Court held whether or not the power point documentary materials involved could enjoy copyright depended on whether or not they reflected the author's creativity. Parts of 9 pieces of the power point documentary materials involved were edited from other website' news but were recompiled and rearranged by Plaintiff-Chu Xiaowei whose expressed idea and theme reflected his creativity. According to law, an intellectual achievement with creativity and can be reproduced by a kind of tangible form is in the sense of work under *Copyright Law*, therefore, 9 pieces of the materials provided by Plaintiff can be the object of copyright. Nevertheless, 3 pieces of the materials were not deemed as copyrighted by the court because Plaintiff couldn't submit enough evidence.

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[9] See Civil Judgment of Beijing Haidian District People's Court (2010) Hai Min Chu Zi No. 10970. (北京市海淀区人民法院民事判决书 <2010> 海民初字第10970号).

[10] See Civil Judgment of Fujian Province Xiamen City Siming District People's Court (2010) Si Min Chu Zi No.9468. (福建省厦门市思明区人民法院民事判决书<2010>思民初字第9468号).

Because the right of compilation is the author's exclusive right, the compiler should obtain approval from other person and should not infringe his/her copyright of the right of publication, the right of authorship, the right of integrity and the right of receiving remuneration and so on.

2.5 Copyright Owner of a Cinematographic Work or a Work Created in a Way Similar to Cinematography

The copyright of a cinematographic work or a work created in a way similar to cinematography shall be enjoyed by the producer, while any of the playwright, director, cameraman, words-writer, composer and other authors of the work shall enjoy the right of authorship, and shall be entitled to obtain remuneration as agreed upon in the contract between him/her and the producer (Para.1, Art.15, *CCL*).

The authors of the screenplay, musical works and other works that are included in a cinematographic work or a work created in a way similar to cinematography and can be exploited separately shall be entitled to exercise their copyright independently (Para.2, Art.15, *CCL*).

2.6 Copyright Owner of a Service Work

A work created by a citizen when fulfilling the tasks assigned to him/her by a legal entity or another organization shall be deemed to be a service work. Unless otherwise provided in Paragraph 2 of Article 16, the copyright of such a work shall be enjoyed by the author, but the legal entity or organization shall have a priority right to exploit the work within the scope of its professional activities. During the 2 years after the completion of the work, the author shall not, without the consent of the legal entity or organization, authorize a third party to exploit the work in the same way as the legal entity or organization does (Para.1. Art.16, *CCL*).

In *Ji Cheng vs. China Art Research Institute et al. copyright belonging and infringement case (2010)*,[11] Beijing Haidian District People's Court also pointed out that:"[T]here are two kinds of service work, one is that the author enjoys copyright but the unit has a priority right to exploit the work within the scope of its professional activities; another is that the author enjoys the right of signature and the unit enjoys all other copyrights."[12]

China Art Research Institute not only claimed painting masks involved belonged to the second kind of service work, but also expressed all the copyrights were belonged to him. According to the circumstances reflected by the evidences in this

[11] See Civil Judgment of Beijing Haidian District People's Court (2010) Hai Min Chu Zi No.25222. (北京市海淀区人民法院民事判决书<2010>海民初字第25222号).

[12] Ibid.

case, the court determined that the Peking Opera Painting masks drawn by Wang Xinfu were not created by mainly utilizing the unit's physical and technical condition and should not be taken responsibility by the unit as claimed by China Art Research Institute. Moreover, China Art Research Institute had admitted that it enjoyed the ownership of painting masks involved in writing and the family of Wang Xinfu (i.e.Plaintiff) enjoyed their copyright.

In addition, the court clarified that:"Painting masks involved belongs to work of fine art, transferring of ownership of the original copy shall not be deemed as transferring of copyright. China Art Research Institute's contradictory explanation confuses the difference between the rights enjoyed by owner of the work of the original copy and copyright owner. Although the owner of the work of fine art of the original copy enjoys its ownership and the right of exhibition of copyright at the same time, yet it does not enjoy such work's other copyright and shall not damage other copyright enjoyed by copyright owner."[13]

After announcing the verdict, none of the parties appealed. This verdict was taken effect.

In *Hu Jinqing and Wu Yun v. Shanghai Animation Film Studio dispute over copyright ownership case (2011)*[14], Hu Jinqing and Wu Yun, The father of ***"Calabash Brothers"*** (See Fig. 2.2) sued Shanghai Animation Film studio several years ago, who were asked to confirm whether or not the copyright of characters in ***"Calabash Brothers"*** belonged to them, which the studio said the art character's copyright belongs to the studio.

This is a typical case of copyright dispute between employee and enterprise. Besides, the creation of the carton figure was in 1960's when China had no copyright law then, the other reason for the dispute is that the two sides didn't sign an agreement at the very beginning.

Hu Jinqing and Wu Yunchu, the Appellants, not satisfied with the first instance trial judgment,[15] lodged an appeal to the court, requesting to overrule and amend the judgment made by the court of first instance to confirm that the copyright of the original works of ***"Calabash Brothers"*** (including ***"Calabash Brothers"*** and ***"Calabash King Kong"***) in the serial paper-cut films ***"Calabash Brothers"*** and its sequel ***"Calabash King Kong"***, belong to the Appellants Hu Jinqing and Wu Yunchu.

After trial, the court decided that all other facts found by the court of first instance were true and the court confirmed such facts.

The court held that viewing from the creation of animation films, the character images in such animation films should have static images at first which should be

[13] See Civil Judgment of Beijing Haidian District People's Court (2010) Hai Min Chu Zi No.25222. (北京市海淀区人民法院民事判决书<2010>海民初字第25222号).

[14] See Civil Judgment of Shanghai Second Intermediate People's Court (2011) Hu Er Zhong Min Wu (Zhi) Zhong Zi No. 62 (上海市第二中级人民法院民事判决书 <2011> 沪二中民五<知> 终字第62号).

[15] See Civil Judgment of Shanghai Huangpu District People's Court (2010) Huang Min San (Zhi) Chu Zi No. 28 (上海市黄浦区人民法院民事判决书 <2010> 黄民三<知> 初字第28号).

Fig. 2.2 Calabash Brothers" image (Source: http://www.iqiyi.com/a_19rrhbkfv1.html?vfm=2008_aldbd)

protected by the *Copyright Law* if they constituted an artwork. In this case, both parties confirmed that the disputed images of ***"Calabash Brothers"*** were firstly created by Hu Jinqing and then amended by Wu Yunchu. The Appellee stated that the images were designed by taking the collective ideas of the camera crew into consideration and they represented its intention. However, according to existing evidence, before the project of the animation film *"**Calabash Brothers**"* was officially initiated, Hu Jinqing had created the image drafts of ***"Calabash Brothers"*** independently which were submitted to relevant departments of the Animation Film Studio for approval after being revised and amended by Wu Yunchu.

Though the final images of ***"Calabash Brothers"*** were formed after times of revision by other creation staff of the Animation Film Studio, they were not substantively different from the original ones, thus did not constitute new works. Therefore, it could not be proved that the images of ***"Calabash Brothers"*** were created under the leadership of the Appellee and indicated the intention of the Appellee. There was the outline of the literary script of ***"Seven Brothers***" at that time. The contents of the script were quite different from those of the later ***"Calabash Brothers"***. Besides,

there were no character images then. Therefore, the conclusion that the images of ***"Calabash Brothers"*** were based on ***"Seven Brothers"*** could not be drawn accordingly.

In conclusion, the court determined that the disputed artwork of images of ***"Calabash Brothers"*** did not belong to the situations specified in Para. 3, Article 11 of the *Copyright Law* that is to say, they were not "legal person works".

On the other hand, the Appellants submitted the story board scripts for the first three episodes of ***"Calabash Brothers"*** as the evidence for the original artwork of the images of ***"Calabash Brothers"***. The story board scripts were not accepted by the court of first instance as evidence for they did not meet the formal requirements, against which the court did not raise any objection. However, the story board scripts proved that the copyright of the works were not necessarily connected with the carrier thereof. In other words, even if the Appellants failed to provide the originals of the images whose copyright they claimed, it did not mean that their rights and interests were denied. In this case, the right of authorship of the animation film ***"Calabash Brothers"***, the testimony of witnesses and the statement on the creation made by both parties were sufficient enough to determine that it was the Appellants who created the artwork of the disputed images of ***"Calabash Brothers"*** to fulfill their tasks allocated by the Studio. Therefore, the disputed works were works created in the course of employment specified in Article 16 of *Copyright Law*. The key of this case lies in the ownership of copyright of these works created in the course of employment. The artwork of the disputed images in this case was created before the implementation of *Copyright Law* when no laws, regulations and policies had set down provisions on the ownership of copyright of works created in the course of employment.

Since the disputed works were still in the copyright protection period, this case should be settled according to the applicable prevailing *Copyright Law*. Article 16 of *Copyright Law* specified the ownership of copyright of works created in the course of employment under different circumstances. The court held that the disputed work belong to the "special works created in the course of employment" defined in Item (2), Para.2, Article 16 that "works created in the course of employment whose copyrights are owned by a legal person or other organization under laws, administrative regulations or agreements and contracts.

In accordance with Item (1), Para.1, Article 153 and Article 158 of *Civil Procedure Law of the People's Republic of China*, the court hereby made the following judgment:

- Reject the appeal and affirm the original verdict.
- The court fee for the second trial of this case is RMB 800 yuans, which shall be born by the Appellants, Hu Jinqing and Wu Yunchu.

In retrial period, the judgment has been published on Issue 4 of the *Gazette of the Supreme People's Court of the People's Republic of China* in 2013 and has been selected into the 2012 China's 10 Cases on Judicial Protection of Intellectual

Shit Tiger" Cartoon image

Fig. 2.3 Shit Tiger" Cartoon image (Source: http://www.aibaoo.com/zs/2557-1.html)

Property and the 2012 Shanghai's 10 Cases on Judicial Protection of Intellectual Property.[16]

In *Kabuskiki Kaisha Beilesheng v. Guangdong Tai Mao Food Co., Ltd., Little GUI (Shanghai) Food Co. Ltd. & Ao Xiaoping's infringement of the right of reproduction, distribution rights, information network dissemination case (2013)*[17], Plaintiff kabuskiki kaisha Beilesheng enjoyed ***"Shit Tiger"*** (See Fig. 2.3) cartoon image art work's copyright. In 1999, the animation, books and other child care products of ***"Shit Tiger"*** cartoon image entered into China. Defendant Guangdong Tai Mao Food Co., Ltd. (hereinafter Tai Mao Co.) printed ***"Happy Tiger"*** model holding different foods on the packing of products of its produced and sold chocolate cups and other products, and printed the product model with ***"Happy tiger"*** model on its product brochure or publicized on its website.

Defendant Little GUI (Shanghai) Food Co. Ltd. (hereinafter Little GUI Co.) and Defendant Ao Xiaoping sold the captioned products with ***"Happy tiger"*** model. Plaintiff thought that the ***"Happy Tiger"*** model used by Tai Mao Co. on its produced and sold product. Its brochure and website, constituted a substantial similarity to Plaintiff's ***"Shit Tiger"*** cartoon image. Therefore, Plaintiff sued to the court requesting the court to order three Defendants cease infringement and compensate for its economic losses RMB 5 million yuans, reasonable cost of RMB 128,746

[16] Hu Jinqing and Wu Yunchu v. Shanghai Animation Film Studio Dispute over Copyright Ownership [EB/OL]. http://www.hshfy.sh.cn/shzcw/English/xxnr_view.jsp?pa=aaWQ9MzUzMzI1JnhoPTEPdcssz&jdfwkey=rfcum1

[17] See Civil Judgment of Shanghai High People's Court (2013) Hu Gao Min San (Zhi) Zhong Zi No. 81 (上海市高级人民法院民事判决书<2013>沪高民三<知> 终字第81号).

yuans and Defendant Tai Mao Co. public apologize on "Legal Daily", eliminate the impact.

Shanghai First Intermediate People's Court heard the case and found that Plaintiff enjoyed ***"Shit Tiger"*** cartoon image art work's copyright. In 1996, ***"Shit Tiger"*** cartoon image was introduced into Mainland China under the form of broadcasting Animation film and television program in China Guangdong TV station. Later on, Plaintiff put in a lot of advertising for ***"Shit Tiger"*** cartoon image. ***"Shit Tiger"*** cartoon image enjoyed a certain degree of visibility in relevant public of Mainland China esp. kid and youth.

As the enterprise in China Guangdong district, Tai Mao Company's relevant consumers also mainly was kid and youth, thus when it carried on product marketing, it had complete opportunity to contact Plaintiff's ***"Shit Tiger"*** cartoon image. The accused infringing ***"Happy Tiger"*** model contained the whole main features of ***"Shit Tiger"*** cartoon image, constituted substantial similarity with ***"Shit Tiger"*** cartoon image. Tai Mao Company's behavior to arbitrarily use ***"Happy Tiger"*** model on its product, brochure and website and Little GUI Company and Ao Xiaoping's behavior to arbitrarily sold products containing ***"Happy Tiger"*** model, all infringed Plaintiff's copyright.

Therefore, the court held that three defendants cease infringement, Defendant Tai Mao Co. compensate Plaintiff economic losses RMB 300,000 yuans and reasonable fee RMB 80,000 yuans, total RMB 380,000 yuans; Defendant Tai Mao Co. publish a statement in "Legal Daily" to eliminate the impact.[18] After judgment,Tai Mao Co. dissatisfied and filed appeal. Shanghai High People's Court held to reject the appeal and upheld the original verdict.

This case's right holder is Japanese enterprise. Its ***"Shit Tiger"*** cartoon image had a very high visibility in China and should be protected by China's law according to law. Without permission, Defendant Tai Mao Co. used ***"Happy Tiger"*** model which was extremely similar with ***"Shit Tiger"*** cartoon image on his child food. This is a typical counterfeiting conduct. Defendant Tai Mao Company's intention to "take a free ride" is very obvious. In accordance with the infringing fact of this case, the court makes the judgment of compensation amount of RMB 380,000 yuans with reasonable fee included according to law, awards sufficient protection to famous cartoon image, severely combats such kind of "taking a free ride" conduct, fully reflects the Chinese courts to equally protect intellectual property rights of Chinese and foreign parties.[19]

During the 2 years after the completion of a work made for hire, the author, with the permission of the legal entity or organization, authorizes a third party to exploit the work in the same way as the legal entity and receives remuneration, the

[18] See Civil Judgment of Shanghai First Intermediate People's Court (2012) Hu Yi Zhong Min Wu (Zhi) Chu Zi No. 132 (上海市第一中级人民法院民事判决书<2012>沪一中民五<知> 初字第132号).

[19] Copyright Infringement Dispute of "Shit Tiger" Cartoon Image (Chinese version) [EB/OL]. http://www.chinacourt.org/article/detail/2014/04/id/1281661.shtml, 2014–04–24.

remuneration shall be distributed between the author and the entity or organization at an agreed ratio (Para.1, Art.12, *Implementing Regulations*).

The time limit of 2 years after the completion of the creation of a work shall be calculated from the date on which the author thereof delivers the work to the entity (Para.2, Art.12, *Implementing Regulations*).

In the following cases the author of a service work shall enjoy the right of authorship, while the legal entity or organization shall enjoy other rights included in the copyright and may reward the author:

1. Drawings of engineering designs and product designs, maps, computer software and other service works, which are created mainly with the materials and technical resources of the legal entity or organization and under its responsibility;
2. Service works of which the copyright is, in accordance with the laws or administrative regulations or as agreed upon in the contract, enjoyed by the legal entity or organization (Para.2, Art.16, *CCL*).

2.7 Copyright Owner of a Commissioned Work

The ownership of copyright in a commissioned work shall be agreed upon in a contract between the commissioning and the commissioned parties. In the absence of such a contract or of an explicit agreement in the contract, the copyright in such a work shall belong to the commissioned party (Art.17, *CCL*).

In *Fujian Province Aquatic Design Institute vs. Hohai University Design Institute copyright belonging and infringement dispute case (2007)*,[20] Fujian Province Zhangzhou City Intermediate People's Court held that:"[P'laintiff was commissioned by Long Hai City Newport Industrial Development Co. Ltd. to compile 'Grade A Fishing Port Project Master Plan Report for Port End, Long Hai City, Fujian Province' ('Plan Report' I) and didn't mention the ownership of copyright in the contract. Thus, the copyright of 'Plan Report' I shall be enjoyed by Plaintiff in accordance with law. 'Plan Report' II compiled by Defendant heavily quoted the content of 'Plan Report' I esp. 'Questions and Suggestions' of Chapter Ten were almost copied in the responsive parts of 'Plan Report' I and didn't indicate the source. Moreover, 'Plan Report' II had been sent already for review in the conference of Grade A Fishing Port Project of Port End, Long Hai City, Fujian Province. Therefore, Defendant's conduct infringed the copyright enjoyed by Plaintiff. Defendant shall assume the liability for infringement and pay damage to Plaintiff."[21]

[20] See Civil Judgment of Fujian Province Zhangzhou City Intermediate People's Court (2007) Zhang Min Chu Zi No.1 (福建省漳州市中级人民法院民事判决书<2007>漳民初字第1号).

[21] See Civil Judgment of Fujian Province Zhangzhou City Intermediate People's Court (2007) Zhang Min Chu Zi No.1 (福建省漳州市中级人民法院民事判决书<2007>漳民初字第1号).

2.8 Copyright Attribution of the Transfer of Ownership of the Original Copy of a Work

According to Art.18 of *CCL*, the transfer of ownership of the original copy of a work of fine art or another work shall not be deemed to include the transfer of the copyright in such a work, however, the right to exhibit the original copy of a work of fine art shall be enjoyed by the owner of such original copy.

In addition to a work of fine art, we should pay attention that other works with ownership of carrier possibly transferred will not necessarily lead to the transfer of copyright. According to *Contract Law of the People's Republic of Chin*a, when an object such as computer software with intellectual property rights is sold, the intellectual property rights of such object shall not belong to the buyer except as otherwise stipulated by law or agreed upon by the parties.

2.9 Copyright Attribution of a Work of an Unknown Author

A work of an unknown author indicates the work whose author's identity can not be made known via normal channel. If a work does not have the author's name mentioned on it or is signed with a pen name rarely known to anyone, but the holder of the original work or draft receiving unit ascertains the real identity, then it does not belong to a work of an unknown author.

According to Art.13 of the *Implementing Regulation*, in the case of a work of an unknown author, the copyright, except the right of authorship, shall be exercised by the owner of the original copy of the work. Where the author has been identified, the copyright shall be exercised by the author or his/her heir in title.

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Shanghai Animation Film Studio, Qu Jianfang and Publishing House of Electronics Industry for Appeal of Dispute over Possession of Copyright Case (Chinese version) (2015)[EB/OL]. http://www.cnsymm.com/2015/1231/21603.html. 2015–12–31

Chapter 3
Copyright Content

China *Copyright Law* (*CCL*) grants authors of works both moral rights and economic rights.

3.1 Moral Rights

According to Items (1)–(4), Paragraph 1, Article 10 of *CCL*, moral rights indicate as follows:

1. The right of publication, that is, the right to decide whether or not to make a work available to the public;
2. The right of authorship, that is, the right to claim authorship and to have the author's name mentioned in connection with the work;

In *ZhangYanjin vs. International Culture Publishing Co. Case (2008)*[1] (involving dispute of copyright-related moral right), Beijing Dongcheng District People's Court held that: "[A]ccording to Copyright Law, the right of authorship indicates the right to claim authorship and to have the author's name mentioned in connection with the work. It includes that the author has the right to sign real name, fictitious name, pseudonym or not sign and also includes the right to forbid other people to sign his/her name. In this case, Defendant argued that signing Plaintiff's name as chief editor of the published book involved has acquired the license from Plaintiff but can not provide any responsive evidence for proof. Thus, Defendant's such defensive opinion is not admissible by the court. Defendant's act to arbitrarily sign Plaintiff's name on the work not created by Plaintiff without his authorization, infringed his right of authorship. According to the provision of *Copyright Law*, one who produces and sells the work faking other person's signature, shall bear the civil

[1] See Civil Judgment of Beijing Dongcheng District People's Court (2008) Dong Min Chu Zi No. 06121 (北京市东城区人民法院民事判决书<2008>东民初字第06121号).

Y. Guo, *Modern China's Copyright Law and Practice*,
DOI 10.1007/978-981-10-5352-8_3

liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making a public apology or paying compensation for damages. ".[2]

In *Sun Lijuan sues Urban Revivo (Guangzhou) and Guangzhou Urban Renewal for copyright infringement case (2015)*,[3] Sun Lijuan (Plaintiff) published a piece of art work showing a giraffe on a website on January 12, 2011. Sun's work then won first prize at a T-shirt design competition in March, 2011. Sun claimed that the two Guangzhou companies (Defendants) used her work in their products and thus infringed her signature, reproduction and publishing rights. She applied to court for an order that the two defendants stop the infringement, pay compensation of RMB 270,000 yuans, and make written apologies to affect public awareness.

The Guangzhou Intellectual Property Court decided that showing the name of authors of art works used on clothes was common practice in the fashion design industry, and therefore the two defendants violated Sun's signature right. Considering the fame of the art works, Guangzhou Urban Renewal's obvious attention, and Urban Revivo (Guangzhou)'s significant business operations, the intellectual property court determined that the compensation was too low in the first verdict and ordered the two defendants compensate Sun with RMB 80,000 yuans and offer her an apology.

3. The right of alteration, that is, the right to alter or authorize others to alter one's work;
4. The right of integrity, that is, the right to protect one's work against distortion and mutilation; the right of attribution of authorship, the right of disclosure of the work to the public, the right to revise the work, and the right of keeping integrity of the work.

Unlike economic rights, moral rights are closely related to the author's personality. Thus. moral rights are not allowed to be waived, licensed or transferred by the author. As a consequence, a contract between a college student and a ghost writer to finish a thesis under the name of the student is null and void, since it actually transferred the right of attribution of authorship and other moral rights.[4]

In *Dai Dunbang and Anhui Hole Wine Limited by Share Ltd. infringement of the right of authorship of the work, to protect the integrity of the work, the right of reproduction and the right of publication disputes case (2012)*,[5] in April 1998, Tianjin People's Fine Arts Publishing House publicized *"Pictures of Tang Poems 100"*. Such a book collected ***"Su Shen Cun"*** painted by Dai Dunbang and had his signature in the right hand side of the painting.

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[2] Ibid.

[3] See Civil Judgment of Guangzhou Intellectual Property Court (2015) Yue Zhi Fa Zhu Min Zhong Zi No. 177(广州知识产权法院民事判决书<2015>粤知法著民终字第177号).

[4] See Copyright Protection in China (updated in April 2010) [EB/OL], at http://www.ipr2.org/roadmap.

[5] See Civil Judgment of Shanghai Second Intermediate People's Court (2012) Hu Er Zhong Min Wu (Zhi) Zhong Zi No. 18 (上海市第二中级人民法院民事判决书 <2012> 沪二中民五<知> 终字第18号).

On August 27, 2011, Dai Dunbang bought a bottle of white wine called "Rhyme Golden Hole" produced by Anhui Hole Wine Company. In the outer packing box of the wine, both sides of the eye-catching used the same piece of art works. The figures' action, expression, outline line and background etc. were identical with ***"Su Shen Cun"*** painting; only cut a large number of background pictures. There was no record of the author's work on the liquor packaging box.

Dai Dunbang and his son signed and performed a settlement agreement with Anhui Hole Wine Co. agreeing that the latter paid RMB 160,000 yuans as the compensation fee for using ***"Su Shen Cun"*** on "Old Hole" wine packing container and wine box. Dai Dunbang authorized Anhui Hole Wine Co. to exclusively use ***"Su Shen Cun"*** on "Old Hole" wine product.

During the second trial, Dai Dunbang provided the court the "Old Hole" wine's outer packing box. There was a decoration on the "Old Hole" wine's outer packing box the same as the one on white wine outer packing box.

On June 21, 2012, Shanghai Second Intermediate People's Court heard the case and found that the title page and back cover of *"Pictures of Tang Poems 100"* explicitly specified Dai Dunbang as the painting author of such book. Anhui Hole Wine Co. didn't provide any evidence to prove *"Pictures of Tang Poems 100"* as illegal publication. Therefore, the court held that such book can be used as an evidence to prove copyright belonging.

Such book collected Dai Dunbang's work-***"Su Shen Cun"***. Although Anhui Hole Wine Co. had raised objection to Dai Dunbang as the author, yet it didn't provide evidence to the contrary to prove. Besides, Anhui Hole Wine Co. had reached settlement agreement with Dai Dunbang concerning the work of ***"Su Shen Cun"*** and paid the work's use fee for RMB 160,000 yuans. This also indirectly showed that Anhui Hole Wine Co. deemed Dai Dunbang as the author of ***"Su Shen Cun"***. Thus, the court made sure Dai Dunbang as the author of ***"Su Shen Cun"***.

According to the prior settlement agreement signed by Dai Dunbang and Anhui Hole Wine Co., the latter only can exclusively use ***"Su Shen Cun"*** on "Old Hole" wine. Therefore, Anhui Hole Wine Company's using ***"Su Shen Cun"*** on the outer package of "Rhyme Golden Hole" white wine still should obtain the approval of copyright holder- Dai Dunbang and paid remuneration. Without the approval of Dai Dunbang, Anhui Hole Wine Co. selectively used ***"Su Shen Cun"*** on the outer packing box of "Rhyme Golden Hole" white wine, not only didn't indicate the identity of the author, but also put "Rhyme Golden Hole" white wine on sale. This behavior explicitly infringed the right of authorship of the work, to protect the integrity of the work, the right of reproduction and the right of publication enjoyed by Dai Dunbang concerning ***"Su Shen Cun"***, and infringed the obtaining remuneration right of Dai Dunbang's approval of Anhui Hole Wine Company's using ***"Su Shen Cun"*** on the outer packing box of "Rhyme Golden Hole" white wine, Anhui Hole Wine Co. should bear the civil liability of stopping infringement, apologizing and compensating for losses for the above-mentioned infringing conducts,

After comprehensively considered the factors of the impact of Anhui Hole Wine Co., visibility of accused infringing product, ***"Su Shen Cun"*** work's appearing value and function in the selling process, Anhui Hole Wine Company's degree of

Film-"the Red Detachment of Women"

Fig. 3.1 Film-"the Red Detachment of Women" (Source: http://www.le.com/movie/10011344.html)

subjective fault of tort and its plot and consequences of infringement etc., the first trial court discretionarily confirmed the compensation amount (RMB 100,000 yuans) which Anhui Hole Wine Co. should bear and this decision was not inappropriate.[6] Thus, Shanghai Second Intermediate People's Court dismissed the appeal and sustained the original verdict.

In *Liang Xin v. the National Ballet of China copyright infringement appeal case (2015)*[7], in 1961, Shanghai Tianma Film Studio shot the film adaptation of ***"the Red Detachment of Women"*** (see Fig. 3.1) created by Liang Xin, and released to the public. In 1964, the National Ballet of China adapted the film script into a ballet drama named as "the Red Detachment of Women" and released to the public. On Jun. 26, 1993, Liang Xin and the National Ballet of China executed an agreement as per the *Copyright Law* implemented since June 1991. The agreement confirmed that the ballet drama named as "the Red Detachment of Women" was adapted as per the film literary script *"the Red Detachment of Women"*, and recognized that the then adaptation was permitted and assisted by Liang Xin. Liang Xin claimed that, as per the then laws in force, the valid term of a copyright licensing contract shall not exceed 10 years, so the aforesaid agreement shall expire to become invalid in June 2003. Therefore, Liang Xin filed a litigation to and requested the court to order the National Ballet of China cease infringement, that is, the National Ballet of China

[6] See Civil Judgment of Shanghai Huangpu District People's Court(2011) Lu Min San (Zhi) Chu Zi No. 180 (上海市黄浦区人民法院民事判决书 < 2011>卢民三<知> 初字第180号).

[7] See Civil Judgment of Beijing Intellectual Property Court (2015) Jing Zhi Min Zhong Zi No.1147 (北京知识产权法院 <2015>京知民终字第1147号).

shall not perform the ballet drama named as *"the Red Detachment of Women"* unless it is otherwise permitted by Liang Xin; make a public apology; and compensate Liang Xin for its economic losses of RMB 500,000 yuans and attorney fees of RMB 50,000 yuans.

The court of the first instance held that, when the National Ballet of China adapted the film literary script-***"the Red Detachment of Women"*** created by Liang Xin into a ballet drama in 1964, he obtained the license of Liang Xin. Although such license was not made in the written form, the existing evidence can be combined to identify that the copyright licensing contract was valid. The agreement executed by the parties in June 1993 only specified the remuneration payable to the original author for the performance of the adapted works and shall not serve as a work's licensing contract. The continuous performance of the ballet drama named as *"the Red Detachment of Women"* by the National Ballet of China after June 2003 shall not constitute the use without license or infringement on Liang Xin's copyright. However, according to law, the National Ballet of China shall pay corresponding remuneration to Liang Xin for the performance of the adapted works, and compensate Liang Xin the economic losses suffered therefore.

With regard to the right of signature, when the National Ballet of China introduced the drama ***"the Red Detachment of Women"*** involved in the case at its official website, he failed to add the name of Liang Xin, and infringed the right of signature possessed by Liang Xin, for which the National Ballet of China shall make an apology.

Therefore, the court of the first instance ordered the National Ballet of China compensate Liang Xin for its economic losses and reasonable expenses on litigation equal to RMB 120,000, and make written apologies to Liang Xin.[8]

After the judgment of first instance was made, both the Plaintiff and the Defendant instituted an appeal, but the court of the second instance maintained the original verdict.

In this case, the court, in combination with the specific political, legal and social environment, made a comprehensive analysis on such matters as whether or not the permit and assistance offered by the original author to others for the adaptation of the works prior to the implementation of the *Copyright Law* constitutes a license behavior de facto, and whether or not the agreement executed by the parties upon implementation of the *Copyright Law* served as a licensing agreement or only specified the remuneration for performance. By complying with the legislative spirit of the *Copyright Law* and considering the political and cultural factors at the specific history period, the judge of this case made a comprehensive analysis and determination on the license act concerning the adaptation and performance right of "***the Red Detachment of Women***", which achieves sound legal effect and social effect. This judgment will be of reference significance for the handling of dispute over copyright on red classic works in the future.[9]

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[8] See Civil Judgment of Beijing Xicheng District People's Court(2012)Xi Min Chu Zi No.1240 (北京市西城区人民法院民事判决书<2015>西民初字第1240号).

[9] See Ten typical intellectual property cases in Beijing during 2015 [EB/OL]. http://www.ciplawyer.com/article.asp?articleid=2824, 2016–4–14

3.2 Economic Rights

Economic rights give authors the exclusive power to exploit the work's economic values by various ways. There are 13 economic rights in Items (5)–(17), Paragraph 1, Article 10 of *CCL*, including:

5. The right of reproduction, that is, the right to produce one or more copies of the work by means of printing, Xeroxing, rubbing, sound recording, video recording, duplicating, or re-shooting, etc.;

In *AI Ying (Shanghai) Trading Co., Ltd. v. Shanghai Ya Ya Mdt InfoTech Ltd. and Shanghai 100 meters Network Technology Co. Ltd. infringing the work's right of reproduction, adaptation rights dispute case (2015)*[10] (involving the judgment of the substantial similarity of art works and the dispute over the right of adaptation), ***"Doraemon"*** cartoon image (Fig. 3.2) is in the world with visibility, in the meantime ***"Doraemon"*** Chinese Animation and publications also emerges the "art graphics ***Doraemon***". Two defendants jointly operated ***"Ding Dong area"*** application software and in the promotion of the software used a ***"Ding Dong area"*** application software and text graphics (Fig. 3.3).

Plaintiff claimed that two defendants 'acts of using the captioned application software and text graphics infringed the right of reproduction and adaptation of ***"Doraemon"*** cartoon image and ***"Doraemon"*** text graphics enjoyed by Plaintiff. Plaintiff sued to the court and asked the court to order two defendants immediately stop using ***"Doraemon"*** features of image elements, publish a statement to eliminate

Figs. 3.2 and 3.3 (Source: China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article. sp?articleid=19290, 2016–7–13)

[10] See Civil Judgment of Shanghai Intellectual Property Court(2015)Hu (Zhi) Min Zhon Zi No.614 (上海知识产权法院民事判决书<2015>沪<知>民终字第614号).

the impact; compensate for the loss RMB 2 million yuans and reasonable expense RMB 50,000 yuans.

Ya Ya Co. contended that ***"Ding Dong area"*** software involved was not operated by him. 100 meters Co. argued that ***Doraemon***'s originality was reflected in its overall image, not the bell, collar, pockets and other elements claimed by Plaintiff, and the color, the angle of view, the shape and so on are not protected by the Copyright Law; Defendants' application software graphics and text graphics both had originality, which did not constitute substantial similarity with ***Doraemon***'s cartoon image and text graphics.

After hearing the case, Shanghai Pudong New Area People's Court decided that Plaintiff's right claim of ***"Doraemon"*** cartoon image's body had lower originality, did not constitute substantial similarity with ***"Ding Dong area"*** application software graphics, and there were differences and larger visual difference between the work of Plaintiff and Defendants. If protecting Plaintiff's work, it would impede the creation freedom of others in the scope of legal protection. The similarity between two defendants' using ***"Ding Dong are"*** text graphics and ***Doraemon***'s text graphics belonged to the scope of public sphere in the creation of art work, had no originality and both had larger visible discrepancy, both did not constitute substantial similarity.

Besides, Plaintiff could not prove that he had obtained related copyright and rights to maintain right for ***Doraemon***'s text graphics art work. In summary, two defendants' acts could not constitute infringement against the captioned work's reproduction right, two defendants' work was not the new one created and based on Plaintiff's work, could not constitute infringement against the adaptation right of Plaintiff's work. Therefore, the first instance court held to refute all the litigation claims of Plaintiff.[11] After trial, Plaintiff appealed but withdrew the appeal during the second trial. The first instance verdict took effect.

This case involved determination of the substantial similarity of art works. The judgment indicated that if Plaintiff claimed the accused infringing work plagiarized part of his work, and then the more higher such part's originality was, the more larger possibility was to be decided infringement. In the specific comparison process, first to determine the same or similar elements in the line, shape, light and color and other elements, then to remove the part of the mind, to examine whether or not the remaining elements existed in the public domain, and according to the same or similar part as being protected after filtration, judged the degree of similarity between the two, finally, via the whole comparison on the basis, to determine whether or not this two constituted substantial similarity.[12]

6. The right of distribution, that is, the right to provide the public with original copies or reproduced copies of works by means of selling or donating;

[11] See Civil Judgment of Shanghai Pudong New Area People's Court (2014) Pu Min San (Zhi) Chu Zi No. 1097 (上海市浦东新区人民法院民事判决书<2014>浦民三<知>初字第1097号)

[12] See China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016–7–13.

7. The right of lease, that is, the right to non-gratuitously permit others to temporarily exploit a cinematographic work, a work created in a way similar to cinematography or computer software, unless the computer software is not the main object under the lease;
8. The right of exhibition, that is, the right to publicly display the original copies or reproduced copies of works of fine art and cinematographic works;

   In spite of the right of exhibition enjoyed by the copyright owner, the owner of the original copy of the work of fine art has the right to exhibit the original copy. It means that as long as the author transferred the ownership of the original copy of a work of fine art, he/she cannot prevent the buyer from exhibiting the original copy to the public.
9. The right of performance, that is, the right to publicly perform works, and to publicly transmit the performance of works by various means;
10. The right of projection, that is, the right to make, by such technical equipment as projector, episcope etc., the works of fine art, photographic works, cinematographic works and works created in a way similar to cinematography etc. reappear publicly;
11. The right of broadcasting, that is, the right to publicly broadcast or disseminate works by wireless means, to disseminate broadcast works to the public by wired dissemination or rebroadcast, and to disseminate broadcast works to the public by audio amplifier or other similar instruments for transmission of signs, sounds or images;
12. The right of information network dissemination, that is, the right to provide the public with works by wired or wireless means, so as to make the public be able to respectively obtain the works at the individually selected time and place;
13. The right of production, that is, the right to fix works on the carrier by cinematography or in a way similar to cinematography;
14. The right of adaptation, that is, the right to modify a work for the purpose of creating a new work of original creation;

In *Chen Zhe v. Yu Zheng, Hunan eTV Culture Media Co., Ltd. case(2015)*,[13] in the first half of 2014, ***"Palace 3: the Lost Daughter"*** is a 2014 Chinese historical television series written and produced by Yu Zheng. In April 2014, a Taiwanese writer Chen Zhe (penname Chiung Yao) made a letter claimed that ***"Palace 3: the Lost Daughter"*** (see Fig. 3.4, the **"disputed show"**) was based on her novel ***"Plum Blossom Scar"*** (see Fig. 3.5, the **"reference novel"**), but Yu Zheng delayed. On May 28, 2014, Chen Zhe filed a lawsuit, claiming that Yu Zheng was unauthorized to copy her original core plot, recompose the disputed drama and produce and broadcast the disputed show with another four defendants. Chen Zhe claimed that Yu Zheng had seriously violated her right of adaptation and cinematization, causing great mental damage, and requested Yu Zheng to immediate stop infringement, eliminate influences, make an apology and compensation of RMB 20 million yuans for economic loss.

[13] See Civil Judgment of Beijing High People's Court (2015) Gao Min (Zhi) Zhong zi No. 1039 (北京市高级人民法院民事判决书<2015>高民<知>终字第1039号).

Fig. 3.4 TV series of "Palace 3: the Lost Daughter" (The **"disputed show"**) (Source: http://baike.baidu.com/link?url=5k20iTMaKYVo4mM2gCJhGQMzRZkFqJckfU7EcA5PI7mWatLPTDzHW9uzDhjEtsZxIpVV4Nfm87xJvmBX9mR9MyBJ-fjxwCdjjm7Kky6H1R35oajby1SctULbuQBaRy-r)

Upon the trial, the court held the following[14]:

- In terms of literary works, it is hard to draw a direct conclusion over some plots and source material that are not similar to each other or belongs to public areas if compared with each other independently. But if making a comparison integrally, it will be conducive to find out the similarity on the structures of two works. Character design, plot structure, and internal logic rearrangement that are specific enough are protected by the copyright law.
- Even if the use of specific scenario, limited expression and known material is not restricted by the Copyright Law, this does not mean that based on the above-mentioned materials, an original works will be automatically classified into specific scenario, limited expression and known material. The whole materials that

[14]You, Yunting. Does Story Plot Plagiarism Constitute Copyright Infringement in China [EB/OL]. http://www.chinaiplawyer.com/chiung-yao-wins-first-trial-plagiarism-lawsuit-yu-zheng-china/February 7, 2015. See also Civil Judgment of Beijing Third Intermediate People's Court (2014) San Zhong Min Chu Zi No. 07916 (北京市第三中级人民法院民事判决书<2014>三中民初字第07916号).

Fig. 3.5 TV show of "Plum Blossom Scar" (The **"reference novel"**) (Source: http://ent.qq.com/d/tv/6/5433/)

contain the character sets and their relationship, scenario, plots and internal logic rearrangement shall be protected by the Copyright Law.

- The **disputed show**-***"Palace 3: the Lost Daughter"***- is similar in plot rearrangement and its deduction process with the **reference novel**-***"Plum Blossom Scar"***. In combination with the similar specific plot and its settings, the disputed show constituted similarity from the overall appearance of the reference novel, leading to the similar experience. It can conclude that the plot in the disputed show had a sourcing relation with the reference novel and thus the disputed show indeed contained a fact of adapting the reference novel.

Beijing Higher Court held the appealed case on December 15, 2015. The court maintained the verdict of first trial, found the disputed show infringed the right of adaptation and production of the reference novel, ordered Defendants stop infringement; Defendant Yu Zheng apologize to Plaintiff Chen Zhe and compensate her RMB5,000,000 yuans.

As a high profile case involving plagiarism of television works, there are three typical aspects in this case.

Firstly, this case specifies the distinguishing criterion between thought and expression in literary works. Regarding the expression in literary works, it is manifested in literal expression and also in the story content expressed by the literals. However, regarding the character settings and mutual relationship as well as the plots defined by occurrence, development and sequential order of the specific events, only when these factors are specific to a certain extent, that is, when the option of plot, arrangement of structure and design of plot proceedings reflect the

unique choice, determination and option of the author, can the literary expression be protected by the *Copyright Law*? Determining the expression protected by literary works is a process of constantly abstracting and filtering.

Secondly, this case specifies the criterion of ***"substantial similarity"***. "Contact" and "substantial similarity" are two essentials for copyright infringement. In literary works, the connection and the logic sequence of the plots make all the plots closely connected and thus form a complete "personal expression". When the character settings, plot structure and internal logic relationship become sufficiently specific, such kind of integral combination is entitled to copyright protection as "expression". If the accused infringing work contains sufficiently specific expressions, and a certain amount and proportion of plot settings are also found in the accused infringing work, the court can then find "substantial similarity" between the works. Alternatively, when the closely intertwined plot settings in the accused work make enough proportion in the copyrighted works, even if the plot settings do not have a large proportion in the accused infringing work, when it is sufficient to enable the audience to perceive that they come from a certain work, the court can still find "substantial similarity".

Thirdly, the expert-assessor is introduced in this case. It sets up a precedent where expert assessor is introduced in a copyright infringement case, so that the trial and judgment of the case will be adapted to the industry feature and rules of creating copyright works.[15]

To compare with the previous case, in *Zhou Haohui v. Yu Zheng et al. copyright infringement case*, on November 7, 2016 the Intermediate People's Court of Yangzhou City, Jiangsu Province decided that TV drama ***"Beauty manufacturing"*** did not constitute plageration and adaptation on Plaintiff's novel ***"Evil hypnotist"*** and held to refute all the litigation claims of Plaintiff.

"Beauty manufacturing" is the costume drama produced by Yu Zheng (Defendant). It was broadcasted in 2014 and caused great repercussions. In 2016, an author Zhou Haohui (Plaintiff) accused the productor of ***"Beauty manufacturing"*** claiming that the 29th set and 30th set of ***"Beauty manufacturing"*** plagerized his novel ***"Evil hypnotist"***. The understanding of the main characters, hypnosis emotional cues, the villain of the crime motive, and the hypnotic plot of biting, jumping from the floor and throwing cups were similar and Zhou Haohui asked the ***"Beauty manufacturing"*** related production company and Yu Zheng to compensate more than RMB 830,000 yuans.

But after the court heard the case, it decided that both works' story line, plot, story structure sequence, character set and characters between the novel "Evil hypnotist" and the 29th set and 30th set of TV drama ***"Beauty manufacturing"*** were not the same, the main story of the two works and the story structure had obvious differences, completely belonged to two different stories, would not lead to the reader and the audience of the two works have the same, similar appreciation, thus the two works did not constitute substantial similarity, Plaintiff's claim concerning

[15] See supra note 9.

that Defendant infringed the right to adapt and produce of his work could not be established. The court dismissed all the litigation claims of Zhou Haohui.[16]

In *Chengdu Yegame Tech Co., Ltd., Chengdu Ze Hong Brand Marketing Planning Co, and Guangzhou Feiyin InfoTech Co., Ltd., Guangzhou Weidong Co. copyright belonging, tort dispute and unfair competition case (2015)*,[17] Ze Hong Co. claimed that it enjoyed copyright of ***"Our Universe"*** novel's network game. Yegame Tech Co. claimed that it enjoyed copyright of ***"Our Universe"*** game software work and the right and benefit of anti-unfair competition, and claimed that Feiyin Company's developing and Weidong Company's operating ***"Our Heaven and Earth"*** web game constituted unfair competition. Therefore, Ze Hong Co. and Yegame Tech Co. sued to the court and asked the court to order Feiyin Co. and Weidong Co. immediately cease the conduct of tort and unfair competition, apologize and compensate economic losses.

The first instance court held that Feiyin Co. and Weidong Co. infringed the adaptation right of novel enjoyed by Ze Hong Co. and constituted unfair competition against Feiyin Co. and Weidong Co., should immediately cease the conduct of tort and compensate economic losses separately and rebutted other claims of Feiyin Co. and Weidong Company.[18] Feiyin Co. and Weidong Co. did not satisfy with the judgment and filed appeal.

The second instance court held that concerning the determination of infringing the adaptation right and unfair competition conduct and the discretionary decision of two disputes' compensation amount by the original trial should be supported, but there was some bias regarding two legal relationships' right subject and tort subject of infringing the novel adaptation right and unfair competition, thus the judgment should be amended.

The second instance court strengthened the argument of infringing the adaptation right and unfair competition conduct. Concerning the determination of unfair competition conduct, the second trial gradually argued from the following aspects:

- Whether or not ***"Our Universe"*** game is well-known commodity;
- Whether or not ***"Our Universe"*** is specific name; and
- Whether or not the name of ***"Our Heaven and Earth"*** web page game and ***"Our Universe"*** web page game constituted similarity.

The second instance court held that Feiyin Co. and Weidong Co. had the unfair competition conduct of unauthorized use of well-known commodity specific name.

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[16] See "Beauty manufacturing" copyright dispute held, the hypnotic plot does not constitute tort (Chinese version) [N]. http://www.chinacourt.org/article/detail/2016/11/id/2339359.shtml, 2016–11–10.

[17] See Civil Judgment of Guangzhou Intellectual Property Court (2015) Yue (Zhi) Fa Zhu Min Zhong Zi No. 30 (广州知识产权法院民事判决书<2015>粤<知>法著民终字第30号).

[18] See Civil Judgment of Guangdong Province Tianhe District People's Court (2013) Sui Tian Fa (Zhi) Min Chu Zi No. 1870 (广东省广州市天河区人民法院民事判决书<2013>穗天法<知>民初字第1870号).

Intellectual property dispute involving network game has been a new type of case of blowout in recent years, raises extensive discussion on the problems of copyright infringement of network game works and unfair competition etc., the corresponding judicial sentence also often gets much attention, and walks in the leading direction of the internationalization of intellectual property theory. This case is typical of its kind toward the determination of whether or not the accused network game infringed network novel's adaptation right, its argument against the game's unfair competition conduct is full of logic, and tries to regulate the situation of arbitrarily using specific name of well-known network game as arbitrarily using specific name of well-known commodity stipulated by *Anti-unfair Competition Law*.[19]

15. The right of translation, that is, the right to transform the language of a work into another language;
16. The right of compilation, that is, the right to choose or edit some works or fragments of works so as to form a new work;

In *Hainan Jing Tian Information Co., Ltd. v. Shanghai Xuxi Business Consulting Co., Ltd. case(2004)*,[20] Hainan Jingtian Company began to develop its ***"Chinese Laws and Regulations Database"*** *(the* ***"database"****)* in 1996, and officially published the database in 1999 after having been officially registered in the State Copyright Office in March 1998. The Shanghai Xuxi Business Consulting Co., Ltd. subsequently copied all of the laws and regulations of the database on its website named ***"Zhuanjia Lunan"*** without authorization. The Jingtian Company then filed a lawsuit, alleging that Xuxi Enterprise's acts infringed the copyrights of its protected database. In its claims, the Jingtian Company demanded Xuxi Enterprise immediately stop the infringement, and compensate the former RMB 200,000 yuans for its economic losses arising out of the alleged infringement.

After hearing the case, the first instance court (Shanghai First Intermediate People's Court) found in *the* ***"database"*** that the regulations of the officials from the State Council were classified so that they were dependent upon the establishing organization, including the ministries, commissions and institutions of the State Council.

The court found that *the database*'s classification of the laws and regulations therein formed 35 categories, primarily dependent upon the establishing organization, and referred to the appropriate categories for the laws and regulations enacted by similar commissions and institutions. The court held that, such previous arrangements and classification codes required a modicum of originality according to the *Copyright Law*, and, at the same time, the ***"database"*** employed abbreviations for some comparatively longer titles in other laws and regulations. Such arrangements and classification codes used some specific approaches, such as a simple search of

[19] See China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016–7–13.

[20] See Civil Judgment of Shanghai High People's Court (2004) Hu Gao Min San (Zhi) Zi No. 122 (上海市高级人民法院民事判决书<2004>沪高民三<知>终字第122号).

the first characters of the titles of the laws and regulations, or those otherwise thereby determined by some arrangement's needs (such as a convenient method of searching) or those of the Jingtian Company.

Therefore, the court upheld that the brief titles used in the arrangement of the information embodied some degree of originality and constituted a protectable work. Upon the afore-mentioned analysis, the court decided that the Xuxi Business infringed Jingtian's database and shall take responsibility for the infringement. Dissatisfied with the decision made by the first instance court, Xuxi Business appealed. The second instance court, however, affirmed the original judgment handled down by the first instance court.

In this case, the court held that the involved ***"database"*** constituted a "compilation work", and subsequently decided that the defendant, without authorization, copied the database, constituting copyright infringement. As an expert pointed out, there is a certain controversy of whether or not the involved database shall be protected by the *Copyright Law*. But in any case, the defendant's unauthorized reproduction of Jingtian's database is likely a good example of unfair competition. If the plaintiff can file a lawsuit alleging violation of unfair competition laws, the plaintiff will bear a comparatively low risk of losing the lawsuit, and cause less controversy as well.[21]

17. Other rights which shall be enjoyed by the copyright owners.

The last economic right enumerated by the *Copyright Law* is often referred to as ***"the catch-all right"***, since it could cover all the other exploitation acts which have economic significance to the copyright owner. For instance, when a webcaster transmits a movie to the public on the real-time basis without the authorization, the copyright owner cannot sue the webcaster for infringement of the right of dissemination through information network, since the right only covers interactive transmission. In *Anle Film Co., Ltd. v. Beijing Shiyue Network Technology Co., Ltd. et al. case (2008)*,[22] Beijing Second Intermediate People's Court used the ***"catch-all right"*** to decide in favor of the copyright owner on the ground that China has an international obligation to fully apply Article 8 of the *WIPO Copyright Treaty (WCT)*, which provides a general right of dissemination to the copyright owner. Thus, the ***"catch-all right"*** must be broadly interpreted to cover communication to the public of the work by any technology.

A copyright owner may permit others to exercise the rights provided in Items (5) through (17) of the preceding paragraph, and may receive remuneration as agreed upon in the contract or in accordance with the relevant provisions in *CCL* (see Para.2, Art.10, *CCL*).

A copyright owner may wholly or partially transfer the rights provided in Items (5) through (17) of Paragraph 1 of Article 10, and may receive remuneration as

[21] For detail, see Yanjie Luo, Can a Database Be Protected by the Copyright Law in China [EB/OL]. http://www.chinaiplawyer.com/database-protected-copyright-law/. September 3, 2013

[22] See Civil Judgment of Beijing Second Intermediate People's Court (2008) Er Zhong Min Chu Zi No.10396. (北京市第二中级人民法院民事判决书 <2008>二中民初字第10396号).

agreed upon in the contract or in accordance with the relevant provisions in *CCL* (see Para.3, Art.10, *CCL*).

Economic rights are also referred to as "exclusive rights", since others must get license from the author to exploit the work by various means covered by economic rights.

The protection period of the right of disclosure and all economic rights is generally 50 years and in the case of individual authors, the lifetime of the author(s) plus 50 years (see Para.1, Art.21, *CCL*).

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Chapter 4
Copyright Limitations

The Chinese Copyright Law imposes two limitations on the exercise of copyright by its owner, namely fair use and statutory license.

4.1 Fair Use

The balance of interests between copyright owners and the public is a central issue behind copyright laws. On the one hand, copyright owners are entitled to extensive rights under copyright laws, the abuse of which would hinder the public from proper use of works, hamper the dissemination and use of information reflected in the works and depart from the legislative purpose of copyright laws, unless necessary limitations are imposed on the rights. On the other hand, too many limitations on the rights will adversely affect the promotion of creativity and will work against the legislative purpose that copyright laws intend to encourage authors to create new works. Therefore, "fair use" of copyrighted works, as one way that limits the owners' copyrights, and balances the interests of copyright owners and the public.

Strictly speaking, "fair use" is a concept baked into US copyright law,[1] and it's a defense to copyright infringement if certain elements are met. The US Copyright Office says that the defense is "decided on a case-by-case basis." The distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted material "does not substitute for obtaining permission." There are, however, at least four factors that judges must consider when deciding fair use: the purpose of

[1] 17 U.S.C.107.

Y. Guo, *Modern China's Copyright Law and Practice*,
DOI 10.1007/978-981-10-5352-8_4

use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and the effect of the use upon the potential market.[2]

In *China's Copyright Law*, there is no similar "fair use". As described below, Article 22 of *China's Copyright Law* adopts the European style "limitations and exceptions", but the academic has conventionally named the regulation of such Article "fair use".[3]

In *Shanghai Aurogon Information and Technology Co., Ltd. . v. China Zhongdian Media Co., Ltd., Beijing Sheng Bi Er Digital Technology Co., Ltd. and Beijing Books Building Co., Ltd. Game Guide copyright infringement case (2010)*,[4] Plaintiff, the developer and copyright holder of the game ***"Gujian Qitan"***, a 3D role-playing video game, filed a lawsuit against three defendants hereof, with the claim that, the book ***"Gujian Qitan Prima Guide"*** *(the* ***"disputed book"****)* published by the ZD media and sold by both SBE and BBB, is unauthorized to use large amounts of screenshot of the disputed game as its cover and contents, infringing the copyright against the works of art in the disputed game.

The court held the following comments upon the trial:

Firstly, the works of arts in the disputed game, dependent on developer's material technical conditions, were co-produced by graphic artists and programmer, and were owned by the developer. So, the court determined that plaintiff shall enjoy copyright on the disputed game.

Secondly, pursuant to the *Copyright Law*, without permission of copyright owner, any copying and publishing the works shall be considered as copyright infringement, excluding the fair use and other conditions, and thus shall undertake liability for its infringement. In this case, the use of pictures in the game guide shall be of necessity and responsibility, but the use shall be excluded from the legal quotation in accordance with laws and regulations. Therefore, the court determined the quotation to unreasonable use, constituting infringement.

In conclusion, the court upheld that the defendants cease to sell and publish the disputed book and compensate more than RMB 100,000 yuans.

But there are dissenting opinions as follows:

- **This case shall be determined of fair use**.

To begin with, the *Copyright Law* regulates that, appropriate quotation from a published work, where such quotation is used to introduce or comment on certain works or to explain a certain issue. As this case involved *"**the game guide of the***

[2] See KRAVET**S,** DAVID. Fair use prevails as Supreme Court rejects Google Books copyright case [EB/OL].
http://arstechnica.com/tech-policy/2016/04/fair-use-prevail-as-supreme-court-rejects-google-books-copyright-case/, Apr 18, 2016.

[3] See Wang, Qian, Research on Copyright Infringement Problem of "Cache" Service Provided by Search Engine [J]. East Law, 2010, (29), available at http://www.privatelaw.com.cn/Web_P/N_Show/?PID=5865.

[4] See Civil Judgment of Beijing Xicheng District People's Court No. Xi Min Chu Zi No. 18215 (北京市西城区人民法院民事判决书<2010>西民初字第18,215号).

Gujian Qitan", it is also quite common to use the screenshots of the disputed game, and recognition came from the court. However, the court also determined that fair use should be judged in accordance with Article 21 of the *Implementing regulations of the Copyright Law*, i.e., it shall not affect the normal exploitation of the work, nor unreasonably prejudice the legitimate interests of the copyright owner. Furthermore, the court held that the sale of the disputed books will absolutely affect the volume of sales of the authorized game guide, causing unfair damages to the potential markets and value of the authorized ones.

One expert doesn't agree with the opinion of the court, because any game guide will also influence the unfair damage as affecting the sales volume of the authorized guide was considered to be unfair damage in accordance with the opinion of the court. This is not made from the use of the screenshots in the disputed book, instead of the content of the disputed book. At the same time, an introduction, explanation and interpretation quoting from the original works will greatly constitute infringement, because it will affect the sale volume of the introduction, explanation and interpretation. Absolutely, as it is, it is unfair use.

- **Does the defendant cause unfair competition?**

If this case did not cause copyright infringement, the question came whether or not publishing other's game guide constitutes unfair competition. With regard to this question, one expert has negative attitudes. Objectively, the publisher actually earned benefits by means of riding other's reputation. Even though, it did not mean the benefits are unreasonable. In the expert's opinion, all rights shall be in a range scope. Back of the case, explanation on other's game will do reference for users. If the explanation was originally without any statements of "authorization", the right holder has no right to forbid other's explanation, otherwise suspecting of "intellectual property abuse". As for the reason, the purpose of intellectual property protection is to encourage creation and information transmission, not monopolizing the information and knowledge. Therefore, laws and regulations shall authorize appropriately the use and reference by others.[5]

In *Google China and Wang Zi's copyright infringement disputes appeal case (2013)*,[6] Wang Xin, known by her penname Mianmian, authorized the Shanghai Joint Publishing Corporation to publish her book ***"Yansuan Qingren"*** *(the* ***"disputed book"****)*. Google China (http://www.Google.cn) collected portions of the book for using its Google Books system, and provided said contents to the general public without prior permission from the author and the publisher. Beijing Guxiang Enterprise ("Defendant one") is the operator of Google China; Google ("Defendant two") actually scanned and digitalized the disputed book for inclusion in its data-

[5] You, Yunting. Does Unauthorized Use of Screenshots in Game Guide Constitute Infringement [EB/OL]. http://www.chinaiplawyer.com/does-unauthorized-use-of-screenshots-in-game-guide-constitute-infringement/. March 22, 2015.

[6] See Civil Judgment of Beijing High People's Court (2013) Gao Min Zhong Zi No. 1221 (北京市高级人民法院民事判决书<2013>高民终字第1221号).

base. Wang Xin, in her capacity as author and creator of the book, brought the two defendants to the court and demanded compensation for infringement.

The court, upon hearing the case, held: considering the fact that the defendant one provided just part of the disputed book, with discontinuous chapters, sections and non-total paragraphs, defendant one's use of the disputed book was considered to be a fragmented usage. Taking into account that fragmented use of copyrighted material was not considered substantial enough to be considered use, there was insufficient infringement to find damage to the substantial marketable value of the disputed book, and even more difficult to find that such use could affect sales of the disputed book. Therefore, the court held that Defendant one would not be required to assume infringement liability. However, considering the fact that the reproduction of the disputed book could cause actual losses to the copyright owner, the court decided that Defendant two infringed the plaintiff's right of reproduction, and therefore would be required to assume liability for compensating the plaintiff for her losses.[7]

Google dissatisfied with the trial and filed appeal to Beijing High People's Court. Google's main appeal reason was that its accused electronic scanning behavior occurred in the United States, thus this case should apply American law. Google's involved reproduction behavior constituted "fair use" and was non-infringement.

Beijing High People's Court's second trial found that Google's appeal argued that its involved reproduction behavior constituted "fair use", but the right belonged to the one enjoyed by copyright owner and its involved reproduction behavior did not belong to the "fair use" behavior under Article 22 of *Copyright Law*. Therefore, its involved reproduction behavior should be preliminarily presumed to constitute infringement. Considering the People's Courts had decided the particular situation beyond Article 22 of *Copyright Law* may also constituted "fair use" in judicial practice, thus when Google argued and proved its involved reproduction behavior belonged to the particular situation of "fair use", such behavior may also be deemed as "fair use".

While judging whether or not the involved reproduction behavior constituted the particular situation of "fair use" beyond Article 22 of *Copyright Law*, we should strictly grasp the standard of identification and comprehensively considered various related factors. Those considered factors of whether or not constituted "fair use" include the purpose and nature of the use of the works, the nature of copyright protection works, the nature of the used part and its proportion in the whole work, whether or not the use of behavior affects the normal use of the works and whether or not the use of the act unreasonably damages the legitimate interests of the copyright owner and so on. Also, the user should bear the burden of proof toward the above-mentioned considered factors. In this case, although Google argued that its involved reproduction behavior constituted "fair use", yet it did not submit evidence regarding the factual problems involved in the above-mentioned considered factors.

[7] See Civil Judgment of Beijing First Intermediate People's Court (2011) Yi Zhong Min Chu Zi No.1321 (北京市第一中级人民法院民事判决书 <2011> 一中民初字第1321号).

Therefore, Google's argument that its involved reproduction behavior constituted "fair use" had insufficient evidence, and should not be supported.

This case is the first one sued by China's author against Google's digital library for copyright infringement and should have significant impacts on domestic trials. But on April 18, 2016, the U.S. Supreme Court declined to hear a challenge from the Authors Guild and other writers claiming Google's scanning of their books amounts to wanton copyright infringement and not fair use.[8]

The guild urged the high court to review a lower court decision in favor of Google that the writers said amounted to an "unprecedented judicial expansion of the fair-use doctrine". At issue is a decision on October 16, 2015 by the 2nd US Circuit Court of Appeals that essentially said it's legal to scan books if you don't own the copyright.[9] The Authors' Guild originally sued Google, saying that serving up search results from scanned books infringes on publishers' copyrights even though the search giant shows only restricted snippets of the work. The writers also claimed that Google's book search snippets provide an illegal free substitute for their work and that Google Books infringed their "derivative rights" in revenue that they could gain from a "licensed search" market.

Google, for its part, urged the justices to side against the writers because, in the end, their works would be more readily discovered. "Google Books gives readers a dramatically new way to find books of interest," Google's brief said. "By formulating their own text queries and reviewing search results, users can identify, determine the relevance of, and locate books they might otherwise never have found." Unlike other forms of Google search, Google does not display advertising to book searchers, nor does it receive payment if a searcher uses Google's link to buy a copy. Google's book scanning project started in 2004. Working with major libraries like Stanford, Columbia, the University of California, and the New York Public Library, Google has scanned and made machine-readable more than 20 million books. Many of them are nonfiction and out of print.

The U.S. Supreme Court let stand the lower court opinion that rejected the writers' claims. That decision on April 18, 2016 means Google Books would not have to close up shop or ask book publishers for permission to scan. In the long run, the judgment could inspire other large-scale digitization projects.[10]

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[8] See ORDER LIST: 578 U.S.[Z]. available at https://www.supremecourt.gov/orders/courtorders/041816zor_2co3.pdf

[9] See U. S. COURT OF APPEALS 2 FOR THE SECOND CIRCUIT [Z]. Docket No. 13-4829-cv, available at http://cases.justia.com/federal/appellate-courts/ca2/13-4829/13-4829-2015-10-16 pdf?ts=1445005805

[10] See supra note 3.

4.1.1 Laws and Regulations Regarding Fair Use

Consistent with the Copyright Law 2001, 12 kinds of fair uses have been identified (Art.22, *CCL*):

1. Use of a published work for the purposes of the user's own private study, research or self-entertainment;
2. Appropriate quotation from a published work in one's own work for the purposes of introduction to, or comments on, author's work, or demonstration of a point;
3. Reuse or citation, for any unavoidable reason, of a published work in newspapers, periodicals, at radio stations, television stations or any other media for the purpose of reporting current events;
4. Reprinting by newspapers or periodicals, or rebroadcasting by radio stations, television stations, or any other media, of articles on current issues relating to politics, economics or religion published by other newspapers, periodicals, or broadcasting by other radio stations, television stations or any other media except where the author has declared that the reprinting and rebroadcasting is not permitted;
5. Publication in newspapers or periodicals, or broadcasting by radio stations, television stations or any other media, of a speech delivered at a public gathering, except where the author has declared that the publication or broadcasting is not permitted;
6. Translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed;
7. Use of a published work, within proper scope, by a State organ for the purpose of fulfilling its official duties;
8. Reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or any similar institution, for the purposes of the display, or preservation of a copy, of the work;
9. Free-of-charge live performance of a published work and said performance neither collects any fees from the members of the public nor pays remuneration to the performers;
10. Copying, drawing, photographing or video recording of an artistic work located or on display in an outdoor public place;
11. Translation of a published work of a Chinese citizen, legal entity or any other organization from the Han language into any minority nationality language for publication and distribution within the country and
12. Transliteration of a published work into Braille and publication of the work so transliterated.

In other words, these 12 specific situations provide that a work may be used without permission from, and without payment or remuneration to, the copyright

holder, provided that the name of the author and the title of the work are mentioned and the other rights enjoyed by the copyright owner under *China's Copyright Law* are not infringed upon. However, Article 22 of *CCL* does not specify the basic conditions constituting "fair use".

As a civil law country, *CCL* provides detailed circumstances for "fair use" in legislation, and the court may exercise the interpretation rights only according to the specific circumstances set forth in *CCL* and cannot rule "fair use" under other circumstances beyond the scope set by *CCL*.

Also, Article 21 of the *Implementation Rules* provides that "the use of any published work is permitted without the permission of the copyright holder according to the relevant provisions of the *Copyright Law*, provided that such use shall not affect the normal use of the work, and shall not unreasonably impair the lawful rights of the copyright owner."

Finally, in response to the rapid development of the Internet in China, Article 6 of *the Ordinances on the Protection of the Right to Network Dissemination of Information* (hereinafter *the Ordinance*) sets forth the provisions regarding "fair use" on the Internet:

Where anyone provides any work through the information network under any of the following circumstances, he/she may be exempted from obtaining the owner's permission as well as paying the relevant remunerations thereto:

1. Where an appropriate portion of any published works is quoted in the works one provides to the general public for the purpose of introducing or commenting on any work or elaborate any issue;
2. Where it is inevitable to reproduce or quote any publicized works in the works he/she provides to the general public for the purpose of making any new release;
3. Where, in order to support the teaching research or scientific research, a small quantity of publicized works is provided to some people who engage in teaching or scientific research;
4. Where any state organ provides to the general public any publicized works within a reasonable range for the purpose of exercising its functions and duties;
5. Where the works as already publicized by any Chinese citizen, legal person or any other organization in Chinese are translated into any language of any minority ethnic group and are provided to such people within the territory of China;
6. Where any already published work is provided to the blind in a way as particularly perceptible to the blind and not for the purpose of making profits;
7. Where any article on current affairs such as political and economic issues that has been published is provided through the information network; and
8. Where a speech as delivered in a public gathering is provided to the general public.

4.1.2 Basic Constitutive Conditions Constituting "Fair Use"

Although Article 22 of *China's Copyright Law* sets forth several cases that constitute "fair use", it does not mean that a situation falling under Article 22 of *CCL* would undoubtedly be deemed as "fair use". In fact, Article 21 of *the Implementation Regulation* provides restrictions to the application of Article 22 of *CCL* that the basic conditions constituting "fair use" are not only limited to the 12 situations set forth in Article 22 of *CCL*, but also be in compliance with the requirements of Article 21 of *the Implementation Regulation*. In other words, Article 22 of *CCL* and Article 21 of *the Implementation Regulation* shall be combined when deciding whether or not an activity constitutes "fair use" of a copyrighted work.

Based on the above provisions, we may conclude that "fair use" requires three constitutive conditions:

1. The use of works shall fall into at least one of the 12 specific situations set forth in Article 22 of the Copyright Law;
2. The use of works shall not affect the normal use of the work by the copyright holder;
3. The use of works shall not unreasonably impair the lawful rights of the copyright holder.

The "lawful rights of the copyright holder" include the moral rights of the copyright holders, such as the right of authorship, the right of alteration and the right to protect copyrighted work in its entirety. Generally, the foregoing conditions constitute what is called the "Three-Step Test"[11] for "fair use".

Since Article 6 of *the Ordinance* sets forth the provisions regarding "fair use" on the Internet, the basic conditions constituting online "fair use" are as follows:

1. The use of works shall fall into at least one of the 8 specific situations set forth in Article 21 of *the Ordinance*;
2. The use of works shall not affect the normal use of the work by the copyright holder;
3. The use of works shall not unreasonably impair the lawful rights of the copyright holder.

[11] The three-step test was first enacted in the 1967 revision of *the Berne Convention*. It provides: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works [a] in certain special cases, provided that [b] such reproduction does not conflict with a normal exploitation of the work and [c] does not unreasonably prejudice the legitimate interests of the author." Nowadays, the three-step test appears not only in the *Berne Convention* (Article 9 (2)) but also in the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs Agreement) (Article 13), the *WIPO Copyright Treaty (WCT)* (Article 10) and the *WIPO Performances and Phonograms Treaty (WPPT)* (Article 16). Moreover, several European Directives contain the test. It has to be noted that the three steps of the test are cumulative and, hence, a failure to comply with one of the steps results in the limitation being disallowed. See SCHONWETTER, TOBIAS. The Three-Step Test within the Copyright System [EB/OL]. http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1

4.1.3 Key Issues Related to Fair Use in Practice

1. Use of Published Work for Personal Study, Research or Self-entertainment

The first particular situation of "fair use" set forth in Article 22 in *China's Copyright Law* is "use of published work for personal study, research or self-entertainment", which is also referred to as "personal use".

In practice, many private copy centers in the colleges of China offer services to copy textbooks for college students. Such use of textbooks complies with the first step of the "Three-Step Test". However, these services have also affected the normal use of the textbooks and unreasonably impaired the authors' lawful rights. Therefore, it violated the second and third steps of the "Three-Step Test" and can not be regarded as "fair use". In 2004, the Beijing High People's Court imposed aggregate damages of almost RMB 6.5 million yuans to a well-known English teaching school in Beijing- Beijing Haidian District Private New Oriental School for the illegal copying and selling of proprietary English test papers (TOEFL, GRE and GMAT) owned by the Education Test Services (ETS) and the Graduate Management Admission Council (GMAC).[12]

In addition, Article 6 of *the Ordinance* does not include the situation of using work found on the Internet for personal study, research or appreciation as "fair use". Therefore, downloading copyrighted music from the Internet through P2P software for "personal appreciation" can not be considered as "fair use", since such use cannot satisfy the first step of the "Three-step Test" for "online fair use".

2. Quotation from Published Works

In order to effectively communicate information and knowledge, people often have to quote from others' works. According to Article 22 of *CCL*, "appropriate quotation from a published work in one's own work for the purposes of introduction of, or comment on, a work, or demonstration of a point" should be protected under "fair use". However, no laws or regulations further clarified the term "appropriate".

On December 31, 2005, Mr. Hu Ge made a video titled ***"A Murder Case Caused by Mantou"*** (see Fig. 4.1) by editing and dubbing certain fragments of a film ***"Wu Ji"***, and then uploaded this video on the Internet, which led to a high-profile debate regarding "online fair use". Some people believed that Mr. Hu Ge had just quoted some materials from the film ***"Wu Ji"*** and did not infringe upon the copyrights of ***"Wu Ji"***. Others believed that the quotation from ***"Wu Ji"*** had exceeded the scope of "appropriate quotation" and infringed the copyright of ***"Wu Ji"***. There was also third opinion that the work of Hu Ge had infringed upon the copyright of ***"Wu Ji"*** based on the concept of "parody of a work". The current *Copyright Law* does not contain the concept of "parody of a work", thus people holding this opinion

[12] See Civil Judgment of Beijing High People's Court (2003) Gao Min Zhong Zi No.1393 (北京市高级人民法院民事判决书<2003>高民终字第1393号). For detailed discussion of this case, see 1.1, Chap. 1.

Fig. 4.1 A video titled "A Murder Case Caused by Mantou" (Source: http://news.17173.com/viewpic.htm?url=http://images.17173.com/2013/news/2013/03/22/zhou0322csp01.jpg)

suggested that the concept should be incorporated into the *Copyright Law* in the future.[13]

In reality, the director of film ***"Wu Ji"***-Mr. Chen Kaige decided not to bring a lawsuit against Hu Ge to the court.

3. Use of Published Work for News Reporting

In accordance with Article 22, Paragraph 3 of *CCL*, inevitable reappearance or citation of a published work in newspapers, periodicals, radio stations, television stations or other media for the purpose of reporting current events are considered "fair use". In practice, the media often defends itself based on the foregoing provision. However, a "fair use"argument can only be established in a situation where both the criteria of "reporting current events" and "inevitable reappearance or citation" are satisfied.

[13] For example, see e.g. Luo, Li. The Copyright Law Border of Parody—Discussing from "A Murder Case Caused by Mantou" (Chinese version) [J]. Jurisprudence, No., 2006, (3):60–66, available at http://www.fengxiaoqingip.com/ipluntan/lwxd-zz/20061106/769.html

In the case of *Xie Yue v. Guangzhou Daily* in 2002,[14] Xie Yue made and published a picture titled *"Diving Young Boy in Zhanjiang"* on a website. "Guangzhou Daily", without Xie Yue's prior consent, used the picture as the illustration of an article named "Half of the People Suffered from Rheumatoid Disease Will Become Disabled" in the "Guangzhou Daily". The court did not support the Defendant's contention that their usage of the picture was "fair use". The court held that the article was not related to current events and there was no necessary connection between the picture and the article, thus, it was not inevitable for "Guangzhou Daily" to use Xie Yue's picture. Accordingly, the court held that the facts of the case did not pertain to the criteria listed under Paragraph 3, Article 22 of *CCL*.

4. Use of Published Work by State Authorities for Purpose of Fulfilling Official Duties

The provision of use of a published work by a state authority within reasonable scope for "purpose of fulfilling its official duties" was set forth in Paragraph 3, Article 22 of *CCL* as one situation of "fair use". Yet the *Copyright Law* and relevant regulations did not provide explanations to the concept of fulfilling its official duties.

In the case of *Hu Haobo v. Examination Centre of the Education Ministry,* in 2007, Mr. Hu claimed that his article titled *"Global Warming—Disaster of Today and Tomorrow"* was quoted and amended in the Chinese Paper of 2003 College Entrance Examination. However, the Examination Center did not inform Mr. Hu, neither mentioned his name nor paid him any form of remuneration. The first trial court-Beijing Haidian District People's Court indicated that although Article 22 of *CCL* provides mentioning the name of the author and the title of the work, yet mentioning the author can only be a general principle regulation. In practice esp. certain circumstances, based on limitation of condition, realistic demand or industry common practice may allow exceptions under special circumstances. For example, Article 19 of the *Implementing Regulation* provides that: "Any person who exploits a work created by another person shall indicate the name of the author and title of the work, **except** otherwise agreed between interested parties or **otherwise impossible to do so due to the specific way in which the work is exploited** (emphasis added)."

The court then elaborated that the way that Examination Centre mentioned the author's name in appreciation articles of College Entrance Examination but omitted the author's name in pragmatic articles e.g. since and technology article, expository essay, was one kind of chosen operation after considering the feature of College Entrance Examination, the value of mentioning the author's name toward examinees and the common practice of mentioning the author's name in pragmatic articles and was reasonable. Therefore, the court held that the Examination Center didn't mention Plaintiff's name did not constitute infringement.[15]

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[14] See Civil Judgment of Guangdong Province High People's Court (2002) Yue Gao Fa Min San Zhong Zi No.85 (广东省高级人民法院民事判决书<2002>粤高法民三终字第85号).

[15] See Civil Judgment of Beijing Haidian District People's Court (2007) Hai Min Chu Zi No16761. (北京市海淀区人民法院民事判决书<2007>海民初字第16761号).

The second trial court-Beijing First Instance People's Court also held that the article involved belonged to pragmatic articles, Examination Centre used such article to design the questions for College Entrance Examination, but owing to the specialty of such using conduct, its conduct of not identifying the author's name belonged to one of the captioned exceptions. Thus, the court determined that the original trial's decision that Examination Centre did not constitute infringement on Appellant's (Hu Haobo's) right of authorship was correct. Of course, as pointed out by the original trial's decision, to express the respect and thanks toward copyright owner, Examination Centre may consider whether or not sending a letter or making a phone call to make responsive notice and thanks after College Entrance Examination ended.[16]

5. Use of an Artistic Work Located or on Display in an Outdoor Public Place

Article 22, Paragraph 10 of *CCL* states that "fair use" can consist of, "copying, drawing, photographing, or video recording of an artistic work located or on display in an outdoor public place." In 2002, The Supreme People's Court issued a judicial interpretation which further clarified the foregoing scope of "fair use".[17]

The *Judicial Interpretation* provides that the term "artistic work in outdoor public places" as mentioned in Article 22, Paragraph 10 of *China's Copyright Law* refers to such artistic works as sculptures, painting, calligraphy works, etc. that are located or displayed in outdoor places for public activities. Anyone who copies, paints, takes photographs or video tapes the artistic works as mentioned in the preceding paragraph may further use the works within a reasonable manner and scope without constituting infringement.

Article 21 of the *Implementing Regulation* provides the criterion for the concept of using the work "within a reasonable manner and scope", that is, the copying, drawing, photographing, or video recording "shall not affect the normal use of the work, and shall not unreasonably impair the lawful rights of the copyright holder." The Supreme People's Court further pointed out in the Official Reply[18] that the "reasonable manner and scope" shall include using the work for profit-making purposes. Therefore, if the work is used in accordance with Article 22, Paragraph 10 of *CCL* and does not trigger Article 21 of the *Implementing Regulation*, the use of work would constitute "fair use", even if it is used for profit-making purpose.[19]

In the case of *Yang Lin v. Xiaoshang Corp. Ltd. (2006)*,[20] Mr. Yang Lin claimed that Xiaoshang had infringed his copyright by using a photograph of his sculpture ***"Dong Yong and the Seven Fairies"*** displayed in a park for business. The court held that the fact that Xiaoshang used the photograph of Yang Lin's sculpture on its prod-

[16] See Civil Judgment of Beijing First Instance People's Court (2008) Yi Zhong Min Zhong No.4505 (北京市第一中级人民法院民事判决书<2008>一中民终字第4505号).

[17] Article 18 of the *Interpretations of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright*, effective as of October 15, 2002.

[18] Official Reply of Supreme People's Court (2004) Min San Ta Zi No. 5.

[19] See Civil Judgment of Hubei Province Wuhan City Intermediate People's Court (2006) Wu (Zhi) Chu Zi No.120. (湖北省武汉市中级人民法院民事判决书<2006>武<知>初字第120号).

[20] Ibid.

uct "Guoguang Sesame Candy" did not affect the normal use of the work, and did not unreasonably impair the lawful rights of Yang Lin.

In another case of *Yang Lin v. Yangtze River Milk Industry Co. Ltd. et al. (2006)*,[21] Hubei Province High People's Court pointed out that Article 18 of the *Supreme People's Court Interpretation Related to Several Problems of Applying Law while Trying Copyright Civil Dispute Cases* clarified further that: "An artistic work located or on display in an outdoor public place provided by Item (10), Article 22 indicates the artistic work of sculpture, painting and calligraphy etc. which is set in an outdoor public place. One, who copies, paints, takes a photograph or takes a video, may reuse such achievement through reasonable method and range and does not commit infringement." Thus, under the circumstance that the accused persons were limited to those whom were indicated by Plaintiff i.e. the actual producer and vendors of sesame candy involved, but the one who directly takes the artistic work involved was not accused by Plaintiff, the court held that the producers, manufacturers or vendors of such sesame candy and its outer packaging were deemed as the photographic works or achievements' owner, may reuse such achievement through reasonable method and range and may not constitute infringement on other person's artistic work.[22]

Cases mentioned above which fall into the category of "specific situations" as provided in Article 22 of *CCL* often occur in practice. We note that the circumstances that constitute "fair use" as set forth in Article 22 of *CCL* are also applicable to the neighboring rights, i.e. the right of publication, the right of performance, the right of sound recordings and video recordings, and the right of organizing broadcasting.[23]

4.2 Statutory License

The statutory license includes that where the copyright owner has not declared that the work concerned is forbidden to be exploited by others, a newspaper or periodical may reprint or print an abstract of the work which was published in another newspaper or periodical (see Para.2, Art.33, *CCL*), and work published may also be exploited for public performance or for the production of a sound recording, video recording, radio program or television program; but subject to the payment of remuneration (see Art.37, 40 & 43, *CCL*).

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[21] See Civil Judgment of Hubei Province Wuhan City Intermediate People's Court (2006) Wu Zhi Chu Zi No.121; Civil Judgment of Hubei Province High People's Court (2008) E Min San Zhong Zi No. 16 (湖北省武汉市中级人民法院民事判决书 <2006>武知初字第121号; 湖北省高级人民法院民事判决书<2008>鄂民三终字第16号).

[22] See Civil Judgment of Hubei Province High People's Court (2008) E Min San Zhong Zi No. 16. (湖北省高级人民法院民事判决书<2008>鄂民三终字第16号).

[23] See Xu, Zifeng, Zhang, Haitao. Public Interest vs. Private Rights – Fair Use under the PRC Laws [EB/OL]. IP Bulletin – Special Issue, 2008, http://www.kingandwood.com/article.aspx?id=IPBulletin081127-13&language=en

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Chapter 5
Neighbouring Rights

China's Copyright Law protects not only works by traditional copyright (author's right), but also subject matters other than works by "neighboring rights". Neighboring rights mean "rights and interests related to copyright". According to Art.26 of *Implementing Regulation*, the so called "rights and interests related to copyright", as mentioned in *China's Copyright Law* (see Art.1) and these Regulations, mean the rights enjoyed by publishers in the typographical arrangements of their books or periodicals published, the rights enjoyed by performers in their performances, the rights enjoyed by producers of sound recordings and video recordings in their sound recordings and video recordings and the rights enjoyed by radio and television stations in their broadcast radio or television programs.

Live performance of works, sound or video recordings, broadcasting signals and typo graphical design are not eligible for protection as "works" and are only subject matters of neighboring rights.

5.1 Rights and Obligations of Publishers

Publishers indicate the Publishing units of Publishing House, newspaper, magazine and audio and video press etc. Publication is an important method to realize the copyright owner's rights and interests. The rights of publishers are as follows:

1. With respect to a work delivered to a book publisher by the copyright owner for publication, the exclusive right to publish the work enjoyed by the book publisher as agreed upon in the contract shall be protected by law, and the work may not be published by others (Art.31, *CCL*).
2. A book publisher may alter or abridge a work with the permission from the copyright owner (Para.1, Art.34, *CCL*). A newspaper or periodical publisher may make editorial modifications and abridgments in a work, but shall not make

Y. Guo, *Modern China's Copyright Law and Practice*,
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modifications in the content of the work unless permission has been obtained from the author (Para.2, Art.34, *CCL*).
3. A publisher shall be entitled to permit others to exploit the format design of a published book or periodical of it or prohibit others from doing so (Para.1, Art.36, *CCL*). The term of protection of the right provided in the preceding paragraph shall be 10 years, expiring on December 31 of the 10th year after the first publication of the book or periodical that uses such a format (Para.2, Art.36, *CCL*).

At the same time of enjoying the above-mentioned rights, the publishers shall assume the obligation of paying remuneration (see Art.30, *CCL*).

5.2 Rights and Obligations of Publishers of Performers

The subject of performers' rights is the performer including actor/actress, performing unit or other person performing literature and art, while the object of performers' rights is performing activity i.e. the reproduction of works of public or playing works by the voice, expression, action of the actor/actress.

Performers of a copyright work are granted several kinds of rights, as follows (Item(1) ~ (6), Art.38, CCL):

1. To show his/her identity;
2. To protect the character in his/her performance from distortion;
3. To authorize others to make live broadcasts or to publicly transmit his/her live performance, and to receive remuneration for it;
4. To authorize others to make sound recordings and video recordings, and to receive remuneration for it;
5. To permit others to reproduce and distribute the sound recordings or video recordings which record his/her performance, and to receive remuneration for it;
6. To permit others to disseminate his/her performance to the public through information network, and to receive remuneration for it.

At the same time of enjoying the above-mentioned rights, the performers also assume certain legal obligations which mainly include as follows:

1. Anyone who is permitted to exploit the works in the ways provided in Items (3) through (6) of the preceding paragraph shall also obtain permission from and pay remuneration to the copyright owner (Para.2, Art.38, *CCL*).
2. A performer (an individual performer or a performing group) who for a performance exploits a work created by another shall obtain permission from and pay remuneration to the copyright owner. A performance organizer who organizes a performance shall obtain permission from and pay remuneration to the copyright owner (Para.1, Art.37, *CCL*).

A performer who for a performance exploits a work created by adaptation, translation, annotation or arrangement of a pre-existing work shall obtain permission from and pay remuneration to both the owner of the copyright in the work created by adaptation, translation, annotation or arrangement and the owner of the copyright in the original work (Para.2, Art.37, *CCL*).

Regarding the Ownership of the Performer's Right, Item 6, Article 5 of the *Implementing Regulations of the Copyright Law* stipulates that, performer refers to an actor/actress, performing organization or any other person who performs literary and artistic works. Since Item 6, Article 5 made a simplified stipulation; there are quite different judgments in China's local courts.

In *China Pingju Opera Theater v. China Record Corporation case (2005)*,[1] ***"Third Sister Yang Goes to Court"*** was written by Cheng Zhaocai, the original author. In February 1962, China Pingju Opera Theater organized, recomposed and rehearsed the *"Third Sister Yang Goes to Court"* (the **"disputed opera"**). In 2002, China Record Corporation (CRC) produced China Pingju Opera Theater's re-performance of the disputed opera in CD format and then published the *"China Opera · Third Sister Yang Goes to Court (Selections)"* CD. China Pingju Opera Theater brought CRC to the Court, alleging that the conduct of the CRC infringed his copyright and the performer's right.

Beijing First Intermediate People's Court held upon hearing the case that, China Pingju Opera Theater which recomposed and organized the disputed opera should be entitled to the copyright and, as the performing organization, will enjoy the performer's right. Based on the afore-mentioned facts, Beijing First Intermediate People's Court made a judgment that CRC's actions had constituted copyright infringement and they would be responsible for compensation.[2] CRC was not satisfied with the judgment and appealed but did not question the afore-mentioned facts. Beijing High People's Court therefore affirmed the original judgment.

In this case, by virtue of the defendant infringing multiple rights of the plaintiff, the ownership of the performer's right is not the key issue. So that the court can directly identify the China Pingju Opera Theater, acting as the performing organization means they are the right holder of the performer's right. Does this mean that the individual actor/actress cannot enjoy the performer's right? The two courts in this case did not give a clear view about this.

In *China Federation of Literary and Art Circles,Tianjin Tianbao Culture Development Co., Ltd. and Tianjin Tianbao Optical Disk Co. Ltd. v. Guangdong Changjin Record Co. Ltd. et al. copyright infringment cispute appeal case (2008)*,[3] Changjin Record is, after obtaining authorization of the performing organization and the scriptwriter, the right holder of the copyright and the performer's right of

[1] See Civil Judgment of Beijing High People's Court (2005) Gao Min Zhong Zi No. 1528 (北京高级人民法院民事判决书 <2005> 高民终字第1258号).

[2] See Civil Judgment of Beijing First Intermediate People's Court (2005) Yi Zhong Min Chu Zi No. 687 (北京市第一中级人民法院民事判决书<2005>一中民初字第687号).

[3] See Civil Judgment of Supreme People's Court (2008) Min San Zhong Zi No. 5 (最高人民法院民事判决书 <2008> 民三终字第5号).

"Double Faults leads to Grudge, Too Late to Repent" (also known as *"Da Jinzhuan"*), "*Three Strikes at Tao Sanchun"*, the "Butterfly Chalice" (upper and lower parts) and *"Chen San Liang"* etc. (all referred to the "**disputed operas**"). Changjin Record found three defendants published the disputed operas without authorization and then brought the three defendants to court.

The Supreme People's Court held that the preparation, organization and rehearsals of an opera were presided by the performing organization, and moreover all the needed props, costumes and capital were afforded by the performing organization. As such, a performance indicated the will of the performing organization and thus the performing organization shall be the "performer" as regulated in the *Copyright Law*. Since the performing organization is the "performer", he/she is entitled to authorize others to make a live broadcast or audio recording. Therefore, without special agreement, an individual actor/actress shall not be entitled to personally hold the afore-mentioned rights.

Based on the holdings, the court made a final judgment that Changjin Record is the right holder of the disputed operas and the actions of the three defendants constituted copyright infringement.

The similarity between the 1st case and the 2nd one is that the performer's right was ordered to be owned by the performing organization. However, the judgments explicitly indicated that without special agreement, the individual actor/actress would not be entitled to own the afore-mentioned rights. In fact, there are no express provisions in laws and judicial interpretations for this, but because the judgment was handed down by the Supreme Court, it has important reference value.

Besides, a judgment backed by Xicheng District Primary People's Court in 1996,[4] determining that even though *"Yu Tangchun"* was performed under the Peking Opera Theater, Mr. Zhao Yanxia shall, as the leading actor, be entitled to the performer's right and claim for his rights under the conditions of the performing organization organizing their performance.

With regard to this opinion, some expert thinks it has some rational value. Because a detailed performance shall be performed by different individual actors/actresses, therefore, the individual actor/actress, especially the leading actors/actresses, should be entitled to their own rights. We can not naturally think that since the performing organization costs so much human power and material resources, the performing organization can solely take the performer's right for granted.

According to the above three judgments, it seems that there is no unified judgment towards the ownership of the performer's right. Actually, some expert tends to agree with the judgment that both the individual actor/actress and the performing organization shall be entitled to the legal rights and interests. However, there shall be a focus between the two legal rights and interests, in other words, the individual actor/actress shall have rights for his/her own performance and the performing organization shall

[4] See Beijing Xicheng District People's Court (1996) XI Min Chu Zi No. 887 (北京市西城区人民法院民事判决书)<1996>西民初字第887号), adapted from Luo, Yanjie. Introduction to Ownership of the Performer's Right in China [EB/OL]. http://www.chinaiplawyer.com/introduction-ownership-performers-right-china/, August 4, 2014.

have the rights over the whole performance. Of course, as for the performing organization and the individual actor/actress, under the present legal system, the best way is to make a contract for the avoidance of doubt.[5]

In the *Beijing Treaty on Audiovisual Performances*, there is an explicit stipulation about the ownership of the performer's right. Article 12 of the *Beijing Treaty on Audiovisual Performances* stipulates that, *"A Contracting Party may provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law."*[6]

Article 33 of the 1st amendment draft of the Copyright Law's Exposure Draft regulated that, *"the performer's right shall be enjoyed by the producer in the audiovisual works, unless the parties have agreed otherwise"*.

As seen from these provisions, one expert's legal tendency is to vest the performer's right in the producer. As such, in the 1st case, the performer's right in the audiovisual works does not necessarily go to the China Pingju Opera Theater.[7]

In *the Music Copyright Society of China v. Hangzhou Nine Hundred Bowl Chain Restaurant Food Co. Ltd. copyright infringement dispute case (2009)*,[8] the Music Copyright Society of China (hereinafter MCSC) was a juridical association approved by The Ministry of Civil Affairs to establish on December 17, 1992, its business scope included to carry out the work of collective management of music copyright, professional exchanges, business training, international cooperation and consulting services etc. Fan Xiaobin and Zhu Derong were the music work ***"Silly Brother Song"*** word and song writer. On March 1, 1994 Zhu Derong signed the music work copyright contract with MCSC, both parties agreed as follow: "Zhu Derong agrees to license MCSC his right of public performance, broadcast and recording and distributing to manage by trust, MCSC is responsible to negotiate with the music work users about the use condition and dispatch the music work's use permit, collect the work's use situation, collect the use fees from users and distribute use fees to Zhu Derong according to the use situation, the captioned managerial activities are made under MCSC's title; MCSC has the right to bring lawsuit against tortfeasor, the

[5] See Luo, Yanjie, supra note 4.

[6] The Beijing treaty was signed by 72 members of WIPO during the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing in 2012. China joined the *Beijing Treaty on audiovisual performance*s on April 24, 2014. The international treaty was the first of its kind to be finalized in China and to be named for a city in the country. Its approval showed China's determination to tackle IP infringements in the audiovisual performing industry. See Hao, Nan. China signs copyright cooperation deal [N]. http://www.chinadaily.com.cn/cndy/2015-12/09/content_22666597.htm,2015–12–09. After it came into force, the Chinese performers will get full protection in the country to approve or accede to the "Beijing treaty".

[7] See Luo, Yanjie, supra note 4.

[8] See Civil Judgment of Hangzhou City Intermediate People's Court (2009) Zhe Hang (Zhi) Chu ZiNo. 91 (杭州市中级人民法院民事判决书<2009>浙杭<知>初字第91号).

proceeds brought by Zhu Derong's license, according to the article of association of MCSC two times a year is to distribute to Zhu Derong; the contract is valid for three years, 60 days before the expiration of Zhu Derong not putting forward a written objection, the contract automatically renews three years, later on also do the same."

On December 1, 1996 Fan Xiaobin signed the contraci with the same content as the captioned music works copyright contract with MCSC.

Nine Hundred Bowl Co. was established on June 7, 2000, its registered capital was RMB 7 million yuans, its operation scope included services: economic information consulting, hotel management, food and beverage management, enterprise management consulting, enterprise marketing planning, corporate brand planning; wholesale, retail and hotel supplies, etc. Nine Hundred Bowl Noodle Soup with Canal Square shop was operated by Nine Hundred Bowl Co.

On July 28, 2008 responding to MCSC's application, the national notary public notary of Hangzhou City, Zhejiang Province and the agent of MCSC Lin Fong came to the door way of Hangzhou Tang Lu gongchenqiao Nine Hundred Bowl Old Noodle Shop (Canal Square shop), recorded the background music played by the shop, subsequent recorded the recording of the music into a disc. Compared the content of the songs involved with the content of the Album CD containing the music work ***"Silly Brother Song"*** provided by Plaintiff, both words and songs were all consistent.

Therefore MCSC claimed that it was jointly initiated and established by National Copyright Bureau (NCB) and the Chinese Musicians Association (CMA) and was approved by General Administration of Press and Publication (GAPP) to be established as the only one music copyright collective management organization in Mainland China. MCSC with the right holder's authorization collectively exercised the right of the obligee, and according to China's *Copyright Law* and the *"Regulation on Collective Administration of Copyright"* developed each kind of work.

Plaintiff claimed that Defendant without license, for the need to operate the shop, publicly performed the song "Silly Brother Song", its conduct infringed the right of performance and broadcast of the music works of the copyright holder. MCSC asked the court to order as follows:

- Defendant immediately cease publicly broadcasting the song ***"Silly Brother Song"***;
- Defendant immediately compensate economic losses and relevant reasonable fee total RMB 35,000 yuans; and
- Defendant bear the litigation fee of this case.

Defendant Nine Hubdred Bowl Co. argued as follows:

- The contract between Plaintiff and the authors had expired, Plaintiff no more had the power of attorney, thus Plaintiff did not have the prosecution right;
- The time of Defendabt's broadcast was very short, before the prosecution of this case, Plaintiff's so called song had already stopped broadcasting, thus, Plaintiff's item (1) litigation claim was not necessary; viewing according to Plaintiff's

evidence, Plaintiff's loss was very little, its litigation claim was far more larger than the actual loss; and

- Plaintiff's claimed relevant reasonable fee under the litigation claim i.e. attorney fee RMB 20,000 yuans, notary fee RMB 3,200 yuans, were far more beyond the standards approved by the Price Bureau and the judicial department.

In the meantime, Nine Hundred Bowl Co. claimed during the trial that Canal Square Shop every 10 days updated the background music, business area was 250 m^2, business hour was 12 h and the turnover was RMB 2,500 yuans/day or so.

After hearing the case, Hangzhou City Intermediate People's Court decided that according to Article 11 of *China's Copyright Law*, "Copyright belongs to author." Fan Xiaobin and Zhu Derong were separately the music work ***"Silly Brother Song"*** word and song writer, were the captioned music work's copyright holders. MCSC was the music copyright collective management organization established according to law, it obtained the right of public performance, broadcast and recording and distributing etc. from the right holder via the music copyright contract, and had the right to bring the lawsuit. Nine Hundred Boal Co. without copyright holder's permission, used the music work involved as the background music for its food and beverage location to make public broadcast, did not pay remuneration, infringed the copyright of the work involved enjoyed by MCSC, should bear the legal liability to stop tort and compensate loss. Nine Hundred Boal Co. claimed that it had stopped broadcasting the music work involved, but didn't provide evidence to prove, thus, Nine Hundred Boal Co. should bear the legal liability to stop tort.

Regarding Nine Hundred Boal Co. argued that the contract between MCSC and the authors had expired, did not have the defense against litigation right. The court decided that the music copyright contract between MCSC and the word and song authors of ***"Silly Brother Song"*** indicated: "60 days before the expiration of Zhu Derong not putting forward a written objection, the contract automatically renews three years." Therefore, Nine Hundred Boal Co. argued that such contract could not be renewed automatically, should submit evidence to prove that the related authors had submitted written protest, but it couldn't prove for this, hence should bear the consequences of the burden of no proof, the court did not accept its defense.

Regarding the litigation claim of MCSC asking Nine Hundred Boal Co. to compensate economic loss and relevant reasonable fee total RMB 35,000 yuans, the court comprehensively considered the visibility of music work ***"Silly Brother Song"***, Nine Hundred Boal Company's subjective fault, other tort detail and MCSC paying reasonable fee to curb tort act of this case, discretionarily decided the compensation amount.

According to Item (1), Article 8, Aryicle 10, Article 11, Item (1), Article 47 and Article 48 to hold as follows[9]:

- Nine Hundred Boal Co. immediately stop the act of using the way involved to publicly broadcast music work ***"Silly Brother Song"***;

[9] See Civil Judgment of Hangzhou City Intermediate People's Court (2009) Zhe Hang (Zhi) Chu ZiNo. 91 (杭州市中级人民法院民事判决书<2009>浙杭<知>初字第91号).

- Nine Hundred Boal Co. compensate MCSC economic losses (including litigation's reasonable payment) RMB 5,500 yuans; and
- Refute MCSC's all other litigation claims.

After the first instance judgment, both parties did not file appeal; this judgment has entered into legal effect.[10]

5.3 Rights of a Producer of Sound Recordings or Video Recordings

The subject of rights of a producer of recordings is a producer of recordings including a producer of sound recordings and video recordings, while the object of rights of a producer of recordings is recorded product including sound recorded product and video recorded one.

Normally, there are three kinds of rights of subject in one recording such as the author's right of original work, performer's right and producer of recordings' right.

According to Art.42 of *CCL*, a producer of sound recordings or video recordings shall have the right to permit others to reproduce, distribute, lease and disseminate to the public through information network such sound recordings or video recordings and shall have the right to receive remuneration for it (the former section, Para.1, Art.42, *CCL*).

In *Beijing Kuro Network music software development Co., Ltd., Shanghai Busheng Music Culture Communication Co., Ltd. and Beijing Bo Sheng Fangan Information Technology Co., Ltd. infringement of the rights of producers of sound recordings dispute case (2005)*,[11] Plaintiff Shanghai Busheng Music Culture Communication Co., Ltd. (hereinafter Shanghai Busheng Co.) claimed that Plaintiff enjoyed record producer right toward ***"Old Dad doesn't be so cool"*** etc. sung by Hu Yanbin and never allowed others to broadcast the captioned songs to the public via information network. Defendant Beijing Kuro Network music software development Co., Ltd. (hereinafter Beijing Kuro Network Co.) and Beijing Bo Sheng Fangan Information Technology Co., Ltd. (hereinafter Beijing Bo Sheng Fangan Co.) utilized Kuro software to provide sharing, searching and downloading service of the captioned songs to the public. Two defendants's above-mentioned behaviors infringed the record producer right enjoyed by Plaintiff, caused Plaintiff material economic losses, Therefore, Plaintiff asked the court to order two defendants immediately stop infringing behaviors involved; jointly and severally compensate

[10] See The Music Copyright Society of China v. Hangzhou Nine Hundred Bowl Chain Restaurant Food Co. Ltd. copyright infringement dispute case (Chinese version) [EB/OL]. http://www.cnipr.net/article_show.asp?article_id=21117, 2014–1–26.

[11] See Civil Judgment of Beijing Second Intermediate People's Court (2005) Er Zhong Min Chu Zi No. 13739 (北京市第二中级人民法院民事判决书<2005>二中民初字第13739号).

Plaintiff economic losses RMB 350,000 yuans and reasonable payment for litigation RMB 30,000 yuans and bear this case's litigation fee.

Defendant Beijing Kuro Network Co. contended that Kuro software neither was developed by him nor was operated by him. Thus, he asked the court to refute Plaintiff's litigation claim. Defendant Beijing Bo Sheng Fangan Co. didn't make any response.

On December 12, 2006, after hearing the case Beijing Second Intermediate People's Court decided that Plaintiff Shanghai Busheng Co. was the record producer of 53 songs involved and enjoyed the record producer right. Those 53 songs involved were downloaded by utilizing Kuro software and were broadcasted online without Plaintiff public permission.

According to relevant provision of law, where an Internet service provider (ISP) participates in any act of another person to infringe copyright through network, or aids and abets, on the Internet, others to carry out any act of copyright infringement, the People's Court shall investigate it and other actors or any other person having directly carried out the infringement, and impose joint liability thereon.

In this case, "kuro.com.cn" website provided a platform to realize broadcasting music works including 53 songs involved through the transmission way of "Peer to Peer" (P2P). The so called P2P technology might let users directly search and download documents stored under the "sharing list" by other online users. Such technology per se might be used to broadcast any other kind documents online, but Kuro software only provided music documents' broadcast. Beaides, "kuro.com.cn" website made multiple and systematic categorization of such music documents, provided various kind searching and downloading ways, provided the function of songs audition and optical disc authoring and did mass ads propaganda to attract users. In the columns of "new record", "ranking list", "new topic" and "strong recommendation" etc., it made specific categorization toward most popular song. Hence, Kuro software made selection and arrangement toward its broadcasting songs. In addition, the situation of "temporarily nobody shares" occurred in the process of downloading songs. Thus, Kuro software did not completely accord to then situation of downloading songs to affirm the listing of songs' titles.

As the ISP to do music documents' broadcasting, Defendant Beijing Bo Sheng Fangan Co. provided platform for broadcasting vast amount songs including 53 songs involved online, and those 53 songs involved all were popular songs in recent years. Viewing from the subjective aspect, Defendant Beijing Bo Sheng Fangan Co. **should know** that the source of those 53 songs involved was very likely not permitted by Plaintiff Shanghai Busheng Co. to upload. Viewing from the objective aspect, Defendant Beijing Bo Sheng Fangan Co. neither proved that the uploading users' resource of 53 songs involved existed parts of legal uploading, nor proved that he had adopted any measure to avoid the uploaded 53 songs involved without Plaintiff Shanghai Busheng Company's permission to use Kuro software to broadcast online.

Therefore, the captioned conduct of Defendant Beijing Bo Sheng Fangan Co. had subjective intention. He also made choice and arrangement toward the songs, provided many means to facilitate users to search, download, watch and listen and record songs, did mass ads. Propaganda to attract users and directly obtained income by way of collecting registration fee. Thus, Defendant Beijing Bo Sheng Fangan

Co. provided assistance toward network users' behavior without right holder's permission to use Kuro software to broadcast 53 songs involved, infringed the right of record producer of 53 songs involved enjoyed by Plaintiff Shanghai Busheng Co., should bear legal liability of ceasing infringement and compensating losses.

Defendant Beijing Kuro Network Co. not only provided technical assistance for the captioned behavior of Defendant Beijing Bo Sheng Fangan Co., but also directly attended the captioned tort act under his name, should jointly bear legal liability of ceasing infringement and compensating losses.

Beijing Kuro Network Co. dissatisfied with the original trial judgment, appealed to Beijing Higher People's Court by reason that network copyright infringement disputes should be mainly governed by the court of tort. Beijing Higher People's Court decided that according to the provisions of China's Civil Procedure Law and relevant judicial interpretations, a lawsuit brought on a tortious act shall be under the jurisdiction of the People's Court of the place where the infringing act is committed or where the defendant is domiciled. Therefore, the case of network copyright infringement disputes may be under the jurisdiction of the People's Court of the place where the defendant is domiciled.

In this case, Shanghai Busheng Co. might sue Beijing Kuro Network Co.as the defendant and bring the lawsuit of infringing the right of producer's sound recording. Owing that the domicile and main office location and actual business location were all located on Beijing Dongcheng District, belonged to Beijing Second Intermediate People's Court's jurisdiction area, thus Beijing Second Intermediate People's Court had the right of jurisdiction.

In conclusion, the original trial judgment's fact finding was clear, applied law correctly, Beijing Kuro Network Co.'s reason to appeal could not be established, hence was not supported by the court. The court decided to refute the appeal and maintain the original trial judgment.[12]

It is worth noting that *Chinese Copyright Law* does not provide for the protection of broadcasting and public performance rights for performers and producers of sound/video recordings.[13]

At the same time of enjoying the captioned rights, the producer also assumes the obligation as follows:

1. A producer of sound recordings or video recordings who, for the production of a sound recording or video recording, exploits a work created by another, shall obtain permission from and pay remuneration to the copyright owner (Para.1, Art.40, *CCL*).
2. A producer of sound recordings or video recordings who exploits a work created by adaptation, translation, annotation or arrangement of a pre-existing work shall obtain permission from and pay remuneration to both the owner of the copyright

[12] See Civil Ruling of Beijing Higher People's Court (2006) Gao Min Zhon Zi No. 242 (北京市高级人民法院民事裁定书<2006>高民终字第242号).

[13] See Copyright Protection in China (updated in April 2010) [EB/OL]. http://www.ipr2.org/roadmap.

in the work created by adaptation, translation, annotation or arrangement and the owner of copyright in the original work (Para.2, Art.40, *CCL*).
3. A producer of a sound recording who, for the production of a sound recording, exploits a musical work which has been lawfully recorded as a sound recording by another, does not need to obtain permission from, but shall, as provided in regulations, pay remuneration to the copyright owner; such work shall not be exploited where the copyright owner has declared that such exploitation is not permitted (Para.3, Art.40, *CCL*).

5.4 Rights and Obligations of Broadcasting and Television Organization

The subjects of a broadcasting party's right are broadcasting and television organization, including a radio station and television station, while the objects of a broadcasting party's right are broadcasting program and television program, which indicate collection products produced integratedly by a radio station and television station from various kinds of works, products and other materials and transmitted via the signal containing the sound and image.

A radio station or television station is entitled to prohibit the following acts which it has not permitted (Para.1&2, Art.45, *CCL*):

1. Rebroadcasting the radio or television which it has broadcast;
2. Recording the radio or television which it has broadcast in the audio or video carrier and to reproduce the audio or video carrier.

At the same time of enjoying the captioned rights, the producer also assumes the obligation as follows:

1. A radio station or television station that broadcasts an unpublished work created by another shall obtain permission from and pay remuneration to the copyright owner (Para.1, Art.43, *CCL*).
2. A radio station or television station that broadcasts a published work created by another does not need to obtain permission from, but shall pay remuneration to the copyright owner (Para.2, Art.43, *CCL*).

In *Foshan People's Broadcasting Station and Jia Zhigang copyright infringement dispute case (2015)*[14], Jia Zhigang is the author of ***"Jia Zhigang's Spring and Autumn Period Stories"*** (see Fig. 5.1) series novel. Science and Culture Video Publishing House made the novel into an audio book named ***"World Stories: Spring and Autumn Stories"*** and played it commercially in programme World Stories on FM 94.6 and FM 92.4 by the name of the author Xie Zhengrong. The content of the programme is about 74% same as the words in novel ***"Jia Zhigang's Spring and***

[14] See Civil Judgment of Beijing Intellectual Property Court (2015) Jing (Zhi) Min Zhong Zi No. 122 (北京知识产权法院民事判决书<2015>京<知>民终字第122号).

Fig. 5.1 Series novel "Jia Zhigang's Spring and Autumn Period Stories" (Source: http://baike.baidu.com/link?url=poYScvIDu6OVETtc-FHHOEvF2ig3BuSl4fnDj_jfxgRRjwiEcmJv1d_taHMCgss-PF6LxO3gm2Zbb14rDoOlcvmB4fuCHiA8qbzpMI2w7dqYSGSPVbpYy7docb9LN8kq)

Autumn Period Stories*"**. The programme ***"World Stories: Spring and Autumn Period Stories" altered the expression to a form more suitable to colloquial language based on original text. During the programme, Jia Zhigang's name was not mentioned until disclosing that he was the author in the ending episode. Jia Zhigang claimed that his copyright was infringed.

Beijing Intellectual Property Court held: "[W]hen a radio station broadcasts a published work by others, the authorship and name of the work shall be specified, and no adaptation shall be made, except ones for the work to be listened to rather than be read. Foshan Radio does not specify Jia Zhigang's name during their use of the book and has made excessive adoption to the work. In two years ***"World Stories: Spring and Autumn Period Stories"*** being broadcasted, Jia Zhigang's authorship is not mentioned until the ending episode. Therefore, the act by Foshan Radio does not comply with paragraph 2 of Article 43 in Copyright Law of China, and is an infringement to the copyright of Jia Zhigang. Xin Zhengrong, as an employee of Foshan Radio, made ***"World Stories: Spring and Autumn Period Stories"*** as a job duty for Foshan Radio. As per mutual consent, the copyright generated by performing job duty is owned by Foshan Radio, so the infringement liability shall also be taken by

Foshan Radio. It is also an infringement for Science and Culture Video Publishing House to publish the programme in discs."[15]

This case provided a thorough explanation on law application of radio station's statutory authorization. Factors that are to be considered upon judging whether or not radio or TV station has infringed copyrights when broadcasting or playing other's published work are also clarified, which are as follows:

- The statutory authorization allows adaptations but these adaptations shall be limited to ones made for broadcasting requirements and suitability, and a new work cannot be derived by addition of new content; and
- A signature is the token of statutory authorization and the constituent elements of it. The verdict of this case further clarified the legal provisions in *Copyright Law* about statutory authorization. It also helps strike a balance between protecting the rights of copyright owner and lawful distribution of culture and art works.[16]

3. A radio station or television station that broadcasts a published sound recording does not need to obtain permission from, but shall pay remuneration to the copyright owner, unless the parties concerned have agreed otherwise (Art.44, *CCL*).
4. A television station that broadcasts another's cinematographic work, work created in a way similar to cinematography or video graphic work shall obtain permission from and pay remuneration to the producer. A television station that broadcasts another's video graphic work shall also obtain permission from and pay remuneration to the copyright owner (Art.46, *CCL*).

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Ten innovation intellectual property cases in Beijing during 2015[EB/OL]. http://www.ciplawyer.com/article.asp?articleid=2825, 2016–4–14

The Music Copyright Society of China v. Hangzhou Nine Hundred Bowl Chain Restaurant Food Co. Ltd. copyright infringement dispute case [EB/OL]. http://www.cnipr.net/article_show.asp?article_id=21117, 2014–1–26

[15] See Civil Judgment of Beijing Intellectual Property Court (2015) Jing (Zhi) Min Zhong Zi No. 122 (北京知识产权法院民事判决书<2015>京<知>民终字第122号).

[16] See Ten innovation intellectual property cases in Beijing during 2015 [EB/OL]. http://www.ciplawyer.com/article.asp?articleid=2825, 2016–4–14.

Chapter 6
Copyright Infringement and Enforcement

6.1 Copyright Infringement

Copyright infringement indicates the activity of using other person's work or exercising the exclusive rights of copyright owner without copyright owner's permission and in lack of legal basis.

In detail, moral rights are infringed if the author is not properly identified, or if the work is disclosed to the public against the author's will, or if the work is distorted to the detriment of the author's reputation. Infringement of economic rights means unauthorized exploitation of a work by means covered by any economic right provided in *China's Copyright Law*.

Under *CCL*, there are two categories of copyright infringement in accordance with the plot, outcome of detriment and liability as discussed as follows.

6.1.1 Copyright Infringement Acts Bearing Civil Liability

According to Item (1) to (11), Art. 47 of *CCL*, one who commits any of the following acts of infringement shall bear the civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making a public apology or paying compensation for damages, depending on the circumstances:

1. Publishing a work without the permission from the copyright owner;
2. Publishing a work of joint authorship as a work created solely by oneself, without the permission from the other co-authors;
3. Having his/her name mentioned in connection with a work created by another, in order to seek personal fame and gain, where he/she has not taken part in the creation of the work;
4. Distorting a work created by another;
5. Plagiarizing the works of others;

Y. Guo, *Modern China's Copyright Law and Practice*,
DOI 10.1007/978-981-10-5352-8_6

6. Exploiting a work by means of exhibition, making cinematographic productions or a means similar to making cinematographic productions, or by means of adaptation, translation, annotation, etc. without the permission from the copyright owner, unless otherwise provided in this Law;
7. Exploiting a work of another without paying the remuneration;
8. Without the permission from the copyright owner or obligee related to the copyright of a cinematographic work or a work created in a way similar to cinematography, computer software, sound recordings or video recordings, leasing his/her work or sound recordings or video recordings, except where otherwise provided in this Law;
9. Without the permission from a publisher, exploiting the format design of its published book or periodical;
10. Without the permission from the performer, broadcasting or publicly transmitting his/her live performance or recording his/her performance;
11. Committing other acts of infringement upon copyright and upon other rights related to copyright.

The copyright administrative departments under the local governments shall be responsible for investigating and handling infringements of copyright, with prejudice of the social and public interests, as enumerated in Article 47 of the Copyright Law. The copyright administrative department under the State Council may investigate and handle copyright infringements that are of nationwide influence (Art. 37, *the Implementing Regulation*).

In *Guangzhou Book Centre,Shanghai Audiouisual Press, Shanghai ISUBURAYA Planning Co., Ltd., ISUBURAYA Productions Co., Ltd. and Xin Pote, Guangzhou Ruishi Culture Communication Co. Ltd. copyright infringement dispute appeal case (2010)*,[1] a cross-century and lasting for more than 10 years copyright infringement dispute from Thailand, Japan expanding to China, arose Chinese judiciary sector's high attention. The enduring struggle originated from a contract signed in 1976. In China, there were more than 50 cases related to ***"Ultraman"*** (see Fig. 6.1) work's copyright dispute. Viewing of complexity of the case and involving Japan, Thailand and China's parties, the Supreme People's Court made unified coordination, decided to preserve *Xin Pote, Guangzhou Ruishi Culture Communication Co. Ltd. v. Guangzhou Book Centre, Shanghai Audiouisual Press, Shanghai ISUBURAYA Planning Co., Ltd., ISUBURAYA Productions Co., Ltd. copyright infringement dispute case* accepted by Guangdong Province Guangzhou Intermediate people's Court in 2005.[2] All other relevant cases were suspended.

Guangdong High People's Court made the final judgment on October 25, 2010. It found as follows:

[1] See Civil Judgment of Guangdong High People's Court (2010) Yue Gao Fa Min San Zhong Zi No.63 (广东省高级人民法院民事判决书<2010>粤高法民三终字第63号).

[2] See Civil Judgment of Guangdong Province Guangzhou Intermediate people's Court (2005) Sui Zhong Fa Min San (Zhi) Chu Zi No. 576 (广东省广州市中级人民法院民事判决书<2005>穗中法民三<知>初字第576号).

Fig. 6.1 Source: http://n1.7k7kimg.cn/uploads/allimg/100122/5_100122164050_1.jpg

- The "Contract in the year of 1976" was signed by Xin Pote and ISUBURAYA Productions Co., Ltd., was their true meaning expressed by two parties, was Lawful and effective and had legally binding force;
- Xin Pote enjoyed "Ultraman" work's exclusive right to use started from the date of the start of the film copy in all areas outside Japan;
- Xin Pote's right on "Ultraman" work was protected by *China's Copyright Law*;
- Guangzhou Book Centre, Shanghai Audiouisual Press, Shanghai ISUBURAYA Planning Co., Ltd. and ISUBURAYA Productions Co., Ltd. infringed Xin Pote's legal right.

Then the court held as follows:

- Revoke the verdict of the first instance.
- Guangzhou Book Centre immediately stop selling audiovisual products of "Ultraman" work; Shanghai Audiovisual Press immediately stop producing and selling audiovisual products of "Ultraman" work and destroy the mother belt, production tools etc.; Shanghai ISUBURAYA Planning Co., Ltd. and ISUBURAYA Productions Co., Ltd. immediately stop permitting anybody by any way in China to sell and produce "Ultraman" work.
- Within 10 days from the date of the effect of this verdict, Shanghai ISUBURAYA Planning Co., Ltd. and ISUBURAYA Productions Co., Ltd. compensate Xin Pote RMB 300,000 yuans and reasonable fee RMB 101,930 yuans; Shanghai Audiovisual Press reimburse tort income of RMB 100,000 yuans.

This is the final judgment. Thus, the dispute of ***"Ultraman"*** work in China eventually has final conclusion i.e. Xin Pote enjoys ***"Ultraman"*** work's exclusive right

to use starting from the date of the start of the film copy in all areas outside Japan. The right obtained by Its Chinese agent Guangzhou Ruishi Culture Communication Co. Ltd. is legal as well.[3]

In *Hainan Haishi Travel Satellite Channel Media Co. Ltd. v. Zhejiang Aimeide Tourism Product Co. Ltd. and Beijing Jingdong 360 E-commerce Co. Ltd. case (2015)*,[4] Aimeide Company used the trademark which was very similar to the logo of the Travel Channel on its luggage product and then sold on the platform of JD Company. Travel Channel claimed the act of the two Defendants infringed the copyright of its logo, therefore filed lawsuit to order the two Defendants cease infringing act and order Aimeide Company compensate the economic loss as well as reasonable expense total RMB 2,000,000 yuans.

In order to prove the trademark was used previously on its independent design, Aimeide Company submitted dozens of evidences. During trial, the Court found that many contact phone numbers stated on the distribution contracts had not been used, or the number had not been raised to eight digit from seven digit, which was obvious against common sense. Aimeide Company also admitted some contracts which were signed after the contracts came into effect. After the above problems were found, Aimeide Company submitted the certificates issued by National Leather Industry Standardization Technical Committee (hereinafter NLISTC) and National Leather Products Quality Supervision and Inspection Center ((hereinafter NLPQSIC), which declared that in 2003, the luggage products of Aimeide Company had once been examined in NLPQSIC and one luggage sample bearing the involved trademark was now stored in the warehouse of the center, whose time was earlier than the Travel Channel started to use its logo.

The Court conducted investigation at the two committees, and both the secretary general Zhao of the NLISTC and vice director Tian of NLPQSIC insisted the above luggage was indeed stored in the warehouse after inspection in 2003. However, while inspecting this luggage, the Court found the involved trademark marking with "?" on its hidden part. But Aimeide Company applied to register the involved trademark in 2005 and was granted for its registration in 2008. In the follow-up investigation, Tian confessed that his testimony was instigated by Zhao, and the involved luggage was handed over to the center by Zhao in 2014, which was confirmed at Court by the person in charge of the center.

The Court decided that all the dozens of evidences submitted by Aimeide Company could not be adopted, whose purpose was to prove the involved trademark was used earlier, and Aimeide Company infringed the copyright of the logo of Travel Channel. Taking into consideration of the factors of the degree of originality and popularity of the involved logo, the features and continuous use of the logo by Aimeide Company, and the scale of Aimeide Company, Aimeide Company earned huge profit through infringing acts, the Court held that Aimeide Company shall

[3] "Ultraman" Copyright Case (Chinese version) [EB/OL]. http://blog.sina.com.cn/s/blog_c0f04a970101g70h.html

[4] See Civil Judgment of Beijing Intellectual Property Court (2015) Jing (Zhi) Min Zhong Zi No. 925 (北京知识产权法院民事判决书<2015>京 <知>民终字第925号).

cease infringing act and compensate economic loss of RMB 2,000,000 yuans. In the meantime, the court of first instance held that many crucial evidences submitted by Aimeide Company were false, among which, the NLISTC issued false testimony, the above acts are so severe, causing serious prejudice to the civil litigation, the Court imposed a fine of RMB 1,000,000 yuans respectively on the two organizations, with a fine of RMB 10,000 yuans on the person in charge Zhao of the NLISTC.[5]

Dissatisfied with the first trial judgment, Aimeide Co. appealed to Beijing Intellectual Property Court. Aimeide Co.. NLISTC and Mr. Zhao filed a retrial application separately. Beijing Intellectual Property Court heard and decided that Aimeide Co. used the icon with the logo was substantially similar, infringed the Travel Channel's copyright. The evidences of prior use submitted by Aimeide Co. were false evidences, cannot prove its trademark being used before the logo involved was used. The first trial's confirmation that Aimeide Co. should compensate the Travel Channel economic loss and reasonable expense totaling RMB 2 million yuans, was not inappropriate, therefore rejected the appeal and maintained the original verdict. Besides, Beijing Intellectual Property Court made the decision to sustain the fine against Aimeide Co.. NLISTC and Mr. Zhao.

Imposing severe punishment on dishonest actions is absolutely indispensable for strengthening the legal protection of intellection property. This case is the first case which the Court of Beijing imposing the maximum penalty on dishonest party as well as the highest penalty in a single case in China after the new civil procedure law was effective.

In this case, the Defendant Aimeide Company firstly submitted many crucial false evidences, and after the evidence of prior use was found to be falsified, it continued submitting false evidences and testimonies. If the above false evidences were not found to be falsified, the interests of the Plaintiff and Defendant are very likely to be reversed. The above act impeded litigation order, wasted judicial resources, impaired the interests of opposed party and ignored judicial authority, therefore, the Court imposed the maximum fine of RMB 1,000,000 yuans on Aimeide Company accordingly. As a national industrial organization, the NLISTC issued falsified evidences and testimonies after signing legal undertaking, which severely interfered with judicial order, so the Court imposed a fine of RMB 100,000 yuans on the committee; As the person in charge, Mr. Zhao falsified the above evidences and issued false testimonies on behalf of the committee, he shall bear corresponding liabilities, and the Court imposed a fine of RMB 10,000 yuans on him accordingly.[6]

In *Pearl River Film Production Company White Swan Audio and Video Publishing House and Chinese sports newspaper agency, Harbin Center Bookstore infringing*

[5] See Civil Judgment of Beijing Daxing District People's Court (16) Da Min Chu No. 11485 (北京市大兴区人民法院民事判决书<2013>大民初字第11485号).

[6] See Ten typical intellectual property cases in Beijing during 2015 [EB/OL]. http://www.ciplawyer.com/article.asp?articleid=2824, 2016–4–14

copyright dispute case (2015)[7] (involving copyright infringement cases of illegal audio and video products), on June 27, 2011, the Mass Sports Department of State General Administration of Spot signed ***"Ninth Sets of Radio Gymnastics Publishing Contract"*** with China Spot Publication Cooperation, agreeing to exclusively license the right of reproduction, publication, distribution and information network dissemination of Ninth Sets of Radio Gymnastics series product to the latter. China Spot Publication Cooperation then exclusively owned the captioned product's exclusive right of reproduction, publication, distribution and information network dissemination. On May 1, 2012 the commissioned attorney of China Spot Publication Cooperation bought the infringing audio and video product involved of Ninth Sets of Radio Gymnastics at Harbin Center Bookstore, the text indicated the publisher was Pearl River Film Production Company White Swan Audio and Video Publishing House (hereinafter simply named White Swan Publishing House), was determined fake copy.

China Spot Publication Cooperation asked the court to order Harbin Center Bookstore and White Swan Publishing House immediately stop tort conduct; White Swan Publishing House compensate economic losses, publish notices in the newspaper, eliminate the impact and so on.

The first instance court decided that White Swan Publishing House could not prove having legal authorization of publishing and manufacturing the accused infringing Ninth Sets of Radio Gymnastics audio and video product, constituted infringement, should bear the relevant legal liability. Harbin Center Bookstore's selling the accused infringing Ninth Sets of Radio Gymnastics audio and video product CD belonged to tort conduct. The court held that Harbin Center Bookstore and White Swan Publishing House stop tort conduct, White Swan Publishing House compensate economic losses.[8] After the trial, White Swan Publishing House appealed to the second instance court.

The second instance court after hearing the case decided that China Spot Publication Cooperation provided the accused infringing Ninth Sets of Radio Gymnastics audio and video product with the text indicating that the publisher was White Swan Publishing House, wanted to use it to prove White Swan Publishing House's reproducing, publishing and distributing the accused publication, implementing tort conduct, should bear tort compensation liability. But to judge whether or not such evidence was sufficient enough to prove the claim of China Spot Publication Cooperation, still should confirm whether or not the accused infringing audio and video product involved, whether or not its indicated text information was true, the accused infringing Ninth Sets of Radio Gymnastics audio and video product provided by China Spot Publication Cooperation was not sufficient enough to prove White Swan Publishing House was the publisher, reproducer and distributor of such product, implemented the accused tort conduct. Under such circumstance, China Spot Publication Cooperation's evidence of litigation claim regarding that

[7] See Civil Judgment of Heilongjiang Province High People's Court (2015) Hei (Zhi) Zhong No.2 (黑龙江省高级人民法院民事判决书<2015>黑<知>终字第2号).

[8] See Civil Judgment of Harbin City Intermediate People's Court (2013) Ha (Zhi) Chu No. 104 (哈尔滨市中级人民法院民事判决书<2013>哈<知>初字第104号).

White Swan Publishing House should bear tort compensation liability was insufficient, should be rejected. Therefore, the court held to revoke part of the first instance verdict, refute the litigation claim of China Spot Publication Cooperation against White Swan Publishing House.

This case concerns copyright infringement case of illegal audio and video product. Plaintiff China Spot Publication Cooperation according to the infringing CD bought at Harbin Center Bookstore took the lawsuit, regarding the problem of whether or not White Swan Publishing House constituted tort, it is quite contradictory in hearing thinking and conclusion between the first and second instance court; the first instance court decided that White Swan Publishing House could not submit evidence on the contrary to negate tort fact and constituted tort, whereas the second instance court determined through analysis that the accused infringing CD bought by China Spot Publication Cooperation was piracy CD, but information on the piracy CD was not true, thus could not decide according by it that White Swan Publishing House was the tortfeasor. We should say that the second instance judgment completely considered that China's current reality of the situation of illegal audio and video product was more confused, clarified right holder's responsibility for obtaining evidence to maintain right, that is should not only use the text information on the piracy CD to decide tortfeasor. After the second instance judgment was rendered, both parties obeyed the judgment and ceased controversy.[9]

6.1.2 Copyright Infringement Acts Bearing Comprehensive Legal Liability

According to Item (1) to (9), Art. 48 of *CCL*, one who commits any of the following acts of infringement shall bear the civil liability for such remedies as ceasing the infringements, eliminating the effects of the act, making a public apology or paying compensation for damages, depending on the circumstances; where he/she damages public interests at the same time, the copyright administration department may order him/her to cease the act of tort, may confiscate his/her illegal gains, confiscate and destroy the reproductions of infringement, and impose a fine on him/her; if the case is serious, the copyright administration department may also confiscate the materials, instruments and equipment, etc. mainly used to make the reproductions of infringement; where his/her act has constituted a crime, he/she shall be investigated for criminal liabilities in accordance with the law:

1. Without the permission from the copyright owner, reproducing, distributing, performing, projecting, broadcasting, compiling, disseminating to the public through information network his/her works, except where otherwise provided in this Law;

[9] See China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016–7–13

Fig. 6.2 Cartoon- "Pleasant Goat and Big Grey Wolf" (Source: http://gz.bendibao.com/wei/2016921/21290.shtm)

2. Publishing a book where the exclusive right of publication belongs to another;
3. Without the permission from a performer, reproducing, distributing the sound recordings or video recordings of his/her performance, or disseminating his/her performance to the public through information network, except where otherwise provided in this Law;

In *Creative Power Entertaining and Lin Po copyright belonging and infringement dispute case (2015)*[10] (involving the amount of compensation for infringement should be considered in the form of packaging factors), Plaintiff Creative Power Entertaining obtained the leading role model of works of art of "Pleasant Goat", "Beautiful Goat" and "Grey Wolf" of the cartoon ***"Pleasant Goat and Big Grey Wolf"*** (see Fig. 6.2) by transfer. Plaintiff's agent bought 5 pieces of small night lamps via witness to the notary public. By comparison in the court, the figure of the image of the goat on the accused infringing product's face of package box and the image of the goat of small night lamps all were goat anthropomorphic image and constituted substantial similarity with works of art of Plaintiff's "Pleasant Goat"; the wolf anthropomorphic image of the accused infringing product's left right side of package box constituted substantial similarity with works of art of Plaintiff's "Grey Wolf"; and the goat anthropomorphic image of the accused infringing prod-

[10] See Civil Judgment of Hunan Province Changsha City Intermediate People's Court (2015) Chang Zhong Min Wu Chu Zi No.00105 (湖南省长沙市中级人民法院<2015>长中民五初字第00105号).

uct's opposite right side of package box constituted substantial similarity with work of art of Plaintiff's "Beautiful Goat".

Defendant Lin Po provided the copy of "Pleasant Goat", "Grey Wolf" and "Beautiful Goat" works of art, had no evidence to prove his selling conduct and the accused small night lamps' using the figure of ***"Pleasant Goat"***, ***"Grey Wolf"*** and ***"Beautiful Goat"*** be with Plaintiff's authorization or permission, thus constituted infringing the distribution right of 3 pieces of ***"Pleasant Goat"***, ***"Grey Wolf"*** and ***"Beautiful Goat***" works of art of Plaintiff, should bear corresponding civil liability.

When considering compensation amount, this case paid attention on properly distinguishing the practical value of the product itself and the ornamental value of works. Based on the fact of Defendant's selling ***"Pleasant Goat"*** shape night lamp product, meanwhile on the package of such product using the figure of ***"Pleasant Goat"*** etc., the court divided infringing conduct into two parts i.e. ***"Pleasant Goat"*** shape product and packaging for the use of infringing graphics. Therefore, in deciding compensation, the court also made a corresponding distinction.

On packaging, the main purpose of the consumer to buy the night lamp goods is for lighting not to admire the lighting; such product's normal sale's profit could not be mainly deemed as tort income. Plaintiff had no evidence to prove and did not claim in the case that the work of the rights of his works had been derived from the commercial interests in addition to the work and had generated relationship with infringing product involved, which was capable enough to be the main factor to influence consumers to choose product involved. Hence, only from the perspective of the protection of copyright law, Defendant's bearing compensation liability for infringing packaging should be differentiated with mainly to sell infringing products as a commodity; but on terms of infringing goods, although with lighting function, because of its overall use of the image of the plaintiff's right, the sale and use of the process was inevitable to complete the full display of the plaintiff's rights. When determining the amount of compensation, the illegal gain by infringement of ***"Pleasant Goat"*** shape product's proportion of profits in the profits should be significantly higher than the situation of the use of infringing figure on the package.

Due to the purpose of using infringing figure on the packaging was sales of the infringing shape of night lamp goods i.e. the carrier of the two types of copyright infringement in this case was ultimately unified, this case was in accordance with heavier copyright infringement behavior i.e. the behavior of sale of goods used the infringing shape to determine the compensation amount. Therefore, the merits of the case are that all the infringing behaviors are considered and the corresponding reasons are expounded comprehensively.[11]

[11] See supra note 9.

In *Hunan Happy Sunshine Interactive Entertainment Media Co. v. Tong Fang Inc. infringing the right of information network dissemination Case (2015)*[12] (involving the server standard of the information network dissemination behavior and identification of the fault of the directed link provider), Hunan Happy Sunshine Co. obtained the exclusive information network dissemination of the program involved via authorization. It claimed that Tong Fang Inc. without permission, preset the rabbit video software in the "Tsinghua Tongfang Lingyue 3 Smart TV treasure" HD media player and placed on the desktop to recommend to the users, so that consumers can use the rabbit video playback program in the first boot and use the rabbit video and its function of playing film and television works as a product of the publicity for the program involved. Tong Fang Inc. failed to fulfill the review obligation and constituted tort.

The first instance court decided that the documented evidence could prove that Hunan Happy SunShine Co. obtained the exclusive information network dissemination of the program involved (a work created by a method similar to a film) in the authorized scope and period, had the right to restrict other's use for profit. Tong Fang Inc. without permission, preset the rabbit video software in the "Tsinghua Tongfang Lingyue 3 Smart TV treasure" HD media player and placed on the desktop to recommend to the users, failed to fulfill the review obligation and constituted tort, should bear the tort liability. Tong Fang's arguments that it was only a hardware manufacturer, involved products have substantial non infringing use and so on were without legal basis.

The first instance court comprehensively considered the situation involved in the program, the case of infringement, etc., discretionarily determined the amount of compensation. It held that Tong Fang Inc. should cease infringement and compensate Hunan Happy SunShine Co. economic losses RMB 15,000 yuans. Dissatisfied with the first trial judgment, Tong Fang Inc. appealed to Beijing Intellectual Property Court.

After hearing the appeal, Beijing Intellectual Property Court held that the first instance court deciding the fact clearly, applying the law correctly, should be maintained. The appeal reason of Tong Fang Inc. could not be established and supported. Therefore, Beijing Intellectual Property Court refuted the appeal and maintained the original verdict.

This case involved the identification of the party's tort liability in the product of set top box. Information network dissemination rights disputes related to set-top boxes raise huge controversy in nowadays judicial practice and its relevant standard is waiting for clarification and unification. This case combines the case situation makes clear against the above-mentioned problem as follows:

- Open sales involved in set-top boxes has the rabbit video developer's mark. Its probative force is higher than proof of an outsider that he/she is the developer of the rabbit video;

[12] See Civil Judgment of Beijing Intellectual Property Court (2015) Jing (Zhi) Min Zhong Zi No. 560 (北京知识产权法院<2015>京<知>民终字第560号).

- The direct infringer is not the one who is required to attend the litigation in the case of infringing the right of information network dissemination;
- The confirmation of information network dissemination conduct adopts the server's standard;
- Active directional link means link provider actively arranges the content of the link and the way it links only leading to a small amount of limited site links; and
- Active directional link service provider should bear higher obligation of recognition.[13]

4. Without the permission from a producer of sound recordings and video recordings, reproducing, distributing, disseminating to the public through information network the sound recordings or video recordings produced by him/her, except where otherwise provided in this Law;
5. Without the permission, broadcasting or reproducing the radio or television, except where otherwise provided in this Law;
6. Without the permission from the copyright owner or obligee related to the copyright, intentionally avoiding or destroying the technical measures taken by the obligee on his/her works, sound recordings or video recordings, etc. to protect the copyright or the rights related to the copyright, except where otherwise provided in laws or administrative regulations;
7. Without the permission from the copyright owner or obligee related to the copyright, intentionally deleting or altering the electronic information on the management of the rights on the works, sound recordings or video recordings, except where otherwise provided in laws or administrative regulations;
8. Producing or selling a work where the signature of another is counterfeited.

In *People v. Zhou Zhiquan and Other Six Persons for copyright infringement case (2014)*,[14] in March 2008, Defendant Zhou Zhiquan incorporated Beijing Xintian Yipin Technology Co., Ltd., which operated the Silu high-definition (HD) website. Under this website, there were the portal website of Silu (www.siluhd.com), the Silu Forum (bbs.siluhd.com), and the HDstar Forum (www.hdstar.org). The portal website mainly covered film and television information, video equipment, and advertisement. The Silu Forum was a platform on which Internet users exchanged film information and was free of charge for users to register. The HDstar Forum was the internal website of the Silu Forum and was not free of charge for users to register, and users must pay to buy an invitation code to become registered members.

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[13] Hunan Happy Sunshine Interactive Entertainment Media Co.v. Tong Fang Inc. infringing the right of information network dissemination case (Chinese version) [EB/OL]. http://www.jcipo.gov.cn/zsjz/detail.php?n_no=50458, 2016–04–22. See also China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016–7–13.

[14] See Criminal Ruling of Beijing First Intermediate People's Court (2014) Yi Zhong Xing Zhong Zi No. 2516 (北京市第一中级人民法院刑事裁定书<2014>一中刑终字第2516号).

From January 2009 to April 2013, Defendant Zhou Zhiquan hired defendants Su Liyuans, Cao Jun, Jia Jingyang, Li Binran and other persons to upload to the HDstar Forum more than 30,000 pieces of film, television, and music works whose copyright was enjoyed by other persons in the form of seed files without permission from copyright owners available for downloading by more than 260,000 registered members by the way of membership, and they sought profits by running advertisements on the Silu website and selling registration invitation codes and VIP membership.

Defendant Kou Yujie was captured for his online sale of hard disks with duplicated HD films on Silu HD website. It was found upon investigation that from May 2012 to April 2013, he hired defendant Cui Bing and other persons to duplicate more than 2,300 pieces of film and television works whose copyright was enjoyed by other persons onto more than 4,000 hard disks by using professional copy software without permission from the copyright owners, and sold such hard disks in the online Taobao shop.

On August 3, 2013, the public security authority transferred Zhou Zhiquan, Su Liyuans, Cao Jun, Li Binran, Jia Jingyang, Kou Yujie, Cui Bing, Yi Shuyang, Yan Jinghui, and Chang Haicheng to the People's Procuratorate of Haidian District, Beijing Municipality for examination and prosecution for their suspected crime of copyright infringement. On February 13, 2014, the People's Procuratorate of Haidian District, Beijing Municipality instituted a public prosecution against Zhou Zhiquan and the other six persons. On May 15 of the same year, the People's Court of Haidian District, Beijing Municipality sentenced these seven defendants to imprisonments ranging from 5 years to 1 year for the crime of copyright infringement, and imposed fines ranging from RMB 1 million yuans to RMB 20,000 yuans upon them. In the second instance review, the original judgment was affirmed.

This case is also known as the case concerning copyright infringement by the nationally-known HD website "Silu." For the complicated technical relations, indirect infringement means, and innovative and unprecedented form of infringement in this case, it has been widely reported by media as the "First Case Concerning Copyright in China." It is the first case in China, where criminal offenders are subject to criminal liability for uploading seed files to the Internet available for downloading by registered members. At the beginning of the case handling, in order to properly apply the law, the procuratorial authority fully applied the mechanism linking up administrative law enforcement with criminal justice, repeatedly convened joint conferences with the law enforcement departments of copyright, put forward precautions in evidence collection from the perspective of criminal justice, and ensured that evidence collected by the administrative law enforcement authority be usable in the criminal proceedings.

At the stage of investigation, the procuratorial authority guided the public security authority in investigation by centering on the orientations and priorities of core evidence taking, which has laid a sound foundation for the smooth handling of the case. At the same time, the procuratorial authority recognized the acts of uploading seed files to the website for downloading by other persons as acts of "duplication and distribution" as prescribed in the *Criminal Law* by paying a visit to the video website enterprise and getting to know technical problems in the website transmission

of the works of the copyright owners; and consulting experts in the field of intellectual property rights and obtaining professional support, and the number of crimes was determined on the basis of the standards of registered members, which have overcome both technical and legal difficulties, and properly charged the defendant with the crimes.

After the occurrence of this case, it has attracted great social concerns and caused intensive response from HD film lovers. The procuratorial authority has always maintained legal rationality, abided by procurators' duties of objectiveness and impartiality, strictly implemented the criminal policy of combining leniency and severity, and made a decision on instituting a public prosecution against 7 criminal offenders with serious circumstances and not filing a lawsuit against the other 3 persons with relatively minor circumstances, which have obtained good legal and social effects.[15]

6.1.3 Interim Relief – Injunction and Property/Evidence Preservation

Injunction means that the right holder requests the court to issue the compulsory order to prohibit or restrict the infringer engaging in certain acts before prosecution in order to prohibit the ongoing implementation or the imminent implementation of the infringing behavior. This system originating from the common law system was introduced into China's legal system of intellectual property right. After amended in 2001, Article 61 of Patent Law, Article 57 of Trademark Law and Article 49 of Copyright Law all added the injunction system related provision.[16]

According to Article 49 of the *Copyright Law*, the plaintiff can request the court to stop infringing acts immediately, preventing huge losses before and during the lawsuit. This is called a "preliminary or pre-trial injunction". In practice, an injunction is not always easy to obtain and can be costly as the plaintiff has to put up a monetary bond which is calculated at an amount somewhere between past gross revenue and profits which would have been earned by the defendant during the injunction period.

Evidence and property preservation pending trial of a lawsuit offers some assistance to plaintiffs to ensure that infringers do not destroy evidence that will later be needed to prove infringement in court. Payment of a monetary bond is a pre-requisite in obtaining the property preservation order that is generally much lower than the amount required for a preliminary injunction.

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[15] Model Cases concerning Protection of Intellectual Property Rights by Procuratorial Authorities in 2014 Issued by the Supreme People's Procuratorate [EB/OL]. http://lawinfochina.com/display.aspx?id=19632&lib=law&EncodingName=big5

[16] Gao, Fuping, Application of Injunction in Intellectual Property Litigation (Chinese version) [EB/OL]. http://newspaper.jfdaily.com/shfzb/html/2013-08/28/content_1984.htm, 2013–08–28.

For example, in *Applicants Autodesk Inc. and Adobe Systems Incorporated applied for pretrial evidence preservationcase (2015)*, Autodesk Inc. and Adobe Systems Incorporated are two software enterprises; they believed that Shanghai Ablues Design Exhibition Co., Ltd. copied, installed and commercially used their series computer software including AutoCAD, Photoshop and Acrobat without authorization. As computers installed with illegal computer software were all inside of the site for business operation of Ablues Company, the applicants objectively cannot obtain relevant evidences; meanwhile, as the involved evidences were all computer software and relevant data, thus had intangibility and can be easily hidden or destroyed; evidences would be hard to obtain once they were transferred, hidden or destroyed, which would cause difficulty to the determination of relevant facts. Therefore the two applicants requested Shanghai Intellectual Property Court to proceed with pretrial evidence preservation.

Shanghai Intellectual Property Court held after examination that the evidences the applicants applied to be preserved belonged to evidences might be destroyed or evidences would be difficult to obtain afterwards, and the applicants cannot collect the evidences for objective reasons, which met the conditions of pretrial evidence preservation. The court therefore made a ruling to conduct evidence preservation on relevant information of the aforementioned series software on computers and other equipment inside the site for business operation of the respondent. After the ruling of evidence preservation, Shanghai Third Intermediate People's Court cooperated with relevant departments of Shanghai Intellectual Property Court, brought the institutional advantage of "merging work in one official" into full play, and successfully completed the pretrial evidence preservation.

This is the first case of pretrial evidence preservation for computer software since the establishment of Shanghai Intellectual Property Court. This case relates to preservation of relevant evidences in near 400 computers in a large-scale working place, and the preservation work is professional and complex. Shanghai Intellectual Property Court hired relevant technical experts to assist in the preservation, made thorough plan for the work of evidence preservation, formed workgroups including technical experts group, onsite counting group and field control group, and clarified the responsibility of each group and their cooperation. All groups operated normatively, orderly preserved the evidences, and successfully completed the preservation work. This case provided referential working method and thinking for exploring enforcement mechanism conformed to features of IP case, increasing linkage between enforcement and trial, enhancing efficiency and accuracy of execution of the ruling of preservation and protecting legitimate interest of the right holder.[17]

Although Art. 50 of the Copyright Law provides that interim relief should be considered and decided upon by the court within 48 h, the plaintiff should expect a longer timeframe in obtaining and the enforcement of any order.[18]

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[17] See Supreme Court Releasing 14 Typical Cases Concluded by Beijing, Shanghai and Guangzhou Intellectual Property Courts [EB/OL]. http://www.lindaliugroup.com/web/info_news_detail/?lang=en&id=2434

[18] See Copyright Protection in China (updated in April 2010) [EB/OL]. http://www.ipr2.org/roadmap

Revised in 2012, China's *Civil Procedure Law* wholly introduced the injunction system to provide procedure law's accordance for injunction system existing in the intellectual property right's substantial law. At the same time, the injunction is a double edged sword, to use appropriately, can effectively protect the legitimate rights and interests of the rights, to use improperly can lead to the prejudgment, damages the interests of the party and even the judicial credibility. No matter the parties or the court should be cautious to take action.

Viewing of the particularity of the injunction relief, the application of the injunction should be strictly grasped, the standard should be returned to the party causing irreparable damage. Whether or not the damage is difficult to make up, the general should be considered from three aspects: first, to investigate the scale of tort, If not in time to stop will seriously expand the scope of infringement and the consequences of damage; second, to examine whether or not the damage can be compensated for the loss of ways to be relieved; and third, to investigate the compensation ability of the respondent.

China's Supreme People's Court has emphasized several times to strictly grasp and carefully treat which utilizes the injunction to do unfair competition conduct. In the meantime of *Civil Procedure Law*'s paving the road for intellectual property rights to apply injunctive relief, it also gives the IPR judicial trial a higher requirement. The judicial agency should protect legitimate competitive power of intellectual property rights, but not to encourage their unfair competitiveness. Only in this way can we play the positive role of intellectual property rights.[19]

In *Blizzard Entertainment, Shanghai Wang Zhiyi Technology Development Co. Ltd. v. Chengdu Seven Travel Technology Co., Ltd.* et al. *for preliminary or injunction of copyright infringement and unfair competition dispute case (2015)*.[20] Plaintiff Blizzard Entertainment is the copyright owner of game series ***"World of Warcraft"***. Plaintiff Wang Zhiyi Co. is the exclusive operator of such game in Mainland China area. Two Plaintiffs claimed that Defendant Seven Travel Co. developed and Defendant Split Time Inc. exclusively operated and Defendant Dynamic View Co. provided downloading the accused "All the world of Warcraft" (originally named "Chief Sal") infringed their copyright of the work of art. Defendant Split Time Inc. simultaneously constituted unfair competition conduct of arbitrarily using Plaintiff's specific name, decoration of well-known game and false advertising. Two Plaintiffs at the same time of prosecution proposed an injunction, requested the court to immediately ban three defendants' accused infringing conduct, and provided equivalent cash guarantee of RMB 10 million yuans.

This case strictly abided the procedure requirement for the injunction, strictly examined the substantive elements of the injunction. The whole process was normative and legal. To ensure that the injunction was "active and prudent, reasonable and effective", after receiving the injunction application by the right holder, the court

[19] See Gao, Fuping, supra note 16.

[20] See Civil Ruling of Guangdong High People's Court (2015) Yue Gao Fa Li Min Zhong Zi No, 525 (广东省高级人民法院民事裁定书<2015>粤高法立民终字第525号).

immediately initiated hearing process and clearly notified both parties that it would hold hearing. The hearing was hosted by full court judges of collegial bench, asked parties around the following injunction reviewed the elements to fully evidence and express their views:

- The possibility of the plaintiff's case to win;
- Whether or not the alleged infringement continues to cause irreparable damage to the plaintiff;
- Whether or not the damage caused to the defendant by the injunction is larger than the damage caused to the plaintiff by not to issue an injunction;
- Whether or not the injunction will harm the interests of the public; and
- How to determine the amount guaranteed by the plaintiff.

After the issuance of the injunction, part of the defendants automatically fulfilled the obligation of the ruling, part of other defendants also fulfilled the obligation after the court's supervision and urging, ensured the smooth execution of the injunction, maintained the dignity of the law and the authority of the judiciary and accomplished better legal effect, In the meantime, This ruling especially required defendants shall continue to provide balance inquiries and refund services etc. for game player and reflect the interests of the game players to consider.

The related public and the industry in this field also issued a positive assessment of the injunction on the case, achieved a better social effect. This case was the first injunction ever since the establishment of Guangzhou Intellectual Property Court,[21] fully demonstrated the court's determination to strengthen the judicial protection of intellectual property right. Besides, this case was selected in September 2015 by the Supreme People's court announcing as a typical case of intellectual property right.[22]

6.1.4 Parallel Importation

Parallel importation is not specifically mentioned or addressed in the *Copyright Law* and can therefore generally be considered as a legal activity, although some limitations on parallel importation can be set through the existence of legal contracts.[23]

[21] See Civil Ruling of Guangzhou Intellectual Property Court (2015) Yue (Zhi) Fa Zhu Min Chu Zi No, 2 (广州知识产权法院民事裁定书<2015>粤<知>法著民初字第2号).

[22] See China 2015 Chart Display of IP Courts' Typical Cases-Unfair competition and monopoly, trade secret, IC layout design,contract and preliminary injunction *Sheet* (Chinese version) [EB/OL].

Chinese Intellectual Property Rights, No. 111, http://www.v4.cc/News-1798372.html

[23] See supra note 18.

6.2 Copyright Enforcement

Just as Xiaohong Yan, deputy minister of the General Administration of Press and Publication of the People's Republic of China (GAPP) and the National Copyright Administration of the People's Republic of China (hereinafter NCAC) pointed out in a speech entitled *"Enforcement of Chinese Copyright System and its Perspective"*, "Copyright protection not only relies on the administrative enforcement, but also on the judicial support", "China's copyright institution adopts a dual protection system of administrative implementation and judicial implementation, mainly due to the special copyright circumstances of 20 years ago. As the data shows, 90% of copyright disputes are resolved through administrative enforcement and administrative mediation, as administrative enforcement provides a fast, low-cost advantage. In a special historical period, such an approach is in line with China's reality. But in the long run, the enforcement in copyright protection should rely on the judicial implementation."[24]

6.2.1 Administrative Enforcement of Copyright

6.2.1.1 General Administrative Enforcement of Copyright

On January 16, 2013 the State Council released four independent decisions on amending the *Regulation on the Implementation of the Copyright Law of the People's Republic of China (the **Implementation**)*, the *Regulation on the Protection of the Right to Network Dissemination of Information*, the *Regulation on the Protection of Computer Software* and the *Regulation of the People's Republic of China on Protection of New Varieties of Plants*. The decisions with effective date on March 1, 2013, are designed to amend provisions on determining the amount of fines in those four regulations in a bid to reinforce the law enforcement against intellectual property infringement and fake commodities.

Inter alia, after amendment, Article 36, *the **Implementation*** provides that "[I]n respect of infringement of copyright, with prejudice of the social and public interests, as enumerated in Article 48 of the *Copyright Law*, the copyright administrative department may impose a fine one to five times the amount exceeding RMB 50,000 yuans of illegal business turnover. Where there is no amount of illegal business turnover or the amount of it is lower than RMB 50,000 yuans, it may impose a fine of no more than RMB 250,000 yuans depending on the seriousness of the case."

Any party who objects to an administrative penalty may bring a lawsuit to the people's court within 3 months as of the date when it received the written decision on the penalty. If a party neither brings a lawsuit nor implements the decision within

[24] See A comprehensive summary and realistic predication of Copyright Law [EB/OL]. http://www.chinaipr.gov.cn/frontierarticle/frontier/201103/1209773_2.html, March 16, 2011.

the above time limit, the copyright administration department concerned may apply to the people's court for enforcement (Article 56, *CCL*).

The primary vehicle for copyright enforcement in China is administrative enforcement through the NCAC and Provincial Copyright Departments (PCDs).

In 2015, administrative law enforcement departments at all levels further improved the efficiency of administrative law enforcement, enhanced its supervision and constantly optimized the legal environment for IPR protection.

NCAC maintained the intense effort to crack down on IPR infringement and piracy. It continued the special administration of Internet-based IPR infringement and piracy, carried out the 11th "Swordnet 2015" action in cooperation with the State Internet Information Office (SIIO), the Ministry of Industry and Information Technology (MIIT) and the Ministry of Public Security (MPS) to intensify the control of third-party APPs of online music, online cloud storage and smart mobile terminals as well as online advertising alliances. In special actions, relevant local departments nationwide handled 383 cases of Internet-based IPR infringement and piracy with an administrative penalty of RMB 4,500,000 yuans, transferred 59 criminal cases involving RMB 38,450,000 yuans to judicial departments, shut down 113 websites involved in IPR infringement and piracy, and deleted more than 2,200,000 pieces of IPR-infringing and pirated music online.

In 2015, copyright law enforcement and monitoring departments at all levels filed, investigated and settled 1,177 cases, transferred 92 cases with criminal responsibilities to judicial departments, and destroyed 380 piracy sites. Among them, 36 copyright infringement cases were supervised and settled independently and 4 copyright infringement cases were in cooperation with other departments. NCAC further consolidated the installation of copyrighted software in government organs, Level 3 or higher level central enterprises and large and medium-sized financial institutions and in conjunction with relevant departments, established a normalized supervision and oversight mechanism.

Governments at all levels enhanced the management of software use and purchased and updated copyrighted software in time. 92.63% of public institutions under central departments installed copyrighted software. In 2015, provinces (autonomous regions and municipalities) supervised and inspected the installation of copyrighted software of 33,500 government organs (times) and governments at all levels purchased 951,900 operation systems and office and antivirus software in total with RMB 492,000,000 yuans. Enterprises achieved important breakthroughs in installing copyrighted software. Central enterprises and large and medium-sized financial institutions comprehensively installed copyrighted software. In total, 27,001 enterprises nationwide have passed the inspection of installing copyrighted software. In 2015, central enterprises and financial institutions spent RMB 1,814,000,000 yuans on purchasing, upgrading and maintaining operation systems and office and antivirus software.

The Ministry of Culture (MOC) strengthened market supervision through unannounced visits, spot checks and supervised operations, and special attentions were given to the Internet cultural market. A total of 19 teams were set up to conduct unannounced, random and cross inspections on cultural markets in 140 counties,

cities and districts and 76 prefecture-level cities in 25 provinces, in order to strengthen the supervision of Internet bars, recreation and entertainment markets and publications. It published the blacklist of violations against laws and regulations, deployed the 22nd, 23rd and 24th batches of investigations on illegal cultural activities on the Internet, supervised the settlement of 217 cases involving Internet cultural market and investigated and settled 882 cases involving Internet cultural market.[25]

Besides, in the conclusive conference of "Swordnet 2016" action held by NCA, Office of the Central Leading Group for Cyberspace Affairs, MIIT and MPS on December 22, 2016, it was reported that through 5 minths investigation and treatment by copyright law enforcement departments at all levels all over the country, there were 512 administrative cases, administrative panelty totaled RMB 4,670,000 yuans, 33 cases were transferred to judicial organs and 290 websites were closed.[26]

6.2.1.2 Border Protection

In accordance with *Regulations of the People's Republic of China Regarding Customs Protection of Intellectual Property Rights*,[27] border protection of copyrighted works and products by the General Administration of Customs (GAC) can be a cost-effective way to prevent counterfeit goods from entering or leaving China. According to Article 2, intellectual property rights under the protection of China's Customs shall be … copyright, as well as the rights and patent related to the copyright, in imported or exported cargo, inclusive of the following: The copyrights or other rights concerned of the citizen or organization from any party to the *Berne Convention for the Protection of Literary and Artistic Works*.

The implementation of Customs protection of intellectual property rights is the commitment of China upon its entry to the WTO, and is a demand for all member parties to the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement). The reason why the international organizations and treaties choose to take measures of the Customs' intellectual property rights protection in the tache of immigration is that, along with the development of globalization, international trade and economy grow more and more important to the countries, and the immigration of cargoes become a more and more significant tache in the transna-

[25] SIPO of PRC.2015 Intellectual Property Rights Protection in China [R]. http://english.sipo.gov.cn/laws/whitepapers/201607/P020160721403876149335.pdf

[26] See Lai, Mingfang. Conclusive conference of "Swordnet 2016" action held in Beijing-512 administrative cases and 290 closed websites through 5 minths investigation and treatment (Chinese version) [N]. China Press and Publication News, 2016–12–23.

[27] (Issued by the State Council of the People's Republic of China (in Decree No. 395) on 2 December 2003; amended according to the State Council's Decision on the Amendment to the Regulations of the People's Republic of China Regarding Customs Protection of Intellectual Property Rights issued on 24 March 2010; and entering into force as of 1 April 2010

tional trade and commerce, and that measures taken in this tache for the intellectual property rights protection can be most effective.

As the supervisory and administrative organ of the country, the Customs is entitled to the exertion of related rights and powers as endowed by the *Law of the Customs of the People's Republic of China* and other laws related to: inspect trans-border transport tools, check and examine trans-border cargoes and articles, and detain those in breach of the *Law on Customs* or other law or stipulated concerned; question suspects and investigate into the suspected illegal law-breaching acts; check and copy contract, invoice, account book, voucher, record, file, business exchange & communication, audio & video recording and other information concerning trans-border transport tools, cargoes or articles, and detain or control in other approach those involved with law-breaching trans-border cargoes or articles. The definition and implementation of said rights and powers ensure the effective performance of the Customs' duties and responsibilities in the investigation and handling of cases of infringement cargo in import & export.[28]

The People's Republic of China prohibits from import or export goods which infringe the intellectual property rights (Para. 1, Art.3). The customs authorities effect the protection of the intellectual property rights pursuant to the relevant laws and provisions of these Regulations, and exercise the related power as provided for in the Customs Law of the People's Republic of China (Para. 2, Art.3).

Owners of intellectual property rights who request the Customs to protect their intellectual property rights shall file application with the Customs for taking the protection measures (Art.4). The consignees of import goods or consignors of export goods and their agents shall, in accordance with the State regulations, declare to the customs authorities the state of the intellectual property rights related to the import or export goods and submit the relevant certifying documents (Art.4).;

Art. 7 stipulates that: "Owners of the intellectual property rights may apply to the General Administration of Customs for the recordal of their intellectual property rights according to the provisions of these Regulations; those applying for the recordal shall file an application in writing. The application shall cover the following:

1. The name or personal name and the place of registration or nationality of the owner of the intellectual property right;
2. The title, contents and relevant information of the intellectual property right;
3. The state of license and exploitation of the intellectual property right;
4. The designation, origin, customshouse of entry or exit, importer or exporter, principal features and price of the goods in respect of which the intellectual property right owner has lawfully exercised the intellectual property right; and
5. The manufacturer, importer or exporter, customshouse of entry or exit, principal features and price of the known infringing goods;

[28] Procedure - The Customs Protection of Intellectual Property Rights [EB/OL]. http://www.dhc-ip.com/en/service.php?id=8

Where there are certifying documents relating to the contents of the application provided for in the proceeding Article, the intellectual property right owner shall attach them with the application."

The recordal for the customs protection of an intellectual property right shall take effect from the date of approval of the recordal by the General Administration of Customs. The term of the recordal shall be 10 years (Art.8).

According to Art. 12, the copyright owner may directly apply to Customs to seize goods suspected of infringing a copyright or record copyright with the GAC to take advantage of Customs' routine screening of shipments.

6.2.2 Judicial Enforcement of Copyright

The courts in China are divided into basic courts, Intermediate Courts, High Courts and the Supreme Court. The court where the initial dispute is brought is known as the court of first instance, while the appellate court is known as the second instance court. This appellate system is similar to that which is in place in the United States. In major metropolitan areas, the intermediate court will be the court of first instance for many intellectual property cases. Jurisdictions in major metropolitan areas such as Beijing, Shanghai and Guangzhou handle the majority of intellectual property cases. Because of this specialized capability and the associated protection existing largely only in major metropolitan areas, there should be a heightened awareness among companies in China with regard to where they bring claims in Chinese courts. Venue, as such, becomes a very important issue when litigating intellectual property claims in China.

In some courts within China, the ability of the local judiciary to address a complex intellectual property case may be an issue. Similar to the United States where judges are virtually always experienced attorneys, China's judiciary has subsequent to the passage in 1995 of the *Judges Law* aggressively moved towards a judiciary which has an academic background in the law. In addition, special intellectual property courts have been set up within the Intermediate courts of many major cities, where the judiciary has been specially trained to deal with intellectual property casework. The specialized background and training of the intellectual property judiciary allows for effective mediation (an attempt at mediation by the judge is required as a precursor to trials in China) and adjudication of copyright claims in China.

The jurisdiction and associated venue for adjudication of cases in China is based upon where the Defendant has his domicile or where the infringing act has taken place.[29] Specific to copyright infringement claims against multiple Defendants (for instance, a manufacturer of infringing goods and its distributor), the Plaintiff may choose the People's Court in the place where one of the Defendants has committed

[29] Civil Procedure Law of the People's Republic of China, art. 29, promulgated on April 9, 1991. 1st amended in 2007 and 2nd amended in 2012.

an infringing act.[30] For foreign or domestic companies seeking to bring infringement actions against Defendants in major Chinese cities such as Beijing, Shanghai, and Guangzhou, the Chinese judicial system offers a viable alternative for adjudication of even the most complex of copyright cases. Plaintiffs bringing infringement actions against Defendants in lower-tier cities or rural locations should, however, give due consideration to jurisdiction and venue options when contemplating adjudication of IPR claims in these less-developed areas. Irrespective of the location, however, the heightened education requirements for the judiciary and growing experience with intellectual property casework have benefited both Chinese and foreign copyright holders in judicial proceedings in China.[31]

We should pay attention that the Chinese government in 2014 and 2015 established 3 new intellectual property courts – in Beijing, Shanghai and Guangzhou. These courts, which have special jurisdiction and expertise, further strengthen China's intellectual property regime and are another step in China's path towards having an advanced intellectual property legal system. On January 9, 2017, Chengdu Intellectual Property Tribunal approved by Supreme People's Court was established. It may aeeept cross region cases.[32] On January 19, 2017, Nanjing and Suzhou Intellectual Property Tribunal approved by Supreme People's Court were established and may also aeeept cross region cases.[33]

The new IP courts will sit as first-instance in civil and administrative cases involving patents, computer software, trade secrets of technical nature, new plant varieties and integrated circuit design, civil cases for the recognition of well-known trademarks and administrative cases against decisions of provincial and municipal governments with respect to IP rights. They will also hear appeals on first-instance decisions in IP cases from decided by basic courts located in their jurisdiction. The Beijing IP Court will also have exclusive jurisdiction with respect to administrative cases against decisions of the state administrative authorities involving the determination of IP rights. Appeals on the decisions of these new IP courts will be to the High Court located in the province where the relevant IP court is located. Thus, it seems that the IP Courts' position in the hierarchy of the Chinese judicial system is similar to that of an intermediate court.

It should be noted that the new IP courts will affect the IP regime only in Beijing, Shanghai, Guangzhou, Chengdu, Nanjing and Suzhou but there will be no change to the current practice in other territories in China. Nevertheless, as a substantial

[30] *Interpretation of the Supreme People's Court of Several Issues Relating to Application of Law to Trial of Cases to Civil Disputes over Copyright, Art. 5*, adopted on October 15, 2002.

[31] See WIGLEY, RICHARD W. Copyright Enforcement and Privacy Protection over the Internet: A Comparison of Laws and Practices in China and the United States [EB/OL]. IP Bulletin - Special Issue, 2008, http://www.kingandwood.com/article.aspx?id=IPBulletin081127-06&language=en

[32] Zhou, Ziming. Chengdu Intellectual Property Tribunal was officially established, nay aeeept cross region cases (Chinese version) [N]. http://scnews.newssc.org/system/20170109/000739613.htm, January 9, 2017.

[33] Where to bring the lawsuit of IPR cases? To have these knowledges at first (Chinese version) [N]. http://www.legaldaily.com.cn/judicial/content/2017-01/22/content_6989968.htm?node=80533, January 22, 2017.

share of China's IP litigation takes place in these 6 cities, the effect may be profound on the entire IP regime in China. This may also, ultimately, pave the way to a more complete and harmonized IP judicial system in the whole of China.

The new IP courts are therefore good news for owners of IP rights and another testimony of the ever-improving level of IP protection in China.[34]

In 2015, local courts accepted 9,839 new IPR administrative cases of first instance, remaining basically stable compared to the previous year, and concluded 10,926 (including old ones), with a year-on-year increase of 123.57%. First instance clearance rate was 70.5%. To break it down, there were 10 copyright cases, down by 16.67% year on year. In 2015, local people's courts nationwide concluded 10,809 IPR criminal cases of first instance and 782 cases of second instance, remaining basically stable compared to the previous year. The effective judgments brought 12,732 persons out of 12,741 suspects in a verdict of guilty. Among the cases brought in a verdict of guilty of IPR infringement, the courts brought in a verdict of guilty of copyright infringement in 414 cases.

Prosecuting departments nationwide performed procuratorial supervision and cracked down on IPR infringement crimes strictly. In relation to arrest approval and prosecution, they approved the arrest of 4,772 people in 2,761 suspected IPR infringement cases and prosecuted 8,664 people in 4,736 cases. More specific, 148 suspects involved in 106 cases of copyright infringement were approved to be arrested and 565 suspects involved in 425 cases were prosecuted.[35]

Besides, the following Chart shows that in 2015, regarding the typical cases, China IP courts heard 13 pieces of copyright civil cases and 1 piece of copyright criminal case as follows[36]:

1. Copyright civil cases

- *"Our universe" web games infringing the right of adaptation and unfair competition case* (involving changing the name of the well-known online games without authorization);
- *AI Ying Co. v. Yaya company* et al. *works infringing the right of reproduction, adaptation rights dispute case* (involving the judgment of the substantial similarity of art works and the dispute over the right of adaptation);
- *Blue Box Toy Factory Ltd. v. Dumex Co.* et al. *infringing the right to reproduce the work and the distribution right dispute case* (involving copyright protection of practical works of Art),;
- *Yongfu Co. Ltd. v. Mr. Huang* et al. *infringing the right to reproduce the work and the distribution right dispute case* (involving copyright protection of foreign practical works of Art);

[34] GROUP, REINHOLD COHN. China's new intellectual property courts [EB/OL]. http://www.lexology.com/library/detail.aspx?g=9c524ea5-4ab3-4eec-87f7-08c5307fc332, March 5 2015

[35] SIPO of PRC.2015 Intellectual Property Rights Protection in China [R]. http://english.sipo.gov.cn/laws/whitepapers/201607/P020160721403876149335.pdf

[36] See China 2015 Chart Display of IP Courts' Typical Cases (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, https://mp.weixin.qq.com/s?__biz=MzA5MTQxNjcxOQ==&mid=2679748041&idx=1&sn=4f6b1a1d0dcffab757fd01b07cf4450d, 2016–05–29.

- *Mr. Wang v. Mr. Bai, Social Science Publishing House and Tian yi Co. infringing copyright dispute case* (involving Identification of plagiarism in writing);
- *Creative Power Entertaining and Lin Po copyright belonging and infringement dispute case* (involving the amount of compensation for infringement should be considered in the form of packaging factors),
- *Foshan People's Broadcasting Station and Jia Zhigang copyright infringement dispute case* (involving how to determine whether the broadcast behavior of the radio and television station complies with the statutory licensing requirements or not);
- *Infringing the right of information network dissemination of "A Bite of China 2" case* (involving identification of search links service in the case of infringement of the right of information network dissemination);
- *Beijing News current news case* (involving whether current affairs news is protected by copyright or not)
- *Hunan Happy Sunshine Interactive Entertainment Media Co. v. Tong Fang Inc. infringing the right of information network dissemination case* (involving the server standard of the information network dissemination behavior and identification of the fault of the directed link provider);
- *Rhino Software Inc. v. Shenzhen Polytron Technologies Inc. infringing computer software copyright dispute case* (involving the protection of intellectual property rights of the new type of case in "Internet +" era);
- *Weng Guoyang v. Shenzhen Jincheng Domain Silver Jewelry Co. Ltd. infringing copyright dispute case* (involving public domain image non infringement case) and
- *Pearl River Film Production Company White Swan Audio and Video Publishing House and Chinese Sports Newspaper Agency, Harbin Center Bookstore infringing copyright dispute case* (involving copyright infringement cases of illegal audio and video products)

2. Copyright criminal case

- *A Crime of copyright infringement by Mr. Chen (involving an unauthorized erection of the server piracy network games constituting copyright infringement case*

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Chapter 7
Collective Management Societies

7.1 Legal Basis and State of Play

On 1 March 2005, the State council promulgated the *Regulation on Collective Administration of Copyright* (hereinafter the *Regulation*),[1] which now governs the establishment, organizational structure, activities and supervision of Collective Management Societies (CMSs).

This Regulation is formulated in accordance with the *Copyright Law of the People's Republic of China* (hereinafter referred to as the *Copyright Law*) so as to regulate the collective administration of copyright, and facilitate both the copyright owners and other right holders relating to copyright (hereinafter referred to as obligees) to exercise their rights as well as for the users to use works (Art. 3, the *Regulation*).

7.1.1 Establishment of CMSs

Art. 3 of the *Regulation* provides that: "The organization for collective administration of copyright as mentioned in this Regulation shall mean a civil society that is lawfully established for the benefit of the right owners, and conducts collective administration of the owner's copyright or other copyright-related rights upon the authorization of the right owners. An organization for collective administration of copyright shall be registered and carry out activities in accordance with this

[1] Issued by the Order No. 429 of the State Council of the People's Republic of China December 28, 2004; amended for the first time in accordance with the Decision of the State Council on Abolishing and Amending Some Administrative Regulations on January 8, 2011; and amended for the second time in accordance with the Decision of the State Council on Amending Some Administrative Regulations on December 7, 2013.

Y. Guo, *Modern China's Copyright Law and Practice*,
DOI 10.1007/978-981-10-5352-8_7

Regulation and other administrative regulations on registration and administration of social organizations."

Article 7 of the *Regulation* prescribes how to establish an organization for collective administration: "Chinese citizens, legal persons or other organizations that lawfully enjoy copyright or copyright-related right, may initiate the establishment of an organization for collective administration of copyright. For the establishment of an organization for collective administration of copyright, the following conditions shall be fulfilled:

1. There shall be no less than 50 right owners who initiate the establishment of the organization for collective administration of copyright;
2. The scope of business of the organization for collective administration of copyright shall not overlap or coincide with that of another lawfully registered organization for collective administration of copyright;

   According to this provision, only one collective society can be established for the exercise of a certain type of right or use. It also provides a legal basis for the Chinese government for approving the establishment of collective societies to avoid competition between the collective societies administrating the same right.
3. The organization for collective administration of copyright may operate in the interest of relevant right owners throughout the country;
4. The organization for collective administration of copyright has formulated a draft articles of association, a draft of royalty rates to be charged, and a draft measures for distributing royalties to the right owners (hereinafter referred to as measures for distributing royalties."

7.1.2 Relationship between CMSs and Right Holders

Article 8 of the *Chinese Copyright Law* provides that the owners of copyright and related rights may authorize an organization to license their rights collectively. This clearly demonstrates that the relationship between CMSs and right holders is based on individual mandates from the right holders to the CMSs.

7.1.3 The Supervision on CMSs

The *Regulation* also specifies the forms of government supervision of the CMS in the following five aspects:

Firstly, the right holders' rights vis-a-vis the CMSs are specified in the *Regulation* to ensure a balanced relationship between the CMSs and the right holders.

Secondly, the *Regulation* confirms the general assemblies position as the CMSs highest policymaking body to ensure that the power is in right holders' hands.

Thirdly, the *Regulation* prescribes the supervisory duties of executive branches of the government, such as departments of civil affairs, finance, and the copyright administration department under the State Council.
Fourthly, users and other social organizations have been conferred rights to oversee the CMSs activities.
Fifthly, the *Regulation* specifies the CMSs internal institutions and operations to ensure transparency.

7.1.4 Works Subject to Collective Management

Collective administration of copyright, which is mentioned in this Regulation, shall mean the following activities carried out by the organizations for collective administration of copyright in their respective own names upon authorization of the obligees, so as to exercise the obligees' relevant rights in a centralized way:

1. Concluding with the user a license contract of copyright or of a copyright-related right (hereinafter referred to as license contract);
2. Charging royalties from the user;
3. Transferring royalties to the obligee;
4. Participating in litigation or arbitration, etc. involving copyright or a copyright-related right (Article 2, the *Regulation*).

Not all categories of works and/or rights covered by the *Copyright Law* are subject to collective administration. According to the *Regulation*, works that can be managed by a CMS are mainly musical works, cinematographic works and works created by virtue of an analogous method of film production, written works, works of fine art, and photographic works, that is, Article 4 of the *Regulation* provides the types of rights subject to collective administration: "Such rights as prescribed in the Copyright Law wich are difficult to be effectively exercised by the right owners themselves as the right of performance, projection, broadcasting, lease, dissemination through information network, reproduction, etc. may be subject to collective administration by organizations for collective administration of copyright."

7.1.5 Statutory Licenses

According to Article 23, Para. 2, Article 33, Para. 2, Article 40, Para. 2, Article 42 and Para. 2, Article 43 of the *CCL*, certain users (such as book publishers, newspapers, periodical publishers, and producers of sound recordings, and broadcasters) can under certain conditions use the works without the right holders' permission, but they must pay compensation to the right owner.

Para. 1, Article 47 of the *Regulation* provides that: "Whoever uses a work of any other person according to Article 23, paragraph 2 of Article 33 or paragraph 3 of

Article 40 of the Copyright Law, but fails to pay royalties to the obligees in accordance with Article 32 of the Regulation for the Implementation of the People's Republic of China the Copyright Law, shall submit the royalties along with the postage and the relevant information on use of the works to the organization for collective administration of copyright which administers the related rights, and this organization for collective administration of copyright shall transfer the royalties to the obligees."

The organization for collective administration of copyright which is responsible for transferring royalties shall set up a system for inquiry of information on the use of works for the obligees' and users' inquiry (Para. 2, Article 47, the *Regulation*).

The organization for collective administration of copyright which is responsible for transferring royalties may draw administrative fees from the royalties it has charged. The administrative fees shall be drawn at the reduced half rate of the collective administration organization's administrative fees as determined by the general assembly. Except for the administrative fees, this organization for collective administration of copyright shall not draw any other fees from the royalties which it has charged (Para. 3, Article 47, the *Regulation*).

Considering establishing a statutory licensing system requires a close relationship between the CMS and right holders, Para. 1, Article 24 of the *Regulation* stipulates that "An organization for collective administration of copyright shall set up a system for inquiry of information on rights, for the obligees' and the users' inquiry. The system for inquiry of information on rights shall include the categories of rights under administration of the organization for collective administration of copyright, the names of the works, audio and video products, etc. and of the obligees, as well as the duration of authorized administration." When an obligee or user is inquiring the information on rights under administration of the organization for collective administration of copyright, this organization shall give a reply (Para. 2, Article 24).

Besides, Article 28 of the *Regulation* stipulates that "An organization for collective administration of copyright may draw a certain proportion from the charged royalties as its administrative fee, which shall be used for maintaining its normal business activities. The proportion for an organization for collective administration of copyright to draw the administrative fee shall gradually decrease with the increase of the income of royalties."

7.1.6 The Development of CMS of China

As everywhere else, the purpose of CMS is to collect from users and distribute among authors and holders of related rights royalties due in respect of the economic have contracted with the creator that the copyright is assigned exploitation of their members' works, including phonograms and videogames.

On December 7, 1992, the Chinese Musicians' Association and the NCAC initiated the establishment of China's first organization for collective administration -the Music Copyright Society of China (MCSC). Most creators of music in China grant

authorization to MCSC to represent them and to administer their works, including collecting fees, granting licenses for use of the work and lodging complaints with the courts or local copyright administrations. MCSC has set up branches in many cities in China and has established business relations with many international copyright organizations and related international institutions.

As mentioned above, in 2004, the State Council promulgated the *Regulation on the Collective Administration of Copyright*. The *Regulation* allows a copyright collective administration society to represent right holders to exercise their copyright in concluding copyright license agreements, collecting royalties from users and transferring royalties to the right holders, and participating in copyright related litigation or arbitrations. Copyright collecting ties in its own name upon obtaining authorization from right holders. Pursuant to the *Regulation*, NCAC formally approved the establishment of another copyright collective management society in 2005, the China Audio-Video Copyright Association ("CAVCA"), which is currently the only collection management society of audio-visual program products. CAVCA only commenced performing its function earlier in 2008, as it did not obtain approval for registration from the Ministry of Civil Affairs until May 28, 2008.

In 2000, NCAC also approved the application for preparation for the establishment of China Written Works Copyright Society ("CWWCS"), which was established on October 24, 2008. Images Copyright Society of China (ICSC) was established on November 21, 2008. On April 16, 2010, China Film Copyright Association ("CFCA") was established and began to collect film works use fee from cyber cafe and long distance coach.

In summary, at present, there are five kinds of CMS in China i.e. the China Audio-Video Copyright Association ("CAVCA"), the Music Copyright Society of China ("MCSC"), China Written Works Copyright Society ("CWWCS"), Images Copyright Society of China (ICSC) and China Film Copyright Association ("CFCA") .

Finally, we have to make clear that CMSs are not the agencies of copyright owners. CMSs are quite different from the agencies in the traditional sense. They have 3 major differences: Legally, CMSs are set up on the basis of trust. It exercises the holding of the properties. But agencies represent a contractual relationship of debt. CMSs may exercise rights in their own names. During lawsuits, they have standing in their own name. Secondly and most importantly, the same kind of works can only be managed by one society, but after being approved by the copyright administration department under the State Council, and make registration in the civil affairs department under the State Council in accordance with the relevant administrative regulations on registration and administration of social organizations, they can have many branches. This is also what was emphasized during the legislation (see Article 12). The third difference is that agencies' service can be free or chargeable, and can be conducted by companies or by individuals. But collective management is non profit-making and must be performed by companies.[2]

[2] See Zhou, Yi, The Development of Copyright Collective Management Is Out of My Expectation [J]. Chinaipmagazine, 2009, (34), avzilable at http://www.chinaipmagazine.com/en/journal-show.asp?id=541

7.2 Main Issues/Problems for CMS Related Laws and Regulation in China

Compared with more developed countries, China's CMSs are less developed in terms of the number of members, revenues and the efficiency of management. The development of CMSs has encountered many difficulties.

The revision of *China's Copyright Law* in 2001 and the enactment of the *Regulations* have improved the situation, but many problems related to the design of collective administration system remain and they will be discussed hereafter.

7.2.1 Extended Collective Licensing

The Collective Administration as prescribed in the *Copyright Law* and the *Regulation* is a voluntary licensing system, and consequently the CMSs need direct mandates from the right holders. The existing legislation does not include a provision whereby the "small rights"– including the broadcasting, public performance and showing of non-dramatical works could be licensed by an approved collecting society even without an express mandate from the right holders. Moreover right owners can exercise those rights separately. The existing legal system does not grant CMSs a privileged status in exercise of the mentioned small rights. This results in the risk that the licensees- such as broadcasters or bars or shops- that has obtained a blanket license from a CMS may still be sued by individual small right owners.

For example, in *Shenzhen Sheng Ying Network Technology Co. Ltd. v. Wuxi Qiao Sheng Entertainment Co., Ltd. case (2015)*,[3] after exclusive authorization in 2013 for 3 years, Sheng Ying Co. via sole license obtained the right in its own name to authorize public recreation places such as Cara OK etc. to reproduce, broadcast and transmit 54 pieces of songs involved music works, and had the right to bring litigation in its own name against the infringing user. Sheng Ying Co. accused Qiao Sheng Co. without permission, reproduced the music works involved to save on its servers and provide Cara OK on demand service to the public, and infringed its right of reproduction and performance.

Jiangsu Province Wuxi City Intermediate People's Court as the first instance court decided that the right of reproduction and performance of those music works involved should be enjoyed by the producer, lyrics and song writers are unable to work alone and advocate the right of reproduction and performance.[4]

After appeal, Jiangsu Province High Prople's Court held that the essence of Sheng Ying Company's behavior was to use CMSs' function and right, violated the

[3] See Civil Judgment of Jiangsu Province High Prople's Court (2015) Su (Zhi) Min Zhong Zi No. 00100 (江苏省高级人民法院民事判决书<2015>苏<知>民终字第00100号).

[4] See Civil Judgment of Jiangsu Province Wuxi City Intermediate People's Court (2014) Xi (Zhi) Min Chu Zi No. 90 (江苏省无锡市中级人民法院民事判决书<2014>锡<知>民初字第90号).

banning regulation which stipulates that except CMSs, no organization and individual may engage in copyright collective management activities.

The third party in addition to CMSs engages in its own name in approved use, collecting fee and management toward public recreation places such as Cara OK etc. through obtaining permission from copyright holders of part of the music works. Such kind of operation model has incurred quite a big controversy all the time. This phenomenon leads Cara OK operators to not knowing how to deal with many charge subjects, market disorder and frequent disputes. This case is the first judgment holding illegitimate CMS by China's judicial adjudication.[5]

Regarding this judgment, there are differences in the views of the industry. One viewpoint thinks that Jiangsu Province High People's Court confirms the illegitimate nature of similar company in the final trial. This can be deemed as a significant breakthrough of how to decide illegitimate collective management in judicial practice, also has important reference value toward NCA's identifying and investigating illegal collective management activities in accordance with the law, and has important meaning toward purifying the environment of copyright collective management and promoting the development of the collective management of copyright in China.

But the president of the Copyright Society of Nanjing Fong Jing argues that this case shows that the existing copyright collective management system has some drawbacks, should try to introduce competition. Concerning this opinion, Director General of the CWWCS Znang Hongpo refutes that to refer some overseas measures of the aspect of copyright collective management such as one sector having many CSCs is good superficially at the beginning, but it will go to the direction of factual monopoly in the long run. He indicates that the purpose of collective management system is to let one CSC exercise the rights which the right holder can not or difficult to directly exercise on behalf such right holder, thus it not only makes the right holder not have to deal with the issue of licensing and fees one by one, but also makes users obtain authorization via simple and convenient channel, maximize the cost of authorization, hence promote the dissemination of works. Under the Internet environment, the authorization and use of works are magnanimous, thus the meaning of collective management is much more substantial.[6]

Also, in early September 2016, one Shenzen record company accused numerous music recreation places including music clubs and KTVs in Xiamen City by reason of copyright infringement and asked the latter immediately stop infringing behavior, delete infringed products from repertoire and compensate corresponding economic losses.

All the defendants contended that they had already paid fee to CAVCCMA for copyright use of Cara OK repertoire, thus they shouldn't bear the tort liability.

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[5] See Shenzhen Sheng Ying Network v. Wuxi Qiao Sheng Entertainment Copyright Infringement Case (Chinese version) [N]. http://www.cnsymm.com/2016/0217/21980.html, 2016–02–17.

[6] See Wei, Fang. Be careful of not good intention copyright agents (Chinese version) [N]. http://www.gapp.gov.cn/chinacopyright/contents/518/273940.htmlRegulations on collective administration of copyright, 2016–1–28.

But Fujian Provience Xiamen City Siming District People's Court didn't think so. The presiding judge analyzed that even though those accused KTVs had signed contract of permission to use with CAVCCMA, yet they could not prove that the copyright owner of the music album involved had authorized CAVCCMA to manage those music and television works involved in the case, hence they still failed to fulfill the obligation of reasonable examination. As an example of the KTV located on Douxi road, Xiamen City, owing that it reproduced 80 pieces of music and television works involved in the case in its Cara OK repertoire system, projected to the public in the form of Cara OK, infringed Plaintiff's right of reproduction and broadcast toward the captioned music and television works involved in the case. Therefore, the court made the first instance judgment which required such KTV bear the liability to immediately cease using and broadcasting, remove the above music and TV works from the VOD system and compensate economic losses and reasonable fee totaled RMB 28,050 yuans.[7]

7.2.2 The Absence of a Dispute Settlement Mechanism

Article 26 of the *Regulation* provides that where two or more organizations for collective administration of copyright charge royalties for one type of rights they may negotiate in advance to determine which one shall charge the royalties in a unified way. But what if no agreement can be reached? How to settle the severe dispute relating to the royalty fee rate and main right users or association of right owners? How to deal with the dispute between the member of the organization and the users?

Due to an absence of dispute settlement mechanism in the *Regulation*, the *Regulation* empowers the government to intervene in the management of CMSs for the purpose of supervision. As the administrative and supervisory agency for CMSs, NCAC should supervise the organizations to ensure that they safeguard the interest of the copyright owners, facilitate the lawful exploitation of copyrighted material and endeavor to keep a balance between the interests of the right holders and the users of works or other protected subject matter.

It is however not an easy task on one hand to strengthen the supervision on CMSs and on the other hand to ensure sufficient independence for the societies so that right holders are given maximum autonomy and a sound environment for development of CMSs can be created. In general, the relationship between CMSs and the right holders, between the CMSs and the users and between the CMSs should be subjected to civil law rules and normal civil process. However the absence of dispute settlement mechanism has lead to an excess of "redtape" – and interventions by NCAC and the passiveness of CMSs.

[7] Chen, Jie. Authorized by CAVCCMA KTV still was found infringement, numerous recreation places were accused (Chinese version) [N]. http://www.taihainet.com/news/xmnews/shms/2016-09-21/1790815_2.html, 2016–09–21.

7.2.3 *Standing to Take Actions on Behalf of Foreign Right Holders*

According to Article 8 of the *Copyright Law*, a CMS may appear in its own name before courts in cases involving rights it administers. It is the first time that the standing of the CMSs has been established in China. But even after the revision of the *Copyright Law* it is not sufficiently clear that Chinese CMSs may take legal action in their own name on behalf of foreign copyright owners. For instance in the case concerning Jacky Cheung's concert in 2002, Tianjin City High People's Court ruled that the MCSC could not sue in its own name on behalf of the members of a Hong Kong based CMS, which should itself initiate the lawsuit.[8] The decision of this case has direct impacts on the protection of the rights of foreign copyright owners. It is unrealistic and also does not conform to the international practice to require overseas collective societies to bring legal actions in their own name in China. The MCSC has appealed the case to the Supreme People's Court of China.

In the captioned case, MCSC and the Hong Kong Association signed mutual representation agreement according to the *Regulation*, which completely complied with international practice. China's CMSs brought lawsuit on behalf of foreign right holders to the court according to the mutual representation agreement signed with overseas (including Hong Kong, Macao and Taiwan) CMSs, should be accepted by the court. This was the opinion that was expressed by NCA to Supreme People's Court on March 30,2004 in "Reply Letter regarding the Litigation Subject Qualification Problem of Overseas CMSs".[9]

Nevertheless, on November 7, 2007, the judge of Tianjin City Second Intermediate Court Third Civil tribunal made efforts to mediate the copyright's economy right dispute arising from "Beyond Tianjin World Masterpiece Shock Concert" between MCSC and Tianjin Rock Culture & Advertisement Co., Ltd. and encouraged both parties to sign a blanket cooperation agreement. Thus, it established the first example of fee paying standard for performing works in performing market in China and had modeling effect on regulating the fee paying problem for lyrics in China's performing market.[10]

Moreover, mainly due to the large number of works involved the cost of litigation for the CMSs has surpassed the cost of individual suits, especially in cases involving

[8] See Civil Ruling of Tianjin City High People's Court (2003) Jin Gao Min San Zi No.31–53 (天津市高级人民法院民事裁定书<2003>津高民三终字第31号至53号).

[9] See Ma, Jichao, To Protect Overseas Music Copyright Needs Cultivate the Inside Other than the Appearance-A Study of Overseas Right Holders' Protection Viewing from Jacky Cheung's Concert Infringement Case (Chinese version) [EB/OL]. http://www.sipo.gov.cn/sipo/ywdt/yazz/t20060306_65667.htm, March 6, 2006.

[10] See Cao, Jiaping. The Judge in Tianjin Second Intermediate Court Aggressively mediated between MCSC and Defendant to certify the fee paying Standard for Performing Lyrics and reached cooperation agreement (Chinese version) [N]. http://tjfy.chinacourt.org/public/detail.php?id=7780, November 7, 2007.

foreign parties. However the damages awarded are usually much less than those awarded to copyright owners who bring lawsuit individually.

In addition, by virtue of the Chinese laws on civil process the burden of proof that rests on a CMS is heavy and costly. Whereas the CMSs are ratified by the state and operate under the supervision of the government, the courts should be allowed to acknowledge their status and determine that after a CMS has presented evidence to back their infringement claims, the user should have the responsibility to prove that he or she has not infringed copyright. Here is a good example, in *Shanghai Guang Di Entertainment Co., Ltd., Shanghai Haoledi Dining Entertainment Co. Ltd. and CAVCCMA copyright ownership and infringement dispute appeal case (2015)*,[11] even though China Audio and Video Copyright Collective Management Association (CAVCCMA) had no evidence to prove its actual losses or infringer's illegal gain, the original court comprehensively considered the factors of the involved work's pattern, volume, visibility, infringer's subjective fault, operation module, the involved work's use time and local economic and cultural development and CAVCCMA's reasonable expenditure paid for stopping tort conduct etc., the original trial court discretionarily decided compensation amount and reasonable investigation fee was correct, and was affirmed by Shanghai Intellectual Property Court.

The original trial court held as follows:

1. Guang Di Co. from the date of entering into force of the judgment immediately cease use and delete 85 music TV works with collective copyright management by CAVCCMA(specific tracks are detailed in the attached list);
2. Guang Di Co. within 10 days of entering into force of the judgment compensate CAVCCMA economic losses RMB 21,250 yuans;
3. Guang Di Co. within 10 days of entering into force of the judgment compensate CAVCCMA reasonable expenditure RMB 10,700 yuans;
4. Haoledi Co. bear compensation liability for Guang Di Company's paying CAVCCMA the captioned (2) and (3) amount.[12]

The original trial identified facts clearly, applied law correctly and there was no improper judgment. Therefore, Shanghai Intellectual Property Court held to reject the appeal and maintain the original verdict.

7.2.4 Miscellaneous Issues

Additional problematic issues/areas include:

[11] See Civil Judgment of Shanghai Intellectual Property Court (2015) Hu (Zhi) Min Zhong Zi No. 733 (上海知识产权法院民事判决书<2015>沪<知>民终字第733号).

[12] See Civil Judgment of Shanghai Huangpu District People's Court (2014) Huang Pu Min San (Zhi) Chu No. 187 (上海市黄浦区人民法院民事判决书<2014>黄浦民三<知>初字第187号).

1. Citizens have little or no awareness on intellectual property rights;
2. Insufficient enforcement actions and lack of deterrence;
3. Discrepancies between laws and administrative regulations, departmental rules and judicial interpretations. For example:

– although CMSs are defined as "non-profit organization"– tax authorities still require them to pay income taxes for monies that they collect;
– CMSs face difficulties in registering local offices in the different regions; China Audio-Video Copyright Association (CAVCA) was ratified by NCAC but its establishment remained effectively blocked by the registration procedure that took the Ministry of Civil Affairs for over 2 years and half. It was until June 2008 the CAVCA finally completed its registration.[13]

7.3 Main Challenges and Improvement to Collective Licensing of Digital Services

Digital technology not only enables new distribution models and new business opportunities, it also provides CMSs with the technical solutions for more efficient management of rights. However, at present collective management of digital rights in China is limited to the licensing of authors rights for the downloading of ring tones. In addition, CMS are unable to deal effectively with the rampant on-line piracy. The main reasons for the above situation are:

1. There are only few CMSs and they deal exclusively with music. In line with the international largest right holders such as the film studios and record companies have opted for the practice individual rather than collective licensing of their on-line and mobile rights;
2. Some agencies collect authorizations from the right holders in order to become engaged in the collective management of their rights without being officially accredited to do so, which can lead to problems. For instance, some of these agencies are only allocating small portions of the collected royalties to right holders, which is hardly in the best interests of the right holders.
3. CMSs lack the capabilities to use high technology such as digital rights management applications (DRMs). For instance, when the MCSC authorizes on-line services to use rights in the works in its repertoire, it does not track the use of the rights using applicable technologies – such as DRMs. Neither does it add DRM to music authorized so as to prevent the reproduction and dissemination of unauthorized music. It is understood however that the actual application of DRMs is as a rule the task of the producer of the final product (a film or a sound recording) or the service provider rather than the CMSs' task;

[13] Collective Management of Authors! Rights and Related Rights in the EU And The PRC-Benefits and Challenges in the Digital Era [EB/OL]. May 2008, http://www.euchinawto.org/index.php?option=com_docman

4. The Chinese CMSs have not sufficiently adapted their operations to the digital environment. For instance the CMSs are yet to establish on-line repertoire databases open for public inquiries or set up on-line licensing platforms.[14]

However, in recent years there are some inspiring improvements as follows:

On May 10, 2010, Digital Copyright Authentication Center of China Written Works Copyright Society ("CWWCS") was also unveiled in Beijing. It is reported that the main tasks of the Center include authorization of digital copyrighted works for members, copyright handling for non-members, and copyright authentication as well as mediation and settlement of disputes, and so on. Meanwhile, CWWCS signed an agreement with Hanwang Technology Co., Ltd. as a copyright agent for cooperation with authorization and with copyright authentication for digital copyrighted works.[15] The copyright transaction between the Society and Hanwang, in which a package of rights was transferred to the user directly, opened the B2C mode and accelerated the pace of digital publishing by offering a new idea.[16]

CWWCS also began to collect its members' e-edition works so as to establish the "members' works content database". This task had been supported broadly and responded positively from members. Till June 20, 2011, CWWCS had received more than 1000e–files of members' works.[17]

In addition, Baidu and the Music Copyright Society of China ("MCSC") announced a collaboration on March 31, 2011. According to the collaboration framework including "ting" platform and MP3 channel, as long as a song is listened for trial or downloaded via the window of Baidu, it should provide the data report for the broadcasting and downloading to CMCA regularly and pay related fee. So far, CMCA has received the fee from Baidu. Later on CMCA would regularly pay the fee to responsive lyrics authors after checking the data.[18]

Finally, in a signal that the creative industry is determined to protect its rights, a union to help enforce digital copyrights in China was officially established on April 26, 2011. In addition to the Beijing International Copyright Trade Center (BICTC), Copyright Society of China (CSC), China Written Works Copyright Society (CWWCS) and China Audio-Video Copyright Association (CAVCA) are among the seven founding members of the union. A group of experienced lawyers would work with the union to provide consulting services on copyright registration, evaluation

[14] Ibid.

[15] See Si, Lin, The Unveiling of Digital Copyright Authentication Center in Beijing [N]. http://www.cptoday.com.cn/En/News/2010-07-05/350.html, July 5, 2010.

[16] See Nie, Kevin. Establish the Authentication Mechanism of Digital Copyright [J]. Chinaipmagazine, 2010, (38), available at http://www.chinaipmagazine.com/en/journal-show.asp?id=632

[17] See CWWCS Begins to Ask Benefits for Digital Copyright [N]. http://www.prccopyright.org.cn/staticnews/2011-07-07/110707115755765/1.html, July 7, 2011.

[18] See Qian, Lifu. Baidu Paid Copyright Fee to CMCA [N]. http://www.dajianet.com/digital/2011/0725/166405.shtml, July 25, 2011.

and protection.[19] Also, China Copyright Agency in the payment collection work has achieved very outstanding achievements, but it only handles written works and some software's payment of remuneration. It does not get involved in other types of payment of remuneration.[20]

Besides, some companies and organizations have developed third-party digital copyright protection products. In July 2015, China's e-commerce giant Alibaba unveiled a digital tool that can add an invisible mark on pictures uploaded by online shop owners and track when the pictures are used without authorization. UniTrust Time Stamp Authority, co-founded by the National Time Service Center of the Chinese Academy of Sciences and Beijing UniTrust Technical Service, keeps track of the creation and modification time of digital files, which can be used as evidence to claim a copyright if disputes occur.[21]

For providing large scale digital system guarantee, many legislators and Internet industry subjects tend to use of collective management system to achieve using large-scale digital works. Under *China's Copyright Law* (3rd Draft for Examination) submitted by the National Copyright Administration (NCA) to the Chinese Legislative Affairs Office of the State Council, there used to be provisions of *"Extended collective licensing" ("ECL")*[22] on 1st draft, 2nd draft and 3rd draft,[23] which allowed CMSs to directly represent right holders to exercise copyright of written works. But because of all parties' opposition, such *"ECL"* provisions regarding written works were crossed out.[24]

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[19] See Hao, Nan. Creative Union to Fight Digital IP Piracy [N]. http://www.chinadaily.com.cn/cndy/2011-05/11/content_12485868.htm, May 11, 2011.

[20] See Liu, Jie. Fully accomplish the digitalization Copyright Collective Management (Chinese version) [EB/OL].
http://www.gapp.gov.cn/chinacopyright/contents/4509/271256.html, 2015–12–25.

[21] Zhang, Zhao. Digital culture and creativity reimagined for World IP Day [N]. http://ipr.chinadaily.com.cn/2016-03/02/content_23722706.htm, March 2, 2016.

[22] In terms of Copyright Law, *"Extended Collective Licensing" ("ECL")* is a form of collective rights management particularly designed for non-member copyright holders. *ECL* has achieved success in Nordic countries, which provides valuable experience and reference. See Li, Yingyi, Xin, Ye. Evaluation of Legislation on the Applicable Scopes and Conditions of Extended Collective Licensing of Copyright in China [J]. Journal of Political Science and Law, 2015, (2), available at http://en.cnki.com.cn/Article_en/CJFDTotal-ZFXK201502008.htm

[23] For example, Article 63 of the *China Copyright Law* (3rd Draft for Examination) provides: "Where an organization for collective administration of copyright can represent the interests of relevant right holders throughout the country as authorized by the right holders, it may exercise the copyright or related rights on behalf of all the right holders *when their published musical or audio & video works are disseminated to the public through self-service karaoke systems and when their works are otherwise used*, except where the right holders have declared in writing that the collective administration is not authorized. An organization for collective administration of copyright shall fairly treat all right owners in the transfer of relevant royalties." Adapted from Lin, Xiuqin. Copyright Collective Management in China-My Personal Perspectives [EB/OL]. https://www.law.berkeley.edu/wp-content/uploads/2015/07/Xiuqin-China-CMO-Regulation-2015-Berkeley.pdf, October 8, 2015.

[24] See Xiong, Qi. Large Scale Digitization and the Innovation of Copyright Collective Management System (Chinese version) [J]. Studies on Law and Business, 2014, (2) available at http://study.ccln.gov.cn/fenke/Faxue/fxjpwz/fxmssfx/107662-4.shtml

Viewing from practice, MCSC has established over 20 years from its establishment till so far. It only has more than 6000 member copyright holders. All other CMSs' established time only have several years, their member copyright holders are even fewer. It is difficult to say that those CMSs can represent many enough copyright holders' benefit in their management field. Therefore, the captioned organizations' wanting to implement *"ECL"* still has to wait for sometime.[25]

Nevertheless, Copyright Law should preserve guaranteeing licensing restrictions on licensing efficiency between copyright owners and CMSs and for licensing models between CMSs and users, should abrogate the examination etc. of CMSs' presiding agency to control licensing conditions and royalties standards under the *Regulation*, allow CMSs to design license modes to meet different business models, turning the regulation of CMSs to the judicial level. Owing to the existence of non-exclusive licenses, any CMS can not create licensing models to unlawfully damage users' benefit through monopolizing the resources of works and guarantee that healthy competition of license modes among various CMSs can be formed effectively.[26]

Further speaking, if China wants to implant *"Extended Collective Licensing"* Management System, then it is necessary to effectively improve the copyright collective management system, e. g. strengthening the copyright collective management organization of non profit, increasing the number of copyright CMS, breaking the monopoly status of the existing copyright collective management, requiring CMSs to guarantee the freedom of the copyright owner to enter or exit, requiring CMSs to establish a fair, open, accurate and reliable distribution system for licensing fee distribution mechanism, requiring CMSs to provide a variety of types of licensing agreement, fully disclosing accounting information, accepting supervision of the member copyright owners and non member ones and the society, prohibiting horizontal or vertical market association, prohibiting restriction of the freedom to choose competitors and users,[27] and enhancing supervision toward CMSs on the base of absorbing successful experiences of international society and so on.[28]

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[25] See Hu, Kaizhong. Thinking on Establishing China's "Extended Collective Licensing" Management System (Chinese version) [J]., Law &Business Research, 2013, (6) available at http://www.cssn.cn/fx/fx_zscqfx/201404/t20140429_1129441.shtml, 2014–4–29.

[26] Ibid.

[27] In general, monopoly without effective regulation causes many problems, such as price distorting (according to the European Commission, for example, the natural monopoly environment seriously distorts the price system for music) and discriminatory treatment (in light of the Chinese government's interference, the authorized monopoly model may make both rights-holders and copyright users vulnerable), which hopefully will be avoided in the competitive model. See Lu, Haijun. Chinese Collective Management of Copyright: the Need for Extensive Changes [J]. Queen Mary Journal of Intellectual Property, 2016:175–206, availabke at https://www.elgaronline.com/view/journals/qmjip/62/qmjip.2016.02.03.xml, 2017–2–8.

[28] See Hu, Kaizhong, supra note 25.

Also, it is suggested by Chinese scholar that *"Extended Collective Licensing" ("ECL")* is desirable for China because of several reasons such as private right is not absolute, right holders may opt out or being paid; it is efficient; it is beneficial for users or society as a whole; it is easy to use orphan work and the scope of *"ECL"* should be extended.[29]

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[29] See Lin, Xiuqin, supra note 23.

Si, Lin. The Unveiling of Digital Copyright Authentication Center in Beijing [N]. http://www.cptoday.com.cn/En/News/2010-07-05/350.html. July 5, 2010

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Chapter 8
Software Copyright Protection

Copyright protection is the most widely used legal protection model for software internationally. As a type of "works", copyright law offers a broad scope of protection to software. Because copyright law standards to qualify as works are not high, only formal innovation is needed. Therefore, almost all software falls within the purview of copyright protection. Based on the "automatic copyright" system, software can conveniently and efficiently be copyright protected immediately after its development without further application and approval. As copyright protection is the most prevailing protection system for intellectual property, most nations which have set up copyright protection systems are members of *Berne Convention* and *Universal Copyright Convention*. Therefore, international protection for software can be more easily gained under a copyright protection system, and there is no need to introduce new multilateral treaties to protect software.

China's Copyright Law explicitly covers software. In 1991, China promulgated the regulations specific to software protection—*Regulation on the Protection of Computer Software* (hereinafter *Regulation*).[1] According to the *Regulation*, software that is independently developed and that is in a material form, such as magnetic media or CD, will enjoy copyright protection.

8.1 The Object and Subject of Software Copyright

8.1.1 The Object

The object of software copyright is computer software which is composed of computer programs and their relevant files (see Art.2, the *Regulation*).

[1] On December 20, 2001, the State Council Promulgated a new edition of *Regulation on the Protection of Computer Software* which was first amended and effective as of January 1, 2002, and was second amended and effective as of March 1, 2013.

Y. Guo, *Modern China's Copyright Law and Practice*,
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"Computer program" shall mean a coded command sequence, or a sRMBolic command sequence or sRMBolic statement sequence automatically convertible to a coded command sequence that can be executed by a device capable of processing information, such as a computer and other such devices, where the purpose of such sequence is to achieve a certain result. The source program and the target program of the same computer program shall be the same work (Item (1), Art.3, the *Regulation*).

"Files" shall mean written information and diagrams used to describe the contents, composition, design, function specifications development details, test results and method of use of a program, such as program design explanations, flow charts and user's manuals (Item (2), Art.3, the *Regulation*).

In order to be protected under the *Regulation*, software must meet the following two conditions (see Art.4, the *Regulation*):

1. It has been developed independently by a developer; and
2. It is fixed on physical media.

In *Beijing Founder Electronics Co., Ltd. v. Blizzard Entertainment Inc., China The 9 Interactive (Shanghai) Limited, Shanghai The 9 Information Technology Co., Ltd., and Beijing Qingwen Books Co., Ltd. case (2010)*,[2] in 2008, Founder initiated the litigation against P&G for it considered that the word **"飘柔"** printed on P&G's product is kind of unauthorized use of the fine art works of Founder Lanting Pavilion, which has infringed its legal rights, demanding the compensation of RMB 620, 000. On the other hand, Procter & Gamble (P&G) stroke back that **"飘柔"** was completed by designing company on its paid entrustment, and it has been prudent about the using of the word, therefore it shall bear no liability.

In December 2010, Beijing Founder Electronics Co., Ltd. (Founder) appealed to the Beijing First Intermediate People's Court after its lawsuit against P&G was dismissed by Beijing Haidian District People's Court. Later on, Beijing First Intermediate People's Court made a second instance judgment affirming the dismissal of the lawsuit again and sustaining the original verdict. It is the second time that the court said no to charge royalties for single words in a font library.

According to the court, for Founder to legally prove that the behavior of P&G constituted copyright infringement, it must prove that the facts in the case satisfy all the following conditions simultaneously:

- The disputed words **"飘柔"** (the Chinese name of Rejoice) constitute a copyrighted work;
- Founder owns the copyright of the disputed words;
- P&G's behavior is deemed as copying and publishing the disputed words; and
- The copying and publishing work of the appellee has not been licensed by the appellant. The said licensing includes both express licensing and implied licensing.

[2] See Civil Judgment of Supreme People's Court (2010) Min San Zhong Zi No. 6 (最高人民法院民事判决书<2010>民三终字第6号).

Taking all existing factors into consideration, the court stated that the action of the appellee was actually permitted by the appellant, so whether the other conditions are met or not will not change the fact that P&G did not infringe upon Founder's copyright.[3]

This case involved the legal attribute of the computer Chinese font. Finally,The Supreme People's Court held as follows:

- Founder Lanting Pavilion should be deemed as computer software and was not the work of art protected by *China's Copyright Law*;
- A single Chinese character produced after the operation of computer Chinese font can be deemed as work of art only when it has originality in the sense of *Copyright Law*; and
- A single Chinese character produced after the operation of computer Chinese font whether or not belongs to the work of art, can not restrict other people's right to properly use Chinese characters to express certain idea and convey certain information.[4]

8.1.2 The Subject

Being the same as the copyright of general works, the subjects of software copyright also include legal person, non-legal person unit and individual citizens. According to Para. 1, Article 5 of the *Regulation*, software developed by Chinese citizens, legal persons or other organizations shall enjoy the copyright in their software under the Regulation regardless of whether or not the software is published.

8.1.3 Software Copyright Owner and Its Right Attribution

"Software copyright owner" shall mean a natural person, legal person or other organization that owns the copyright in software in accordance with the Regulation (Item (4), Art.3, the *Regulation*). Copyright in software shall arise on the date on which the development of the software is completed (Para.1, Art.14, the *Regulation*).

Unless the Regulation provides otherwise, the copyright in software shall vest in the software developer (Para.1, Art.9, the *Regulation*) i.e. a legal person or other organization that actually organizes, directly carries out the development work and

[3] 2011 Top 10 IP Cases in China's Software Industry [EB/OL]. http://www.chinaipmagazine.com/en/journal-show.asp?id=837, 2012–7–12.

[4] "Ten Big National Courts' IPR Judicial Protection Case in 2012"-Beijing Founder Electronics Co., Ltd. v. Blizzard Entertainment Inc., China The9 Interactive (Shanghai) Limited, Shanghai The9 Information Technology Co., Ltd., and Beijing Qingwen Books Co., Ltd. Case [EB/OL]. http://www.hshfy.sh.cn/shzcw/gweb/xxnr_view.jsp?pa=aaWQ9MzQ5NTA5JnhoPTEmdHlwZT0xz

bears responsibility for the completed software, or a natural person who completes the development of software independently on the strength of his/her own facilities and bears responsibility for such software (Item (3), Art.3, the *Regulation*). Absent evidence to the contrary, the natural person, legal person or other organization that puts his/her or its name on software shall be the developer thereof (Para.2, Art.9, the *Regulation*).

The right attribution and exercise principle of software copyright developed by commission and cooperation are identical with the ones of general works, while the copyright attribution of computer software created by task has certain specialty.

According to Article 13 of the *Regulation*, where the software developed by a natural person during his/her employment period at a legal person or other organization is in any of the following circumstances, the copyright in that software shall be vested in the legal person or other organization, and such legal person or other organization may reward the natural person that develops the software:

1. Where such software is developed to achieve an expressly designated development objective of his/her job;
2. Where the software developed is a foreseeable or natural result of the activities performed in his/her duties; or
3. Where the software is developed mainly by using the material and technical resources such as the capital, specific equipment or special information not yet disclosed of a legal person or other organization, and the responsibility for the software is borne by the legal person or other organization.

8.2 The Content of Software Copyright

Being the same as general copyright, software copyright also includes moral rights and economic rights, but there are only two kinds of moral rights for software copyright i.e. the right of publication and the right of authorship (see Item (1) & (2), Para.1, Art.8, the *Regulation*).

As to the economic rights of software copyright, they indicate reproduction, distribution, rental, communication via an information network, translation and other rights to which the Software copyright owner is entitled (see Item(3)–(9), Para.1, Art.8, the *Regulation*).

A Software copyright owner may permit others to exercise his/her software copyright and may assign all or part of his/her software copyright, and has the right to receive remuneration (see Para.2 & 3, Art.8, the *Regulation*).

8.3 Term of Protection of Software Copyright

According to Para. 2, Article 14 of the *Regulation*, a natural person's copyright in software shall be protected for a period consisting of the natural person's lifetime and 50 years after his/her death, and ending on 31 December of the 50th year after the natural person's death. Where the software is jointly developed, such period shall end on 31 December of the 50th year after the death of the last surviving natural person.

The copyright in software of a legal person or other organization shall be protected for a period of 50 years, ending on 31 December of the 50th year after the first publication of the software, except that if such software is not published within 50 years from the date of completion of its development, it shall no longer be protected under the Regulation (Para.3, Art.14, the *Regulation*).

8.4 Limitations of Software Copyright

The limitations of software copyright are much more different than the one of other works by *CCL*. They mainly performs in the following several aspects.

8.4.1 The Range of Fair Use Is Greatly Reduced

Under Article 17 of the *Regulation*, where software is used in the forms such as installing, displaying, transmitting or saving the software to learn and study the design concepts and principles, permission from, and payment of remuneration to, the software copyright owner is not required.

8.4.2 No Statutory License

Unlike *China's Copyright Law,* there is no provision concerning statutory license under the *regulation*.

8.4.3 Users' Rights

As we know, the purposes of regulating the rights of software holder are to prevent the abuse of software copyright and safeguard the legitimate interests. In accordance with Article 16 of the *Regulation*, The owner of the legal reproductions of software shall enjoy the following rights:

1. Installing the software into a computer and other instruments that possess the capacity for information processing as required for use;
2. Making back-up reproductions to prevent damage to the reproductions. Such back-up reproductions may not be made available to others by any means, and shall be responsible for destroying the back-up reproductions when the owner loses the ownership of the legal reproductions; and.
3. Making necessary modifications to the software in order to use it in the actual computer application environment or to improve its functions and performance. Unless agreed otherwise in a contract, the modified software may not be provided to any third party without the permission of the software copyright owner.

Here we would like to discuss a China's Courts Decision regarding the enterprise's use of "personal edition" software constitute non-infringement.

In *Chongqing Huamei Aesthetic Plastic Surgery Hospital Co., Ltd. and Rhino Software Inc. copyright infringement appeal case (2013)*,[5] Rhino Software Inc., the copyright holder of all versions of Serv-U Software, brought Chongqing Huamei Hospital to the court, claiming that, Chongqing Huamei Hospital, unauthorized to duplicate and use the Serv-U software, shall constitute copyright infringement.

The court of first instance accepted the case and heard the following:

First, the disputed Serv-U 6.4 on the server of Chongqing Huamei Hospital was the trial version which Rhino Software Inc. was announced to provide for 30-days free use, and Chongqing Huamei produced evidence of the lawful origin of the disputed software on its server.

Second, Rhino Software Inc. acting as the developer and the right holder of the disputed software, shall have the ability to determine whether or not the trial version for 30-days free use was continued to use.

Third, however, Rhino Software Inc. did not undertake any effective measures to the use of the disputed software.

For these reasons, Chongqing Huamei Hospital's use of the disputed software on its server beyond the 30-days free use did not constitute infringement.[6]

Rhino Software Inc. was dissatisfied with the judgment of first instance and appealed to Chongqing Fifth Intermediate People's Court. The court of second instance decided that, when installing the disputed software, the user shall first agree with the Software License Agreement and then could continuously install and use the disputed software. The Software License Agreement made the establishment of a contractual license relationship between the copyright holder and the end user. The judgment whether or not Chongqing Huamei Hospital constitutes infringement shall be relied on the agreement in the Software License Agreement.

First, Rhino Software Inc. has made clearly allowing unintended users to use the personal version of Serv-U software without registration for an indefinite period,

[5] See Civil Judgment of Chongqing City Fifth Intermediate People's Court (2013) Yu Wu Zhong Fa Min Zhong Zi No. 01886 (重庆市第五中级人民法院民事判决书 <2013>渝五中法民终字第01886号).

[6] See Civil Judgment of Chongqing City Yuzhong District People's Court (2012) Yu Zhong (Zhi) Min Chu Zi No. 00118 (重庆市渝中区人民法院民事判决书<2012>渝中<知>民初字第00118号).

and to duplicate and distribute the disputed software and related program on a non-profit basis. Therefore, according to the provision of duplication and distribution in the Software License Agreement, Chongqing Huamei Hospital may obtain the disputed software from the third party.

Second, according to the provision of evaluation and registration in the Software License Agreement, Chongqing Huamei Hospital can evaluate and use the Serv-U software for 30-days free use, and can continuously use the personal version of Serv-U6.4 without registration for an indefinite period. In addition, the Software License Agreement did not have any provision or term of declaring that the personal version of Serv-U Software was designed for personal user for the purpose of study.

Third, Rhino Software Inc.'s claim requesting Chongqing Huamei Hospital to pay the fees had neither legal basis nor factual facts.

For these reasons, the court of second instance affirmed the original judgment, determining that Chongqing Huamei Hospital did not constitute infringement.

According to one expert's opinion, perhaps we can learn something from the above-mentioned judgment as follows[7]:

- **Software enterprise shall have taken the initiative to restrict users using the trial version after the 30-days of free use.**

In the original judgment, the court of first instance held that "Rhino Software Inc. did not undertake any effective measures to the use of the disputed software. For these reasons, Chongqing Huamei Hospital's use of the disputed software on its server beyond the 30-days free use does not constitute infringement."

This view seems unreasonable but is accord to the market rules. Because there are large amounts of free software in the market and users are already accustomed to use the free software. If software enterprises are allowed to adopt the method of "first free trial and then paid use", it is likely to lead large amounts of software enterprises into deliberately not expressing or implying that users shall pay for the software, thus damaging the interests of users who are unintended to constitute infringement. Therefore, software enterprises shall, if hope to improve its software through free trial use, have taken the initiative to restrict users using the trial version after the 30-days of free use. If users take breakable ways to continuous use of the trial version, software enterprises may claim for its rights and interests.

- **"Personal edition" and "enterprise edition" shall be correctly understood.**

In daily life, most commercial software sets up different editions for different users named with "personal edition" or "enterprise edition". An enterprise edition is entitled to be with full functions and higher payment, whilst a personal edition is possessed with basic functions, fewer restrictions and free use, for the purpose of software improvement.

[7] Luo, Yanjie. Why China's Courts Decided the Enterprise's Use of "Personal Edition" Software Constitute Non-infringement [EB/OL]. http://www.chinaiplawyer.com/chinas-courts-decided-enterprises-use-personal-edition-software-constitute-non-infringement/, May 21, 2014.

However, from the perspective of the judgment, either "personal edition" or "enterprise edition" is just a method of definition and a functional description. A "personal edition" is not designated for individuals, and an "enterprise edition" is not designated for enterprises. In this case, even though Defendant Chongqing Huamei Hospital is an enterprise, the court still determined that the defendant shall have the right to continuously use the disputed software in "personal edition" for an indefinite period.

- **The validity of the Software License Agreement is affirmed so that software enterprises shall make an agreement that enterprises must not use personal edition software.**

In most software installation, users are required to agree on similar documents to the Software License Agreement. In this case, the court affirmed the validity of the Software License Agreement and determined that *the Software License Agreement made the establishment of a contractual license relationship between the copyright holder and the end user*. Meanwhile, the court also held that *"Rhino Software Inc. has made clearly allowing unintended users to use the personal version of Serv-U software without registration for an indefinite period, and to duplicate and distribute the disputed software and related program on a non-profit basis. Rhino Software Inc. claim requesting Chongqing Huamei Hospital to pay the fees had neither legal basis nor factual facts."*

When combining the understanding of "enterprise edition" and "personal edition", we could know that software enterprises are unable to use the method of definition such as "enterprise edition" and "personal edition" to restrict those enterprises to purchase the "enterprise edition" software. The effective way is to affirm the type of users for different editions and attempt to establish the "breach clause" in the License Agreement. Lessons of Rhino Software Inc. in this case shall be a cautionary example for other software enterprises.[8]

8.5 Software Registration

Software registration is divided into software copyright registration, software copyright exclusive licensing contract and assignment contract registration. Under Paragraph 1, Article 4 of the *Measure for Computer Software Copyright Registration* (hereinafter the *Measure*), the applicant for registration of a software copyright shall be the copyright owner of the software and the natural person, legal person or other organization in whom the software copyright becomes vested through succession, assignment or inheritance.

The applicant for registration of a software copyright contract shall be a party to a software copyright exclusive licensing contract or assignment contract (Paragraph 2, Art.4, the *Measure*). The National Copyright Administration (NCA) recognizes the Copyright Protection Centre of China as the institution for registration of soft-

[8] Ibid. Luo, Yanjie.

ware (Para.2, Art.6, the *Measure*). Software registration documents are important evidence to prove that the subject of registration enjoys software copyright and signs software licensing contract and assignment contract. But software registration is not the evidence arising from software copyright because software copyright arises from the date of accomplishment of software development. Unregistered software copyright or software licensing contract and assignment contract are still protected by law. Just as Article 21 of the *Regulation* provides that licensing contracts that license others to exclusive exercise of software copyright or contracts of assignment of software copyright **may be** (emphasis added) registered with the software registration authority recognized by the copyright administration department of the State Council.

8.6 Software Copyright Infringement Behavior

8.6.1 Infringement Acts Bearing Civil Liability

According to Item(1)–(6), Article 23 of the *Regulation*, unless stipulated otherwise in the PRC *Copyright Law* and the *Regulation*, anyone who commits any of the following infringing acts shall undertake civil liability by ceasing the infringement, eliminating the effects, apologizing, paying damages, etc., depending on the circumstances:

1. Publication or registration of software without permission from the owner of the copyright therein;
2. Publication or registration of another's software as one's own software;
3. Publication or registration of jointly developed software without permission from the other co-developers as software completed solely by oneself;
4. Affixing one's name to another's software or altering the name affixed to another's software;
5. Revising or translating software without permission from the software copyright owner; or.
6. Other infringements of software copyright.

It should be notified that under Article 29, where software developed by a software developer is similar to an existing software due to a limited selection of forms of expression that may be used, it shall not constitute an infringement of the copyright of the already existing software.

In *Beijing UniStrong Science & Technology Co., Ltd. v. Microsoft appeal against computer software copyright disputed case (2013)*[9] (determining embedded soft-

[9] See Civil Judgment of Beijing High People's Court (2013) Gao Min Zhong Zi No. 2263 (北京高级人民法院民事判决书 <2013>高民终字第2263号).

ware copyright infringement), Microsoft is the computer software copyright holder and manufacturer of "WindowsCE6.0", the sixth major release of the Microsoft Windows embedded operating system targeted to enterprise specific tools such as industrial controllers and consumer electronics devices. In 2011, Microsoft found that UniStrong's navigation products were not labeled with copyrighted software in line with Microsoft's customs and thus they were considered to use "WindowsCE6.0" without Microsoft's authorization. As such, Microsoft took UniStrong to the court.

In the court, UniStrong proved that it commissioned CHENG UEI Precision Industry Co., Ltd. to purchase its WindowsCE6.0 from HON HAI Precision Industry Co., Ltd. HON HAI Precision Industry Co., Ltd. purchased the WindowsCE6.0 from Synnex Technology International Corporation, the agent of Microsoft in Taiwan. UniStrong affirmed the purchase order on April 2, 2010 with CHENG UEI Precision Industry Co., Ltd. but there was no signature or stamp on the purchase order. Furthermore, UniStrong argued that Microsoft's rule requesting labeling copyrighted software is an internal policy and therefore not binding. For these reasons, UniStrong insisted that its WindowsCE6.0 was legally sourced, thus not infringing the copyright of Microsoft.

Beijing First Intermediate People's Court heard the case and held that, by virtue of no signature or stamp on the purchase orders, the evidence provided by UniStrong would not be accepted. As such, Beijing First Intermediate People's Court determined that UniStrong had constituted copyright infringement and shall make a compensation of more than RMB 1 million yuans.[10]

Dissatisfied with the judgment made by Beijing First Intermediate People's Court, UniStrong appealed to Beijing High People's Court. Beijing High People's Court decided the following upon the hearing[11]:

- Microsoft has copyright over WindowsCE6.0 and thus shall be protected by laws.
- UniStrong provided a certificate from CHENG UEI Precision Industry Co., Ltd., which said that the 248,040 pieces of MicrosoftWinCELabel sent by CHENG UEI Precision Industry Co., Ltd. were legally purchased from HON HAI Precision Industry Co., Ltd., the Microsoft's agent in Taiwan. This demonstrated that CHENG UEI Precision had already provided copyrighted labels for UniStrong. During the first instance, UniStrong also affirmed that CHENG UEI Precision Industry Co., Ltd. had already provided copyrighted labels. However, the involved software was not tagged with any copyrighted label.

Therefore, Beijing High People's Court held that the judgment of Beijing First Intermediate People's Court was correct and upheld the verdict.

[10] See Civil Judgment of Beijing First Intermediate People's Court (2011) Yi Zhong Min Chu Zi No. 12617 (北京第一中级人民法院民事判决书 <2011> 一中民初字第12617号).

[11] See Civil Judgment of Beijing High People's Court (2013) Gao Min Zhong Zi No. 2263 (北京高级人民法院民事判决书 <2013>高民终字第2263号).

According to one expert's opinion, there are two aspects in this case to be taken notice as follows[12]:

- **The infringer in good faith may be exempted from liability in the case of computer software infringement.**

Article 30 of the *Regulations on Computer Software Protection* stipulates that, "A holder of copies of a piece of software that neither knows nor has reasonable grounds to know that such copies are infringing ones does not bear liability of compensation but shall cease the use of, and destroy, the infringing copies. Nevertheless, if the cease of use or the destruction of such copies is likely to cause heavy losses to him/her, the holder of such copies may, after paying reasonable remuneration to the software copyright owner, continue to use such copies."

In this case, UniStrong tried to make use of Article 30 to exempt from its liability but in the end did not provide sufficient evidence, leading to the judgment that they infringed copyright.

Based on the above stipulations, the expert suggests that enterprises in business be sure to purchase software through the formal channels and keep all relevant documents, such as receipts, to avoid unnecessary disputes.

- **Business practices may also be a legal basis for the judgment.**

Generally, it is the explicit stipulations that shall be the legislative basis for the court to determine the case. However, because the law, in practice, often lags behind actual trades, in most countries, business practices and customs are acknowledged as one of the sources of law. For example, the United Nations *Convention on Contracts for the International Sale of Goods* stipulates that "the parties are bound by any usage to which they have both agreed and by any practices which they have established between themselves".

In this case, Microsoft provided its standard contract to prove that the embedded operating system of Microsoft shall be owned with a copyright label that must not be removed from the products. Even though UniStrong kept doubt over its trueness, legitimacy and relevance of the customs, through its read me and other evidences, this indicated the existence of this 'custom'. The court acknowledged such a practice being a key fact basis to decide that UniStrong had constituted copyright infringement.[13]

In *Rhino Software Inc. v. Shenzhen Netac Polytron Technologies Inc. infringing computer software copyright dispute case (2015)*[14] (involving the protection of intellectual property rights of the new type of case in "Internet +" era), Plaintiff Rhino Inc. is the copyright owner of software Serv-U FTP Server v6.3. "Serv-U

[12] Luo, Yanjie. Why UniStrong's Navigation Found Guility of Copyright Infringement against Microsoft [EB/OL]. http://www.chinaiplawyer.com/unistrongs-navigation-found-guility-copyright-infringement-microsoft%EF%BC%9F/, July 2, 2014.

[13] Ibid.

[14] See Civil Judgment of Guangdong High People's Court (2015) Yue Gao Fa Min San Ti Zi No. 2 (广东省高级人民法院民事判决书<2015>粤高法民三提字第2号).

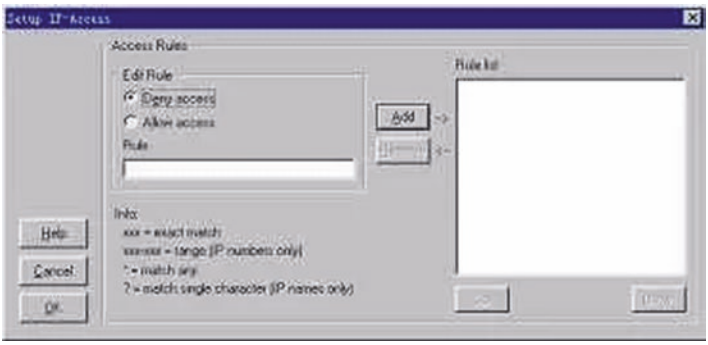

Fig. 8.1 Source: Luo, Yanjie. Why UniStrong's Navigation Found Guility of Copyright Infringement against Microsoft [EB/OL]. http://www.chinaiplawyer.com/unistrongs-navigation-found-guility-copyright-infringement-microsoft

Editions" and Chinese excerpt records Serv-U software has 5 editions of different function, inter alia "personal version" for free use may solve basuc problems, "standard version" may meet the vast majority of people's personal server requirements, "safe version" adds encryption function, "profession version" is used for small and medium size organizations and "enterprise version" is used for medium and large organizations and high traffic FTP host (see Fig. 8.1).

Rhino Inc. announces that: "Serv-U is a trial version. After installment, you will have a complete run of 30 days of 'enterprise version'. If after the probationary period you don't complete registration, Serv-U will become free of charge 'personal edition'." On April 11, 2011, Rhino Inc. carried out the following operation by the computer on the Internet: Clicking on the "run" item on the computer desktop, entering the space on the right of the "open" into "telnetwww.netac.com.cn21", then Clicking "OK" button displaying in the pop-up dialog box: "220 Serv-U FTP Server v6.3 for Winsock ready…" Netac Co. confirmed that www.netac.com.cn was his operating website. Therefore, Rhino Inc. brought the lawsuit to Nanshan District People's Court, Shenzhen City and asked the court to order Netac Co. cease infringing his computer software's copyright and compensate economic losses.. The first instance court held to refute all the claims of the Plaintiff.[15]

Dissatisfied with the first instance trial judgment, Rhino Inc. filed the appeal. Shenzhen City Intermediate People's Court, Guangdong Province decided that Rhino Inc. via the Telnet remote login command procedures to visit Netac Company's web server to obtain feedback information had certainty, but Telnet program through the remote login can only get the indication of the surface Information of FTP in the accused web server, to obtain the evidence of whether or not the accused web server operating the software involved, needed to be accomplished by Netac Co. which controlled the accused web server. Netac Co. could not provide the

[15] See Civil Judgment of Guangdong Province Shenzhen City Nanshan District People's Court (2011) Shen Nan Fa (Zhi) Min Zhong Zi. No. 1039 (广东省深圳市南山区人民法院民事判决书<2011>深南法<知>民初字第1039号).

related evidence in this aspect, should bear unbeneficial outcome. Therefore, Shenzhen City Intermediate People's Court held as follows:

- Revoke the judgment of the first instance;
- Netac Co. immediately stop using Serv-U FTP Server v6.3; and
- Netac Co. compensate Rhino Inc. economic losses RMB 200,000 yuans.[16]

Netac Co. dissatisfied with the second instance trial judgment, asked for retrial. Guangdong High People's Court decided Netac Company's application for retrial be sustained, thus made a retrial judgment to revoke the second instance trial judgment, and maintain the first instance verdict.[17]

This case is the new category one of intellectual property right protection in "Internet **+**" era, involves the identification of the evidence for the information of the remote evidence, judicial practice around the country has different understanding and is waiting for an unified judgment rule. Based on seriously studying the operation mode of Telnet, on whether or not to apply detailed discussion of application to "high probability" standard, reasonably distributed burden of proof.

In the meantime, the court decided that when judging whether or not constituted copyright infringement, should insist "**contact + substantial similarity**" principle. On this case's involving collecting and examining evidence and admissibility and based on this to determine relevant cases' fact was a complex and professional technical and judicial process, Plaintiff needed to provide sufficient evidence on Defendant's infringing fact or apply to the people's court according to law to take evidence preservation or measures or identify relevant professional issues by entrusting relevant agency according to law and even needed to apply to the people's court according to the authority to investigate and collect evidence and testimony in court to complete, and could not only depend on Plaintiff's via the feedback information received by the remote login server to replace the above-mentioned process.

Only depending on using computer remote login command procedures for the acquisition of evidence to determine Defendant's infringing Plaintiff's computer software copyright, objectively also might weaken people's court 's playing the function of trial, even made the judicial power wane. This case has guiding meaning on how computer software copyright owner to correctly prove and maintain rights.[18]

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[16] See Civil Judgment of Guangdong Province Shenzhen City Intermediate People's Court (2014) Shen Zhong Fa (Zhi) Min Zhong Zi No. 504 (广东省深圳市中级人民法院民事判决书 <2014>深中法<知>民终字第504号).

[17] See Chen, Jun. Rhino Inc.Serv-U Computer Software Dispotes' Rights and Wrongs (Chonese version) [EB/OL]. http://www.hfiplaw.cn/?p=4959, 2015–09–23.

[18] See China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016–7–13.

8.6.2 Infringement Acts Bearing Comprehensive Legal Liability

According to Article 24 of the *Regulation*, unless stipulated otherwise in the PRC *Copyright Law*, these Regulations or other laws and administrative regulations, anyone who commits any of the following infringing acts without permission by the software copyright owner shall bear civil liability by ceasing the infringement, eliminating the effects, apologizing, paying damages, etc., depending on the circumstances; if his/her act also prejudices the public interest, he/she may be subjected by a copyright administration department to an order to cease the infringing act, confiscation of unlawful income, confiscation and destruction of the infringing reproductions and the imposition of a fine; if the circumstances are serious, the copyright administration department may also confiscate the materials, tools, equipment etc. mainly used in the manufacture of the infringing reproductions; if the act violates the criminal law, his/her criminal liability shall be pursued in accordance with the relevant provisions of the criminal law on the crime of infringing copyright or selling infringing reproductions:

1. Reproducing wholly or in part of the software of the copyright owner;
2. Distributing, renting or communicating the software of the copyright owner via an information network to the public;
3. Evading or damaging intentionally the technical measures taken by the copyright owner to protect his/her software copyright;
4. Deleting or amending intentionally the electronic information of administration of the software rights; or
5. Assigning or licensing others to exercise the software copyright of the copyright owner.

On August 20, 2009, The People's Court of Huqiu District of Suzou City in Jiangsu Province imposed criminal penalties upon several people involved in copying Windows XP, modifying it into the software ***"Tomato Garden"***, and providing it to the public via the Internet. The court sentenced Lei Hong, producer of ***"Tomato Garden"*** and manager of the program's website, to three-and-a-half years in prison and fined him RMB 1 million yuans (about USD 146,000). Chengdu Share Software Net Science and Technology Co., Ltd. (SSN) cooperated with Hong and provided technical support. The court fined the company nearly RMB 9 million yuans (about USD 1.3 million) and ordered it to forfeit about RMB 3 million yuans (approximately USD 430,000) in illegal earnings. SSN President Xianzhong Sun received three-and-a-half years in prison and was fined RMB 1 million yuans (about USD 146,000). The court sentenced Marketing Director of SSN, Tianping Zhang, to 2 years in prison and ordered him to pay a RMB 1 million yuans fine. Zhuoyong Liang, who participated in developing and producing the plagiarized software, also

received a two-year sentence and was ordered to pay a RMB 100,000 yuans (about USD 14,000) fine.[19]

It is the first time that a Chinese court has treated such copyright infringement as a crime. After the first trial, none of the parties appealed, thus, this judgment was finalized and had legal effect.

On May13, 2010, the plaintiff-Microsoft also reached the settlement agreement with the defendants in Suzhou Intermediate People's Court and obtained the RMB 3 million yuans for damage.[20]

In July 2010, the defendant Yu Mou, who deciphered by decompiling means ***"Dragon Valley"*** *online game* client programs and the corresponding communication protocol, after copying a part of the source code, add your own making all kinds of games, Automatic operation of the script, which produced the game's ***"plug-in"*** software, but also copied more than 1000 core document genuine game client, so that the game system without running the game client directly run the game, and to provide the game itself does not have the automatic movement operation and other functions, the normal operation mode genuine game system causing damage. Mou, who has recruited more than using the ***"plug-in"*** software to log the above online games, game gold production sold for profit. To the incident, the illegal income Mou et al. totaled RMB 46 million yuans.

Mou et al., who by the court to the crime of copyright infringement were sentenced to 4 years to 1 year and 9 months in prison, each was imposed ranging from RMB 400,000 to 50,000 yuans fine.[21] After the trail, the prosecution did not protest and all the defendants did not appeal, therefore the first trial judgment took effect.

This is a new type crime in China which the defendants utilized ***"plug-in"*** program creating virtual game gold to make a profit. This case involved 11 defendants, huge amount of money, caused great social impact, thus it was listed as the Ministry of Public Security (MPS) supervision case. In current day when network industry gradually becomes an important part of China's economic growth, this case's judgment cracks down on online games plug-in and its related behavior, effectively protects the legitimate rights and interests of the Internet game operators, is conducive to regulate the market order of the Internet game industry, is conducive to regulate the market order of the Internet game industry, is conducive to the whole society to create a good atmosphere of respect for intellectual property, and is also conducive to promote the healthy development of China's game industry.[22]

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[19] See Criminal Judgment of Jiangsu Province Suzou City Huqiu District People's Court (2009) Hu (Zhi) Xing Chu Zi No.0001 (江苏省苏州市虎丘区人民法院刑事判决书<2009>虎<知>刑初字第0001号).

[20] See "Tomato Garden" Case Microft obtained RMB 3 million for damage [N]. http://www.iplaws.com.cn/news.php?id=634&fid=17&typeid=26, May 20, 2010.

[21] See Criminal Judgment of Shanghai Xuhui Destrict People's Court (2011) Xu Xing Chu Zi No. 984 (上海市徐汇区人民法院刑事判决书<2011>徐刑初字第984号).

[22] "Dragon Valley" Online Game Plug-in Criminal Copyright Infringement Case (Chinese version) [EB/OL]. http://sh.people.com.cn/n/2013/0425/c134768-18543191.html

It should be notified that *Regulations on Computer Software Protection* was revised by Decree No.632 of PRC State Council on January 30, 2013 and effective as of March 1, 2013. Para.2, Art. 24 was amended as follows: "Whoever commits the act referred to in item (1) or (2) of the preceding paragraph may be concurrently fined RMB 100 yuans for per copy or ***1 to 5 times*** (emphasis added) of the value of the products; and, those who commits the act referred to in item (3), (4) or (5) of the preceding paragraph may be fined not more than ***RMB 200,000 yuans*** (emphasis added) concurrently.".

In *the People's Procuratorate of Haidian District, Beijing prosecuted Huo Hongwei, Liu Yifei, Duan Yuting, Hao Limeng, Shen Ling, Wu Sumei case*, the victim Glodon Company is a software development company, and its company websites supplies the download of the legitimate copy of the software to the public for free. After downloading the software, users need to purchase the software encryption locks to use the software. Sincee April of 2013, the defendant Huo Hongwei, as the legal representative and the actual responsible person of Anyang Weijie Electronic Commerce Company, employed the defendants Wu Sumei, Duan Yuting, Hao Limeng, Shen Ling and Liu Yifei to sell the software encryption locks copyrighted by Glodon Company and the software cracking drivers via the Internet without the authorization of the copyright owner, which actually reached a goal of selling the software copyrighted by Glodon Company. Their illegal turnover amounted RMB 274,944 yuans. The defendant Liu Yifei participated the aforementioned crime since June of 2013, and the concerning illegal turnover amounts RMB 189,436 yuans. On October 28, 2013, the defendants Huo GongWei, Wu Sumei, Duan Yuting, Hao Limeng, Shen Ling and Liu Yifei were arrested by the Public Security Buruau (PSB). Afterwards, the defendant Huo Hongwei paid a damage of RMB 500,000 yuans to Glodon Company, who then showed understanding to him.

Beijing High People's Court held that, as the directly responsible managers and persons of Anyang Weijie Electronic Commerce Company Limited, the defendants Huo GongWei, Wu Sumei, Duan Yuting, Hao Limeng, Shen Ling and Liu Yifei, without the authorization of the copyright owner, issued the computer software copyrighted by other party in the name of their company for the purpose of making profit, which infringed the copyright of the other party. Specifically, the circumstances of Huo GongWei, Wu Sumei, Duan Yuting, Hao Limeng and Shen Ling were very serious, and the circumstance of Liu Yifei was serious, so their acts have constituted the crime of copyright infringement and should be punished. In respect of the defense of the defendant Huo HongWei and his defending lawyer that it is the crime of selling pirate copies that shall be charged, it shall not be adopted because the evidences of this case that their act of selling the software encryption locks copyrighted by Glodon Company and the software cracking drivers has actually reached the goal of selling the software copyrighted by Glodon Co. The essence of such act is to issue the others' work, which satisfied the constitutive elements for the copyright infringement crime and shall be affirmed as such crime.

The current mode of computer software infringement is characterized by the following: the infringers sell software through selling the software encryption locks and make money by controlling the supply and use channel. The function and pur-

pose of the pirated encryption locks is to allow others to use the locked legitimate software, which actually bypass the technological protection measures of the copyright owner, and the object infringed here is the copyright of the software.

In this case, the pirated encryption locks sold by the defendants are different from the legitimate encryption locks. The pirated encryption locks firstly unlocked the software and then set up a new lock, and realized the function of encryption and decryption of the legitimate encryption lock through the technical means such as recoding, In determining whether an act constitutes copyright infringement crime or not, it is in need to consider such infringement mode, and identify the connotation of "issue" according to the essence of the acts.

In this case, the defendants modify and remove the encryption program of the legitimate software through selling the recoded encryption program, which in essence is selling the software copyrighted by others. So such act should be deemed as the "issuance" defined in the *Criminal Law*, and constitutes the crime of copyright infringement.

This case is a typical case on the new computer software infringement crimes where the court extended the original connotation of "issuance" in affirming the crimes by focusing on the nature of criminal acts, and has certain significance in identifying the criminal object and the way of the infringement.[23]

In *Shanghai Pudong New Area People's Procuratorate Proscuting Mr. Chen for copyright infringement case (2014)*[24] (involving an unauthorized erection of the server piracy online games constituting copyright infringement case), The online game software ***"the Legend of Mir2"*** is exclusively operated by Shanghai Shanda Network Development Co., Ltd.(hereinafter Shanda Co.). From May 2012, Defendant Mr. Chen under the circumstance of knowing Shanda Company being the online game software ***"the Legend of Mir2"*** the only one legitimate operator in Mainland China**,** without the copyright owner's permission**,** illegally obtained the game program of ***"the Legend of Mir2",*** adapted it into ***"Dragon World"*** online game, rented servers in Guangdong Province, Fujian province and other places, combined sl.yuyuans99.com domain name, and set up the game server without permission for the release of ***"Dragon World"*** online games on the Internet.

The game player by clicking on the page of the "gold recharge" button recharged the money through Sheng Futong, Alipay and other trading platforms transferring into Defendant Mr. Chen and his control of Mr. Wang's personal bank account. Till this case came out into the open, Defendant Mr. Chen had received a total of more than RMB 324 yuans recharge costs from players. On July 30, 2014, Defendant Mr. Chen after notified by public security agency voluntarily surrendered and after appearing in the agency confessed to the crime. Commissioned by the public security agency, Shanghai Chenxing Electronic Data Judicial Identification Center provided Huchen Judicial Identification Center (2014) Ji Jian Zi No. 188 "Judicial

[23] See Ten typical intellectual property cases in Beijing during 2015 [EB/OL]. http://www.ciplawyer.com/article.asp?articleid=2824, 2016–4–14.

[24] See Criminal Judgment of Shanghai Pudong New Area People's Court (2014) Pu Xing (Zhi) Chu Zi No.33 (上海市浦东新区人民法院刑事判决书<2014>浦刑 <知> 初字第33号).

Identification for Private Server Program" making similarity comparison between the game involved in the seizure of the server program involved and ***"the Legend of Mir2"*** V1.78 version game server program. The conclusion was the game server involved in the program existed substantial similarity with the sample of ***"the Legend of Mir2"*** V1.78 provided by Shanda Co.

Shanghai Pudong New Area People's Court found that Defendant Mr. Chen's circumstances for purpose of making profit, without the permission of the copyright owner, reproducing and distributing computer software were especially serious; his conduct had constituted the crime of copyright infringement. The charge of the public prosecution organ was established and supported. Defendant Mr. Chen had voluntarily surrendered himself, according to law a lighter punishment was rendered to him.

Therefore, according to Defendant's crime circumstance, the perniciousness of society, pleading guilty to repentance attitude etc. and in accordance with Item (1), Article 217 etc. of China's *Criminal Law*, the court held as follows:

- Defendant Mr. Chen's committing the crime of copyright infringement, is sentenced to 3 years and 3 months, a fine of RMB 1 million and 7 hundred thousand yuans;
- The illegal proceeds shall be confiscated; and
- 3 seized laptop computers and 1 seized desktop host computer of the tools for committing the crime shall be confiscated.

This case has already taken effect.

In recent years, China's online game industry develops very swift and violent; its whole sales have more than RMB 1 hundred billion yuans. But without permission, secretly setting up an online game server and reaping benefits from it becomes the important factors affecting the development of China's online game industry. It is necessary to take criminal punishment measures according to law to combat the serious consequences of serious private server conduct, so as to promoting the healthy development of the online game industry. During the hearing process of this case, the Shanghai Chenxing Electronic Data Judicial Identification Center compared the procedures and sample procedures, identified the substance which was similar to the meaning of the *Copyright Law*, and Defendant Mr. Chen's conduct complied with the constituents of the crime of copyright infringement. Criminal judicial protection of the online game program is not only the provisions of the law, but also an urgent need for the protection of the industry. The hearing of this case will play a certain reference role for the trial of the similar cases in the future.[25]

[25] See supra note 18.

8.6.3 Legal Liability of Subjects Related to Software Reproductions

If a publisher or producer of software reproductions is unable to produce evidence that its publication or production was lawfully authorized, or if a distributor of software reproductions or a person renting out software reproductions is unable to produce evidence of the lawful origin of the reproductions that it distributes or rents out, it shall bear legal liability (Art.28, the *Regulation*).

Besides, if the holder of a software reproduction does not know or there are no reasonable grounds for him/her to know that the software is an infringing reproduction, he/she shall not be liable for compensation, but he/she should cease the use and destroy the infringing reproduction. If the cease of use and destruction of the infringing reproduction will result in major losses to the user of the reproduction, he/she may continue to use after paying the software copyright owner a reasonable fee (Art.30, the *Regulation*).

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"Ten Big National Courts' IPR Judicial Protection Case in 2012"-Beijing Founder Electronics Co., Ltd.v. Blizzard Entertainment Inc., China The9 Interactive (Shanghai) Limited, Shanghai The9 Information Technology Co., Ltd., and Beijing Qingwen Books Co., Ltd. Case [EB/OL]. http://www.hshfy.sh.cn/shzcw/gweb/xxnr_view.jsp?pa=aaWQ9MzQ5NTA5JnhoPTEmdHlwZT0xz

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Chapter 9
Online Copyright Protection

As we know, the development of copyright has a close relationship with technology. The Internet, which was researched in the 1960s, developed in the 1980s and well used in the 1990s has been described as history's greatest photocopying machine and a wonderful common resource for users, bringing copyright unprecedented challenges.[1] Enormous differences between this digital medium and the traditional media in terms of copyright, which include the ease of replicating a work, transmitting it to multiple users and the convenience of representation. Moreover, the advent of faster technologies, such as cable modems and the increase in storage space on the average PC are only making this issue more obvious than ever. Copyright has become one of the essential Net debates and can be seen as divided into two camps. One is made up of those who promote the free redistribution of any and all material throughout global networks, and the other is composed of those who want to see the development of controls so that, authors, or owners of information can track their travels and be paid for usage.

China is the most populous country in both the real and online world. On January 22, 2017, CNNIC released the 39th Statistical Report on Internet Development in China (hereinafter referred to as the "Report"). "Report" shows that as of December 2016, the scale of Chinese Internet users reached 731 million, equivalent to the total population of Europe, the Internet penetration rate reached 53.2%. China's Internet industry as a whole to the standardization and value of development, while mobile Internet to promote the sharing of consumption patterns, equipment, intelligent and diversified scene.

As of December 2016, China ". CN" domain name total of 20.61 million, an increase of 25.9%, accounting for the proportion of the total number of domain names in China was 48.7%. "China" domain name for a total of 474,000, annual growth of 34.4%.

As of December 2016, the scale of Internet users in China reached 731 million, penetration rate reached 53.2%, more than the global average of 3.1 percentage

[1] See DAVIES, GILLIAN. Copyright and the Public Interest [M]. Sweet & Maxwell, 2002.

Y. Guo, *Modern China's Copyright Law and Practice*,
DOI 10.1007/978-981-10-5352-8_9

points, more than the Asian average of 7.6 percentage points. A total of 42.99 million new users, an increase of 6.2%. The size of Chinese Internet users has been the equivalent of the total population in Europe.

As of December 2016, China's mobile phone users reached 695 million scale, the growth rate of more than 10% for three consecutive years. Desktop computers, notebook computers have declined usage, mobile phones continue to squeeze the use of other personal Internet devices. Mobile Internet and offline economic ties are becoming increasingly close. In 2016, the scale of mobile payment users in China grew rapidly, reaching 469 million, with an annual growth rate of 31.2%. The proportion of Internet users' online payments increased from 57.7% to 67.5%. Mobile payment to pay the field of rapid penetration of the field, greatly enriched the payment scenarios, 50.3% of Internet users shop online shopping using the mobile payment and settlement.

Network booking car users to 1.68 billion, an increase over the first half of 2016 46.61 million, a growth rate of 37.9%. Net about the car as a representative of the shared economy services, in the revitalization of vehicle resources to meet the needs of users travel has played an important role, and with the introduction of relevant policies into the normative development period. As of the end of 2016, 32.5% of Chinese Internet users use the Internet for charitable acts, the user size reached 238 million. The Internet as the carrier of the fund-raising, public welfare, social circle fund-raising and other public welfare new model to promote the process of charitable contributions sunshine, convenient operation, the form of diversification.

As of December 2016, China's online government service users, including Alipay / WeChat city service, government WeChat public number, website, microblogging and mobile phone applications, reached 239 million, accounting for 32.7% of the total Internet users. Internet government services platform interoperability and service content refinement, greatly enhance the wisdom of the level of government services to improve user life happiness and satisfaction. All levels of government and institutions to speed up the "two micro-end" online layout, to promote the Internet government information open to mobile, real-time, transparent direction.

As of the end of December 2016, the number of listed Internet companies in China and abroad reached 91, the overall market value of 5.4 trillion yuan. Tencent and Alibaba, the total market value of more than 3 trillion yuan, the two companies as China's Internet companies on behalf of China's listed Internet companies accounted for 57% of the total market capitalization.

In 2016, the use of computers, Internet use and broadband access have been widespread, respectively, 99.0%, 95.6% and 93.7%, respectively, compared to last year rose 3.8, 6.6 and 7.4 percentage points. In addition, Internet applications in the information communication category, financial and human resources management and other internal support applications, the proportion of corporate Internet activities are maintained upward trend. In addition, online sales, online procurement to carry out the proportion of more than 10 percentage points of growth, respectively 45.3% and 45.6%. In the traditional media and new media to speed up the integration of the development trend, the Internet in the enterprise marketing system plays an increasingly important role in promoting the proportion of Internet marketing

38.7%. In addition, Liu Cheng enterprises have information systems, compared to 2015 increased 13.4 percentage points. In the process of upgrading the supply chain, enterprises increasingly pay attention to and give full play to the role of the Internet.[2]

Nevertheless, this presents risks and opportunities to IP owners. Chinese authorities have recently responded to calls for an enhanced online copyright protection regime and more rigorous measures to combat piracy in China's virtual world.

As the name suggests, the most essential differentiation between online copyright and traditional copyright is the different protected object. Therefore, we may give a definition for online copyright on the base of traditional copyright concept i.e. online copyright is the general term of moral right and economy right of copyrighted work under the online environment enjoyed by the copyright owner. It can be seen on the concept that online copyright is not a new type right but is another name of traditional copyright in the Internet era.

9.1 A Historical Review

China, a late comer in developing its legal and regulatory framework for protecting online copyright, has been catching up fast in the past decade. Online copyright was first recognized in an Interpretation promulgated by the Supreme People's Court (SPC) in December 2000. In the following year, *China's Copyright Law* (2001) was amended to formally introduce a new form of right: the right of dissemination via information network. Specific measures were issued in subsequent years to refine the framework for protecting online copyright.

In 2005, China's copyright office, the National Copyright Administration of China (NCAC) issued the first set of administrative rules to address issues relating to online copyright enforcement.

In 2006, the State Council, China's Cabinet, issued the *Ordinance to Protect the Right of Dissemination via Information Network*. The *Ordinance* defined the rights of copyright owners in disseminating information using networks, provided a notice and took down procedure for handling online copyright disputes and afforded limited immunities to Internet service providers (ISPs).

One significant aspect of the *Ordinance* is that it addresses the legal uncertainty highlighted in a 2005 lawsuit involving illegal MP3 downloading (i.e. *Shanghai Busheng Music Culture Media Co.,Ltd. v. Beijing Baidu Network Technology Co.,Ltd. case*.[3] On September 16, 2005, the People's Court of Haidian District in Beijing ordered Baidu pay RMB 68,000 yuans to Shanghai Busheng for unauthorized downloads of 46 songs): namely, the legal liability of ISPs that provide search engine or linking services which indirectly allowed Internet users to access

[2] See CNNIC released the 39th "China Internet Development Statistics Report": the size of Chinese Internet users reached 731 million. [N]. http://www.pingchina.org/2017/199/ January 22, 2017.

[3] See Civil Judgment of Beijing Haidian District People's Court (2005) Hai Min Chu Zi No. 14665 (北京市海淀区人民法院民事判决书 <2005 > 海民初字第14665号).

copyright-infringing works. Thus, the *Ordinance* stipulates, for the first time in China, some of the specific liabilities that ISPs could face for providing online search and web-linking services, and sets forth guidelines for ISPs to follow in order to avoid such liability.

Item (5), Article 14 of the *Ordinance* requires the notice issued by the copyright owner to include the following information:

1. The right owner's name, contact information, and physical address;
2. The description and network address of the infringing work, performance and audio or video products that are required to be removed; and.
3. The preliminary evidential materials that prove the alleged infringement.

According to Article 15 of the *Ordinance,* ISPs will not be liable for infringing the right of communication if the providers ensure the prompt removal of infringing content and any links thereto upon receipt of an infringement notice with supporting evidence from a copyright holder. If the individual or entity that was providing that work issues a "non-infringement statement" with supporting evidence, then the ISPs must promptly repost the relevant content or link upon receipt (see Art.17, the *Ordinance*).

Where a network service provider provides information memory space to its service objects, or provides the works, performance and audio-visual products to the general public through the information network and in case the following requirements are satisfied, it is not required to assume the liabilities of compensation:

1. Clearly indicating that the information memory space is provided to the service objects and publicizing the name, contact person and web address of the network service provider;
2. Having not altered the works, performance and audio-visual products that are provided to the service objects;
3. Having no knowledge of and being justifiable reason to know the infringement of the works, performance and audio-visual products;
4. Having not obtained any economic benefit from the provision of the works, performance and audio-visual products to its service objects; and
5. After receiving a notice from the owner, deleting those works, performance and audio-visual products that the owner regards as infringing ones according to the present Ordinance (see Article 22, the *Ordinance*).

In China, a principle similar to the U.S. Safe Harbor Principle[4] (the "Chinese Safe Harbor Principle") is established by Article 23 of the PRC Regulations. Article 23 of the *Ordinance* provides that: "Where a network service provider provides any searching or linking service to its service objects or cuts off the link to any infringing

[4] Section 512 of the U.S. Digital Millennium Copyright Act (DMCA) provides that an ISP shall not be liable for monetary relief if the ISP promptly removes the infringing contents upon receiving the notification of infringement from the copyright holder. This provision is commonly known as the Safe Harbor Principle.

work, performance, or audio-visual product after receiving a notice from the right owner according to the provisions of the present Ordinance, it is not required to assume the liabilities of compensation. However, when anyone is ***fully aware*** or ***should have known*** (emphasis added) that any of the works, performance or audio-visual product it has linked to constitutes any infringement, it shall be subject to the liabilities of joint infringement."

Under such principle, an ISP shall be immune from compensation liability if the ISP removes the links to the infringing work, performance, and audio or video products upon receiving the notice from the right owner.

The PRC laws do not contain the U.S. ***"Red Flag Test"***.[5] However, the last paragraph of Article 23 of the *Ordinance* provides an exception to the "Notice-to-Remove" procedure, namely, "the ISP shall be liable for contributory infringement if such party has known or should have known the links to the works, performances, or audio -video products are illegal".

Therefore, Baidu met the chance to turn its fate around in another case. On November 7, 2006, in *IFPI v. Baidu case,* Beijing's First Intermediate Court held that Baidu's service, which provides web links to the music, did not constitute an infringement as all the music was downloaded from web servers of third parties (for detail, see discussion at 9.4.2 below).

In recent years, there has been endless debate regarding "Safe Harbor Principle" in the audio-video industry. The copyright holders and the member of audio-video copyright association Sohu,Union Voole etc. claim that some video-sharing websites utilize the "Safe Harbor Principle" to circumvent liability, whereas the video-sharing websites argue that some copyright holders and the peer ignore such principle by constantly initiating litigation to achieve their commercial goals.

Nevertheless, in *Beijing days Pictures v. Tudou case (2009)*[6] (involving *"Magic Romance"* TV series), Shanghai Pudong New Area People's Court dismissed Plaintiff's claims on March 5, 2010. This is the first time for Tudou to win the lawsuit owing to the "Safe Harbor Principle".[7] It has been the second batch video-sharing website since 56.com won the lawsuit in 2009.[8]

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[5] According to §512 (d), DMCA, a prerequisite for applying the Safe Harbor Principle is that the ISP "does not have actual knowledge that the material or activity is infringing or, in the absence of such actual knowledge, is not aware of the facts or circumstances from which infringing activity is apparent." This requirement, which is described as the ***"Red Flag Principle"***, means that an ISP shall not be entitled to infringement immunity on the grounds of not receiving the removal notice from the copyright owner if the infringing facts are obvious.

[6] See Civil Judgment of Shanghai Pudong New Area People's Court (2009) Pu Min San (Zhi) Chu Zi No.303. (上海市浦东新区人民法院民事判决书<2009>浦民三<知>初字第303号).

[7] See Yue, Tian. Tudou borrowed safe harbor principles to win the first case of 2010 copyright disputes (Chinese version) [N]. http://www.cnetnews.com.cn/2010/0401/1689708.shtml, 2010–04–01.

[8] See Civil Judgment of Beijing Chaoyang District People's Court (2008) Chao Min Chu Zi No.16141. (北京市朝阳区人民法院民事判决书<2008>朝民初字第16141号).

In the above-mentioned *Beijing days Pictures v. Tudou case (2009)*,[9] the court held: "It can not be presumed that Defendant had subjective fault only because of the infringing works appearing in its website" and "Plaintiff did not notify Defendant in advance", and "Defendant had deleted suspicious infringing video in time after received the complaint. Therefore, Defendant fulfilled the duty of copyright care." This verdict was taken effect.

Simultaneously, in *Mr. Yan Zhizhong vs. Tudou case (2010)*[10] (involving *"Live Ludu Interesting Episode"* theatre work), Shanghai Pudong New Area People's Court rejected Plaintiff's claims on March 12, 2010.[11] The appellate court -Shanghai First Intermediate People's Court still rejected Appellant's (Plaintiff's) claims and maintained the original verdict on August 10, 2010.

In April 2010, in *Joy.cn vs. Tudou case* involving two sets of TV series-*"Magic Cube"* and *"Loyal Soul"*, Shanghai Pudong New Area People's Court also determined that Joy lost the case according to the "Safe Harbor Principle".[12]

It seems that the determination of reasonable duty of care is developed dynamically accompanied by China and International Internet technology's new development. It can be expected that to effectively improve three legislative and technological aspects of legal relationship, copyright holder and ISP via the determination of reasonable duty of care of China's "Safe Harbor Principle", it is bound to promote the harmonious development of independent safety of the emerging online video industry in China.[13]

The Supreme People's Court (SPC) also amended the Interpretation in 2006 to remove the exemption for acts of reprinting or extracting and editing copyrighted works that had previously been published in newspapers or disseminated through a network.[14]

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[9] See Civil Judgment of Shanghai Pudong New Area People's Court (2009) Pu Min San (Zhi) Chu Zi No.303 (上海市浦东新区人民法院民事判决书<2009>浦民三<知>初字第303号).

[10] See Civil Judgment of Shanghai First Intermediate People's Court (2010) Hu Yi Zhong Min Wu (Zhi) Zhong No.89 (上海市第一中级人民法院民事判决书<2010>沪一中民五<知>终字第89号).

[11] See Civil Judgment of Shanghai City Pudong New Area People's Court (2009) Pu Min San (Zhi) Chu Zi No.204 . (上海市浦东新区人民法院民事判决书<2009>浦民三<知>初字第204号).

[12] See Civil Judgment of Shanghai Pudong New Area People's Court (2009) Pu Min San (Zhi) Chu No. 408 & 409 (上海市浦东新区人民法院民事判决书<2009>浦民三<知>初字第408、409号).

[13] See Zhang, Dong, Liu, Min. Perspective of the Determination Problem on the Duty of Care of the "SafeHarborPrinciple" [EB/OL]. http://ielaw.uibe.edu.cn/html/wenku/guojijingjifa/guojijingjifaxuelilun/20110317/15871_2.html

[14] *Interpretation by the Supreme People's Court of Several Issues Relating to Application of Law to Trial of Cases of Dispute over Copyright on Computer Network*, amended at the 1406th Meeting of the Adjudication Commission of the Supreme People's Court on 20 November 2006 and entering into force on 20 November 2006.

9.2 New Legislation

On December 17, 2012, the SPC promulgated the *Regulation on Several Issues on Application of the Law in Civil Cases Concerning the Right of Network Dissemination of Information* (the *Information Network Regulation*) which was took effect on January 1,2013.

In order to correctly hear civil dispute cases of infringement of the right of dissemination through information networks, protect the right of dissemination through information networks according to the law, stimulate the healthy development of the information network industry, safeguard the public interest,on the basis of the provisions of the "General Principles of Civil Law of the People's Republic of China", the "Tort Liability Law of the People's Republic of China", the "Copyright Law of the People's Republic of China", the "Civil Procedure Law of the People's Republic of China" and other relevant laws,and integrating judicial practice, the *Information Network Regulations* was formulated.

Pursuant to the *Information Network Regulation*,the provision by the network users or the network service providers of the works, performance, audio and video products with their information network dissemination right enjoyed by the other right holders through the information network without the permit of the right holders will constitute infringement upon the information network dissemination right,unless otherwise provided by the laws or administrative regulations(see Para.1,Article 3). If the network service providers instigate network users to, or help them, infringe the information network dissemination right when providing the network services,such network service providers shall bear joint and several liabilities for the network users' infringement of the information network dissemination right(see Para.1,Article 7).

Notably,the *Information Network Regulation* allows for jurisdiction to be asserted by Chinese Courts. Based on Article 15, when the terminal of the infringing server is in foreign countries or regions, the court in the place of the terminal used by plaintiff to discover the infringement has jurisdiction. The implementation of the new law will help Chinese rights holders find legal support when bringing suit against the kind of infringement found in foreign websites like the App Store.[15]

Also, the *Information Network Regulation* has created detailed articles to assist in the court's determination of whether or not an ISP shall be considered to have known of its users infringing conduct, infringing upon the network dissemination of information rights of others (see Article 9):

1. The information management capacity matches the essence of the ISP's services, methods and the possibility that infringement would occur;
2. The type and popularity of the communicated work, performance and radio and video recording and degree of obviousness in determining infringement;

[15] See China Revised Its Law on Jurisdiction of Internet Infringement Involving Foreign Elements [N]. http://www.chinaiplawyer.com/china-revised-law-jurisdiction-internet-infringement-involving-foreign-elements/, February 12, 2013.

3. Whether or not the ISP has actively chosen, edited, modified or recommended the work, performance or radio and video recording;
4. Whether or not ISP has actively taken measures to prevent infringement;
5. Whether or not ISP has implemented a convenient process to receive infringement notices, and whether or not it has made timely responses to said infringement notices;
6. Whether or not ISP has taken proper measures against repeated infringers; and
7. Other relevant factors.

For the same, the above regulation only applies to ISPs where its users provide the infringing content. As for other ISPs, we believe they may still be referred to.

Finally, the *Information Network Regulation* has made independent regulations concerning the ***"shall have known"*** standard when applied to video uploading websites, where the most serious forms of infringement often occur:

1. Where the ISP has recommended popular videos through the creation of a list, catalogue, reference, description paragraph, brief description or other method when providing its network service, and allows the public to download, browse, or otherwise obtain the copyrighted video in other direct ways (see Article 10);
2. Placing popular films and video works on a main page or other location where the ISP would obviously know of its existence (see Item (1), Article12);
3. Where the ISP chooses, edits, arranges, provides recommendations based on genre or theme or content of a popular film or video work, or otherwise provides a ranking system for said copyrighted films and video works (see Item (2), Article12);
4. Other situations in which the ISP would clearly be aware that the copyrighted work, performance, or radio and video works are being provided without license, and no reasonable measures have been taken to curb such infringing activity (see Item (3), Article12).[16]

In practice, Beijing Chinese online digital publishing Co., Ltd.(hereinafter Beijing Chinese online Co.) brought a lawsuit against its subordinate website DBP Network Technology Co., Ltd. (hereinafter DBP Network Co.) to the court for the latter's unauthorized dissemination of the former's e-book entitled *"Empresses in the Palace"*. Beijing Chinese online Co. asked the court to order DBP Network Co. stop infringement and pay for the loss of RMB 164,500 yuans.

On April 15, 2013, Beijing Chaoyang District People's Court made the first instance judgment.[17] This was the first time to apply the *Information Network Regulation* by the court to determine that DBP Network Co. constituted instigating

[16] Introduction and Interpretation of China's Judicial Interpretation on the Right to Network Dissemination of Information, II [EB/OL]. http://www.chinaiplawyer.com/introduction-interpretation-chinas-judicial-interpretation-network-dissemination-information-ii/ February 28, 2013.

[17] See Civil Judgment of Beijing Chaoyang District People's Court (2013) Chao Min Chu Zi No. 8854 (北京市朝阳区人民法院民事判决书<2013>朝民初字第8854号).

infringement and held it to pay Beijing Chinese online Co. more than RMB 40,000 yuans for compensation.[18]

The judgment of this case was selected into *2013 national fifty key intellectual property cases*.

In *Guangzhou Betta Network Technology Co. Ltd.v. Shanghai Yao Yu Cultural Media Co., Ltd. copyright infringement and unfair competition disputes appeal case(2015)*,[19] according to the judgment in the first instance,[20] Guangzhou Douyu Network Technology Co., Ltd. (hereinafter referred to as "Douyu") was required to compensate Shanghai Yaoyu Media Co., Ltd. (hereinafter referred to as "Yaoyu") for economic loss of RMB 1 million yuans and reasonable expenditures of rights protection of RMB 100,000 yuans and make an announcement at a notable place on the homepage of Douyu's website so as to eliminate the harmful effect.

In 2014, Yaoyu obtained the exclusive video broadcasting right in Mainland China for 2015 DOTA2 Asian Championship. Douyu, without authorization, made a live broadcast of such event by way of putting up the screenshots of the event accompanied by the comments of the host while watching the event on the client side and used the mark of Yaoyu during live broadcast, thus was sued by Yaoyu.

The Court in the first instance found that network users can only watch on going involved events within the specific time period by Douyu's live broadcast. Yaoyu's claim of its infringed video broadcasting rights neither belonged to the right of network dissemination of information, nor belonged to other statutory rights of copyright and the game screen did not belong to the copyright law works. Therefore, Yaoyu's claim regarding Douyu's copyright infringement can not be set up. But the Court in the first instance confirmed that the behavior of Douyu constituted unfair competition and made a judgment that Douyu assumed the liability to eliminate the effects and compensate a total amount of RMB 1.1 million yuans for economic loss and reasonable costs. After the judgment, Douyu refused to accept such judgment and made an appeal to Shanghai Intellectual Property Court.

In the second instance, Shanghai Intellectual Property Court found that Douyu did not make any investment to the organization and operation of the event involved and failed to obtain the video broadcasting right, while it reaped the commercial results generated from the event organized and operated by Yaoyu for free and captured the audiences of Yaoyu, which caused the serious loss of Yaoyu's website traffic, affected the advertising revenue capacity of Yaoyu, damaged Yaoyu's com-

[18] Board moderator uploaded "Empresses in the Palace" the court firstly held website instigating infringement (Chinese version) [N].http://www.chinacourt.org/article/detail/2013/04/id/941403.shtml, April 15, 2013.

[19] See Civil Judgment of Shanghai Intellectual Property Court (2015) Hu Zhi Min Zhong Zi No. 641 (上海知识产权法院民事判决书 <2015>沪<知>民终字第641号).

[20] See Civil Judgment of Shanghai Pudong New Area People's Court (2015) Pu Min San (Zhi) Zi No. 191 (上海市浦东新区人民法院民事判决书<2015>浦民三<知>初字第191号).

mercial opportunities and competitive advantages and weakened Yaoyu's potential to increase the value of its online live broadcast platform.

For these reasons, the behavior of Douyu breached the principle of "honesty and credibility" in the *Anti-Unfair Competition Law*, violated the recognized business ethics, damaged the legal interests and rights of Yaoyu and disrupted the market competition orders, which was obviously unjustifiable and constituted unfair competition. Therefore, the appeal was rejected and the original verdict was upheld.[21]

As a simple reminder, professional game live web site should be aware of such a large-scale well-known event broadcast must be authorized by the license. The judging outcome of this case has a good guide and regulation role for China's development of electronic sports game industry.

In *Leshi Internet Information Technology (Beijing) Co. Limited by Share v. Shanghai Qian Shan Network Technology Development Co., Ltd. copyright infringement and unfair competition disputes case (2015)*,[22] Leshi Co. claimed that it enjoyed the copyright of those movie and TV drama works of "Monk Comes Down The Mountain", "Mr. Yan's Daughter Doesn't Worry about Whom to Marry" and "Gu Jiale's Happy Life". But without authorization, *MoreTV*, the software operated by Qian Shan Co., deliberately avoided and destroyed technical protection measures of Leshi Co. to spread on the Internet and provide the above-mentioned works with "hotlink" form, thus infringed Leshi Company's copyright.

Besides, Qian Shan Co. also removed Leshi Company's play page ads and patch ads, skipped membership fees so as to cause serious damage to Leshi Company's business model. His behavior attracted a large amount of users to download the use of his application software and got illegal gains, but Qian Shan was free to take up Leshi Company's bandwidth resources and increased the burden on Leshi Company's server, thus constituted unfair competition.

Leshi Co. sued to the court, requesting the court to order Qian Shan Co. immediately stop acts of infringement and unfair competition, compensate Leshi Co. for economic losses and reasonable expenses RMB 2 million yuans.

In early July 2016, Beijing Chaoyang District People's Court held that MoreTV's illegitimate "hotlink" behavior infringed Leshi Company's right of information network dissemination and constituted unfair competition. The court ordered Qian Shan Co. immediately stop the infringement and compensate Leshi Co. economic losses RMB 500,000 yuans and notary fees RMB 22,040 yuans.[23]

In *Leshi Internet Information and Technology (Beijing) Co. Limited by Share v. Beijing Xiaomi Scientice and Technology Co. Ltd. and Future TV Co., Ltd. Infringing*

[21] Douyu.com Involved In the Nation's First Dispute Case on E - sport Event Live Broadcast Is Sentenced to Pay a Compensation of One Million [EB/OL]. Shanghai Law Journal, http://shzcfy.hshfy.sh.cn/zcfy/en/detail.jhtml?id=10006221&lmdm=lm102

[22] See Civil Judgment of Beijing Chaoyang District People's Court(2015)Chao Min (Zhi) Chu Zi No. 44290(北京市朝阳区人民法院民事判决书<2015>朝民<知>初字第44290号).

[23] For detail, see Tong, Ning, Leshi Sued MoreTV Illegitimate "Stealink-link" Infringing Right (Chinese version)[N]. http://www.fawan.com/Article/fwkx/2016/07/03/349687.html, 2016–7–3.

Fig. 9.1 Movie- "Will love to the end" (Source: https://baike.baidu.com/pic/%E5%B0%86%E7%88%B1%E6%83%85%E8%BF%9B%E8%A1%8C%E5%88%B0%E5%BA%95/5402741/0/3b6833f5ccb8ce76bc3109be?fr=lemma#aid=0&pic=3b6833f5ccb8ce76bc3109be)

the right to information network dissemination of work disputes case (2016),[24] Plaintiff Leshi Beijing Co. claimed that it obtained exclusive right to network dissemination information of movie ***"Will love to the end"*** (see Fig. 9.1). Without getting permission and paying remuneration, Defendant Xiaomi Co. used its manufactured and sold MI BOX cooperated with Defendant Future TV Co., Ltd. to illegally provide to the public online broadcast service of the work involved via information network. Two defendants' behaviors infringed the exclusive right to information network dissemination enjoyed by Plaintiff and caused him significant financial losses, constituted tort. Therefore, Plaintiff brought the lawsuit to the court asking the court to order two defendants jointly compensate it economic losses and reasonable fee total RMB 50,000 yuans.

[24] See Civil Judgment of Beijing Haidian District People's Court (2016) Jing 0108 Min Chu 355(北京市海淀区人民法院民事判决书<2016>京0108民初355号).

According to the fact verified of this case, Defendant Future TV Co., Ltd. provided online broadcast service of the work involved on its operated China Internet TV Platform letting users get involved work at the time and place of the individual, didn't obtain permission from the copyright holder of the work involved and infringed Plaintiff's right to information network dissemination. As one of the few Internet TV platform approved by the State Administration of Radio and Television (SART), Defendant Future TV Co., Ltd., was authorized by executive agency and not by general market competition to carry out Internet TV business. This company used the copyrighted work enjoyed by others, surely influenced the right of the copyright holder, and also influenced the benefit of his cooperated service providers.

Thus, Defendant Future TV Co., Ltd. should have a more rigorous review obligation toward others' works used on its platform so as to effectively protect copyright holder's benefit and guarantee smooth development of the business with its platform cooperated service providers. The subjective fault of Defendant Future TV Co Ltd. was obvious, should bear the liability for his tort act.

In this case, in accordance with the "Cooperation Agreement" signed by Xiaomi Co. and Future TV Company, they began cooperation by the way of joint operation mode. Both parties jointly operated products, were jointly responsible for the management of related software modules and negotiated pricing and pricing methods. Hence, Xiaomi Co. and Future TV Co. existed the relationship of sharing income. Toward part of the work involved, Xiaomi Co. even provided meter currency system to support payment for the platform involved. Toward Future TV Company's information network dissemination behavior of the work involved, Xiaomi Co. had common meaning contact with him, constituted joint infringement. Thus, they should bear joint and several tort compensation liabilities. The court rejected Xiaomi Company's argument.

Xiaomi Co. and Future TV Co. should jointly bear relevant liability. Regarding the specific amount of compensation for losses, viewing that both parties did not submit the evidences of Leshi Beijing Company's actual losses or two defendants' illegal gains, the court would comprehensively consider the factors of the visibility of the work involved, Xiaomi Co. and Future TV Company's subjective fault, and the nature of tort etc. to make discretionary decision and no longer fully supported. Two defendants should also compensate the reasonable portion of Leshi Beijing Company's paying fee for litigation.

In summary, according to Item (1), Article 48 and Article 49 of *China's Copyright Law*, the court held as follows:

- Defendant Beijing Xiaomi Scientice and Technology Co. Ltd. and Defendant Future TV Co., Ltd. jointly compensate Leshi Internet Information and Technology (Beijing) Co. Limited by Share economic losses and reasonable expense total RMB 20,000 yuans within 10 days from the date of taking effect of this verdict;

- All other claim by Leshi Internet Information and Technology (Beijing) Co. Limited by Share are rejected.[25]

As mentioned above,on January 16, 2013 the State Council released four independent decisions on amending the *Ordinance to Protect the Right of Dissemination via Information Network* with effective date on March 1, 2013.

After amendment, the original phrases ***"may impose thereupon a fine of 100,000 yuans"*** and ***"a fine of less than 100, 000 yuans may be imposed thereupon"*** under Article 18 and 19 of the *Ordinance were changed into* "***may impose a fine one to five times the amount exceeding RMB 50,000 yuans of illegal business turnover. Where there is no amount of illegal business turnover or the amount of it is lower than RMB 50,000 yuans, it may impose a fine of no more than RMB 250,000 yuans Depending on the seriousness of the case*** (emphasis added)."

Also, as we know, China's online copyright regime is beginning to take shape after a decade of reforms and improvements have continued to be made in the past year. In 2009, the NCAC revised its *Implementing Measure on Administrative Actions against Copyright Infringement* (hereinafter *Implementing Measure*), which was first promulgated in 2003. The new *Implementing Measure* came into force on June 15, 2009 and had improved the power of administrative authorities in combating online copyright piracy. In particular, the new measures expanded the definition of infringing acts to include unauthorized provision of another's works on the Internet and refusal to disclose the identity and information of the suspected infringer by an ISP without good reason.

Moreover, administrative authorities are empowered to confiscate equipment used for installing or storing infringing works. They are also allowed to preserve equipment (such as web servers) used for installing and storing suspected infringing works (such as web pages) during their evidence collection exercise.

To facilitate copyright enforcement, the new *Implementing Measure* also drastically lowered various thresholds to qualify as severe infringement cases, which attract harsher sanctions[26]:

1. The illegal profit threshold is lowered from RMB 5000 yuans ($730) for individual infringers or RMB30,000 yuans ($4400) for non-individual infringers to RMB 2,500 ($365) for all infringers;
2. The illegal turnover threshold is lowered from RMB 30,000 yuans ($4400) for individual infringers or RMB 100,000 yuans ($14,600) for non-individual infringers to RMB 15,000 yuans ($2,200) for all infringers; and
3. The quantity of infringing copies is lowered from 2,000 pieces for individualinfringers or 5,000 for non-individual infringers to 250 pieces for all infringers.

[25] See Civil Judgment of Beijing Haidian District People's Court (2016) Jing 0108 Min Chu 355(北京市海淀区人民法院民事判决书<2016>京0108民初355号).

[26] See Art. 31 of the *Implementing Measure on Administrative Actions against Copyright Infringement* (2009).

Furthermore, Article 36 of the new *PRC Tort Liability Law*, which came into effect in July 2010, provides that right owners can send a notice to and request ISPs to take measures to remove, block or disable connection to infringing content put up by people using the ISPs' network. If the ISPs fail to respond in a timely manner upon receipt of such notification, it will be held jointly liable with the infringing users in respect of any additional harm done to the right owners as a result of its failure to take prompt action. This chapter also stipulates that where an ISP is aware that a user is using its network to commit any infringing acts but fails to take any steps to stop or prevent such acts, it will be held jointly liable with the user.

Besides, on January 10, 2011, the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security of the P.R.C. issued and made effective their *Opinions on Some Issues Concerning Application of Law in Handling Criminal Cases of Intellectual Property Rights Infringement*[27] (hereinafter referred to as the *Opinions*). While the *Opinions* cover a wide variety of intellectual property rights issues, certain Articles of the *Opinions* are specifically applicable to copyright infringement and, more specifically, online copyright infringement. It is useful to examine the guidelines set forth by some of these Articles.

Firstly, Article 10 of the *Opinions* defines what constitutes "for the purpose of making profits" required for criminal prosecution, as follows:

> In addition to sale, any on the following circumstances may be determined as "for the purpose of making profits":
>
> 1. Charge fees directly or indirectly through such means as publishing non-free advertisements in or binding a third party's works with other person's works;
> 2. Charge fees directly or indirectly by transmitting other people's works through the information network or providing such services as publishing non-free advertisements on the websites or web pages by making use of the infringing works uploaded by others;
> 3. Charge membership registration fees or other fees for transmitting others' works through the information network in the form of a membership system; and.
> 4. Other circumstances that make profits by "taking advantage of other's works."

While Article 10 provides needed clarification regarding what constitutes "for the purpose of making profits", it is especially noteworthy that it highlights "publishing non-free advertisements" as a basis for "making profits". As much of the online world is driven by online ad revenues, the *Opinions* now makes clear that infringers cannot claim that they are not "making profits" merely because they are not directly charging the user for the content at issue. As such, copyright owners now have a clearer basis for seeking criminal prosecution against websites which offer infringing content to users and where said websites are driven by online ad revenues or, alternatively "membership registration fees".

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[27] Supreme People's Court, Supreme People's Procuratorate, and Ministry of Public Security, *"Opinions of the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security on Some Issues Concerning Application of Law in Handling Criminal Cases of Intellectual Property Rights Infringement"*, Promulgated and Effective on January 10, 2011.

Though it may seem obvious in the online world, the Internet has created a new means of distributing content and it is, as such, required that the laws adapt to this new reality. In regards to what constitutes "distribution" as set forth in Article 217 of *the Criminal Law of the P.R.C.*, the *Opinions* provides clarity, in that it defines distribution of infringing content (including infringing copyright-protected works) to include the act of "…transmit[ting] through the Internet…" and such acts could, in certain circumstances, constitute the crime of copyright infringement.

It is often difficult to establish a monetary amount of the alleged infringement in a world such as today's China, where revenues from sales of physical content (such as music CDs or movie/TV DVDs) are relatively minimal, and the market for paid online content is in a very nascent stage. The *Opinions*, however, provide other means which could in certain cases prove to be more viable options to meet the infringement thresholds required for criminal prosecution in the P.R.C. Article 13 of the *Opinion*s provides some guidelines on the minimal thresholds for supporting criminal prosecution of acts of transmitting infringing works (including infringing copyright works) over the Internet, such as establishing an "aggregate quantity of others' works being transmitted is more than 500 pieces" or "[w]here others' works being transmitted has been actually clicked for more than 50,000 times". While it may be difficult to prove that a certain music downloading is worth X RMB, it may be easier to prove via network statistics the number of tunes downloaded or relevant "click" rates and under the *Opinions*, rights holders have this greater flexibility.

Finally, it is important to note that the *Opinions*, as per Article 15, do not leave out those entities which act as "accomplice[s] of intellectual property crimes". Article 15 of the *Opinions* includes those entities as possible accomplices as those which "provide such services as Internet access, server co-location, network storage space, [and] communication and transmit channels…." Making clear that the threat of criminal prosecution applies not only to alleged online infringers, but also to their online "accomplices", the *Opinions* may provide rights holders with additional leverage in discussions with Internet infrastructure providers regarding the activities of alleged infringers and make said providers more closely monitor the possibly-infringing activities of their clients.[28]

As to *China's Copyright Law*,the current draft attempts to adopt into the structure of the basic law principles for determining the joint and several liability of service providers in the online environment, and the latest draft appears to create aiding and abetting-type liability for services that abets or instigates infringements (including non-hosted infringements) of third parties. In so doing, it could make it possible to efficiently remove infringing materials from the Internet as well as halt people from engaging in massive infringements, but much will depend on the imple-

[28] See WIGLEY, RICHARD . New Guidelines for Criminal Prosecutions of Online Copyright Infringement Provide Aid in Fight against Online Piracy [EB/OL]. King & Wood's Intellectual Property GroupOnline, http://www.chinalawinsight.com/2011/01/articles/intellectual-property/new-guidelines-for-criminal-prosecutions-of-online-copyright-infringement-provide-aid-in-fight-against-online-piracy/, Jan 19, 2011.

mentation of these measures. Some problems with the draft Copyright Law formulation, and thus there is room for some improvements and clarifications.

Many other important topics are taken up in the draft Copyright Law revision, including coverage of reproductions in the online environment, the communication to the public right (including an interactive making available right as contemplated under the WIPO "Internet" Treaties, the WCT and WPPT), technological protection measures (TPMs), rights in broadcasts, computer program protection provisions, remedy provisions, statutory/compulsory license provisions, collective management, and exceptions. Some of the currently proposed provisions need to be carefully considered and revised before enactment to avoid conflicts with China's WTO obligations.[29]

9.3 Administrative Enforcement

In the past few years, the Chinese courts and other enforcement authorities have stepped up their efforts to tackle online copyright infringement and test the boundaries of Chinese laws against new types of copyright infringement encountered in the ever-evolving online world.

As mentioned before, NCAC maintained the intense effort to crack down on IPR infringement and piracy. It continued the special administration of Internet-based IPR infringement and piracy, carried out the 11th "Sword net 2015" action in cooperation with the State Internet Information Office (SIIO), the Ministry of Industry and Information Technology (MIIT) and the Ministry of Public Security (MPS) to intensify the control of third-party APPs of online music, online cloud storage and smart mobile terminals as well as online advertising alliances.

In special actions, relevant local departments nationwide handled 383 cases of Internet-based IPR infringement and piracy with an administrative penalty of RMB 4,500,000 yuans, transferred 59 criminal cases involving RMB 38,450,000 yuans to judicial departments, shut down 113 websites involved in IPR infringement and piracy, and deleted more than 2,200,000 pieces of IPR-infringing and pirated music online. In 2015, copyright law enforcement and monitoring departments at all levels filed, investigated and settled 1,177 cases, transferred 92 cases with criminal responsibilities to judicial departments, and destroyed 380 piracy sites. Among them, 36 copyright infringement cases were supervised and settled independently and 4 copyright infringement cases were in cooperation with other departments.[30]

Besides, as mentioned before, in the conclusive conference of "Swordnet 2016" action held by NCA, Office of the Central Leading Group for Cyberspace Affairs,

[29] See IIPA Files Request to Testify and Testimony at USTR [N]. http://www.iipa.com/pdf/2012_Sep19_China_WTO_Compliance_Request_to_Testify_and_Testimony.pdf,September 19, 2012.

[30] SIPO of PRC.2015 Intellectual Property Rights Protection in China [R]. http://english.sipo.gov.cn/laws/whitepapers/201607/P020160721403876149335.pdf.

MIIT and MPS on December 22, 2016, it was reported that through 5 minths investigation and treatment by copyright law enforcement departments at all levels all over the country, there were 512 administrative cases, administrative panelty totaled RMB 4,670,000 yuans, 33 cases were transferred to judicial organs and 290 websites were closed.[31]

9.4 Selected Civil and Criminal Cases

9.4.1 Two Model Civil Cases Before China's 2001 Copyright Law Amendment[32]

Cases concerning infringement of copyright of works placed on the web had occurred frequently in China in the past few years, while the "1991 *Copyright Law*" had no clear provisions dealing with online copyright disputes. When faced with these cases, the Chinese courts boldly interpreted then existing *Chinese Copyright Law*, giving them new meanings for the Internet age.

(1) *Wangmeng et al. v. Century Internet Communications Technology Co. Ltd. case(1999)*[33] (involving the nature of online dissemination of copyrighted works and ISP/ICP's liabilities).

In this nationwide-known case, the First Instance Court, Beijing Haidian District People's Court held that, except as otherwise provided by the law, any entity or individual with publicly exploited others works without authorization, constituted copyright infringement.[34] The case involved a dispute between six famous Chinese writers ————Wang Meng, Zhang Chenzhi, Zhang Kangkang, Bi Shumin, Zhang Jie and Liu Zhengyun and one of China's earliest Internet Service Provider (ISP) and Internet Content Provider (ICP) (hereinafter ISP/ICP). Defendant established on his website a novel section, which carried a lot of novel stories by Chinese writers, including those authored by the above six writers. The works were uploaded by a special group in charge of the maintenance of this section on the website, which got the works either by downloading them from other websites or from novel fans who emailed the works to the group for free.

Defendant argued that the existing Chinese law had no provision on whether or not the dissemination of other's works via the Internet required prior consent from

[31] See Lai, Mingfang. Conclusive conference of "Swordnet 2016" action held in Beijing-512 administrative cases and 290 closed websites through 5 months investigation and treatment (Chinese version) [N]. China Press and Publication News, 2016–12–23.

[32] See Guo, Yimeei. A Comment on Chinese Legal Environment of Online Copyright Protection [A]. Guo, Yimeei ed. Research on Selected China's Legal Issues of E-Business [M]. Springer, 2015:178–181.

[33] See Civil Judgment of Beijing First Intermediate People's Court (1999) Yi Zhong Zhi Zhong Zi No.185. (北京市第一中级人民法院民事判决书<1999>一中<知>终字第185号).

[34] See Civil Judgment of Bejing Haidian District People's Court (1999) Hai (Zhi) Chu Zi No.57. (北京市海淀区人民法院民事判决书<1999>海<知>初字第57号).

the copyright owners concerned or how to pay the copyright owners remunerations. He maintained that he was not the first one to put the works on the Internet, and therefore, he was not aware of the exploitation of the plaintiffs' works on the Internet.

Beijing Haidian District People's Court interpreted that then current Copyright Law covered online publications and distributions. It held: "[P]aragraph 5 of Article 10 of the Copyright Law of China does not exhaust or enumerate all means of exploiting works. With the development of science and technology, new media of works will emerge and the range of exploiting works will be expanded. …… It should be affirmed that the dissemination of works via the Internet is one of the ways of using works, and the copyright owners of works have the right to decide whether or not their works could be disseminated through the Internet. …… Although the dissemination of works through the Internet is somewhat different from the ways of exploiting works through publication, circulation, public performance and play as defined by 'the Copyright Law of China', it is meant in essence to realize the dissemination of works to the general public, to enable viewers or listeners to know the content of the works concerned. …… The difference among the ways of disseminating works should not affect the right of the copyright owners to control the dissemination of their works."[35]

As to Defendant's liabilities, the court held that Defendant, as an ISP/ICP, was an infringer, because he saved the works on his web servers and made them available to everyone who visited the website. The First Instance Court's decision was fully upheld by the appeal court, Beijing First Intermediate People's Court. The most prominent feature of the case is that Chinese courts began to decide cases by relying on its own interpretations of legislative intent. The appeal court held that, since the legislative intent was to protect the exclusive right of copyright owners, it was naturally to reason that the law governs online use of works, which was only one of the ways of using works. This is a very encouraging message for copyright owners who are concerned with their rights being infringed in China.

(2) *Chen Weihua v. Chengdu Computer Business Information Weekly case (1999)*[36] (determining authorship of online works)

Chinese courts also dealt with cases concerning identification of authors of works published on the Internet. Generally, Chinese judges' view was that it was Defendants' burden of proof to prove Plaintiff was not the legitimate author. In this so called "3D sesame Street" case, an article entitled ***"Joking Talk about MAYA"*** was uploaded to a web page called "3D Sesame Street", with the author name ***"Wufang"***. Later, the article was published on a newspaper with the name ***"Wufang"*** but no contribution fee was paid. Plaintiff claimed ***"Wufang"*** was his penname and sued for copyright infringement, but Defendant insisted that Plaintiff prove he was ***"Wufang"*** at first. Beijing Haidian District People's Court, upon the finding that (1) the article was first published on "3D Sesame Street" web page and that (2) the web

[35] Ibid.

[36] See Civil Judgment Beijing Haidian District People's Court (1999) Hai (Zhi) Chu Zi No. 18. (北京市海淀区人民法院民事判决书<1999>海<知>初字第18号).

page was Plaintiff's homepage because Plaintiff was in control of the homepage access, held that Plaintiff was assumed the true author of the article, unless Defendant could provide reasonable evidence to prove the contrary.

As indicated in the captioned cases, Chinese courts touched some respect of online copyright infringements and preferred to protect the rights of true copyright owners. However, in a traditionally civil law country like China, the judges' enthusiasm cannot last long without legislative backup. As pointed out by a Chinese judge, the online copyright problem "must be tacked through the joint efforts of legislature, judicial authority and the jurisprudence circle."[37]

9.4.2 Selected Civil Cases After China's 2001 Copyright Law Amendment

(1) *Hanwang Tech. Co. v. Taiwan Jingpin Tech. Co.& Zhongshan Mingren Computer Development Co. case (2005)* (China's first online software sales infringement case).

In May 2000, Taiwan Jingpin Technology Company began to manufacture and sell online the "WinCE Handwriting Chinese Characters Identification Core V1.0" software, which was developed by Hanwang Technology. In the same year, Zhongshan Mingren installed the pirated software, provided by Taiwan Jingpin Technology Company, in Zhongshan Mingren PC products.

According to China's "Legal Daily", after four years' of court hearings, Beijing High People's Court issued a judgment in China's first online software sales infringement case in May 2005. The two defendants, Taiwan Jingpin Technology Company and Zhongshan Mingren Computer Development Company, were ordered to pay Hanwang Technology Company RMB 300,000 and RMB 2.8 million, respectively, as compensation.

The court held that the two defendant's software, though having different branding and names from Hanwang's products, both originated from Hanwang's software code.[38]

(2) *Shanghai Xuanting Entertainment Information Technology Co., Ltd. v. Beijing Baidu Network Information Technology Co., Ltd. et al. case (2011)*[39] (determining the liability of Baidu's wireless channel of providing the public with involved works)

Defendant Baidu, who provided the public access to copyright works of others on its secondary domain wap.baidu.com, alleged that he only provided search and transcoding services and that the involved works were not stored on his servers.

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[37] See Wang, Jiangyu. The Internet and E-commerce in China: Regulations, Judicial Views, and Government Policies [J]. The Computer & Internet Lawyer, 2001, (1): 12–30.

[38] "China's First Online Software Sales Infringement Case Settled" [N]. March 17, 2005, http://www.chinatechnews.com/index.php?action=show&type=news&id=2461.

[39] See Civil Judgment of Shanghai First Intermediate People's Court (2011) Hu Yi Zhong Min Wu (Zhi) Zhong Zi No. 141 (上海市第一中级人民法院民事判决书<2011>沪一中民五<知>终字第141号).

In this case, Shanghai Luwan District People's Court decided as follows:

- Defendant Baidu should cease the infringing act against the right to network dissemination of information of "*Fight under The Sky* (*Dou Po Cang Qiong*)", "*A Story of Becoming Immortal* (*Fan Ren Xiu Xian Zhuan*)", "*The Card Maker* (*Ka Tu*)", "*Bodyguard* (*Jin Shen Bao Biao*)" and "*King of A Time* (*Tian Wang*)" in which the Plaintiff Shanghai Xuanting has the property right immediately after this determination took effect;
- Defendant Baidu should compensate Plaintiff Shanghai Xuanting RMB 500,000 yuans for his financial losses and RMB 44,500 yuans for his reasonable expenses incurred hereby within 10 days after this verdict took effect; and
- Other claims of the Plaintiff Shanghai Xuanting are overruled.

After the first instance, Baidu, dissatisfied with such verdict, lodged an appeal to Shanghai First Intermediate People's Court. During the trial by the court of second instance, Baidu withdrew his appeal.

Whether or not Baidu wireless channel stored the involved works on his servers was the focus of dispute in this case. The Court found that it was inevitable to duplicate and store web pages from third parties while Baidu wireless channel transcoding them and that web pages produced in the process of transcoding were only duplicates in some forms rather than the original ones. Evidence of this case demonstrated through attributes query of the web page the fact that the master data displayed by the web page were stored on Baidu's server and Baidu displayed at the bottom of each page "Original Webpage", further proving that he acknowledged this web page was only a duplicate rather than the original one. Therefore, the Court held that in this case Baidu wireless channel stored the involved works on his server.

Baidu argued that he did not and could not store massive contents from third parties in advance since it was impossible to predict the instructions given by users and he searched relevant content on the Internet, transcoded them in a real-time manner and then reversed them back to the user upon receipt of a user's request. The court decided that this statement made by Baidu was authentic.

Then, the question left was that whether or not Baidu, who provided the public with involved works through his wireless channel, was eligible for exemption from liability due to "temporary storage"? The court decided that Baidu's act of storing the involved works through his wireless channel did not comply with Article 21 of the *Ordinance to Protect the Right of Dissemination via Information Network* concerning exemption from liability due to temporary storage, which is designed to increase the efficiency of network transmission and target at technical phenomena frequently occur in network transmission process.

To be specific, when a user visits a target website, he/she usually has to go through more than one transit servers before the instruction is transmitted and information obtained. In order to increase the efficiency of network transmission, the transit server will store the information transmitted from the target website server on its system cache while the user visiting the target website and will transmit such information directly from its system cache to the next user who attempts to visit the same target website, thus accelerating the speed at which users obtain the information.

In this case, Baidu wireless channel stored the involved works for the purpose of transcoding and provided them to mobile users. Besides, the server of Baidu wireless channel acted in this case as more than just a transit server for increasing the efficiency of network transmission. Considering that purpose involved in this case was not consistent with that indicated in the exemption clause, the court held that Baidu's storing the involved works through his wireless channel was not eligible under the exemption clause.

In this case, Baidu wireless channel actually replaced the third party website to provide the public with involved works because of his act and expanded dissemination of involved works even to mobile terminal. The act of Defendant Baidu impacted the normal use of involved works by Plaintiff as well as the economic right holder, and substantially weakened the effect expected by Plaintiff to achieve economic purposes by charging on viewing the copyright involved works, hence unreasonably damaging the legal benefits of Plaintiff.

In conclusion, the court held that the act of Baidu wireless channel of providing the public with involved works constituted direct infringement on Plaintiff's property right in involved works.[40]

(3) *Beijing Locojoy Technology Co Ltd. v. Beijing Koramgame Network Technology Co Ltd. case(2014)*[41] (determining copyright law protection of written works and unfair competition)

Beijing Intellectual Property Court held that Plaintiff's mobile game ***"Wo Jiao MT on line"*** (My name is MT on line), and ***"Wo Jiao MT 2"*** (My name is MT 2) and figures of the games did not enjoy Copyright Law protection of written works, and that the figure images in the two litigated games were not actually similar, so that Defendant did not infringe upon Plaintiff's copyright.

However, the court also noted that Plaintiff's games came out earlier than Defendant's and had gained a reputation in the market. Defendant, a player in the same field, not only failed to avoid similarity in names and figures, but conducted promotions that would lead to confusion. The court found that Defendant's actions constituted unfair competition by using another's well-known name without permission and by making false advertisements. The court ordered Defendant stop the behavior and compensate Plaintiff with RMB 500,000 yuans ($78,100) for economic losses plus reasonable expenses of RMB 35,000 yuans.

(4) *CCTV International vs. Shanghai TuDou Network Technology Co., Ltd. case(2013),*[42] (determining the liability for providing storage of the copyrighted video on website and the damage)

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[40] Gu, Wenkai, Xu, Ha. Determination of Infringement Liability of Search Engine Providers – Shanghai Xuanting Entertainment Information Technology Co., Ltd. v. Beijing Baidu Network Information Technology Co., Ltd. et al. Property Right Infringement [EB/OL]. http://www.hshfy.sh.cn/shzcw/English/xxnr_view.jsp?pa=aaWQ9MzUzMzg2JnhoPTEPdcssz&jdfwkey=rfcuc1.

[41] See Civil Judgment of Beijing Intellectual Property Court (2014) Jing (Zhi) Min Chu Zi No.1 (北京知识产权法院民事判决书<2014>京<知>民初字第1号).

[42] See Civil Judgment of Shanghai First Intermediate People's Court (2014) Hu Yi Zhong Min Wu(Zhi)Zhong Zi No. 228 (上海市第一中级人民法院民事判决书2013沪一中民五<知>终字第228号).

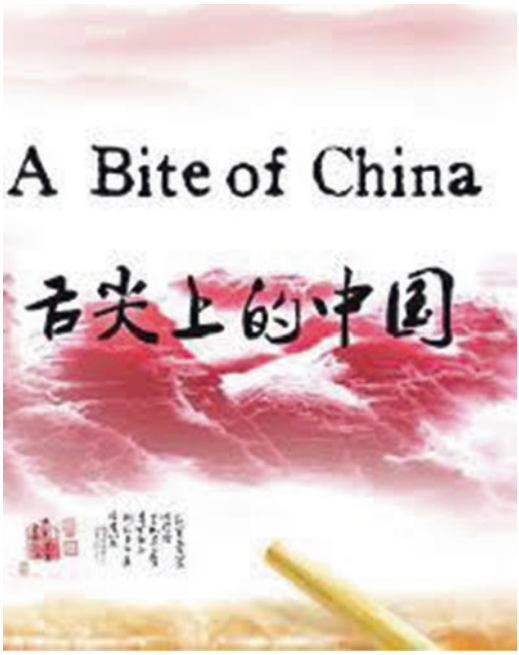

Fig. 9.2 "The documentary series- A Bite of China" (Source: A model copyright infringement case–"A Bite of China" [EB/OL]. http://supremepeoplescourtmonitor.com/2014/06/26/a-model-copyright-infringement-case-a-bite-of-china/)

Shanghai Minhang District People's Court held that Defendant was liable and ordered to pay damages of RMB 240,000 yuans and reasonable costs of RMB 8000 yuans.[43]

The court held that "the documentary series- ***A Bite of China*** - (see Fig. 9.2) is in the category of cinematographic works and works created by a process analogous to cinematography, and is therefore protected by *China's Copyright Law*. Defendant provided an online on-demand link to the show without proper authorization from the copyright owner, which is a typical infringement of copyright though Internet broadcasting and therefore he bears liability for infringement." While Defendant argued that the video was uploaded by an Internet user, the courts found that Defendant failed to provide evidence to support his argument. The courts reasoned that because that the portal was required to control and manage the information and identity of the uploader, the website had the burden of proof. Since Defendant had deleted the original uploading information on its own, he should bear the adverse legal consequences.

[43] See Civil Judgment of Shanghai Minhang District People's Court (2013) Min Min San (zhi) Chu Zi No. 242 (上海市闵行区人民法院<2013>闵民三<知>初字民事判决书第242号).

This case is a typical copyright infringement through Internet sharing. In assessing the damages, the courts considered the copyright type, social recognition of the video, the nature of the infringement action, as well as the Internet portal's operational size, business model and influences, among other factors. The damages of RMB 240,000 yuans can help to compensate the copyright owner, and force Internet video portal operators to discipline themselves and manage their business. This case shows the trends of increased protection of intellectual properties, and serves as a warning to other Internet video copyright infringers.[44]

(5) *Shanghai Xuanting Entertainment Information Technology Co., Ltd. v. Beijing Fantasy Network Technology Co., Ltd. for appeal of dispute over information network communication right infringement case* (2014)[45]

Shanghai Xuanting Entertainment Information Technology, operator of www.qidian.com literature website, had sued the Beijing Fantasy Zongheng Network Technology. He accused Zongheng of publishing the novel ***"Immorality"*** on its literary website www.zongheng.com without authorization. Xuanting had signed copyright agreements in January 2010 with Wang Zhong, the novel's writer. *China's Copyright Law* set an upper limit for compensation in such cases at RMB 500,000 yuans. Shanghai Second Intermediate People's Court imposed a higher fine on the grounds that Zongheng earned more from the novel.[46]

After trial, Defendant Zongheng did not feel satisfied and filed an appeal. After hearing the case, Shanghai High People's Court held that the original judgment identified facts clearly and its applicable law was correct, thus Shanghai High People's Court overruled the appeal and maintained the original verdict.

Both parties of this case are China's famous network novel portals. Although the involved novel ***"Immorality"*** is only a work of novel, yet it is a best-selling work containing more than 5,000,000 words and ranking first in Soho's search list. The court awards RMB 3 million yuans which is the highest amount of compensation according to law and reflects China's increase of intellectual property protection efforts.[47]

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[44] A model copyright infringement case–"A Bite of China" [EB/OL]. http://supremepeoplescourtmonitor.com/2014/06/26/a-model-copyright-infringement-case-a-bite-of-china/

[45] See Civil Judgment of Shanghai High People's Court (2014) Hu Gao Min (Zhi) Zhong Zi No. 78 (上海市高级人民法院民事判决书<2014>沪高民<知>终字第78号).

[46] See Civil Judgment of Shanghai Second Intermediate People's Court (2013) Hu Er Zhong Min Wu (Zhi) Chu Zi No. 191(上海市第二中级人民法院民事判决书<2013>沪二中民五<知>初字第191号) .

[47] See 2014 Shanghai Top Ten IP Case- Shanghai Xuanting Entertainment Information Technology Co., Ltd. v. Beijing Fantasy Network Technology Co., Ltd. for Appeal of Dispute over Information Network Communication Right Infringement Case [EB/OL]. http://www.sipa.gov.cn/gb/zscq/node2/node23/u1ai10930.html.

(6) *Zhou Weihai v. Shanghai Yiyou Information Technology Co., Ltd. for appeal of dispute over copyright infringement case (2015)*[48] (determining the examination and recognition of ISP& ICP)

The People's Court of Putuo District, Shanghai after the first trial viewed that Defendant used 37 works in disputes owned by Plaintiff on www. Earsgo.com operated by Defendant without permission of the owner, and such act was infringement. Even though Defendant was just the Internet service provider (ISP) of information storage space, the practice still did not conform to the exceptions for ISPs specified by laws and should assume liability for infringement. The court made a judgment that Defendant should extend a formal apology to Plaintiff and compensate economic loss and reasonable expense total RMB 40,000 yuans. Defendant did not accept the judgment and filed an appeal.[49]

After the second trial, Shanghai Intellectual Property Court rejected the appeal and affirmed the judgment in the first trial because the court held that Defendant's website used pictures involved in the first trial for website introduction and scenic spots display, it was not a service provider of information storage space in the sense of copyright law.

This case was about the examination and recognition of Internet service provider (ISP) and Internet content provider (ICP). The comprehensive examination and judgment should be done to the website business, website content arrangement, website promotional information, self-introduction information and profit model and others. Service provider of information storage space generally takes the offer of information storage space service as the main business of the website while the site is a public platform for network users to upload, browse and download. The main business of www.Earsgo.com in this case is to provide voice guide service; the pictures in dispute play a role of promoting and displaying relevant scenic spots on the website and become a part of introduction of scenic spots provided. Even though these pictures were uploaded by network users, the site still cannot be identified as service provider of information storage space. The judgment of this case provided some thoughts for examining and recognizing the information storage space provider and the content provider.[50]

(7) *CCTV International Co., Ltd. v. Beijing Douguo Information Tech. Co. Ltd. and Beijing Douguo Yangtian Network Tech. Co. Ltd. dispute over infringement of right of information network dissemination case (2015)*[51] (determining the wearch linking service),

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[48] See Civil Judgment of Shanghai Intellectual Property Court (2015) Hu (Zhi) Min Zhong Zi No. 287 (上海知识产权法院民事判决书<2015>沪<知>民终字第287号).

[49] See Civil Judgment of Shanghai Putuo District People's Court (2014) Pu Min San (Zhi) Chu No. 427 (上海市普陀区人民法院<2014>普民三<知>初字第427号).

[50] Typical cases of IP courts of Beijing, Shanghai and Guangzhou [EB/OL]. http://www.hshfy.sh.cn:82/gate/big5/www.hshfy.sh.cn/css/2016/04/14/20160414154856828.pdf, 2015–10–09.

[51] See Civil Judgment of Beijing intellectual Property Court (2015) Ijng (Zhi) Min Zhong No. 1444 (北京知识产权法院<2015>京<知>民终字第1444号).

Fig. 9.3 CCTV series program-*"A Bite Of China 2" (the program involved*) (Source: China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016-7-13.)

CCTV International Co. is the owner of the right of information network dissemination of a TV series program-***"A Bite Of China 2"*** (see Fig. 9.3, hereinafter briefly named ***the program involved***). By iPhone5 mobile phone through the information network to provide the public with the show's online play service, CCTV International discovered that in the application software -"A Bite Of China 2" jointly developed by Douguo Information Co. and Douguo Yangyian Co. (hereinafter briefly named ***the software involved***), through the information network it provided the public with the show's online play service. CCTV International Co. claimed that without permission, Douguo Information Co. and Douguo Yangtian Co. through the information network to provide the public with the online play service of ***the program involved,*** seriously damaged his legitimate right and benefit, caused him material economic loss. Therefore, CCTV International asked the court to order Douguo Information Co. and Douguo Yangyian Co. immediately stop tort conduct, jointly and severally compensate him economic loss RMB 1 million yuans and the reasonable fee for maintaining the right RMB 50,000 yuans.

Douguo Information Co. and Douguo Yangyian Co contended that there was evidence to prove that ***the program involved*** originated from Sohu video website, what they provided was only search linking service, asked the court to overrule CCTV International Company's all litigation claims.

Beijing Shijingshan District People's Court found that the making time of the notarized evidence of the capture program submitted by Douguo Information Co. and Douguo Yangyian Co. was later than the notarized time of two times infringement against CCTV International Co. for near half a year, but the "updated date" shown on ***the software involved*** was earlier than the one shown at notarizing by CCTV International Co., thus could not exclude the possibility of its modifying ***the software involved,*** the court did not accept their notarized evidence of the capture program. In this case, Douguo Information Co. and Douguo Yangyian Co. argued that they only provided linking service, should prove for it, but they didn't submit evidence to prove, the notary certificate submitted by CCTV International Co. showed that ***the program involved*** in the process of clicking play neither left ***the software involved,*** nor showed the absolute web address jumping around to Sohu video website, hence the court did not accept their such claim. The video screen of ***the program involved*** shows "Sohu video" watermark, only according to such watermark was not sufficient enough to prove that ***the program involved*** linked from "Sohu video". In the meantime, documented evidence also showed "Sohu video" didn't make sub-transfer of the right of information network dissemination of the work involved.

Thus, the evidence submitted by CCTV International Co. reached the standard of proof of the high degree of probability, may decide that Douguo Information Co. and Douguo Yangyian Co. provided online broadcasting of ***the program involved*** through ***the software involved,*** infringed the exclusive right of information network dissemination enjoyed by CCTV International Co., should jointly and severally assume the civil liability of ceasing infringement and compensating damage. Therefore, the court held that Douguo Information Co. and Douguo Yangyian Co. immediately cease the online broadcast service through mobile phone App. Software "A Bite Of China 2", and jointly and severally compensate CCTV International Co. economic losses RMB 250,000 yuans and reasonable expenditure RMB 23,000 yuans.[52]

Douguo Information Co. and Douguo Yangyian Co. dissatisfied with the first instance judgment, jointly appealed to Beijing Intellectual Property Court, claimed that they only provide linking service and should not bear tort liability.

Beijing intellectual Property Court decided that Douguo Information Co. and Douguo Yangyian Co. in the process of clicking play of ***the program involved*** might see play page jump, but did not submit evidence to prove. The broadcast of ***the program involved*** neither left ***the software involve,*** nor showed having jumped to the absolute web address of Sohu video website, therefore, the court did not support Douguo Information Co. and Douguo Yangyian Company's argument what they provided was only the network linking service. It is not sufficient in this case only to prove ***the program involved*** was linked from Sohu video website by its watermark, the court should determine that Douguo Information Co. and Douguo

[52] See Civil Judgment of Beijing Shijingshan District People's Court(2014)Shi Min (Zhi) No. 8807(北京市石景山区人民法院<2014>石民<知>初字第8807号).

Yangyian Co. provided online broadcast for ***the program involved,*** they should bear tort liability. Thus, the court held to refute two defendants' appeal and maintain the original verdict.

In the civil dispute case of infringing the right of information network dissemination, Plaintiff had preliminary evidence to prove network service provider providing related works, performances, audio and video products, but network service provider could provet that he only provided network service and had no fault, People's Court should not determine that he constituted tort. The key point to hear thus case was whether or not Douguo Information Co. and Douguo Yangyian Co. broadcasted ***the program involved*** through mobile phone App. could be determined as only provided search linking service.

First, in the aspect of evidence determination, the court adopted Superior Principle of evidence, i.e. one of the parties submits evidence of high probability of the standard of proof, and such evidence can be taken. Owing that Douguo Information Co. and Douguo Yangyian Co. did not make reasonable explanation on the defect of their defense evidence, hence, the court did not accept their evidence, and only accepted CCTV International Company's tort evidence.

Second, in the aspect of substance determination, the court comprehensively considered the following factors:

- In the process of click broadcasting ***the program involved*** neither left ***the software involved,*** nor showed jumping to the absolute web address of Sohu video website;
- Although the video footage broadcasted by ***the program involved*** showed the watermark of "Sohu video", yet only according to such watermark was insufficient enough to prove that ***the program involved*** was linked from "Sohu video"; and
- "Sohu video" also didn't sub-transfer the right of information network dissemination of ***the program involve.***

Finally, the court decided that Douguo Information Co. and Douguo Yangyian Co. provided online broadcasting of ***the program involved*** through ***the software involved***. The court comprehensively considered the factors of commercial value, broadcast time, fee of authorizing to use and the degree of subjective intention of Defendants' implementing tort conduct, lasting time etc., discretionarily confirmed the compensation amount of RMB 273,000 yuans.

Because this case involved the CCTV hit documentary- "A Bite of China 2", it invokes much concern of the public, The judgment of this case powerfully protects the copyright owner's legitimate benefit, embodies the spirit of strengthening the protection of intellectual property rights in this case and has a good social publicity effect.[53]

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[53] See China 2015 Chart Display of IP Courts' Typical Cases-Copyright Sheet (Chinese version) [EB/OL]. Chinese Intellectual Property Rights, No. 111, http://www.ciplawyer.cn/article.asp?articleid=19290, 2016–7–13.

9.4.3 Selected Recent Cases Involved Online Music

Online music is the most popular use of the Internet in China – CNNIC reported a usage rate of 83.5%. According to the International Federation of the Phonographic Industry (IFPI), China's top search engines have been facilitating massive unauthorized MP3 downloading. The legal battles in the Chinese courts between record companies and Chinese search engines, including the Nasdaq-listed Baidu.com (Baidu) which commands almost 60% of China's search engine market share, have continued to make headlines so far.

(1) *Universal Record Co. vs. Beijing Baidu Network Technology Co. Ltd. case (2007)*[54] (Dispute of infringing the right of information network dissemination).

On November 17, 2006, Beijing First Intermediate People's Court rendered its first trial judgment on the legal action jointly initiated by seven internationally renowned record companies including SonyBMG, Warner, EMI and Universal etc. against Baidu for copyright infringement on Baidu's music search engine service. The court held that Baidu's services did not constitute copyright infringement and dismissed the plaintiffs' actions.[55] In December 2006, those record companies lost their appeal against the Bejiing court's judgment that Baidu was not guilty of copyright infringement.

In the second trial of this case, Beijing High People's Court explicitly indicated as follows: "The behavior to upload the works or use other method to put them on the network server which is open to the public constitutes the right of information network dissemination behavior. Its result is to let the public at their personal chosen time and computer by visiting the websites which the works are located to obtain the works. Therefore, to determine whether or not the accused infringement conduct belongs to infringing the right of information network dissemination should depend on whether or not the accused infringement conduct belongs to the conduct of providing works by uploading and other methods."[56]

(2) *EMI Hong Kong., SonyBMG, Warner Records Co.and Zheng Dong et al. vs. Yahoo.cn case(2007).*[57]

In December 2007, the Beijing High People's Court made a key judgment about intermediary copyright liability in China. In this case, the International Federation of Phonographic Industries (IFPI), on behalf of 11 record companies including EMI

[54] See Civil Judgment of Beijing High People's Court(2007)Gao Min Zhong Zi No.594. (北京市高级人民法院民事判决书<2007>高民终字第594号) .

[55] See Civil Judgment of Beijing First Intermediate People's Court(2005)Yi Zhong Min Chu Zi No.8474 (北京市第一中级人民法院民事判决书<2005>一中民初字第8474号).

[56] See Civil Judgment of Beijing High People's Court(2007)Gao Min Zhong Zi No.594. (北京市高级人民法院民事判决书<2007>高民终字第594号) .

[57] See Civil Judgment of Beijing High People's Court(2007)Gao Min Zhong Zi No.01239. (北京市高级人民法院民事判决书<2007>高民终字第01239号).

Hong Kong., SonyBMG, Warner Records Co.and Zheng Dong etc. sued Beijing Alibaba Information Technology Co. Ltd. (which operated Yahoo.cn) for contributory copyright infringement because Yahoo.cn's site allowed users to find and download unauthorized copies of popular songs. IFPI notified Yahoo.cn of the unauthorized songs they were concerned with by providing sample links to each song and requesting Yahoo.cn to remove all copies of the unauthorized songs from their network. Yahoo.cn removed the songs specified by IFPI but not all unauthorized songs as requested. IFPI won the case in the first instance at the Beijing Second Intermediate People's Court,[58] and again on appeal at the Beijing High People's Court.

This judgment is based partly on the *Ordinance* stipulating that Internet service providers (ISPs) shall be liable for infringement if they "know" or "should have known" of an infringing work. The judgment places the burden on the intermediary to take extra efforts to monitor their network once they have been notified of infringements.

This case sends a clear message that rights holders have legal recourse in China if they notify intermediaries of infringing content. Additionally, the judgment indicates that intermediaries have a duty to remove unauthorized content that they know to exist on their networks. However, the degree of responsibility and diligence that the intermediary must exercise is still a contested area. For example, if a website is given notice regarding one song, do they have an obligation to police all future infringements of the same song and/or regulate all instances of similar content? What is technologically and economically feasible? What is the scope of the intermediary's responsibility?[59]

In addition, following the issuance of the *Ordinance* and further research on network infringement, the courts of "Baidu's case" and "Yahoo.cn's case" correctly realized that only various types of "uploading" behavior can constitute "network dissemination behavior". Providing link objectively enlarges the dissemination range of linked works or products, but it is not "network dissemination behavior". Even if linked works or products are infringing ones i.e. being "uploaded" without permission, providing link can not constitute directly infringing "the right of information network dissemination behavior". Therefore, in "Baidu's case" the direct reason for the plaintiff losing the case is mistakenly applying "direct infringement" as the only one cause of action.[60]

(3) *IFPI vs. Yahoo.cn and Sohu case.*

[58] See Civil Judgment of Beijing Second Intermediate People's Court (2007) Eer Zhong Min Chu Zi No.02630. (北京市第一中级人民法院民事判决书<2007>二中民初字第02630号).

[59] See Wang, Lisa. Searching for Liability: Online Copyright Infringement in China [EB/OL]. Issue: March 2008, http://www.chinalawandpractice.com/Article/1886194/Channel/9937/Searching-for-Liability-Online-Copyright-Infringement-in-China.html.

[60] See Wang, Qian. Second Comment on Identification of ILSP Indirect Infringement—Compared the Judgment of "7 Record Companies vs. Baidu" with the One of "11 Record Companies vs. Yahoo.cn" [J]. Intellectual Property, 2007, (4), available at http://www.maoup.com/htm/2009724/801.htm.

Undaunted by defeat in 2007 in "Baidu's case", a number of the global music labels (Sony BMG Music Entertainment Hong Kong, Universal Music and Warner Music Hong Kong) filed a lawsuit against Baidu and another major Chinese search engine, Sohu.com, in February 2008 and demanded that they remove thousands of links to music downloads that were said to be infringing. In January 2010, local media reported that Beijing First Intermediate People's Court found in favor of Baidu and held that Baidu was not liable to pay any damages as it merely provided search service for the pirated music files and was not engaged in the actual unauthorized copying by the third party sites.[61]

After the music labels' appeal, Beijing High People's Court precisely verified the detail of a case, with the assistance of China Internet Association Mediation Center (CIAMC) and made several times mediation; Beijing High People's Court finally made both parties reach mediation agreement on the basis of a fundamental copyright license agreement.[62] Therefore, hundreds of millions of Internet users can get a lot of genuine songs on Baidu website. The most important thing is, this mediation agreement provides a fundamental solution and approach for the contradiction between the traditional copyright industry including music, text, film and television and the emerging Internet industry.

Another example of creative industries that in this case is not so successful at first stage is really famous in China, because thousand of young people use Baidu and Sogou to download songs.

Sogou and Baidu are search engines in China. Sogou is the music service portal of Sohu.com. The International Federation of the Phonographic Industry (IFPI) represented Universal Music, Sony BMG Music Entertainment (Hong Kong) and Warner Music HongKong in a lawsuit against Baidu in February 2008. Gold Label Entertainment Ltd., backed by EMI Group Ltd., also brought a lawsuit against Sogou. The musicians were suing for $9 million dollars in damages and prejudices against Baidu and for $7.5 million dollars against Sogou. The claim against Baidu was based on 127 tracks of music copyright. They wanted the maximum penalty that is $71,000,000 dollars per track or about 9 million dollars in total. Baidu was one of the worst violators of music copyrights and they wanted the maximum compensation for not respecting the rights of authors and artists as well as recording companies.

Baidu and Sohu denied any involvement in the process of obtaining copyrighted music, as they did not host the illegal files, they only allow search and they provided only lists of other web sites with links.[63]

On January 26, 2010, the Beijing First Intermediate Court found in favor of Baidu and Sogou that the two were not in violation of *Chinese Copyright Law* by linking to sites or directly to unauthorized downloading.

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[61] See Civil Judgment of Beijing First Intermediate People's Court(2008)Yi Zhong Min Chu Zi No.5034 (北京市第一中级人民法院民事判决书<2008>一中民初字第5034号).

[62] See Civil Mediation Agreement of Beijing High People's Court (2010) Gao Min Zhonh Zi No. 1694, 1700 & 1699 (北京市高级人民法院民事调解书<2010>高民终字第1694号、1700号、1699号).

[63] http://en.wikipedia.org/wiki/Music_copyright_infringement_in_the_People's_Republic_of_China, visited on March 13,2012.

"We are pleased with the courts decision and will continue to comply with local laws and regulations," a Baidu spokesman said by e-mail following the judgment.

IFPI reacted sharply to the verdict. "The judgments in the Baidu and Sohu/Sogou cases are extremely disappointed and we are considering our next steps. The verdicts do not reflect the reality that both operators have built their music search businesses on the basis of facilitating mass copyright infringement, to the detriment of artists, producers and all those involved in Chinas legitimate music market," the IFPI said in a statement.[64]

IFPI appealed later on. During the process of second trial hearing, the full court of Beijing High People's Court helped both parties to reach settlement based on their cooperation agreement. Under such agreement, Baidu pays the royalty, Universal Music, Sony BMG and Warner would authorize Baidu to upload its whole complete song list and the list of new songs to be promoted in the near future. Network users may broadcast and download related songs for free through Baidu.[65] On February 28, 2013, international 4 big record companies also signed a settlement agreement with Sohu/Sogou under the auspices of Beijing High People's Court. Therefore, the years of major copyright dispute case together involved 105 popular songs and involved in the subject of the total of RMB 54 million yuans, has been satisfactorily and completely resolved. Millions of Internet users finally can get a lot of genuine songs in Sogou website.[66]

Another case that also finished in court with Baidu was with Shanda Literature, and the decision of the court was that Baidu must compensate Shanda Literature with $75,700 dollars. Shanda Literature is part of Shanghai-based Shanda Interactive Entertainment Limited, an interactive entertainment media company. Baidu also provides unauthorized literary works on his search engine instead of directing Internet users to a third website, according to the verdict. The behaviour that Baidu had demonstrated was the same as copying and uploading. There were rumours that Shanda was buying shares of online file-sharing website docin.com circulating online. If true, it would make Shanda a potential competitor of Baidu Wenku (Baidu Library), according to hexun.com. The director of Shanda Hou Xiaoqiang said that over 95% of the famous literature can be found in Baidu and this was accessible without any charge. This would result in one thousand million of yuanss for Shanda. The lawyer of Shanda told in the "Global Times" newspaper that the economical compensation was not enough for them, but they were happy with the courts decision in China and this verdict was the first victory for the publishing industry against Baidu.

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[64] SCHWANKERT, STEVEN. IFPI Members Lose Second Suit Against Baidu [N]. http://www.billboard.biz/bbbiz/content_display/industry/news/e3ia67226593de9282c19ec3878c170f5dd, 2010/01/26.

[65] Baidu's Music Infringement Settled by Mediation and Reached Cooperation Agreement (Chinese version) [N]. http://www.chinaeclaw.com/News/2011-12-21/19060.html, 2011/12/21.

[66] See Xie, Zhenke. Int'l Four Big Record Companies Shake Hands with Sohu/Sogou and Made It Up (Chinese version) [N]. http://www.chinacourt.org/article/detail/2013/03/id/905060.shtml, 2013–03–04.

According to China's *Copyright Law*, violators have to pay the amount of money equal to losses suffered by the copyright owner due to the infringement, or the amount of profits gained by the offender through illegal actions, with a maximum of RMB 500,000 yuans. Shanda's victory proved that we should trust law enforcement as it will bring about effective solutions in tackling copyright infringement.[67]

Baidu appealed later on. But in August 2011 he applied to the Shanghai First Intermediate People's Court to withdraw the request for appeal and was approved by the court. Both parties still enforced the judgment according to the original verdict.[68]

(4) *China 5fad.com vs. Baidu case*[69] (for the 4th Time).

On July 17, 2007, Zhejiang Fanya E-Commerce Co. Ltd. (which operated China 5fad.com) brought the lawsuit to Beijing High People's Court. In February 2009, the court held that Baidu infringed the right of information network dissemination of 26 songs and should pay RMB 70,000 yuans demage to Pan Asia.[70] But Fanya Asia dissatisfied and filed the appeal. On May 11, 2012, the Supreme People's Court held to affirm Item (1) and (3) of the civil judgment of Beijing High People's Court and changed Item (2) of such civil judgment as follows: Within 10 days from the date of the effective of this decision, Beijing Baidu Netcom Science Technology Co., Ltd. and Baidu Online Network Technology (Beijing) Co., Ltd. jointly compensate Zhejiang Fanya E-Commerce Co. Ltd. economic losses RMB 400,000 yuans and reasonable expense of litigation RMB 128000 yuans.[71]

It is worthy to notify that this case involved lyrics cache. Baidu's song search extracted entirely the lyrics from other websites, reproduced them to his own server and provided directly to the public. The court found that: "Even though Baidu provides the web address of source websites and puts the full text of the lyrics in front of the source of the lyrics after revealing the lyrics, most users under normal circumstances still will at first choose to obtain the lyrics from the webpage of Baidi.com while not to click the third party websites which originally provides the lyrics. Such lyrics cache completely substitutes the third party websites' function to provide lyrics and is enough to affect the market benefit of the third party."[72] Therefore, the court held that Baidu's conduct constituted infringement.

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[67] http://business.globaltimes.cn/industries/2011-05/654167_2.html, 2011/05/12

[68] Shanda v.Baidu Infringement Case Finalized Baidu Appealed But Withdrew (Chinese version) [N]. http://www.legaldaily.com.cn/society/content/2011-08/26/content_2903981.htm?node=288132011/08/26. See also Civil Judgment of Shanghai First Intermediate People's Court(2010)Lu Min San (Zhi) Chu No.61(上海市第一中级人民法院民事判决书<2010>卢民三知 初字第61号).

[69] See Civil Judgment of Supreme People's Court (2009) Min san Zhong Zi No. 2 (最高人民法院民事判决书<2009>民三终字第2号).

[70] See Civil Judgment of Beijing High People's Court(2007)Gao Min Chu Zi No.1201. (北京市高级人民法院民事判决书<2007>高民初字第1201号).

[71] See Civil Judgment of Supreme People's Court (2009) Min san Zhong Zi No. 2 (最高人民法院民事判决书<2009>民三终字第2号).

[72] Ibid.

(5) *MCSC vs. Baidu case (2010).*[73]

Just 1 month after that decision of *IFPI vs. Yahoo.cn and Sohu* as previously discussed in (3), Music Copyright Society of China (MCSC), the Chinese counterpart of IFPI, had better luck in court. In a lawsuit involving the lyrics of 50 songs belonging to members of the MCSC, a Beijing District Court penalized Baidu at first instance for unauthorized redistribution of copyrighted music lyrics on its MP3 lyrics search service. When users of Baidu's lyrics search service entered a song name, the relevant lyrics were displayed in the form of snapshots taken from the original third party web pages containing the lyrics. According to local media reports, the court found that such storage on its server and display of lyrics in snapshot form by Baidu violated MCSC's right of dissemination using an information network.

In the case, the court indicated that: "Owing to the feature of briefer content of the expression form of lyrics, it makes cache which only can show partial content of source websites under normal circumstances, shows the whole content of lyrics works. Therefore, although the defendant provides the web address of partial source websites, and the above content initially has the possibility to originate from the third party websites, yet because the defendant provides the whole content of lyric in its webpage of cache etc., it makes most of the users need not choose to click the web address of source websites to obtain lyrics under normal circumstances i.e. whether the defendant provides the information of source websites or not, the users may directly obtain the whole lyrics information from the webpage of Baidi.com. The above mentioned operation has already substituted the function of providing lyrics by source websites actually. The search called by the defendant has lost its fundamental feature of providing information index and source, and objectively had the function of letting the users obtain the lyrics from its server. Hence, the conduct of providing lyrics by way of cache called by the defendant is not the search engine's service within the fair use range."[74]

The Court awarded MCSC RMB 50,000 yuans ($7,300 dollars) damages against Baidu and RMB10,000 yuans for litigation expense. Baidu appealed, but was rejected by Beijing First Intermediate People's Court in July 2010.[75] This decision represents a notable step taken by the Chinese courts towards better protection of online copyright in civil proceedings.

Although the specific terms of judgments in "China 5fad.com vs. Baidu case" and "MCSC vs. Baidu case" have little difference, yet their logic is very consistent———— Because the users may see complete lyrics content from Baidu's search result, need not visit the source websites, thus, Baidu's "lyrics cache" entirely substitutes the lyrics content of source websites. This kind of lyrics reproduction

[73] See Civil Judgment of Beijing First Intermediate People's Court (2010) Yi Zhong Min Zhong Zi No.10275 (北京市第一中级人民法院民事判决书<2010>一中民终字第10275号).

[74] See Civil Judgment of Beijing Haidian District People's Court (2008) Hai Min Chu Zi No.7404 (北京市海淀区人民法院民事判决书<2008>海民初字第7404号).

[75] See Civil Judgment of Beijing First Intermediate People's Court (2010) Yi Zhong Min Zhong Zi No.10275 (北京市第一中级人民法院民事判决书<2010>一中民终字第10275号).

and dissemination may cause huge negative effect to the benefit of source websites.

Besides, it is necessary to indicate that the courts' analyses are in accordance with the "transformative use"[76] and "market substitute" factors of "fair use doctrine" stipulated by America's Copyright Law.[77] The so called "lyrics cache" is substantially different from "webpage cache" (which helps the users to understand target website's content during network jam) and "thumbnails cache" (which lets the users to generally understand target website's picture content). It is not "transformative use" for lyrics to completely reproduce lyrics and directly open to the public. The consequence is to substitute the source websites to provide the users lyrics, then plunders the page view which should be obtained by source websites and occupies the source websites' market share.

Finally, the verdict of the "MCSC vs. Baidu case" directly pointed out such kind of use of works "is not the search engine service within the range of 'fair use'", actually recognized the court should apply the open and flexible standard such as "fair use" to determine the legitimacy of "cache".[78]

9.4.4 Selected Recent Cases Involved Online Movie and TV Series

At present, Internet piracy has become "a leading killer" of copyright protection on Chinese films and videos in the new media environment. The infringement of Internet piracy not only impairs the legal interests of right holders, causes numerous right conflicts and disputes, disturbs the network transmission order, but also influences the healthy development of the Internet.

Internet technology has enabled new business models to develop; at the same time, it has also affected the interests of certain traditional industries. The legislative intent of intellectual property law is to protect the intellectual achievements of the authors and inventors, encourage creativity and invention and promote the development of the technology of a society.

In practice, debates have arisen as to under what situation an ISP shall be deemed as "having known or having reason to know" the existence of the infringing works.

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[76] The concept of "transformative use" itself does not appear in America's Copyright Law, but develops step by step in the trial practice. The concrete discussion was seen scatteredly in many precedents. In Campbell case, the U.S. Supreme Court pointed out that: "The enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is "transformative," altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. See *Campbell v.Acuff- Rose Music*, 510 U.S. 569(1994).

[77] 17 USC 107.

[78] See Wang, Qian. Research on Copyright Infringement Problem of "Cache" Service Provided by Search Engine [J]. East Law, 2010, (29), available at http://www.privatelaw.com.cn/Web_P/N_Show/?PID=5865

As to the video-sharing websites, they often much more easily proved themselves to be in line with the redemptive conditions of Item (1),(2),(4),(5) of Article 22 of the *Ordinance*. Therefore, when the right holders haven't sent the infringement notice to the video-sharing websites, to use which kind of standard to determine whether or not "the ISP knows or has reasonable reason to have known" that "the materials uploaded by users are infringing ones", becomes the key point to determine the ISP's liability.

In the following recent cases, China's court found that where the business model of ISP is to induce and assist its users to communicate infringing contents and reflects the intention of ISP to make profits from the infringing contents, the ISP should be hold liable even it dose not know the existence of the specific infringing content.

(1) *Beijing Ciwen Film and TV Production Co., Ltd. et al. v. POCO Case (2006).*[79]

Guangzhou intermediate People's Court held: "Guangzhou Shulian Software Technology Co., Ltd. as a network company (POCO) provides P2P resource share platform, when network users download the movie" Seven Swords "on its operating website, there is detailed introduction toward" Seven Swords "on Shulian Company's webpage and has the mark guiding for download, POCO website infringed Ciwen Company's right of information network dissesmination, should bear ceasing tort and bear civil liability." Therefore, the court held that Defendant Shulian Co. immediately cease tort, apologize and compensate Ciwen Co.various losses RMB 80,000 yuans.[80]

After first instance judgment, Shulian Co. dissatisfied, and filed appeal to Guangdong High People's Court.

Guangdong High People's Court decided: "Defendant Shulian Co. provided POCO (P2P) software to users for dowaloading and running, after users download and install P2P software, it designates the shared area on the hard disk of the computer terminal storage. After Internet users in the area store related works, other user who downloads P2P may also directly connect to such user's computer terminal and makes downloading, and need not go through Shulian Company's server to do data exchange. Therefore, during the broadcast process, each PC simultaneously plays the role of server and client, directly grasps data source from other user's computer not the central server. To summarize, Shulian Co. is not the direct provider of the mivie 'Seven Swords', and does not store such movie on his webwite to provide the public to downloas, does not constitute tort act."[81]

But Guangdong High People's Court decided at at the same time: "The movie was first publicly broadcasted on July 29, 2005, and the accused infringing act

[79] See Civil Judgment of Guangdong High People's Court(2006)Yue Gao Fa Min San Zhong Zi No. 355 (广东省高级人民法院民事判决书<2006>粤高法民三终字第355号).

[80] See Civil Judgment of Guangdong Province Guangzhou intermediate People's Court (2006) Sui Znong Fa Min San Chu Zi No. 7 (广东省广州市中级人民法院民事判决书<2006>穗中法民三初字第7号).

[81] See Civil Judgment of Guangdong High People's Court(2006)Yue Gao Fa Min San Zhong No. 355 (广东省高级人民法院民事判决书<2006>粤高法民三终字第355号).

occurred in Novemner of the same year, both are only 3 months away, exists in Shulian Company's central major server, allows to exist on the webpage regarding propaganda and introduction of the mivie 'Seven Swords' and the'search result' list, and can not make examination in time when doing network maintance. As a professional web service provider, Shulian Co. should have known at this time the copyright owner of 'Seven Swords'won't permit any website and individual to provide his/her movie invested huge amount to shoot for the public to download for free. But Shulian Co. still provides the service of P2P software and its registration, BBS, search and linking and so on for the net users, helps users to smoothly download the work involved. Thus, it is sufficient to determine that Shulian Co. exists subjective fault of ***"should have known"*** (emphasis added), constitutes the joint tort liability of helping direct tortfeasor to implement tort act."[82]

Therefore, on June 23, 2008 Guangdong High People's Court refuted Shulian Company's appeal according to law and maintained Guangzhou intermediate People's Court's first instance verdict.[83]

(2) *NewCom Online v.Tudou case (2008)*[84]

Shanghai High People's Court held that: "Although Appellant (Tudou) did not upload the infringing video ,which was the act of direct infringement, he indulged its users' infringement when it ***should have known*** (emphasis added) the existence of the infringement, which is contributory infringement of copyright on Internet. Appellant had subjective fault and should be subject to the liability of infringement. The reasons are as follows: First of all, Appellant was an ISP operating a video-sharing website. ……It is worthy to notify that Appellant set separated columns for the "original" works and other such as 'entertainment','movie' and 'music'. This act itself proved that Appellant knew the risk that users might upload unauthorized popular movies and TV series other than original works, such as home-made videos or other entertaining videos."

(3) *JOY.cn v.VeryCD case (2009)*[85]

Shanghai First Intermediate People's Court held that: "When designing its business model, Defendant launched a Movie Channel, which was classified and edited in advance in the way that allowing users to upload introductions of movies. This made it easier and faster for the users to share infringing movies for free and aggravated the consequence of infringement.

Defendant could foresee the result. However, he not only failed to take effective measures to prevent the aggravation of the infringement, but launched the recom-

[82] Ibid.

[83] Ibid.

[84] See Civil Judgment of Shanghai High People's Court (2008) Hu Gao Min San (Zhi) Zhong Zi No.62 (上海市高级人民法院民事判决书<2008>沪高民三知终字第62号).

[85] See Civil Judgment of Shanghai First Intermediate People's Court(2009)Hu Yi Zhong Min Wu (Zhi) Chu Zi No.46 (上海市第一中级人民法院民事判决书<2009>沪一中民五<知>初字第46号).

mendation section to induce users to download. Defendant's foregoing actions showed clearly its intention to encourage and assist the communication of the infringing contents.

Defendant had subjective fault in helping the communication of the movie in question and infringed the Plaintiff's right to communicate through information network."

(4) *JOY.cn v.Tudou case (2010)*[86]

Tudou.com was ordered by Shanghai Second Intermediate People's Court pay RMB 20,000 yuans (approximately$2,952 dollars) to Shanghai Joy. cn Corp., the operator of video Web portal Joy.cn, as compensation for copyright infringement of broadcasting the movie "Happy Goat and Grey Wolf" online on July 22, 2010.[87]

The court held that: "After foreseeing the risk of infringement, ISP should take necessary measures to prevent the frequent occurrence of copyright infringement to movies and TV series. If ISP fails to take reasonable measures which are possible, it is necessary to determine that the ISP has subjective fault.…Available evidence suggests the Appellant (Tudou) did not restrict users uploading of unauthorized movies and TV series in any way other than a notice of prohibiting the uploading of unauthorized movies and TV series and a disclaimer. If it is practically difficult for Appellant to develop a perfect technology to identify copyrighted works under current technical conditions and level of economy development, limiting the length of time of the videos would be an effective precaution to prevent users from uploading unauthorized movies and TV series."[88]

In this case, the court pointed out clearly for the first time that under certain circumstances, video-sharing websites should be subject to liability even if it has no knowledge of "specific" infringement.

The court held that no matter the ISP has the knowledge of specific infringement or only has the general knowledge of infringement, the subjective fault should be found in anyway. Therefore, if a person intentionally assists the infringement, the subjective fault should be found no matter it is specific or general knowledge.[89]

(5) *TCL, Xunlei,PPStream and Gome Electrical &VOOLE copyright infringement disputr case (2010)*[90]

This the first judicial case which combined traditional TV industry-TCL with new Internet industry- Xunlei and high technology such as cyber link- PPStream

[86] See Civil Judgment of Shanghai Second Intermediate People's Court (2010) Hu Er Zhong Min Wu (Zhi) Zhong Zi No. 26 (上海市第二中级人民法院民事判决书<2010> 沪二中民五<知>终字第26号).

[87] See Joy Sued Tudo Infringement Case Second Trial Ruling Maintained First Trial One [N]. http://www.fayii.com/html/News_10752.html, July 23, 2010.

[88] See Wang, Qian. Judicial Protection of Copyright in Internet:Progress and Challenge, http://www.ipr2.org/.../3_Wang_Qian王迁-网络环境中著作权保护的进展与挑战(英文)-EN857.pdf

[89] Ibid.

[90] See Civil Judgment of Beijing High People's Court(2010)Gao Min Zhong Zi No. 2581(北京市高级人民法院<2010>高民终字第2581号).

etc. together in China. Three Defendants- TCL, Xunlei, PPStream were required by the court to pay RMB 87,500 yuans in compensation to the Plaintiff. Gome Electrical need not bear any responsibility.

Beijing Second Intermediate People's Court held that: "Plaintiff or authorized persons had never made torrent files for the movie in question or released the files on Internet. Therefore, the address of torrent files appeared in the search result was that of the website where unauthorized materials were communicated.… According to content of the search result page which had been notarized, Defendants, Xunlei and TCL edited and arranged the search result and it was reasonable for them to know the works linked to are infringing. Defendants knowingly contributed the infringement by providing linking service to infringing materials and should be subject to the liability of joint infringement."[91]

Dissatisfied with the judgment, Defendants, Xunlei and TCL appealed. Beijing High People's Court found that Defendants' reasons to appeal lacked factual and legal basis. Therefore, Beijing High People's Court held to reject the appeal and uphold the original verdict.

(6) *Shenzhen QVOD Technology CO., Ltd. & Shanghai Cohesion Media Technology Co., Ltd. case (2014)*[92]

Plaintiff Shenzhen QVOD Technology CO., Ltd. enjoyed exclusive right of Network Dissemination of Information of TV Play Series ***"Startling by Each Step"*** (see Fig. 9.4). Plaintiff discovered that Defendant Shanghai Cohesion Media Technology Co., Ltd. performed the behavior to infringe Plaintiff's right of network dissemination of information of involved TV Play Series. Therefore, Plaintiff suited Defendant to the court requesting the court to order Defendant cease infringement and compensate economy losses RMB 80,000 yuans.

Shenzhen Nanshan District People's Court's first trial found that the involved TV Play Series ***"Startling by Each Step"*** were uploaded to the Internet by broadcast on demand site webmaster without permission. Such behavior infringed Plaintiff's right of network dissemination of information of the film and TV work. Defendant established such broadcast on demand site, uploaded and broadcasted the involved film and TV work, and released ads etc. to provide objective assistance. Meanwhile, Defendant provided the columns of TV Play Series and hit show etc. to edit and recommend the TV drama, and provided a link address to the TV drama involved. This proved that Defendant in the subjective aspect existed the fault of instigating and aiding the infringement, the court should held that Defendant's behavior infringed Plaintiff's right of Network dissemination of information and Defendant

[91] See Civil Judgment of Beijing Second Intermediate People's Court(2009)Er Zhong Min Chu Zi No. 17910(北京市第二中级人民法院民事判决书<2009>二中民初字第17910号).

[92] See Civil Judgment of Guangdong Province, Shenzhen City Intermediate People's Court(2014) Shen Zhong Fa (Zhi) Min Zhong Zi No. 91 (广东省深圳市中级人民法院民事判决书<2014>深中法<知>民终字第91号).

Fig. 9.4 TV Play Series-"Startling by Each Step" (Source: http://www.gb.cri.cn/27564/2011/09/13/1326s3369823.html)

should cease infringement and compensate Plaintiff economy losses RMB 48,000 yuans.[93]

After the judgment of the first instance, Defendant appealed. Guangdong Province Shenzhen City Intermediate People's Court made the final judgment: rejected the appeal and upheld the original verdict.

The Chinese courts were also active in criminal enforcement against online copyright violations. The first successful criminal conviction for large-scale online software privacy in China was concluded in August 2009. As mentioned previously, the principal of the infamous Tomato Garden website (www.tomatolei.com) – one of China's most popular websites for pirated software, which offered free downloading of a modified version of Windows XP to an estimated 10 million users – was given a three-and-a-half year prison term and a fine of RMB 1 million ($146,000) by People's Court of Huqiu District of Suzou City in Jiangsu Province.[94]

[93] See Civil Judgment of Shenzhen Nanshan District People's Court (2013) Shen Nan Fa (Zhi) Min Chu Zi No.349 (深圳市南山区人民法院民事判决书<2013>深南法<知>民初字第349号).

[94] See Criminal Judgment of Jiangsu Province Suzou City Huqiu District People's Court (2009) Hu (Zhi) Xing Chu Zi No.0001 (江苏省苏州市虎丘区人民法院刑事判决书<2009>虎<知>刑初字第0001号).

But in *Beijing My Music Mdt InfoTech Ltd. and Beijing Ciwen Film And Television Production Co., Ltd.infringment appeal case (2009)*,[95] on March 24,2009 Beijing second intermediate People's Court made the final judgment that My Music which operated 56.com enjoyed the copyright exemption.

In 2008 Ciwen accused that TV series "Home" video in 56.com was played online without the permission of Ciwen attached commercial signs as advertising in title and play pages and claimed that 56.com set the "Home" video link on his webpage, this behavior infringed the right of information network dissemination of Ciwen's film and TV's copyright, caused him economic losses. Therefore, Ciwen brought the lawsuit to the court and requested the court to order My Music stop infringement, compensate Ciwen economic losses and reasonable expenses RMB 120,000 yuans.

My Music argued that 56.com belonged to Internet video sharing website, provided Information storage service. Even if there was infringement, the uploaders should bear tort liability. The website operator should bear tort liability only when it received the right holder's notice and failed to fulfill the deletion obligations. Thus, it did not agree with Ciwen's litigation request.

For both parties' dispute, Beijing Chaoyang District People's Court found that Ciwen owned the copyright of "Home", My Music was the actual operator of 56.com and found that 56.com belonged to the web site to provide users with web space; My Music belonged to network service provider for providing information storage space.

According to the *Ordinance to Protect the Right of Dissemination via Information Network,* network service provider for providing information storage space shall not bear compensation liability with the following conditions: clearly indicating his information storage space is to provide and open his name, contacts and network addresses to the service; not changing the content of the service to upload the work; not knowing and having no reasonable reason to know the work of the service object uploaded is an infringing one; not directly benefiting from the work uploaded by the service object and removing the infringing works in time.

In this case, first, in accordance with the notary certificate provided by Ciwen and My Music, My Music had already in 56.com indicated that he provided users storage space, 56.com also made public My Music's name, the way of contact and network address;

Second, My Music announced in the website that there was no non-technical editing or tampering with video uploaded by the network user. Ciwen's evidence only showed that My Music before the involved work's broadcasting showed the 56.com logo, and had no evidence to make clear that My Music had changed the involved work uploaded by network users;

Third, before prosecution Ciwen didn't send written notice to My Music and there was ***no evidence to indicate*** that My Music ***knew*** or ***should have known***

[95] See Civil Judgment of Beijing Second Intermediate People's Court (2009) Er Zhong Min Znong Zi No. 9(北京市第二中级人民法院民事判决书<2009>二中民终字第9号).

(emphasis added) that the involved work uploaded by Internet users infringing other people's copyright;

Fourth, the video in 56.com may be viewed for free and didn't collect fee from its users. Although there was one advertisement next to the work involved, yet no evidence can show that My Music may directly obtain economy benefit;

Fifth, Ciwen didn't send written notice of infringement to My Music and after the litigation of this case happened, one can not search "Home" video in 56.com.

Accordingly, My Music should not bear compensation liability. Regarding Ciwen's claim to request My Music to compensate economy loss, Beijing Chaoyang District People's Court did not support.[96]

In the second trial, Beijing Second Intermediate People's Court held that the original trial court's decision of My Music's not bearing compensation liability was not inappropriate. The appeal claimed that My Music was not in accordance with the relevant exemption clause and should bear compensation liability submitted by the appellant-Ciwen had insufficient evidence, therefore was rejected by Beijing Second Intermediate People's Court.

Also in *China Film Media Asia Audio Video Distribution Co. Ltd. v. Youku.com & 51TV.com case(2013)*,[97] the court held that Defendants' linking copyrighted movies constituted non-infringement.

China Film Media Co. Ltd., the copyright owner of the movie ***"Isabella"*** (the "disputed movie"), authorized Youku.com to broadcast ***"Isabella"*** to personal computers through the Internet, but at the same time did not authorize Youku.com to broadcast the movie to other types of devices, such as mobile phones. However, after the China Film Media Co., Ltd. discovered that consumers could watch the disputed movie through Kuaishou Movie, a mobile client developed by 51TV.com, through a link to Youku.com, China Film Media Co., Ltd. brought the case to court claiming that Youku.com and 51TV.com had engaged in infringement of its copyright.

Shanghai Yangpu District Primary People's Court heard the case and decided that Youku.com and 51TV.com had not engaged in infringement, on the grounds that Youku.com had the right to upload the disputed movie and that 51TV.com had merely offered a link to the disputed movie. Dissatisfied with the judgment, China Film Media Co., Ltd. appealed. The Shanghai Second Intermediate People's Court accepted the case and held the following:

- China Film Media Co., Ltd. was unable to prove that he had authorized a limited right of information communication via network to Youku.com, insufficiently demonstrating that Youku.com went beyond the given authorization to broadcast the disputed movie.

[96] See Civil Judgment of Beijing Chaoyang District People's Court(2008)Chao Min Chu Zi No. 16141(北京市朝阳区人民法院民事判决书<2008>朝民初字第16141号).

[97] See Civil Judgment of Shanghai Second Intermediate People's Court (2013) Yang Min San (Zhi) Zhong Zi No. 105 (上海市第二中级人民法院民事判决书<2013>沪二中民五<知>终字第105号).

- Due to the fact that 51TV.com merely offered a linking service, which Youku.com was authorized to broadcast, 51TV.com did not engage in infringement; either direct or contributory in nature.

Therefore, Shanghai Second Intermediate People's Court affirmed the original verdict.[98]

Besides, as reported, in *Sohu Video v. Shenzhen Xunlei Network Technology Ltd. Co. case* (involoving infringement of information network transmission right), Defendant developed and operated "Thunder Video", "Thunder HD" polymerization software, hotlinked (without permission) the content of TV dramas "Golden Fate God Bestows", "Husband and Wife to Buy a House", "the Wife's Secret" and "My Economic Boyfriend" etc. which Plaintiff enjoyed the exclusive right to network dissemination of information and provided video online broadcast. Therefore, Plaintiff sued Defendant to Shenzhen City Nanshan District People's Court.

During the first trial, Shenzhen City Nanshan District People's Court determined that Defendant Xunlei Co. under the circumstance of not obtaining the permission from the works involved right holder-Plaintiff, via technical means analyzed and cracked Sohu video related code and secretly obtained information on the film and television works, so that the public did not need to log in "Sohu video", by the Defendant "Thunder video," "Thunder HD" polymerization software can achieve to watch the works online. It is a new style use method of work, should obtain the permission of the right holder. Defendant's behavior expanded the scope of the spread of film and television works, resulted in the loss of the interests of the oblige, Infringed the right of information network dissemination, should bear the corresponding tort liability according to law. Thus, the court held as follows:

- Defendant Shenzhen Xunlei Network Technology Ltd. Co. Immediately stop infringing the plaintiff's right to network dissemination of information;
- Defendant compensate Plaintiff economic losses and a reasonable fee of rights maimtainance totaled RMB 164,000 yuan.

During the second trial, Shenzhen City Intermediate People's Court determined after hearing the case determined that this case was a violation of the right to information dissemination of works disputes, although what Defendant provided was search linking service, yet he without permission bypassed advertisement to directly grasp video, intentionally circumvent or destroy Plaintiff's technical measure to protect the right of network dissemination of information for the works involved, had already constituted tort. Therefore, the court held to reject the appeal and upheld the original verdict. This is the final judgment.

Some analysis indicates that the final victory of this case clarifies Illegal nature of mobile phone software "aggregation" hotlinking behavior, determines the "aggregation" software cracking and hotlinking behavior constitue Infringement of the

[98] See Luo, Yanjie. Linking Copyrighted Movies Constituted Non-infringement [EB/Ol]. http://www.chinaiplawyer.com/linking-copyrighted-movies-constituted-non-infringement/, April 2, 2014.

right holder, effectively safeguards the legitimate rights and interests of the oblige. The software for "copycat polymerization" does not conform to the trend of market economy, is contrary to China's intellectual property strategy and encouraging cultural innovation. We hope this case's judgment thinking can be widely promoted and applied, can effectively prevent such violations continuing to be popular and maintain the healthy and orderly development of network video.[99]

9.5 Definition Problem of ISP's "Know"

According to Para.6, Art. 36 of *Tort Liability Law*, it stipulates: "Where a network service provider knows that a network user is infringing upon a civil right or interest of another person through his network services, and fails to take necessary measures, he shall be jointly and severally liable for any additional harm with the network user." After the promulgation of *Tort Liability Law*, under the *Regulation on Several Issues on Application of the Law in Civil Cases Concerning the Right of Network Dissemination of Information* promulgated by Supreme People's Court (SPC) in 2012, it overally accepts to use ***"should have known"*** to determine ISPs' subjective fault (see Art. 8). In addition, Art. 60 of the Copyright Law draft realeased in 2012 also put ***"should have known"*** into determing ISPs' subjective fault. These legislative documents indicated that China's each kind legislation basically and overally accepts to use ***"should have known"*** as one of the approach to determine ISPs' subjective fault.

Viewin from judicial practice, China's court judgment has changed from being restricted by ***"being fully aware"*** into including ***"should have known"***. After the promulgation of *the Ordinances on the Protection of the Right to Network Dissemination of Information* in 2006, the judgment of various local courts began to widen the requirement toward ISPs subjective state, using ***"should have known"*** to determine ISPs' subjective fault gradually obtained the recogenetion by the court, for example, in *Ciwen v. Hainan CNC case (2009)*, SPC decided that even though Plaintiff didn't send tort notice to Defendant and Defendant immediately deleted infringing works after prosecution, but the behavior of Defendant's providing "deep link" was dtfferent from the common link only directing to the third party websites. Hainan CNC toward his channel's content also had the examination obligation to some degree.[100]

But how to intreprete the word of ***"know"*** in the above-mentioned clause esp. whether or not ***"know"*** inclues ***"should have known"***, currently there exists controversy in the academic circle in China. The origin of this phenomenon lies on the conflict of two theories which are Internet service providers (ISPs) ***"should have***

[99] See Ming, Yu. Sohu video sued Xunlei for tort awarded RMB 164000 yuan (Chinese version) [N]. TechWeb, http://www.chinaeclaw.com/show.php?contentid=23006, 2016–12–08.

[100] See Civil Judgment of Supreme People's Court (2009) Min Ti Zi No. 17 (最高人民法院民事判决书<2009>民提字第17 号)

known" theory and ISPs are not obligated for cencorship theory. Concerning the latter theory, ISPs do not bear the obligation of examination toward the content uploaded by users is a consistent understanding of China's legislative and theoretical circles, is also a common practice in most countries in the world. No matter Article 512(m) of the U.S. Digital Millennium Copyright Act (DMCA) or Article 15 of EU Directive of Electronic Commerce, or Article 7 of German Telemediengesetz (Telemedia Act), all explicitly stipulate that ISPs do not bear the obligation of examination toward the content of their websites. Once we recognize ISPs do not bear the obligation of examination, and then it means in theory to exclude the justification of ISPs' bearing the obligation of ***"should have known"***.

The theory ISPs ***"should have known"*** cannot be justified, it is obvious the restriction of freedom. According to substantive argumentation rules of civil law, the one who restricts the subject's freedom bears the obligation of Justification of argument.[101] To justify ISPs' ***"should have known"*** tort exists, at present, the academicans advocating ***"should have known"*** provide mainly two reasons as follows: one is that tort exists very obviously, therefore ISPs ***"should have known"***; another is that American legislation also provides ***"apparent knowledge"*** requirement to ISPs. But these two reasons are difficult to be established.[102]

To the second reason, it seems that there is some misunderstanding on American laws. For instance, the stipulation of being "aware of the obvious fact or situation of infringement" under (c) (1) (A) (ii), Art. 512 of DMCA is not used to determine ISPs' fault. The correct system status of such regulation is that it is used to determine whether or not ISPs enjoy the ***"Safe Harbor"*** protection. In the meantime, even though ISPs cannot enjoy the ***"Safe Harbor"*** protection, it doesn't mean that they should necessarily bear tort liability. Whether to bear tort liability or not still needs to be in accordance with the constitutive requirements of U. S. *Copyright Law* to make the judgment.[103]

The second reason also mistakenly makes the U. S. ***"Red Flag Test"*** being equal to ***"should have known"***. The ***"Red Flag Test"*** is the approach provided by U.S. Congress to determine whether or not ISPs are "aware of the obvious fact or situation of infringement". But the ***"Red Flag Test"*** does not provide ISPs subjective requirement of ***"should have known"***. According to the U.S. DMCA legislative report, The ***"Red Flag Test"*** cuntains subjective and objective aspects: one is whether or not subjectively ISPs are aware of tort situation; another is whether or not objectively "tort is vivid viewing from shch situation", that is, "viewing from a rational person in this situation or similar situation whether tort is vivid or not".[104]

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[101] See Wang Yi. Substantive Argument Rules of the Value Judgment of Civil Law-on the Background of the Academic Practice of Chinese Civil Law (Chinese version) [J]. China's Social Science, 2004, (6): 104–116.

[102] To the first reason, for detailed discussion,see Xu, Wei. A New Explanation of the Determation of "Know" of Internet Service Providers (Chinese version) [J]. Science of Law, 2014, (2):163–173.

[103] See DMCA H. R. Rep. No. 105–551, pt. 1, at 11 (1998).

[104] See DMCA H. R. Rep. No. 105–551 (2), pt. 2, at 63 (1998); DMCA S. R. Rep. No. 205–190, at 44 (1998).

When introducing the U.S. ***"Red Flag Test"***, China's academy tends to focus on the objective aspect of the content, and looks down upon the subjective aspect. In fact, the ***"Red Flag Test"*** uses ISPs' having realized tort situation as the subjective premise, and did not provide obligation requirement that ISPs should realize tort.[105] We may see that the requirements against ISPs of the U.S. ***"Red Flag Test"*** and China's ***"should have known"*** are not the same. To use the U.S. ***"Red Flag Test"*** to justify the basis of China's requirement of ISPs ***"should have known"*** is the mistaken reading of American legislation.

In American judicial judgments fewly existed the one determing ISPs complying with the ***"Red Flag Test"***. Just as one U. S. scholar introduced: "So far, (the court) has never determined 'apparent knowledge'is established according to the "Red Flag Test". In fact, unless ISPs receive tort notice complying with the law, the copyright holder in fact almost impossibly proves 'know'."[106]

From this we may see that American court toward the ***"Red Flag Test"*** esp. the requirement of the subjective aspect makes very strigenent interpretation. This strigenent interpretation even reaches such kind of degree that unless copyright holder sends tort notice complying with the law, orelse ISPs will always not be determined to satisfy the ***"Red Flag Test"***.[107] The U.S. method and that under China's judicial practice there extst big volume of phenomenen to use ***"should have known"*** to determine ISPs' subjective fault and hold that they bear liability form vivid comparision. Therefore, based on the ***"Red Flag Test"*** to prove that China should provide ISPs ***"should have known"*** requirement is really contradictory to the true situation of American judicial practice.

Viewing from comparative law experience, before the passage of DMCA in the U.S., the court used to adopt ***"cuntructive knowledge"*** method to determine whether or not ISPs satisfy the requirement of contributing to tort.[108] But viewing from the DMCA regulation afterwards, while designate ***"Safe Harbor Prinple"***, legiglators did not adopt the method of ***"cuntructive knowledge"*** but adopted ***"apparent knowledge"***. To compare, the subjective requirement of ***"apparent knowledge"*** is higher than ***"cuntructive knowledge"***, ***"apparent knowledge"*** requires to prove "excluding any reasonable doubt", does not allow logic break down, i.e. to require ISPs have manifest knowledge.[109] ***"Contructive knowledge"*** exists logic necessity break down, its proof standard only requires the high degree of probability. Whereas

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[105] Ibid.

[106] Chang, Lilina. The "Red Flag Test" for Apparent Knowledge under the DMCA §512 (c) Safe Harbor [J]. Cardozo Arts & Enterainment Law Journel, 2010, (28):195-222.

[107] HASSANABADIF, AMIR. Viacom V. YouTube-All Eyes Blind: The Limits of the DMCA in a Web 2.0 World [J]. Berkeley Tech. Law Journay, 2011, (26): 405–439.

[108] See, for example, Religious Tech. Ctr. V. Netcom Online Communication Serv., 907 F. Supp. 1361 (N. D. Cal. 1995); Marobie-Fl. Inc. v. National Ass'n of Fire & Equip. Distrib. and Northweast Nexus. Inc., 983 F. Supp. 1167 (N. D. Ill. 1997).

[109] DMITRIEVAT, IRINA Y. I Know It When I See It: Should Internet Providers Recognize Copyright Violations When They See It [J]. Santa Clara Computer & High Tech. Law Journal, 2000, (16):233–261.

viewing form after the passage of DMCA for several years, the court has never determined ISPs constituting ***"apparent knowledge"***. The requirement of ***"apparent knowledge"*** even in the States may also belong to too high subjective requirement, and raises part of scholars' criticism.[110] Accordingly, one Chinese academican thinks that China need not adapt the high standard of ***"apparent knowledge"*** the same as U.S. to determine ISPs' subjective fault. To adopt comparatively lower standard subjective requirement i.e. ***"contructive knowledge"*** may be suitable for China's choice.[111]

To summarize, toward the law interpretation of ISPs' subjective situation ***"know"*** may follow the logic as follows: under the circumstance without direct evidence to prove ISPs' subjective situaaion, via constructive regulations of litigation law, according to some basic fact related to their subjective situation, may construct ISPs subjectively ***"know"*** that tort exists. According to this, if ISPs did not adapt measures in time, they sould bear tort liability. Thus, objective facts from the starting point of the world to the ending point of ISPs' bearing tort liability, the logical context is fully straightened and communicated.

It is worthy to pay attention that China's judicial experience under the circumstance of handling no direct evidernce, how to determine whether or not ISPs should bear tort liability, has no less experience than the States. In the States, owing that the definition of ***"apparent knowledge"*** is not clear, and the court rarely determines ISPs establishing ***"apparent knowledge"***, thus American court fewly from the front to explain what factors can be used to successfully identify the establishment of ***"apparent knowledg"***. On the contrary, In China there exist big volume of judicial judgments from the front to explain what factors can be used to successfully identify the establishment of ***"should have known"*** (actually should be ***"contructive knowledge"*** with system function similar to ***"apparent knowledge"***), the court has accumulated a lot of experience in practice and theory.

Viewing from the future trend, following the U.S. Internet industry sector's mature development, the court from a view of the tendency to protect by not determing ISPs' ***"apparent knowledge"***, is not likely to keep on. Just as one American scholar analyzed, once the U.S. Congress begins to prevent the spread of illicit goods in the network, "the change of policy will be on the website owner to undertake more responsibility."[112] Once the American court begins to from the front to determine ISPs's establishing ***"apparent knowledg***", then the judicial experience of regarding determing ISPs' establishing ***"know"*** in China will possibly provide reference experience for the States. Thereore, if not improperly belittle oneself, in the

[110] See HASSANABADIF, AMIR. Viacom V. YouTube-All Eyes Blind: The Limits of the DMCA in a Web 2.0 World [J]. Berkeley Tech. Law Journay, 2011, (26): 405–439. Also see Chang, Lilina. The "Red Flag Test" for Apparent Knowledge under the DMCA §512 (c) Safe Harbor [J]. Cardozo Arts & Enterainment Law Journel, 2010, (28):195–222.

[111] See Xu, W, supra note 102 at 170.

[112] CIULA, JAMES. What Do They Know? Actusl Knowledge, Sufficient Knowledge, Specific Knowledge, Geberal Knowledge: an Analysis of Contributory Trademark Infringement Considering Tiffany v. eBay[J]. IDEA: The Intellectual Property Law Review, 2009-2010, (50):129–160.

emerging field of network law, an in-depth discussion on the construction rules in China will be possible to achieve the beneficial contribution of Chinese law to the world.[113]

9.6 Industry Initiatives

At the end of December 2009, the Online Copyright Working Committee of the Internet Society of China was established to promote awareness of and compliance with the relevant laws and to provide a forum to mediate online copyright disputes and facilitate communication between Internet-related businesses and copyright owners.

Both international and Chinese copyright holders are actively protecting their rights using industry organizations. For example, the China Written Works Copyright Society (CWWCS) has been in active negotiations with Google, which scanned and uploaded at least 18,000 books written by 570 Chinese authors into its digital library without permission. It is noted that one famous author-Mien Mien brought a lawsuit against Google on November 6, 2009 asking the court to confirm Google'sinfringement, hold that Google remove the work from the website, apologize publicly and compensate RMB 60,000 yuans totally for the economic and mental loss. As discussed in Chap. 4 previously, Google China finally lost the case.

CWWCS has called on all Chinese writers to join in the protest against Google. On November 18, 2009, the Society issued a copyright protection notice to Google, requiring them to submit a disposal plan for the previously unauthorized scanning of Chinese works, and to settle compensation issues before December 31, 2009.

Upon receipt of protest from Chinese writers, Google published a Statement of Reconciliation via CWWCS. In this statement, Google divided the terms into two categories: agreeing with reconciliation and disagreeing with reconciliation. If writers agreed, at least$60 dollars will be paid to each author, and another 63% of revenues from online reading will be paid on the condition that the right holder submits application by him/her. If no application is submitted by June 5 of next year, it is deemed as a waiver of their rights. If disagreeing is chosen, the writers had to sue Google before January 5, 2010.

Chinese writers all reacted against the statement.[114]

Till now, most scholars have supported collective organizations to solve the problem, and the presiding governmental agency i.e. National Copyright Administration (NCA) has granted the CWWCS approval to do the job. The Chinese Writers' Association (CWA) published a reply from Google Books on January 9, 2010 in which company officials said they are "ready to apologize to Chinese authors."

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[113] See Xu, Wei. supra note 102 at 172. Service Providers.

[114] See Sara Yan. *Suspected Infringement, Google's Digital Library Enmeshed in Copyright Scandal* [EB/OL]. http://www.chinaipmagazine.com/en/journal-show.asp?id=564, 2010–4–27

"Following discussions and communications in recent months, we do believe that our communication with Chinese writers has not been good enough," Google said in the scanned letter posted on the association's website.

"Google is ready to apologize to Chinese writers about this," said the letter, which bore the signature of Erik Hartmann, Asia-Pacific head of Google Books.

Some Chinese media considered the latest occurrence a victory for the Chinese authors, saying this is the first time in the world that Google Books has apologized to any authors.

On January 12, 2010 at about 10 am Google Books' top negotiator in China, Erik Hartmann, called his counterpart, Zhang Hongbo, deputy director of China Written Works Copyright Society (CWWCS), and said Google wanted to postpone the 4th round negotiation scheduled for 2 pm that day, leaving a formal apology hanging in air.[115] On March 23, 2010, Google China announced that because of hacker's attacking problem, he stopped the "screening examination" of his search service and transferred his search service from Mainland China to Hong Kong.[116]

Nevertheless, on the dispute between the CWWCS and Google, Zhang Hongbo, made the following comment: "This is not a clash between Chinese and American laws, because the infringement is a simple fact. Neither is this a simple right-defending action. We should draw lessons from the dispute for the development of our digital publishing. Without solving copyright permission, even a company as strong as Google needs tremendous efforts to build up a digital library, not to mention those who gave up the idea as Microsoft and Yahoo. As we always believed, digital publishing is advanced in nature, for it is a better tool in spreading culture and generating commercial profits for authors. We hope we can find a balancing point acceptable to all."[117]

As a proactive measure to address online copyright piracy, the Motion Picture Association (MPA) entered into memorandums of understanding with major Chinese user-generated content websites that have agreed to take down infringing materials upon receiving notice from member Hollywood studios.

Effective online copyright protection will remain a challenge for IP owners given China's burgeoning virtual world. The developments described above clearly demonstrate that Chinese authorities and other stakeholders are committed to improving the legal and regulatory environment to safeguard the interests of everyone involved in the creation, dissemination and enjoyment of copyright works in China. It is

[115] See Yu Xie. Google copyright dispute put on hold [N]. http://www.chinadaily.com.cn/business/2010-01/13/content_9311576.htm, 2010–01–13.

[116] See Disclosing the secret of Google's leaving China for 5 years in the surface to leave straightly feels regretful in the mind (Chinese version) [N]. http://bbs.tianya.cn/post-333-748776-1.shtml, 2015–10–14.

[117] See Zhou, Yi. Google Books Is a Great Lesson to China's Digital Publishing – An Interview with Zhang Hongbo, Deputy Director of CWWCS [EB/OL]. http://www.chinaipmagazine.com/en/journal-show.asp?id=5702010-5-11

hoped that those positive steps can provide more certainty in enforcement and guide further advancement in online copyright protection in China.[118]

Since China launched major economic reforms in the late 1970's, its economy has experienced tremendous growth. This fact is well known and widely respected in the international community. Much of China's economic reform, as well as much of the economic development resulting from this reform, was in the agricultural and manufacturing sectors of the Chinese economy. The information sector of the Chinese economy, although it has grown in recent years, remains a sector with a far greater potential for growth than has occurred to date.

Intellectual property law can help fulfill China's further aspirations for growth of its economy. As Dr. Lulin Gao has observed, "[T]hough there is no doubt that many factors contributed to the rapid development of the Chinese economy, the favorable legal situation for intellectual property assumes an ever-increasing importance in stimulating economic development."[119] This is especially true for the information sector of China's economy because markets for information products and services can only thrive when intellectual property rights are secure.

Internet will continue to challenge copyright protection. How to effectively deal with the expected challenges is a common task for China. New technology forced us to choose cooperation rather than conflict. As discussed above, Chinese copyright protection system is a recent legal development in response to China's need to join the international economic community. Despite inadequate enforcement and relatively short copyright protection history, China's government is dedicated to building an efficient copyright protection system.

However, under the annual pressure from the U.S. Special 301 report on the prevalence of IPR infringement in China and the strengths and weaknesses of China's IPR protection and enforcement regimes and more experience acquired in complying with international standard, China will make strides toward more effective copyright protection system. The Internet will not only introduce challenge to us but also create a new opportunity for China and all her trading partners to attain new cooperation in a new era.[120]

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[118] See WIGLEY, RICHARD . New Guidelines for Criminal Prosecutions of Online Copyright Infringement Provide Aid in Fight against Online Piracy [EB/OL]. King & Wood's Intellectual Property GroupOnline, http://www.chinalawinsight.com/2011/01/articles/intellectual-property/new-guidelines-for-criminal-prosecutions-of-online-copyright-infringement-provide-aid-in-fight-against-online-piracy/, Jan 19, 2011.

[119] See, e.g., Gao, Lulin. China's Intellectual Property System in Progress in China [A]. ABBOTT, FREDERICK M. ed. The World Trading System: Defining the Principles of Engagement [M]. 1998:135. See also MANSFIELD, EDWIN, Intellectual Property, Technology, and Economic Growth [A]. RUSHING, FRANCIS W., BROWN, CAROLE GANZ. ed. Intellectual Property Rights in Science, Technology, and Economic Performance: International Comparisons, 1990 (discussing the relationship between intellectual property rights and economic growth more generally).

[120] See Guo, Yimeei. A Comment on Chinese Legal Environment of Online Copyright Protection. [A]. Guo, Yimeei, ed.Research on Selected China's Legal Issues of E-Business [M]. Springer, 2015:181.

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