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The Long and Winding Road to Effective Copyright Protection in China

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The Long and Winding Road to Effective Copyright Protection in China

Peter K. Yu*

Abstract

In November 2020, China adopted the Third Amendment to the Copyright Law, providing a major overhaul of its copyright regime. This Amendment entered into effect on June 1, 2021. The last time the regime was completely revamped was in October 2001, when the Copyright Law was amended two months before China joined the World Trade Organization. While U.S. policymakers and industry groups have had mixed reactions to the recent Amendment, the new law presents an opportunity to take stock of the progress China has made in the copyright reform process. This Article begins by mapping the long and winding road to effective copyright protection in China, especially in relation to U.S. rights holders. It then focuses on the recent Amendment, highlighting five sets of upgrades or changes while offering some overarching observations. The Article concludes by identifying five road tips to help copyright holders accelerate the trip toward their destination of effective copyright protection.

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I. INTRODUCTION

Since the mid-1980s, foreign copyright industries and their supportive governments have actively pushed for copyright law reforms in China.¹ In the ensuing two decades, a wide array of laws and regulations emerged in the Chinese copyright regime, largely as a result of external pressure.² Whether in hindsight beneficial or not,³ these transplanted laws sought to convert the regime in the image of copyright systems found in the developed world.⁴

While the patent and trademark regimes, like the copyright regime, are

1. See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 137–54 (2000) [hereinafter Yu, *From Pirates to Partners I*] (discussing the United States’ changing attitude toward the pace of intellectual property reforms in China in the mid-1980s and the more aggressive measures taken to push for such reforms from the late 1980s to the mid-1990s).

2. See Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 173, 185–88 (Daniel J. Gervais ed., 1st ed. 2007) [hereinafter Yu, *China Puzzle*] (discussing the external pressure that drove intellectual property reforms in China in the latter half of the 1990s and in the 2000s).

3. See Peter K. Yu, *When the Chinese Intellectual Property System Hits 35*, 8 QUEEN MARY J. INTELL. PROP. 3, 12 (2018) [hereinafter Yu, *Chinese Intellectual Property System*]. As I noted in an earlier article:

[D]espite having the burden of assuming WTO-plus obligations in intellectual property and other areas, China has been doing very well since it joined the international trading body. Although one can certainly debate whether the country’s success in the intellectual property area actually originated from the WTO or its TRIPS Agreement—an important distinction—the WTO’s “single undertaking” approach has virtually guaranteed that China could not have obtained benefits from non-intellectual property reforms without also implementing TRIPS-based reforms.

Id. (footnote omitted); see also KURT M. CAMPBELL, *THE PIVOT: THE FUTURE OF AMERICAN STATECRAFT IN ASIA* 195 (2016) (“The last time China signed on to a difficult trade agreement was when it joined the WTO, and after a period of costly but necessary domestic reforms, it benefited dramatically.”); Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525, 550 (2012) [hereinafter Yu, *Rise and Decline*] (“[T]he push for China to strengthen intellectual property protection has resulted in the slow and paradoxical erosion of the United States’ competitive position.”); Gordon G. Chang, *TPP vs. RCEP: America and China Battle for Control of Pacific Trade*, NAT’L INT. (Oct. 6, 2015), <http://nationalinterest.org/feature/tpp-vs-rcep-america-china-battle-control-pacific-trade-14021> (“[China] reaped large gains after it joined the World Trade Organization in December 2001, due mostly to the reforms required by its accession agreement.”).

4. See Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China* [hereinafter Yu, *Transplant and Transformation*], in GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 20, 27–28 (Nari Lee et al. eds., 2016) [hereinafter GOVERNANCE OF IPRS] (“The history of intellectual property laws in China is a history of legal transplants.”). See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) (providing a seminal work discussing legal transplants).

heavily populated with transplanted laws, the past decade has seen China experiencing an innovative turn.⁵ With the rise of indigenous intellectual property activities, local policymakers began to pay greater attention to domestic needs.⁶ The amendments to both the Patent Law and the Trademark Law in the past decade were driven mostly by internal considerations, as opposed to concerns about noncompliance with foreign intellectual property norms.⁷

On November 11, 2020, China adopted the Third Amendment to the Copyright Law (Third Amendment),⁸ providing a major overhaul of its copyright regime.⁹ This Amendment entered into effect on June 1, 2021.¹⁰ The last time the regime was completely revamped was in October 2001,¹¹ when the Copyright Law was amended two months before China joined the World Trade Organization (WTO).¹² While U.S. policymakers and industry

5. See generally Peter K. Yu, *China's Innovative Turn and the Changing Pharmaceutical Landscape*, 51 U. PAC. L. REV. 593, 595–602 (2020) (discussing China's innovative turn).

6. See Yu, *Chinese Intellectual Property System*, *supra* note 3, at 6. As I noted in an earlier article:

[T]he development of the Chinese intellectual property system has changed from actively transplanting laws from abroad to introducing amendments that are specifically tailored to rapidly changing local conditions. Although China will continue to borrow from foreign models and experiences, the country's intellectual property system, to a large extent, has already aged beyond the point where it can benefit significantly from copying models from abroad. Instead, the country needs to start exploring models that would best suit its needs, interests, conditions and priorities while figuring out how to improve these models to maximize their benefits.

Id.

7. See Guo He, *Patents*, in CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS 25, 28 (Rohan Kariyawasam ed., 2011) [hereinafter CHINESE IP AND TECHNOLOGY LAWS] (“The impetus for the early amendments came from outside, whilst the need for the third amendment [to the Patent Law] originated from within China, that is to say, the majority of the third amendment was to meet the needs of the development of the domestic economy and technology originating in China.”); Yu, *Transplant and Transformation*, *supra* note 4, at 27–28 (noting that “China, for the first time, adjusted its patent standards based on its own needs”).

8. Copyright Law of the People's Republic of China [2020 Copyright Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), <http://www.npc.gov.cn/englishnpc/c23934/202109/ae0f0804894b4f71949016957eec45a3.shtml> (China).

9. See *infra* text accompanying notes 76–79.

10. 2020 Copyright Law.

11. See Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001), <http://www.asianlii.org/cn/legis/cen/laws/cloproc372/> (China); see also *infra* text accompanying notes 76–79 (discussing the limited impact of the Second Amendment to the Copyright Law).

12. China became the 143rd member of the WTO on December 11, 2001. *China*, WORLD TRADE

groups have had mixed reactions to the recent Amendment—an unsurprising fact considering that China and the United States are in the middle of a trade war¹³—this Symposium provides a timely forum to take stock of the progress China has made in the copyright reform process.

Part II maps the long and winding road to effective copyright protection in China, especially in relation to U.S. rights holders. Part III focuses on the Third Amendment, highlighting five sets of upgrades or changes while offering three overarching observations. Part IV concludes by identifying five road tips to help copyright holders accelerate the trip toward their destination of effective copyright protection.

II. THE LONG AND WINDING ROAD

Although there has been a vibrant debate on whether indigenous copyright notions existed in imperial China,¹⁴ the country has had copyright

ORG., https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm (last visited Feb. 24, 2022). See generally Peter K. Yu et al., *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1 (2003) (discussing the ramifications of China's entry into the WTO).

13. See China Briefing Team, *U.S.–China Relations in the Biden-Era: A Timeline*, CHINA BRIEFING (Oct. 12, 2021), <https://www.china-briefing.com/news/us-china-relations-in-the-biden-era-a-timeline/> (providing an updated timeline of U.S.–China developments during the Biden Administration); Dorcas Wong & Alexander Chipman Koty, *The US–China Trade War: A Timeline*, CHINA BRIEFING (Aug. 25, 2020), <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/> (providing a timeline of the trade tariffs that the United States and China have imposed on each other). See generally ANGELA HUYUE ZHANG, CHINESE ANTITRUST EXCEPTIONALISM: HOW THE RISE OF CHINA CHALLENGES GLOBAL REGULATION 203–34 (2021) (discussing the U.S.–China trade war in the antitrust and regulatory contexts); Henry Gao, *WTO Reform and China: Defining or Defiling the Multilateral Trading System?*, 62 HARV. INT'L L.J. (SPECIAL ISSUE) 1, 26–33 (2021) (documenting the U.S.–China trade war); Lee Jyh-An, *Shifting IP Battlegrounds in the U.S.–China Trade War*, 43 COLUM. J.L. & ARTS 147 (2020) (discussing the U.S.–China trade war in the intellectual property context).

14. See generally ZHONGGUO BANQUANSHI YANJIU WENXIAN [HISTORICAL DOCUMENTS OF CHINA'S COPYRIGHT LAW] (Zhou Lin & Li Mingshan eds., 1999) [hereinafter HISTORICAL DOCUMENTS] (in Chinese); WANG FEI-HSIEN, PIRATES AND PUBLISHERS: A SOCIAL HISTORY OF COPYRIGHT IN MODERN CHINA (2019) [hereinafter WANG, PIRATES AND PUBLISHERS] (providing a social and cultural history of copyright in late imperial and modern China); Feng Xiaoqing et al., *Awakening of a Sleeping Dragon: The Evolution of Copyright Conception in China*, 51 J. COPYRIGHT SOC'Y U.S.A. 615 (2004) (discussing the historical evolution of the copyright concept in China); Ken Shao, *The Promotion of Learning in Chinese History: Discovering the Lost Soul of Modern Copyright*, 24 COLUM. J. ASIAN L. 63 (2010) (examining the historical environment in which copyright was practiced in imperial China); Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1053–54 (2018) [hereinafter Yu, *Half-Century of Scholarship*] (noting the debate on the existence of indigenous notions of intellectual property rights in China).

law for at least a century.¹⁵ The first copyright statute, the Great Qing Copyright Law of 1910 (*Da Qing Zhuzuoquan Lü*), was adopted the year before the fall of the Qing dynasty and the end of imperial rule.¹⁶ Providing registration-based copyright protection to literary works for the life of the author plus thirty years,¹⁷ this statute was introduced in part to address the call for institutional reforms following the Boxer Uprising at the turn of the twentieth century¹⁸ and in part to fulfill the commitments laid down in the bilateral commercial treaties China had signed with Japan and the United

15. Before China adopted its first copyright law in 1910, a customary copyright regime already existed. See generally WANG, PIRATES AND PUBLISHERS, *supra* note 14, at 93–210 (documenting this regime). This regime continued even after the law’s adoption. See *id.* at 200 (“Shanghai booksellers seem to have continued to prefer appealing to the guild instead of filing copyright lawsuits in court.”). Interestingly, in nineteenth-century America, customary protection in the form of courtesy copyright was also used to protect English authors, such as Charles Dickens and Anthony Trollope. For discussions of courtesy copyright, see SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 52 (2001); Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 13–14 (1986); Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 342 (2003) [hereinafter Yu, *Copyright Divide*].

16. *Da Qing Zhuzuoquan Lü* [Great Qing Copyright Law] (promulgated Nov. 17, 1910) (China), reprinted in HISTORICAL DOCUMENTS, *supra* note 14, at 89–94, translated in NORWOOD F. ALLMAN, HANDBOOK ON THE PROTECTION OF TRADE-MARKS, PATENTS, COPYRIGHTS, AND TRADE-NAMES IN CHINA 112–21 (1924). See generally Li Yufeng & Catherine W. Ng, *Understanding the Great Qing Copyright Law of 1910*, 56 J. COPYRIGHT SOC’Y U.S.A. 767 (2009) (discussing the Great Qing Copyright Law). The term *zhuzuoquan* is better translated as “author’s right,” which brings with it the European tradition of *droit d’auteur*. See WANG, PIRATES AND PUBLISHERS, *supra* note 14, at 197–98 (tracing the term *zhuzuoquan* to the Japanese term *chosakukun*, which is distinguished from the Japanese term *hanken* (copyright)). Nevertheless, this Article translates the term as “copyright” (*banquan*) due to its preferred usage in official English translations and the interchangeability of the two terms. See Copyright Law of the People’s Republic of China [2020 Copyright Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), art. 62, <http://www.npc.gov.cn/englishnpc/c23934/202109/ae0f0804894b4f71949016957eec45a3.shtml> (China); General Principles of the Civil Law of the People’s Republic of China (promulgated by the Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 94, <http://www.asianlii.org/cn/legis/cen/laws/gpotclotproc555/> (China). For the same reason, the term “Copyright Law” is used to refer to all the modern copyright statutes in China, even though the title and text of those statutes use the term *zhuzuoquan*. For these longstanding complications and their interchangeable use in the Chinese context, see Guo Shoukang, *Some Opinions on Copyright in the People’s Republic of China*, 1 J. CHINESE L. 63, 64 (1987); Shen Jianming, *The P.R.C.’s First Copyright Law Analyzed*, 14 HASTINGS INT’L & COMPAR. L. REV. 529, 530 (1991); Zheng Chengsi, *The First Copyright Law of the People’s Republic of China*, 12 EUR. INTELL. PROP. REV. 376, 376 (1990).

17. See Great Qing Copyright Law, art. 5.

18. See Li & Ng, *supra* note 16, at 787 (“The 1910 Great Qing Copyright Law was . . . born out of China’s anxiety to reform and to modernize.”). See generally IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 387–418 (6th ed. 2000) (discussing the Boxer Uprising).

States.¹⁹ Article XI of the 1903 Treaty with the United States specifically required China to give full copyright protection to American nationals “in the same way and manner and subject to the same conditions upon which [the country] agree[d] to protect trade-marks.”²⁰ This requirement targeted “book[s], map[s], print[s] or engraving[s] especially prepared for the use and education of the Chinese people,” as well as Chinese translations of foreign books.²¹ Because imperial rule collapsed a year after the promulgation of this statute, “its significance lies in the following it received in future drafts of copyright laws and not in its actual time of usage.”²²

While early English language scholarship on Chinese copyright law explored why China did not import or embrace Western copyright norms, one cannot lose sight of the fact that the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), the foundational international copyright treaty, was not established until 1886.²³ Before the adoption of the Berne Convention, copyright norms varied significantly from country to country even in continental Europe.²⁴ Meanwhile, China had just lost the Sino–French War in 1885.²⁵ A decade later, the colonial powers carved the country “into leased territories and spheres of interest, within which they constructed railways, opened mines, established factories, operated banks, and ran all kinds of exploitive organizations.”²⁶ As Peter

19. See ALLMAN, *supra* note 16, at 103–05 (discussing these treaties); see also William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT’L L. & POL. 135, 138 (1996) (noting that the 1903 Treaty with the United States had the distinction of being “one of the first efforts by the United States anywhere to use its strength bilaterally to bring about greater intellectual property protection”).

20. Treaty Between the United States and China for the Extension of the Commercial Relations Between Them, China-U.S., art. XI, Oct. 8, 1903, 33 Stat. 2208 [hereinafter 1903 Treaty]. It is worth noting that, despite the stipulated condition linking copyright law to trademark law, China did not offer trademark protection until 1923. See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 41 (1995). It is therefore no surprise that Chinese officials attempted to delay the introduction of a copyright law by contending that “it [would be] premature to issue [such a law] until the trademark law [went] into force and prove[d] acceptable and effective.” *Id.* at 42.

21. 1903 Treaty, *supra* note 20, art. XI.

22. ZHENG CHENGI WITH MICHAEL D. PENDLETON, *CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW* 87 (1987).

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

24. See Ricketson, *supra* note 15, at 11–12 (noting the significant variations across countries that had copyright laws at that time).

25. See generally HSÜ, *supra* note 18, at 325–30 (discussing the Sino–French War).

26. *Id.* at 344.

Feng reminded us, intellectual property rights arrived “with such inventions and novel ideas as the gunboat, opium, ‘most favoured nation’ trading status and extraterritoriality.”²⁷ Although China did not make any proactive effort to join the newly established international copyright family in the late nineteenth century, it would never have been granted a seat at the negotiating table had it tried.²⁸

During the Republican era, efforts were made to enact new copyright laws, all of which were substantially identical to, or drawn heavily from, the Great Qing Copyright Law.²⁹ Immediately after the collapse of imperial rule, the provisional government continued to use the Qing law in the form of a provisional act.³⁰ This law quickly evolved into a new copyright law, which the Peking-based Beiyang government released in 1915.³¹ Shortly after the Nationalist Party (*Kuomintang*) took power, the government adopted yet another copyright law in 1928,³² offering protection to “books, music, photographs, designs, sculpture[s], and other technical, literary, and artistic

27. PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 3 (2d ed. 2003); see also ALFORD, *supra* note 20, at 30 (describing China as “[l]earning the [l]aw at [g]unpoint” when Western notions of intellectual property were introduced into the country at the turn of the twentieth century).

28. China was not invited to establish international copyright relations with the colonial powers until after the signing of bilateral agreements at the turn of the century. See ZHENG WITH PENDLETON, *supra* note 22, at 88 (“In 1913 and in 1920, the United States, the United Kingdom and France had invited China to adopt the Berne Convention as well as to conclude certain bilateral copyright treaties with them.”). Until around that time, there was very limited attention to the Berne Convention in China. See CHEN GE, *COPYRIGHT AND INTERNATIONAL NEGOTIATIONS: AN ENGINE OF FREE EXPRESSION IN CHINA?* 36 (2017) [hereinafter CHEN, *COPYRIGHT AND INTERNATIONAL NEGOTIATIONS*] (“On 4 March, 1902, Yuanji Zhang, the editor in chief of the *Diplomatic Review*, published a Chinese translation of the [original Berne Convention].” (Chinese characters omitted)). Within Asia, a good point of comparison is Japan, which joined the United States in observing the final conference that established the Berne Convention. Ricketson, *supra* note 15, at 29. Japan beat China in the Sino–Japanese War in 1895, see HSÜ, *supra* note 18, at 339–43, and became the first Asian country to join the Berne Convention four years later, see Ricketson, *supra* note 15, at 29. It is worth noting that, despite its accession, Japan “had not received the anticipated benefits from joining because the Japanese language continued to pose a barrier to the reception of Japanese works beyond Asia.” Li & Ng, *supra* note 16, at 783.

29. See Yu, *Half-Century of Scholarship*, *supra* note 14, at 1054 n.35.

30. See ALLMAN, *supra* note 16, at 107 (noting that “China has passed a provisional and experimental copyright act”); see also HISTORICAL DOCUMENTS, *supra* note 14, at 133–34 (reprinting the internal notice concerning the temporary use and continued application of the Great Qing Copyright Law).

31. BEIYANG ZHENGFU ZHUZUOQUAN FA [BEIYANG GOVERNMENT COPYRIGHT LAW] (1915) (China), *reprinted in* HISTORICAL DOCUMENTS, *supra* note 14, at 136–40 (in Chinese).

32. ZHUZUOQUAN FA [COPYRIGHT LAW] (1928) (China), *reprinted in* HISTORICAL DOCUMENTS, *supra* note 14, at 225–29 (in Chinese).

works.”³³ Despite these repeated legislative efforts, “the decades of incessant wars, famines and revolutions” did not allow copyright protection to take root in China.³⁴

With the founding of the People’s Republic in October 1949, the Chinese copyright regime slowly transformed into one with Socialist characteristics.³⁵ The regulations introduced at that time focused primarily on the basic payments for writings and manuscripts (*gaochou* or *gaofei*),³⁶ the noneconomic rights of attribution and integrity,³⁷ and contracts between authors and state organs.³⁸ Whatever limited protection authors enjoyed in

33. ALFORD, *supra* note 20, at 50.

34. FENG, *supra* note 27, at 3.

35. See Li Yufeng, *Copyright Protection in China*, in CHINESE IP AND TECHNOLOGY LAWS, *supra* note 7, at 78, 79 [hereinafter Li, *Copyright Protection in China*] (“In 1949, the People’s Republic of China . . . was founded. As a result of the cold war, China dedicated itself to bridg[ing] a socialist legal system and imitated the former Soviet Union’s copyright system.”). Although the People’s Republic did not adopt a copyright law until 1990, it drafted some copyright regulations based on the Soviet Model. As the late Zheng Chengsi recounted:

In 1956, the Chinese Ministry of Culture issued a document dealing with questions concerning foreign authors’ copyright, but it was only a restricted document and has never been published. Notwithstanding, it was an important first attempt to fix “copyright” in a legislative form. In 1957, the same Ministry drafted another document entitled “Interim Regulations concerning the Protection of Copyright in Published Works” and an “Explanation of the Regulations.”

ZHENG WITH PENDLETON, *supra* note 22, at 90; see also HISTORICAL DOCUMENTS, *supra* note 14, at 300–07 (providing the texts of the interim regulations and the attendant explanations). These draft regulations never took effect due to the Anti-Rightist Movement in 1957 and the Great Leap Forward that began the year after. See CHEN, COPYRIGHT AND INTERNATIONAL NEGOTIATIONS, *supra* note 28, at 74; see also HSÜ, *supra* note 18, at 655–58, 663–64 (discussing the Anti-Rightist Movement and the Great Leap Forward).

36. See ALFORD, *supra* note 20, at 59 (“Chinese officials and scholars closely studied the Soviet example, which at least in theory provided that authors were entitled to fixed ‘basic payments’ for their work, based predominantly on the number of copies printed, which the Chinese termed *gaofei*, and had the right to prevent unauthorized alteration of their work.”); Li, *Copyright Protection in China*, *supra* note 35, at 79 (“With a lack of a coherent and consistent policy, the interests of authors w[ere] limited to remuneration (*gaofei*).”).

37. See Zheng Chengsi, *The Future Chinese Copyright System and Its Context*, 15 INT’L REV. INDUS. PROP. & COPYRIGHT L. 141, 144 (1984) (“[F]rom the very beginning of the People’s Republic of China, the author has enjoyed the right to a contribution fee in most cases, the right to publish (or not to publish) his work, the right to publish under his own name or pseudonymously, or in some other way, and the right to prevent distortion of his work in all cases.”).

38. See ALFORD, *supra* note 20, at 60 (“[T]he 1952 Rules on the Editorial Organization and Work System of State Publishing Entities . . . called on the leadership of such organs to form ‘contracts’ with authors. These contracts, which were more akin to confirmations of relationships authorized by the state plan than freely negotiated arm’s-length agreements, followed the Soviet model and concerned the submission of manuscripts, publication, and payment.” (footnote omitted)).

the 1950s and the early 1960s was further weakened after the launch of the Cultural Revolution (1966–1976).³⁹ In a period in which “scientists, engineers and members of the intelligentsia were discredited, demoted or dismissed from their positions,”⁴⁰ most authors understandably declined to claim authorship or demand material rewards.⁴¹

In the late 1970s, China reopened its economy to the outside world.⁴² Shortly after, the country signed the Agreement on Trade Relations Between the United States of America and the People’s Republic of China in July 1979.⁴³ Article VI(5) of the Agreement specifically called for reciprocal copyright protection.⁴⁴ To fulfill this commitment as well as to facilitate

39. *See id.* at 63 (“[I]n keeping with the move to curtail [the rights of authors], the move that had commenced in the late 1950’s to reduce *gaofei* intensified. In March 1961, the Ministry of Culture issued a circular specifying that the prior practice of remunerating authors in part according to the number of books printed or reprinted was to be eliminated. In its place, authors were to receive more modest payments, based on the number of characters a work contained and its ‘quality.’” (footnotes omitted)).

40. Yu, *Transplant and Transformation*, *supra* note 4, at 23; *see also* ALFORD, *supra* note 20, at 64 (“With acceptable discourse greatly narrowed, many authors found their works regarded as no longer suitable for distribution, making contractual protection irrelevant.” (footnote omitted)).

41. *See* ALFORD, *supra* note 20, at 64 (noting that many Chinese, fearing political repercussions, became “unwilling to acknowledge their personal role in [creative and] inventive activity”). As a comrade would ask during the Cultural Revolution: “Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?” *Id.* at 65.

42. *See* HSÜ, *supra* note 18, at 858–69 (discussing China’s adoption of the Open-Door Policy in December 1978, which provided “a complete reversal of the Maoist policy of seclusion that had been in force . . . between 1958 and 1978”).

43. Agreement on Trade Relations Between the United States of America and the People’s Republic of China, China-U.S., July 7, 1979, 31 U.S.T. 4652.

44. *See id.* art. VI(5) (“Both Contracting Parties agree that each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party.”); *see also id.* art. VI(1) (“Both Contracting Parties in their trade relations recognize the importance of effective protection of . . . copyrights.”). *But cf.* Jon A. Baumgarten, *Copyright Relations Between the United States and the People’s Republic of China—The Seventeenth Annual Jean Geiringer Memorial Lecture*, 27 BULL. COPYRIGHT SOC’Y U.S.A. 419, 429 (1980) (“[C]opyright was probably viewed as, at most, a collateral matter whose treatment was made necessary by section 405(b)(5) of [the U.S.] Trade Act, rather than by substantive concern with copyright protection, the further development of which would be left to other forums and times.”). Although these provisions are often cited to illustrate China’s early commitments to offer copyright protection shortly after the reopening, an agreement to cooperate in the field of high energy physics that was signed a few months earlier also included commitments in the intellectual property area. Implementing Accord Between the Department of Energy of the United States of America and the State Scientific and Technological Commission of the People’s Republic of China on Cooperation in the Field of High Energy Physics, China-U.S., art. 6, Jan. 31, 1979, 18 I.L.M. 345 (recognizing “the need to agree upon provisions concerning protection of copyrights and treatment of

economic and technological catch-up,⁴⁵ China undertook efforts to develop a modern copyright law, along with laws in the patent and trademark areas.⁴⁶ Although the Trademark Law was promulgated in 1982 and the Patent Law two years later,⁴⁷ it would take many more years before the Copyright Law finally emerged.⁴⁸ Among the major legislative challenges were the concerns

inventions or discoveries made or conceived in the course of or under this Accord in order to facilitate specific activities hereunder”).

45. See Yu, *Transplant and Transformation*, *supra* note 4, at 24 (“The establishment of a modern intellectual property system was considered an essential policy tool to help China play economic and technological catch-up.”).

46. See ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 120–21 (2005) (“In April 1979 the State Press and Publications Administration . . . requested that the State Council establish an administrative organization charged with drafting what would become China’s Copyright Law.”).

47. Patent Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1984, effective Apr. 1, 1985), <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100050884.html> (China); Trademark Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983), <http://www.asianlii.org/cn/legis/cen/laws/tl115/> (China).

48. Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991), <https://www.mfa.gov.cn/ce/cgsf/eng/kj/wjfg/t43948.htm> (China). There were nonetheless developments in the interim. As Professor Alford recounted:

[China adopted] a series of regulations and related measures, developed (in many instances for internal circulation only) between 1980 and 1986, that addressed the production of both written and audiovisual materials, covering matters ranging, for example, from the submission of manuscripts to publication to remuneration. Typical of these were the 1984 Trial Regulations Concerning Basic Payment for Book-Writing, which divided the universe of Chinese authors, editors, translators, proofreaders, indexers, and other literary personnel into nine categories and fixed firm boundaries for the payment of each such group, even down to the number of free copies that one was to receive.

ALFORD, *supra* note 20, at 76 (footnote omitted); see also CHEN, *COPYRIGHT AND INTERNATIONAL NEGOTIATIONS*, *supra* note 28, at 86–87 (listing some of these regulations and measures); ZHENG WITH PENDLETON, *supra* note 22, at 94 (citing the Interim Regulations Concerning Copyright Protection on Audio-Video Publications, developed by the Ministry of Radio, Film and Television, as “the first document with legal effect in China, in whose title, the word ‘Copyright’ appears”). In April 1986, China adopted the General Principles of Civil Law, which “provide[d its] first major public recognition of copyright.” ALFORD, *supra* note 20, at 77. Article 94 states: “Citizens and legal persons shall enjoy rights of authorship (copyrights) and shall be entitled to sign their names as authors, issue and publish their works and obtain remuneration in accordance with the law.” General Principles of the Civil Law of the People’s Republic of China (promulgated by the Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 94, <http://www.asianlii.org/cn/legis/cen/laws/gpotclotproc555/> (China); see also *id.* art. 118 (“If the rights of authorship (copyrights) . . . of citizens or legal persons are infringed upon by such means as plagiarism, alteration or imitation, they shall have the right to demand that the infringement be stopped, its ill effects be eliminated and the damages be compensated for.”).

about the law's complications with the Press Law (*Xinwen Fa*),⁴⁹ the potential impact of copyright protection on science and technology,⁵⁰ and select technical issues in copyright and related areas.⁵¹

In the mid-1980s, the United States began exerting greater pressure on China to speed up intellectual property reforms.⁵² By then, the new trademark and patent laws had already taken effect, and the Copyright Law was the only major law that had yet to be adopted.⁵³ To accelerate copyright law reform in China and to strengthen protection for computer software, the United States negotiated the Memorandum of Understanding on Enactment and Scope of PRC Copyright Law, which the two countries signed in May 1989.⁵⁴

49. See MERTHA, *supra* note 46, at 121 (recounting the debate surrounding the drafting of both the Copyright Law and the Press Law); *id.* at 125 (recounting the debate on whether the Copyright Law should handle issues of ideological correctness).

50. See *id.* at 123 (recounting the concern that stronger copyright protection would make it difficult for China to “fully develop[] its science and technology capabilities” and would therefore render the country “strategically vulnerable and economically noncompetitive in the international system”).

51. See *id.* at 122. As Andrew Mertha noted:

Throughout the 1980s, there would be several flashpoints of debate. These included the legal rights of the individual over the individual's work unit (*danwei*); the proposed protection of computer software or folk literature under the Copyright Law; the notion of third-party or “neighbor's rights” covering the often complex legal and creative relationships among the various parties involved in producing an audio or video recording; the inheritance or transferal of copyright; and the balance between the rights and obligations of copyright holders.

Id.

52. See Warren H. Maruyama, *U.S.–China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 165, 186 (Mark A. Cohen et al. eds., 1999) (“At a 1985 meeting to the U.S.–China Joint Committee on Commerce and Trade (JCCT), the U.S. for the first time expressed concerns about weak Chinese IPR [intellectual property right] standards. In 1987, the U.S. put IPR protection on the agenda for U.S.–China market access talks.”). The National Copyright Administration was established around this time. Through a relationship known as “one organization, two signboards” (*yige jigou liangkuai paizi*), this agency was established in July 1985 in the same unit as the Press and Publications Administration. See CHEN, COPYRIGHT AND INTERNATIONAL NEGOTIATIONS, *supra* note 28, at 89–90; MERTHA, *supra* note 46, at 134.

53. See Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985), <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100050884.html> (China); Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983), <http://www.asianlii.org/cn/legis/cen/laws/tl115/> (China). The Copyright Law was not adopted until September 1990. Copyright Law of the People's Republic of China [1990 Copyright Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991), <https://www.mfa.gov.cn/ce/cgsf/eng/kj/wjfg/t43948.htm> (China).

54. See *PRC Agrees to Push for Copyright Law That Will Protect Computer Software*, 3 WORLD

Although this memorandum was never ratified,⁵⁵ the instrument “paved the way for the eventual adoption of the Copyright Law in [September] 1990 and a separate set of computer software regulations the year after.”⁵⁶

The 1990 Copyright Law⁵⁷ was developed through a meticulous process that involved “more than 20 drafts . . . many of which differed substantially as power shifted.”⁵⁸ Nevertheless, it did not provide the high protection standards authors enjoyed in developed countries.⁵⁹ As a result, the United States continued to demand stronger copyright protection; such demands eventually led to the signing of a new memorandum of understanding in January 1992.⁶⁰ That instrument became “the first full bilateral [intellectual property] agreement” between China and the United States.⁶¹ Article 3 of the Memorandum specifically required China to join both the Berne Convention and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention).⁶²

To preempt conflicts between the Copyright Law and international agreements, China promulgated the International Copyright Treaties Implementing Rules in September 1992.⁶³ These rules included detailed

INTELL. PROP. REP. (BL) 151 (1989) (reprinting the 1989 Memorandum of Understanding); *see also* Yu, *Half-Century of Scholarship*, *supra* note 14, at 1066 (referring to this memorandum as “the first intellectual property-related memorandum of understanding . . . after China reopened to the outside world”).

55. *See* MERTHA, *supra* note 46, at 124 (noting the unratified status of this memorandum).

56. Yu, *Transplant and Transformation*, *supra* note 4, at 25; *see also* ZHANG ZHENQING, *INTELLECTUAL PROPERTY RIGHTS IN CHINA* 96–97 (2019) (documenting the challenges and bitter debate toward the end of the drafting process).

57. 1990 Copyright Law.

58. ALFORD, *supra* note 20, at 77.

59. *See id.* at 78–80 (discussing the 1990 Copyright Law); MERTHA, *supra* note 46, at 124–26 (same).

60. Memorandum of Understanding on the Protection of Intellectual Property, China-U.S., Jan. 17, 1992, T.I.A.S. No. 12,036 [hereinafter 1992 MOU].

61. Joseph A. Massey, *The Emperor Is Far Away: China’s Enforcement of Intellectual Property Rights Protection, 1986–2006*, 7 *CHI. J. INT’L L.* 231, 235 (2006).

62. *See* 1992 MOU, *supra* note 60, art. 3.1 (“The Chinese Government will accede to the Berne Convention for the Protection of Literary and Artistic Works . . . (Paris 1971). The Chinese Government will submit a bill authorizing accession to the Berne Convention to its legislative body by April 1, 1992 and will use its best efforts to have the bill enacted by June 30, 1992.”); *id.* art. 3.2 (“The Chinese Government will accede to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention) and submit a bill to its legislative body authorizing accession by June 30, 1992.”).

63. *See* International Copyright Treaties Implementing Rules (promulgated by the State Council, Sept. 25, 1992, effective Sept. 30, 1992), art. 19, <http://en.ncaac.gov.cn/copyright/contents/10367/329085.shtml> (China) (“Where preexisting

provisions on the protections for foreign authors and their copyrighted works.⁶⁴ Although these rules effectively minimized the tensions or conflicts between domestic and international copyright standards, they generated the perverse effect of providing “super-national treatment” of foreign authors, whose protections were stronger than those available to local authors.⁶⁵

In the next decade, China was busy preparing to join the WTO.⁶⁶ To ensure that its intellectual property laws conformed to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),⁶⁷ the country undertook a major overhaul of its copyright regime. In October 2001, the First Amendment to the Copyright Law was adopted.⁶⁸ Included in this Amendment were the expansion of copyrightable subject matter, the introduction of new exclusive rights, the tightening of copyright limitations and exceptions, the reduction of super-national treatment, the requirement that copyright assignments be in writing, and the placement on accused infringers of the burden to prove the existence of a legitimate license.⁶⁹ This revamped copyright regime provided the legal background against which copyright holders and their industries operated in the next two decades.⁷⁰

administrative regulations relating to copyright may conflict with these Rules[,] these Rules shall apply. Where these Rules may conflict with international copyright treaties, the international copyright treaties shall apply.”)

64. *See id.*

65. *See* XUE HONG & ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY 12 (2002) (discussing the double standards); Feng Xiaoqing & Frank Xianfeng Huang, *International Standards and Local Elements: New Developments of Copyright Law in China*, 49 J. COPYRIGHT SOC’Y U.S.A. 917, 919 (2002) (discussing the “super-national treatment” in which “foreign nationals enjoy better treatment under international conventions than Chinese nationals”).

66. *See generally* Li Yahong, *The Wolf Has Come: Are China’s Intellectual Property Industries Prepared for the WTO?*, 20 UCLA PAC. BASIN L.J. 77 (2002) (discussing the amendments China introduced in the run-up to the WTO membership and the impact such membership would have on the country and its intellectual property industries); Julia Cheng, Note, *China’s Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT’L L.J. 1941, 2005–12 (1998) (discussing the potential improvements in the Chinese intellectual property system that WTO accession could spark).

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

68. Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001), <http://www.asianlii.org/cn/legis/cen/laws/cloproc372/> (China).

69. *See* Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 909–10 (2006) [hereinafter Yu, *From Pirates to Partners II*] (discussing the changes in the First Amendment to the Copyright Law).

70. *See infra* text accompanying notes 76–79.

Notwithstanding this First Amendment and other WTO-driven amendments in the patent and trademark areas,⁷¹ intellectual property enforcement remained a serious problem in China. As the *2005 National Trade Estimate Report on Foreign Trade Barriers* stated, “[w]hile China has made significant progress in its efforts to make its framework of laws, regulations and implementing rules WTO-consistent, serious problems remain, particularly with China’s enforcement of intellectual property rights.”⁷² In April 2007, the United States filed a complaint against China before the WTO Dispute Settlement Body in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*.⁷³ A key claim in this complaint concerned the denial of copyright protection to works that had not been authorized for publication or dissemination within China.⁷⁴

After the WTO panel found Article 4 of the Copyright Law to be inconsistent with the TRIPS Agreement,⁷⁵ China introduced the Second Amendment.⁷⁶ This Amendment removed the first sentence of the challenged provision, which stipulated that “[w]orks the publication [and/or] distribution of which is prohibited by law shall not be protected by this Law.”⁷⁷ As a

71. See Yu, *From Pirates to Partners II*, *supra* note 69, at 906–23 (discussing the amendments in the patent, trademark, and copyright areas in the early 2000s).

72. OFF. OF THE U.S. TRADE REPRESENTATIVE, 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 95 (2005).

73. Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/1 (Apr. 16, 2007).

74. See *id.* at 3–6 (complaining that Article 4 of the Chinese Copyright Law was inconsistent with Article 5 of the Berne Convention and Articles 9.1 and 41.1 of the TRIPS Agreement).

75. See Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* ¶ 8.1(a), WTO Doc. WT/DS362/R (adopted Jan. 26, 2009) [hereinafter WTO Panel Report] (finding the first sentence of Article 4 of the Chinese Copyright Law “inconsistent with China’s obligations under: (i) Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement; and (ii) Article 41.1 of the TRIPS Agreement”). For discussions of this claim, see generally Tomer Broude, *It’s Easily Done: The China—Intellectual Property Rights Enforcement Dispute and the Freedom of Expression*, 13 J. WORLD INTELL. PROP. 660 (2010); Dong Hao & Gu Minkang, *Copyrightable or Not: A Review of the Chinese Provision on “Illegal Works” Targeted by WTO DS362 and Suggestions on the Legal Reform*, 4 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 335 (2009); Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1075–81, 1096–1101 (2011) [hereinafter Yu, *TRIPS Enforcement Dispute*]; Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT’L L. REV. 727, 739–43 (2011) [hereinafter Yu, *TRIPS Enforcement and Developing Countries*].

76. Copyright Law of the People’s Republic of China [2010 Copyright Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010), http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987430.htm (China); see also Yu, *TRIPS Enforcement Dispute*, *supra* note 75, at 1097–98 (discussing the amendment).

77. Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l

replacement, the Second Amendment added the following sentence at the end of the provision: “The publication and dissemination of works shall be subject to the administration and supervision of the State.”⁷⁸ To avoid amending the Copyright Law solely to implement the WTO panel decision, China added a provision to cover the use of copyright as a pledge.⁷⁹ Given the changes in only two provisions, the Second Amendment, despite its name, did not have any major impact on the Chinese copyright regime.

In July 2011, only a year after the adoption of the Second Amendment, China began considering a new amendment to upgrade its copyright regime.⁸⁰ In March, July, and October 2012, the National Copyright Administration (NCA) released three amendment drafts,⁸¹ with the first two opened for public comments.⁸² The NCA submitted its finalized draft to the State Council later

People’s Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001), art. 4, <http://www.asianlii.org/cn/legis/cen/laws/cloproc372/> (China).

78. 2010 Copyright Law, art. 4.

79. *Id.* art. 26. Article 26 provides: “In 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.” *Id.* This provision has now been renumbered as Article 28. Copyright Law of the People’s Republic of China [2020 Copyright Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), art. 28, <http://www.npc.gov.cn/englishnpc/c23934/202109/ae0f0804894b4f71949016957ecc45a3.shtml> (China).

80. See Li Mingde, *Intellectual Property Law Revision in China: Transplantation and Transformation*, in GOVERNANCE OF IPRS, *supra* note 4, at 65, 66–67 [hereinafter Li, *Intellectual Property Law Revision*]. Li Mingde recounted the origin of this amendment:

In July 2011, the National Copyright Administration of China (NCAC) announced the start of the third revision of the Copyright Law, and entrusted three academic institutions—the Intellectual Property Center of China Academy of Social Sciences, the Intellectual Property Research Center of Zhongnan University of Economics and Law and the Intellectual Property School of Renmin University—to draft their proposals for amending the law. On the basis of these three expert proposals, the NCAC formed its first draft and published it for public consultation on 31 March 2012. Surprisingly, the draft gave rise to huge numbers of opinions, discussions and debates among the public. On 6 July 2012, the NCAC published its second draft on the amendment of the Copyright Law for public consultation. On the basis of the public consultation, the NCAC formed its third draft and submitted it to the State Council on [18] December 2012.

Id. (footnotes omitted).

81. See Wan Yong, *Safe Harbors from Copyright Infringement Liability in China*, 60 J. COPYRIGHT SOC’Y U.S.A. 635, 654–55 (2013) (“[O]n March 31, and July 6, 2012, the [NCAC] released the First and Second Draft Amendments of the Copyright Law for public comments. . . . The Third Draft Amendment of the Copyright Law . . . was released by the NCAC in October 2012.” (footnotes omitted)).

82. Copyright Law of the People’s Republic of China (Amendment Draft, Mar. 31, 2012),

that year.⁸³ In June 2014, the Legislative Affairs Office of the State Council released an amendment draft, again for public comments.⁸⁴ These various drafts attracted debates and controversies in a number of areas, including most notably collective copyright management organizations and copyright limitations and exceptions.⁸⁵ To address these concerns, the NCA rewrote the amendment draft and resubmitted it to the State Council in December 2017.⁸⁶

In April 2020, amid the COVID-19 pandemic, the State Council released a new amendment draft.⁸⁷ A follow-up draft with some substantial changes was released four months later.⁸⁸ On November 11, 2020, the Standing Committee of the National People's Congress finally approved the Third Amendment.⁸⁹ After more than nine years and at least six drafts, the Chinese copyright regime was completely revamped for the second time following its establishment three decades ago.⁹⁰

<https://npcobserver.files.wordpress.com/2020/04/copyright-law-mar.-2012-draft-revision.pdf> (China) (in Chinese); Copyright Law of the People's Republic of China (Second Amendment Draft, July 6, 2012), <https://npcobserver.files.wordpress.com/2020/04/copyright-law-july-2012-draft-revision.pdf> (China) (in Chinese).

83. See Tian Xianjin et al., *Copyright Law of China*, in IP PROTECTION IN CHINA 151, 157 (Donna Suchy ed., 2015) (“The third draft was not available to the public but rather only circulated within the government branches for internal comments”); see also Li, *Intellectual Property Law Revision*, *supra* note 80, at 67 (stating that the NCA submitted the third draft to the State Council in December 2012).

84. Copyright Law of the People's Republic of China (Amendment Draft Submitted for Review, June 6, 2014), http://www.gov.cn/xinwen/2014-06/10/content_2697701.htm (China) [hereinafter 2014 Amendment Draft] (in Chinese).

85. See He Tianxiang, *Transplanting Fair Use in China? History, Impediments and the Future*, 2020 U. ILL. J.L. TECH. & POL'Y 359, 363 [hereinafter He, *Transplanting Fair Use*] (noting among the “substantial controversies” the proposed “changes to the clauses related to collective management societies and copyright exceptions/fair use clauses”).

86. See *Explanation on the Amendment to the Copyright Law of the People's Republic of China (Draft)*, NAT'L PEOPLE'S CONG. PEOPLE'S REPUBLIC CHINA (Apr. 26, 2020), <http://www.npc.gov.cn/npc/c30834/202011/f254003ab9144f5db7363cb3e01cabde.shtml> (in Chinese).

87. Amendment to the Copyright Law of the People's Republic of China (Draft, Apr. 26, 2020), <https://npcobserver.files.wordpress.com/2020/04/copyright-law-draft-amendment.pdf> (China) [hereinafter Draft for First Review] (in Chinese).

88. Amendment to the Copyright Law of the People's Republic of China (Draft for Second Review, Aug. 17, 2020), <https://npcobserver.files.wordpress.com/2020/08/copyright-law-2nd-draft-amendment.pdf> (China) (in Chinese).

89. Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), <http://www.npc.gov.cn/englishnpc/c23934/202109/ae0f0804894b4f71949016957eec45a3.shtml> (China).

90. See *supra* text accompanying notes 8–12.

III. MOVING AHEAD (SLOWLY AT TIMES)

Immediately following the adoption of the Third Amendment, commentators expressed cautious optimism. For instance, in the *2021 Special 301 Report*, the United States Trade Representative recognized the progress made by the recent amendments to intellectual property laws but noted that “it remains to be seen whether these measures sufficiently address existing challenges to right holders.”⁹¹ Likewise, the International Intellectual Property Alliance, an industry group that has been pushing for stronger copyright protection in China for decades,⁹² considered the recent copyright law amendment “a positive development” but nonetheless emphasized the critical importance of implementation and the need for further reforms.⁹³

In a forthcoming special issue of the *Journal of the Copyright Society of the U.S.A.*, I highlight the major legislative changes brought about by the Third Amendment and evaluate its strengths and limitations.⁹⁴ Drawing on this earlier analysis, Section A briefly summarizes the five sets of upgrades or changes that the new Amendment ushered in. Section B offers three overarching observations about the latest round of copyright law reform in China.

A. Upgrades and Changes

Although the Third Amendment has garnered mixed reactions from both rights holders and policymakers,⁹⁵ it has moved copyright holders closer to their destination of effective copyright protection. Specifically, the new Amendment provides five sets of upgrades or changes to the Chinese copyright regime.

The first set of upgrades improves the regime’s ability to respond to

91. OFF. OF THE U.S. TRADE REPRESENTATIVE, 2021 SPECIAL 301 REPORT 41–42 (2021) [hereinafter 2021 SPECIAL 301 REPORT].

92. *See About—IIPA*, INT’L INTELL. PROP. ALL., <https://www.iipa.org/about/> (last visited Oct. 20, 2021) (“The International Intellectual Property Alliance . . . is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers.”).

93. *See* INT’L INTELL. PROP. ALL., IIPA 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 12, 22 (2021).

94. *See* Peter K. Yu, *Third Amendment to the Chinese Copyright Law*, 69 J. COPYRIGHT SOC’Y U.S.A. (forthcoming 2022) [hereinafter Yu, *Third Amendment*].

95. *See* INT’L INTELL. PROP. ALL., *supra* note 93, at 12, 22; 2021 SPECIAL 301 REPORT, *supra* note 91, at 41–42.

technological change, including the arrival of both new technologies and new modes of communication. The Third Amendment expanded the list of copyrightable subject matter in Article 3 to cover all works in the fields of “literature, arts, and sciences” as long as those works are original and have been expressed in a certain form.⁹⁶ To address questions concerning whether short videos, animations, game contents, or other unconventional audiovisual creations fit within the coverage,⁹⁷ this provision further replaced the category

96. *Compare* Copyright Law of the People’s Republic of China [2010 Copyright Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010), art. 3, http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987430.htm (China) (providing a delineated list of “works of literature, art, natural science, social science, [and] engineering technology”), *with* Copyright Law of the People’s Republic of China [2020 Copyright Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), art. 3, <http://www.npc.gov.cn/englishnpc/c23934/202109/ae0f0804894b4f71949016957eec45a3.shtml> (China) (extending coverage to all works in the fields of “literature, arts, and sciences” as long as those works are original and have been expressed in a certain form). Before the amendment, Article 2 of the Regulations for the Implementation of the Copyright Law provides: “The term ‘works’ as referred to in the Copyright Law means intellectual creations with originality in the literary, artistic or scientific domain, insofar as they can be reproduced in a tangible form.” Regulations for the Implementation of the Copyright Law of the People’s Republic of China (promulgated by the State Council, Aug. 2, 2002, amended Jan. 30, 2013, effective Mar. 1, 2013), art. 2, <https://wipolex.wipo.int/en/text/466277> (China). For discussions of changes to Article 3, see generally Feng Xiaoqing & Cong Lixian, *The Status of the Object of Copyright: Research on the System of Works Protected by the Amended Chinese Copyright Law*, 69 J. COPYRIGHT SOC’Y U.S.A. (forthcoming 2022); He Huaiwen & Wu Xinyuan, *The Audiovisual Works and Their Protection Under Chinese Copyright Law*, 69 J. COPYRIGHT SOC’Y U.S.A. (forthcoming 2022); Zhang Chenguo, *What Are Works: Copyright Law Subject Matter in the Transition to the Digital Era: Perspectives on the Third Amendment to the Chinese Copyright Act*, 7 QUEEN MARY J. INTEL. PROP. 468 (2017) [hereinafter Zhang, *What Are Works*]. The term *duchuangxing* in Chinese is generally translated as originality, even though it is literally closer to “independent creation.” These two new requirements are similar but not identical to the originality and fixation requirements in U.S. copyright law. See 17 U.S.C. § 102(a) (2018) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .”).

97. See Li, *Intellectual Property Law Revision*, *supra* note 80, at 71 (“[W]hat is a video recording, what is the difference between a cinematographic work and a video recording? This was not clear for a long time.”); Liu Wei & Liu Jiarui, *Copyright Protection of Sports Programs in China*, 64 J. COPYRIGHT SOC’Y U.S.A. 235, 249–51 (2017) (discussing the limitations of using neighboring rights in video recordings to protect sports programs); Zhang, *What Are Works*, *supra* note 96, at 474–75 (“Under the previous definition of a film work, it was difficult for the court to determine whether a ‘flash’ file could be subsumed under the film works category.”); Gui Hongxia et al., *The Amended Copyright Law and Its Potential Implications*, CHINA LAW INSIGHT (Dec. 2, 2020), <https://www.chinalawinsight.com/2020/12/articles/intellectual-property/the-amended-copyright-law-and-its-potential-implications/> (suggesting that the new category of audiovisual works was introduced “in response to the demand for protection of new types of audio-visual works, such as online game graphics and short videos, which are created by filming methods different from those of film works”); Savannah Hardingham et al., *Amendments to China’s Copyright Law*, NAT’L L. REV. (Apr. 13, 2021), <https://www.natlawreview.com/article/amendments-to-china-s-copyright-law> (“The broader

of “cinematographic works and works created by a process analogous to cinematography” with a new and broader category of audiovisual works.⁹⁸

In addition, to preempt challenges posed by new technologies, Article 24 made the copyright regime more flexible by adding “[o]ther circumstances provided for by laws and administrative regulations” to the list of enumerated circumstances in which a copyrighted work may be used without authorization or remuneration.⁹⁹ Article 10 clarifies that the broadcasting right covers the public dissemination and rebroadcast of copyrighted “works by wired or wireless means.”¹⁰⁰ Article 47 further extends to broadcasting organizations the right of communication through an information network.¹⁰¹ The latter two amendments removed the ambiguity concerning whether the broadcasting right covers webcasts and online live broadcasts.¹⁰²

definition [of audiovisual works] seems focused on preventing piracy of live-streamed sports and online gaming broadcasts, as well as protection of emerging forms of works like short videos and animations.”).

98. *Compare* Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001), art. 3(6), <http://www.asianlii.org/cn/legis/cen/laws/cloproc372/> (China) (extending protection to “cinematographic works and works created by a process analogous to cinematography”), with 2020 Copyright Law, art. 3(6) (extending protection to audiovisual works). Interestingly, Article 3(5) of the 1990 Copyright Law offered protection to “cinematographic, television and videographic works” before the law was amended in October 2001 to cover “cinematographic works and works created by a process analogous to cinematography.” Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001), <http://www.asianlii.org/cn/legis/cen/laws/cloproc372/> (China); Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991), art. 3(5), <https://www.mfa.gov.cn/ce/cgsf/eng/kj/wjfg/t43948.htm> (China); *see also* PETER GANEA & THOMAS PATTLACH, *INTELLECTUAL PROPERTY LAW IN CHINA* 216 (Christopher Heath ed., 1st ed. 2005) (noting that the use of this “broad term . . . was justified by concerns that a more comprehensive term would have been difficult to understand by a public not yet accustomed to copyright terminology”). When the law was amended in 2001, drafters considered the term “audiovisual works” but in the end embraced language mirroring Article 2(1) of the Berne Convention. *See* XUE & ZHENG, *supra* note 65, at 9; *see also* Berne Convention, *supra* note 23, art. 2(1) (including “cinematographic works to which are assimilated works expressed by a process analogous to cinematography” among “literary and artistic works”).

99. 2020 Copyright Law, art. 24(13).

100. *Id.* art. 10.

101. *Id.* art. 47(3).

102. *See* Gui et al., *supra* note 97 (“[T]he Internet live broadcasting falls within the coverage of the right of broadcasting, which solves the long-standing practical dilemma that neither the broadcasting right nor the information network dissemination right can be applied to regulate the Internet live broadcasting.”); Hardingham et al., *supra* note 97 (stating that the change of the definition of the broadcasting right “allows communication through the Internet to be included in the scope of [that right]”). *See generally* He, *Transplanting Fair Use*, *supra* note 85, at 382–84 (discussing live game

The second set of upgrades provides enhancement or clarification to the rights enjoyed by a wide array of individuals and organizations. Article 5 expanded the protection for newspaper publishers and radio and television stations by reducing the ineligibility of copyright protection from “news on current affairs” to “purely factual information.”¹⁰³ Article 8 added sub-provisions covering the collection, transfer, and allocation of royalties by collective copyright management organizations; the arrangements for resolving disagreements between these organizations and their users; the periodic disclosure of information relating to royalties and management fees; and issues relating to oversight and management.¹⁰⁴ Article 12 created a rebuttable presumption of authorship in the individual or entity whose name has been attributed to the work and who has corresponding rights in that

webcasting). To reduce complications between the different and potentially overlapping rights, Article 47 states further that radio and television stations, in exercising the rights granted in the provision, cannot affect, restrict, or infringe upon the copyright or related rights enjoyed by others. 2020 Copyright Law, art. 47; *see also* Gui et al., *supra* note 97 (“[T]his Amendment will make the issue more complicated when it is uncertain which right should come into play (e.g. the right to broadcast, the right to communicate works through information network[s] or any other right).”).

103. *Compare* Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010), art. 5, http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987430.htm (China), *with* 2020 Copyright Law, art. 5. Although this substitution seems to reiterate the well-established principle that copyright protection does not extend to facts, the amendment was driven by the growing unauthorized reproduction and dissemination of programs on news or current affairs and the need to protect creative contents in those programs. *See* AFD China Intellectual Property, *China: Third Amendment to China’s Copyright Law*, MONDAQ (Jan. 8, 2021), <https://www.mondaq.com/china/copyright/1023682/third-amendment-to-china39s-copyright-law> (“[T]he content and photographs in a piece of news show not only simple facts but also commentary created with writing techniques which should be regarded as original intellectual achievements of the news writer and thus should be included as a subject matter of copyright.”).

104. 2020 Copyright Law, art. 8. This provision was first introduced in October 2001. Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001), art. 8, <http://www.asianlii.org/cn/legis/cen/laws/cloproc372/> (China); *see also* Yu, *From Pirates to Partners II*, *supra* note 69, at 918–19 (discussing this new provision). In addition to this provision, China introduced the Regulations on Copyright Collective Administration (promulgated by the State Council, Dec. 22, 2004, effective Mar. 1, 2005), <https://en.ncac.gov.cn/copyright/contents/10366/338275.shtml> (China). For discussions of collective copyright management in China, *see generally* Wu Weiguang, *China’s CMC System and Its Problems from the Copyright Law of 1990 to Its Third Amendment*, in GOVERNANCE OF IPRS, *supra* note 4, at 213; Jiang Fuxiao & Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, 15 J. WORLD INTELL. PROP. 221 (2012); Lin Xiuqin & Wang Xuan, *Challenges and Opportunities of China’s Copyright Collective Management in the New Era*, 69 J. COPYRIGHT SOC’Y U.S.A. (forthcoming 2022).

work.¹⁰⁵ Article 14 recognizes the freedom of joint authors to exercise rights independently, subject only to an accounting for profits, as long as those rights are not implicated in a transfer, an exclusive grant, or a pledge.¹⁰⁶ Article 16 makes explicit that anybody using derivative works should obtain authorization from the copyright holders of both the relevant work and the underlying work.¹⁰⁷ Article 17 states that authors hold the copyright in films, television programs, and other audiovisual works involving multiple parties while “screenwriters, directors, cinematographers, lyricists, composers, and so forth” enjoy the right of attribution and, when provided for in contracts, the right to receive remuneration.¹⁰⁸

Beyond the rights for authors, Article 45 requires remuneration be paid to producers when sound recordings are publicly performed or broadcast.¹⁰⁹ The Third Amendment further expanded the neighboring rights of performers—an unsurprising position considering China’s pivotal role in the successful conclusion of the Beijing Treaty on Audiovisual Performances (Beijing Treaty) under the auspices of the World Intellectual Property Organization (WIPO).¹¹⁰ Consistent with Article 5(1) of this treaty,¹¹¹ Articles 39(5) and 44 of the Copyright Law recognize that performers have rental rights.¹¹² Article 40, a new provision on performances for hire, grants performers the

105. 2020 Copyright Law, art. 12.

106. *Id.* art. 14. The arrangement is similar to what is found in the United States and other jurisdictions. See MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 6.08–.12 (perm. ed., rev. vol. 2015).

107. 2020 Copyright Law, art. 16.

108. *Id.* art. 17.

109. *Id.* art. 45.

110. Beijing Treaty on Audiovisual Performances, June 23, 2012, <https://wipolex.wipo.int/en/treaties/textdetails/12213>; see also Peter K. Yu, *Caught in the Middle: WIPO and Emerging Economies*, in *RESEARCH HANDBOOK ON THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: THE FIRST 50 YEARS AND BEYOND* 358, 367 (Sam Ricketson ed., 2020) (noting China’s role in hosting the diplomatic meeting that led to the successful conclusion of the Beijing Treaty).

111. Beijing Treaty on Audiovisual Performances, *supra* note 110, art. 5(1).

112. Copyright Law of the People’s Republic of China [2020 Copyright Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), arts. 39(5), 44, <http://www.npc.gov.cn/englishnpc/c23934/202109/ae0f0804894b4f71949016957ecc45a3.shtml> (China); see also GANEA & PATTLACH, *supra* note 98, at 233 n.88 (“[A]part from the producers [of video recordings], only the owners of the rights in cinematographic works and software producers enjoy a rental right.”); Li, *Copyright Protection in China*, *supra* note 35, at 94 (criticizing the failure of the 2001 Copyright Law to provide rental rights to performers); Liu Chuntian, *Copyright Protection Under the Network Environment*, in *CHINESE IP AND TECHNOLOGY LAWS*, *supra* note 7, at 227, 234 (noting that China “does not have the same level of experience in dealing with rental rights as the West”).

rights to be identified and to protect their image in the performance from distortion while allowing performing units to freely use such performance within their business scope.¹¹³

The third set of upgrades relates to copyright enforcement and remedies. Article 54 greatly increased the amount of pre-established or statutory damages, setting a new floor of *Renminbi* (RMB) 500 (over \$78) while raising the ceiling from RMB 500,000 (over \$78,000) to RMB 5,000,000 (over \$780,000).¹¹⁴ In cases of serious willful infringement, the provision grants punitive damages of up to five times the compensation amount, which is to be determined based on actual losses, illegal incomes, or royalties.¹¹⁵ Compared with copyright law in the United States, Europe, and other jurisdictions, the inclusion of both pre-established and punitive damages is somewhat unusual.¹¹⁶ Nevertheless, such inclusion shows the Xi Jinping Administration's resolve to provide stronger deterrents against copyright infringement. As President Xi declared before the release of the 2020 amendment drafts, it is important to "put in place a punitive compensation system to significantly raise the cost for offenders."¹¹⁷ Similar changes can be found in the Fourth Amendment to the Patent Law, which took effect at the same time as the amended Copyright Law, as well as the earlier amendments to the Trademark Law and the Law Against Unfair Competition.¹¹⁸

113. 2020 Copyright Law, art. 40.

114. *Compare id.* art. 54 (setting the ceiling at RMB 5,000,000), with Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010), art. 48(8), http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987430.htm (China) (setting the ceiling at RMB 500,000); *see also* Lee Jyh-An, *Formulating Copyright Damages in China*, 69 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2022) [hereinafter Lee, *Formulating Copyright Damages*].

115. *See* 2020 Copyright Law, art. 54; *see also* Lee, *Formulating Copyright Damages*, *supra* note 114 (discussing punitive damages); Zhang Guangliang, *Punitive Damages for Copyright Infringement in China: Interpretations, Issues and Solutions*, 69 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2022) (same).

116. *See* Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 718–19 (2010) [hereinafter Yu, *Digital Copyright Reform*] (discussing how statutory damages may not fit well within the legal tradition in Hong Kong, considering the availability of additional damages with punitive elements).

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

118. *See* Law Against Unfair Competition of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, amended Nov. 4, 2017, effective Jan. 1, 2018), arts. 17–18, <https://wipolex.wipo.int/en/text/547026> (China) (setting the ceiling at RMB 3,000,000 and providing for quintuple damages in specified circumstances); Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Oct.

In addition, Article 54 allows the shift of the burden of production from the copyright holder to the accused infringer in cases where evidence production has been challenging.¹¹⁹ For the purpose of determining compensation, the provision states that once the right holder has met the necessary burden to produce evidence, the court may order the accused infringer to produce the relevant account books or other materials over which he or she has control.¹²⁰ Article 55 further strengthened the investigative, inspection, and seizure powers of copyright authorities¹²¹ at both the national and subnational levels.¹²² Although copyright holders and their supportive governments and industry groups quickly welcomed the increased enforcement powers, some commentators have registered concerns about potential overzealous enforcement,¹²³ especially considering that copyright remains a private right.¹²⁴

The fourth set of upgrades promotes the consistency and coherence between the Copyright Law and international intellectual property

17, 2020, effective June 1, 2021), art. 71, <http://www.npc.gov.cn/englishnpc/c23934/202109/63b3c7cb2db342fdadacc4a09ac8364.shtml> (China) (setting the ceiling at RMB 5,000,000 and providing for quintuple damages in cases of serious willful patent infringement); Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Apr. 23, 2019, effective Nov. 1, 2019), art. 63, <https://wipo.lex.wipo.int/en/text/579988> (China) (setting the ceiling at RMB 5,000,000 and providing for quintuple damages in cases of malicious trademark infringement).

119. 2020 Copyright Law, art. 54.

120. *Id.*

121. *Id.* art. 55. See generally Xie Huijia & Chen Liuxi, *The Amendment of Copyright Administrative Enforcement in China*, 69 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2022) (discussing administrative enforcement in relation to the Third Amendment).

122. See 2020 Copyright Law, art. 7 (allocating responsibilities among national and local copyright authorities).

123. See Li, *Intellectual Property Law Revision*, *supra* note 80, at 86 ("Many experts have criticized the fact that a government agency can go to a company in order to investigate a suspected patent infringement and even pursue coercive measures contained in the amendment as being detrimental to businesses in China.").

124. See TRIPS Agreement, *supra* note 67, pmb., recital 4 ("[I]ntellectual property rights are private rights."); see also Li Xuan & Carlos M. Correa, *Towards a Development Approach on IP Enforcement: Conclusions and Strategic Recommendations*, in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES 207, 210 (Li Xuan & Carlos M. Correa eds., 2009) (noting that the demands for strengthened intellectual property enforcement "seem to overlook . . . the crucial fact that IPRs are *private rights* and, hence, the burden and cost of their enforcement is to be borne by the right-holder, not the public at large"); Yu, *TRIPS Enforcement and Developing Countries*, *supra* note 75, at 747–54 (discussing that the WTO panel in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* emphasized the importance of the TRIPS minimum standards and the Agreement's recognition that "intellectual property rights are private rights").

agreements, including those that China has signed but not yet ratified.¹²⁵ Consistent with the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled,¹²⁶ Articles 24(12) and 50(2) of the amended Copyright Law improved access to copyrighted works by those with print disabilities.¹²⁷ These changes moved China a step closer to ratifying the treaty, which took place in February 2022.¹²⁸ The changes to performance rights also facilitate the implementation of the Beijing Treaty, which entered into force in China in April 2020.¹²⁹ One could even surmise that the retention of neighboring rights for broadcasting organizations will help minimize the changes needed should WIPO member states be able to conclude the Treaty to Protect Broadcasting Organizations and should China express interest in acceding to that instrument.¹³⁰

The final set of changes involve statutory updates. To promote consistency and coherence with the recently adopted Civil Code,¹³¹ which took effect on January 1, 2021, the Third Amendment replaced the terms “citizens” and “other organizations” in multiple articles with “natural

125. Notwithstanding this effort, commentators have found inconsistencies with obligations under international intellectual property agreements. *See, e.g.,* Wang Qian, *Copyright Law Revision and International Treaties and Agreements*, ELEC. INTELL. PROP., Nov. 2020, at 4 (in Chinese).

126. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, June 27, 2013, <http://www.wipo.int/wipolex/en/details.jsp?id=13169>.

127. Copyright Law of the People’s Republic of China [2020 Copyright Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), arts. 24(12), 50(2), <http://www.npc.gov.cn/englishnpc/c23934/202109/ae0f0804894b4f71949016957ecc45a3.shtml> (China).

128. *See WIPO Administered Treaties: Contracting Parties > Marrakesh VIP Treaty*, WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=843 (last visited Oct. 20, 2021) (stating that China ratified the treaty on February 5, 2022, and that the treaty will take effect on May 5).

129. *See* 2020 Copyright Law, art. 40; Beijing Treaty on Audiovisual Performances, *supra* note 110.

130. *See Protection of Broadcasting Organizations—Background Brief*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/pressroom/en/briefs/broadcasting.html> (last visited Oct. 20, 2021) (providing the background on the negotiations surrounding the proposed Treaty on the Protection of Broadcasting Organizations). It is worth noting that, despite joining most WIPO-administered international intellectual property agreements, China is not a member of the Rome Convention. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 43.

131. Civil Code of the People’s Republic of China (promulgated by the National People’s Congress, May 28, 2020, effective Jan. 1, 2021), http://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html (China).

persons” and “non-legal-person organization,” respectively.¹³² The Amendment also modified the provisions concerning the responsibilities of national and local copyright authorities,¹³³ reflecting the relocation of the NCA from the State Council to the Publicity Department of the Central Committee of the Communist Party of China (*Zhong Xuan Bu*) in March 2018.¹³⁴ Finally, Articles 49 to 51 brought into the Copyright Law the provisions on technological protection measures and rights management information¹³⁵ that were laid down in the Regulations for Protection of the Right of Communication Through an Information Network.¹³⁶ Introduced in May 2006, those regulations had been in force for more than a decade.¹³⁷ Not only did the Third Amendment extend the anticircumvention protection regime beyond the right of communication through an information network, Article 50 added new exceptions for encryption research and software reverse engineering.¹³⁸

B. Overarching Observations

Although this Section does not intend to evaluate the strengths and limitations of the Third Amendment—which I have already provided in a forthcoming article¹³⁹—it offers three closing observations that I hope will

132. Compare Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010), arts. 2, 9, 11, 16, 19, 21, 22, http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987430.htm (China), with 2020 Copyright Law, arts. 2, 9, 11, 12, 18, 21, 23, 24.

133. See 2020 Copyright Law, art. 7.

134. See *The Central Committee of the Communist Party of China Published the “Deepening Party and State Institutional Reform Plan,”* GOV’T PEOPLE’S REPUBLIC CHINA (Mar. 21, 2018), http://www.gov.cn/zhengce/2018-03/21/content_5276191.htm [hereinafter *Institutional Reform Plan*] (in Chinese) (providing the institutional reform plan).

135. 2020 Copyright Law, arts. 49–51; see also Xie Lin, *Inconsistent Anti-Circumvention Legislation and Its Future in China: Towards a Harmonized and Balanced Approach*, 69 J. COPYRIGHT SOC’Y U.S.A. (forthcoming 2022) (discussing the provisions). For discussions of anticircumvention protection in China, see generally (Jerry) Jie Hua, *Toward a More Balanced Model: The Revision of Anti-Circumvention Rules*, 60 J. COPYRIGHT SOC’Y U.S.A. 327 (2013); Xie Huijia, *The Regulation of Anti-Circumvention in China*, 54 J. COPYRIGHT SOC’Y U.S.A. 545 (2007); Xie Huijia, *The Regulation of Digital Rights Management in China*, 39 INT’L REV. INTELL. PROP. & COMPETITION L. 662 (2008).

136. Regulations for Protection of the Right of Communication Through an Information Network (promulgated by the State Council, May 10, 2006, effective July 1, 2006), <https://wipolex.wipo.int/en/text/475177> (China).

137. *Id.*

138. 2020 Copyright Law, art. 50(5).

139. Yu, *Third Amendment*, *supra* note 94.

shed light on the latest round of copyright law reform in China. These observations also show that the Chinese copyright regime is moving forward, though at a pace slower than foreign copyright holders and their supportive governments and industry groups would like.

The first observation recognizes that the Third Amendment marked the first time China amended its copyright law to meet domestic needs and conditions (*guoqing*), as opposed to external demands.¹⁴⁰ While China had already done that in the patent and trademark areas¹⁴¹ following the State Council's adoption of the National Intellectual Property Strategy in June 2008¹⁴² and the country's innovative turn in the mid-2000s, it had yet to do so in the copyright area until the latest round of copyright law reform.

From a legislative standpoint, such a shift toward internal focus can be quite beneficial. As the voluminous literature on legal transplants has shown, the introduction of foreign legal norms without appropriate customization can create a mismatch between the transplanted laws and local conditions.¹⁴³ This literature not only offers insight into copyright law reform but brings back memories about the many historical problems China had when developing its copyright regime in the imperial and Republican eras. As William Alford noted, the laws that the Kuomintang government introduced in the 1920s and 1930s "failed to achieve their stated objectives because they presumed a legal

140. See Tian et al., *supra* note 83, at 236 ("[T]he 2001 and 2010 amendments are both passive reactions from external pressure. . . . Different from the two previous amendments, the third revision is an initiative and comprehensive adjustment of the Copyright Law intended to accommodate the country's economic and social development and technological progress."); He, *Transplanting Fair Use*, *supra* note 85, at 362 ("The . . . third revision of the [Chinese Copyright Law] is believed to be the first voluntary move that will echo China's national IP [intellectual property] strategy to promote indigenous innovation and build an 'innovative country.'"); Wu Handong & Liu Xin, *Analysis of and Comment on the Revision of China's Copyright Law*, DONGYUE TRIB., Jan. 2020, at 164, 164 (in Chinese) (stating that the Third Amendment was an active and comprehensive legislative revision that was developed without international pressure).

141. See *supra* text accompanying notes 6–7.

142. See STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, AN OUTLINE OF THE NATIONAL INTELLECTUAL PROPERTY STRATEGY (2008), <https://wipolex.wipo.int/en/text/475076>; see also Yu, *Half-Century of Scholarship*, *supra* note 14, at 1079–85 (discussing the National Intellectual Property Strategy). This strategy "provided a comprehensive plan to improve the protection and management of intellectual property rights while emphasizing the need for active development of independent or self-controlled intellectual property." Yu, *Transplant and Transformation*, *supra* note 4, at 27.

143. See JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 280 (1980) (contending that the law and development movement is "an energetic but flawed attempt to provide American legal assistance and to transfer American legal models, which were themselves flawed"); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1035 (2011) ("[A]s we learn from the failed 'law and development' movement, legal transplants tend to be insensitive to the local environment.").

structure, and indeed, a legal consciousness, that did not then exist in China and, most likely, could not have flourished there at that time.”¹⁴⁴

One could certainly query the internal focus of the Third Amendment by questioning whether the U.S.–China Economic and Trade Agreement (Phase One Agreement) signed during the Trump Administration¹⁴⁵ and the ongoing bilateral trade war have accelerated the final adoption of the new copyright law amendment.¹⁴⁶ After all, the review of the amendment drafts stalled after the rather intense debate on the 2014 draft.¹⁴⁷ Some of the changes in the Third Amendment, such as the rebuttable presumption of authorship in Article 12 and the shift of the burden of production in Article 54, also track closely the commitments in Article 1.29 of the Phase One Agreement.¹⁴⁸ Nevertheless, many of the issues in the U.S.–China trade negotiations during the Trump Administration focused on trade secrets and technology transfer measures, rather than copyright protection.¹⁴⁹ Article 1.29 remains the only provision in the Phase One Agreement that specifically addresses the protection and enforcement of copyright and related rights.¹⁵⁰

144. ALFORD, *supra* note 20, at 53.

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

146. See He, *Transplanting Fair Use*, *supra* note 85, at 363 (“Given that China and the United States have been engaged in a trade war since 2018 and that the topic of IP protection is of great concern, it is foreseeable that under such enormous pressure, the Chinese government will soon need an amended [Copyright Law].” (footnote omitted)).

147. See *supra* text accompanying notes 84–86.

148. Phase One Agreement, *supra* note 145, art. 1.29. One could even argue that Article 1.27 of the Agreement, which calls for “deterrent-level penalties,” has heavily influenced the increase in statutory damages and the addition of punitive damages. *Id.* art. 1.27. Notwithstanding this provision and the related commitments, the United States and its industries have been demanding China offer deterrent-level penalties for more than three decades. See Yu, *China Puzzle*, *supra* note 2, at 185–88; Yu, *From Pirates to Partners I*, *supra* note 1, at 140–48.

149. See OFF. OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018) [hereinafter SECTION 301 REPORT FINDINGS] (providing the final report of the Section 301 investigation conducted during the Trump Administration); OFF. OF THE U.S. TRADE REPRESENTATIVE, UPDATE CONCERNING CHINA’S ACTS, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION (2018) [hereinafter SECTION 301 REPORT UPDATE] (providing an update to the earlier report). See generally *The U.S.–China Forced Technology Transfer Dispute*, 52 SETON HALL L. REV. (forthcoming 2022) (discussing the forced technology transfer dispute between China and the United States).

150. Phase One Agreement, *supra* note 145, art. 1.29. Article 1.22 also mentions copyright and trademark enforcement at physical markets. *Id.* art. 1.22.

The second observation recalls the unfinished business left behind in the latest round of copyright law reform in China. There are three notable examples. First, the 2014 amendment draft released by the now-abolished Legislative Affairs Office of the State Council included detailed provisions on collective copyright management organizations.¹⁵¹ Some of those provisions have since been deleted in the final text of the Third Amendment, although Article 8 now includes several new subprovisions covering issues relating to those organizations.¹⁵² Second, those favoring broad copyright limitations and exceptions had actively advocated for the adoption of an open-ended list of circumstances in which a copyrighted work may be used without authorization or remuneration.¹⁵³ Although Article 24 eventually introduced a new catch-all category of “[o]ther circumstances provided for by laws and administrative regulations”—arguably a compromise with the 2014 amendment draft¹⁵⁴—policymakers and commentators recognize that there is still much work to do if they are to push for greater flexibility in Chinese copyright law, similar to what is found in the U.S. fair use regime.¹⁵⁵ Third, the April 2020

151. See 2014 Amendment Draft, *supra* note 84, arts. 61–67.

152. Compare *id.*, with Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), art. 8, <http://www.npc.gov.cn/englishnpc/c23934/202109/ae0f0804894b4f71949016957ecc45a3.shtml> (China).

153. See, e.g., Wang Jie & He Tianxiang, *To Share Is Fair: The Changing Face of China’s Fair Use Doctrine in the Sharing Economy and Beyond*, 35 COMPUT. L. & SEC. REV. 15 (2019) (discussing how the development of a fair use regime can effectively promote a sharing economy in China); Zhang Chenguo, *Introducing the Open Clause to Improve Copyright Flexibility in Cyberspace? Analysis and Commentary on the Proposed “Two-Step Test” in the Third Amendment to the Copyright Law of the PRC, in Comparison with the EU and the US*, 33 COMPUT. L. & SEC. REV. 73 (2017) (discussing the benefits of introducing an open-ended exception to the Chinese Copyright Law and offering proposals to achieve such introduction). Apart from these commentators, the Supreme People’s Court stated in a judicial interpretation that, in special circumstances, courts could consider the fair use factors in intellectual property cases when it is necessary to promote technological innovation and commercial development. Several Opinions on the Full Exertion of Intellectual Property Adjudicatory Function to Promote Greater Development and Flourishing of Socialist Culture and to Facilitate Coordinated Independent Economic Development, Judicial Interpretation No. 18 [2011], ¶ 8 (promulgated by the Judicial Comm. Sup. People’s Ct., Dec. 16, 2011, effective Dec. 16, 2011), http://zscq.court.gov.cn/dcyj/201205/t20120509_176751.html (China) (in Chinese).

154. See 2014 Amendment Draft, *supra* note 84, art. 43(13) (proposing to add “other circumstances” to the list of enumerated circumstances); see also Peter K. Yu, *Customizing Fair Use Transplants*, LAWS, Mar. 2018, no. 9, at 10, <http://www.mdpi.com/2075-471X/7/1/9> (using the proposal to illustrate one form of fair use transplant); Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111, 133–34 (discussing the proposed Article 43).

155. See 17 U.S.C. § 107 (2018) (providing the fair use provision); see also Peter Ganea, *Copyright*, in PETER GANEA ET AL., *INTELLECTUAL PROPERTY LAW IN CHINA* 293, 308 (Christopher Heath ed., 2d ed. 2021) (referring to Article 43(13) of the amended Copyright Law as “fair use light”).

amendment draft included a provision to curb copyright abuse and the disruption of the communication order (*chuanbo zhixu*).¹⁵⁶ To avoid complications with the Civil Code and the Anti-Monopoly Law, that provision was deleted in the August 2020 draft as well as the final text of the Third Amendment.¹⁵⁷

Like the unfinished business in the domestic legislative process, the Third Amendment also failed to address, or address specifically, many of the hotly debated issues in the copyright arena.¹⁵⁸ These issues include mass digitization and orphan works, the development of user-generated content, exceptions for text and data mining, digital exhaustion of copyright, new approaches to online intermediary liability (including the notice-and-staydown mechanism and the use of website blocking to reduce copyright infringement), and changes brought about by the advent of machine learning and greater use of artificial intelligence.¹⁵⁹ Fortunately, as Li Mingde reminded us, it is not uncommon to find that unfinished reforms reach consensus in future legislative rounds.¹⁶⁰ Given the fast-paced developments in the copyright field and the

discussions of Article 24, see generally He Tianxiang, *The Copyright Limitations of the 2020 Copyright Law of China: A Satisfactory Compromise?*, 69 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2022); (Jerry) Jie Hua, *Copyright Exceptions for Text and Data Mining in China: Inspiration from Transformative Use*, 69 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2022).

156. See Draft for First Review, *supra* note 87, art. 50; see also Mark Cohen, *Public Interest and Private Rights in the Copyright Law Amendments*, CHINA IPR (June 7, 2020), <https://chinaipr.com/2020/06/07/public-interest-and-private-rights-in-the-copyright-law-amendments/> (discussing this now-rejected provision).

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

158. See Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), <http://www.npc.gov.cn/englishnpc/c23934/202109/ae0f0804894b4f71949016957eec45a3.shtml> (China).

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

160. See Li Mingde, *The Process of Intellectual Property Law Reform in China*, 8 QUEEN MARY J. INTEL. PROP. 26, 35 (2018) [hereinafter Li, *Intellectual Property Law Reform*] (“[C]onsensus cannot

need to update the law to fit rapidly changing technological conditions and user practices, many of these issues will likely be addressed in the next round of copyright law reform.

The final observation concerns that consolidation the Third Amendment provides to different legal and regulatory measures in the copyright area. Instead of multiple legal sources ranging from the law to implementing regulations to judicial interpretations, copyright holders, policymakers, industry groups, and foreign investors can now get a clearer picture of the Chinese copyright landscape from the newly amended statute. To be sure, copyright-related measures will have legal effects in China regardless of whether they reside in a single source or multiple sources. Nevertheless, as is common with civil law jurisdictions, there have been questions concerning the hierarchy, legal effects, and coherence of the disparate legal sources in the copyright area.¹⁶¹ Foreign rights holders may also be less familiar with normative sources beyond the Copyright Law and its implementing regulations, such as the interpretations and other guidance documents issued by the Supreme People's Court, the Supreme People's Procuratorate, and other state organs.¹⁶²

Notwithstanding the Amendment's consolidation of legal sources, a civil law jurisdiction like China will still need implementing regulations, judicial interpretations from the Supreme People's Court, and other supportive normative documents.¹⁶³ Given the lengthy process required to develop

always be reached, and some good solutions or ideas will not have been accepted or incorporated into the amendment. Some of these solutions or ideas, however, will be considered as part of the next reform, and they may be adopted about eight to ten years later.”)

161. Legislation Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Mar. 15, 2000, amended Mar. 15, 2015, effective Mar. 15, 2015), http://www.npc.gov.cn/zgrdw/npc/dbdhhy/12_3/2015-03/18/content_1930713.htm (China) (in Chinese) (stipulating the hierarchy of constitutional provisions, laws, administrative regulations, local regulations, rules, and other normative documents); see also He, *Transplanting Fair Use*, *supra* note 85, at 387–90 (discussing the uncertain nature of Supreme People's Court's judicial interpretations). See generally CHEN JIANFU, CHINESE LAW: CONTEXT AND TRANSFORMATION 171–206 (2008) (discussing the sources of law and the law-making process in China).

162. See WTO Panel Report, *supra* note 75, ¶¶ 7.417–.424 (discussing the normative effects of judicial interpretations).

163. As Li Mingde observed:

If China were to draft an overall copyright law, it would be difficult for the country to respond in a timely manner to fast social and economic developments. Under the current copyright protection system, although it is difficult to amend the Copyright Law, it is easier for China to amend the Regulations, or issue administrative regulations or ordinances, or to issue judicial interpretations and guidance. Generally speaking, since most of the international copyright norms are imported into the Chinese Copyright Law and related regulations, China has utilized sub-regulations to respond to the challenges resulting

copyright law amendments,¹⁶⁴ one can also appreciate the quicker response and greater tailoring provided by these regulations and documents. Nevertheless, the Third Amendment has greatly reduced the complexities of the Chinese copyright regime, thereby allowing foreign policymakers and businesses to develop a better understanding of the regime's strengths and limitations.

IV. SOME HELPFUL ROAD TIPS

Although the Third Amendment has provided some promising upgrades to the Chinese copyright regime, the overall level of protection remains below what foreign rights holders and their supportive governments and industry groups would like.¹⁶⁵ One therefore cannot help but wonder what other measures can be taken to further improve the Chinese copyright regime and to help rights holders drive around the remaining roadblocks. To enable copyright holders to accelerate the trip toward their destination of effective copyright protection, this Part offers five road tips.

A. Undertake Comparative Analysis

Comparative analysis is essential to the proper evaluation of the progress made in the copyright reform process.¹⁶⁶ Sadly, the past decades have seen

from social and economic development, or has implemented the international norms in a mode suitable for China.

Li, *Intellectual Property Law Revision*, *supra* note 80, at 68. Thanks to Mark Cohen for asking a question in this direction.

164. See, e.g., Li, *Intellectual Property Law Reform*, *supra* note 160, at 33 (“[I]t takes about eight to ten years to amend an intellectual property law.”).

165. See INT’L INTELL. PROP. ALL., *supra* note 93, at 12 (“Civil litigation, even when successfully brought against blatant piracy services, is generally non-deterrent and insufficient, given the scale of the piracy problem and the limitations of civil litigation in China (e.g., lack of meaningful injunctive relief, relatively low per-title damage awards, and costly litigation procedures.”); 2021 SPECIAL 301 REPORT, *supra* note 91, at 42 (listing “difficulties in establishing actual damages, insufficient damage awards based on low-level statutory minimums, . . . and lack of deterrent-level statutory damages and criminal penalties” among “existing challenges to right holders”).

166. See Peter K. Yu, *The Comparative Economics of International Intellectual Property Agreements*, in *COMPARATIVE LAW AND ECONOMICS* 282, 309–10 (Theodore Eisenberg & Giovanni B. Ramello eds., 2016) (discussing the benefits of comparative analysis); Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1027–28 (1999) (“[Comparisons of laws in different jurisdictions] are integral to law reform initiatives intended to reduce the differences.”); Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMPAR. L. 429, 453 (2001) (“A comparativist perspective will always aid appreciation of laws. But the increasingly multidimensional nature of international intellectual property litigation may mean that only a comparativist can fully appreciate these

many rights holders and their supportive governments and industry groups using idealized yardsticks to evaluate copyright law reforms in China.¹⁶⁷ The use of these yardsticks has not only led to unrealistic expectations but has also been quite misleading and counterproductive in the reform effort.¹⁶⁸

To assess the strengths and limitations of the Third Amendment—and, for that matter, other copyright law amendments—two lines of comparative inquiries can be quite helpful. The first line of inquiry, cross-sectoral analysis, compares the progress China has made in one sector—say, music (the focus of this Symposium)—with the progress made in other sectors—for instance, books, movies, computer programs, and online games.

For illustrative purposes, compare the developments in the music and movie sectors.¹⁶⁹ Two decades ago, foreign copyright holders in China and their supportive governments and industry groups had widespread concerns about both market access¹⁷⁰ and film piracy.¹⁷¹ While the intellectual property enforcement problems have not disappeared and market access in China remains a work in progress,¹⁷² the country has now moved up to become one of the world's top two film markets.¹⁷³ China also “leads the world in cinemas

dimensions and accord them the proper weight.”); Yu, *Half-Century of Scholarship*, *supra* note 14, at 1122–23 (explaining why the scholarship on the Chinese intellectual property system provides an attractive forum for scholars to undertake comparative intellectual property research); Peter K. Yu, *Enforcement, Economics and Estimates*, 2 *WIPO J.* 1, 17 (2010) [hereinafter Yu, *Enforcement*] (discussing the benefits of comparative analysis in the enforcement context).

167. See Yu, *Enforcement*, *supra* note 166, at 13–15 (cautioning against measuring countries using “an idealised yardstick of effective intellectual property protection and enforcement”).

168. See *id.* at 13–16 (using China to illustrate the challenges of comparing different levels of intellectual property protection and enforcement).

169. Although this Section compares the music sector with the movie sector, comparison with the game sector could be equally illuminating. See *INT'L INTEL. PROP. ALL.*, *supra* note 93, at 12 (noting that China now has “the largest market for video games”).

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

171. For the Author's earlier discussions of the piracy and counterfeiting problems in China, see generally Yu, *China Puzzle*, *supra* note 2; Yu, *From Pirates to Partners I*, *supra* note 1; Yu, *From Pirates to Partners II*, *supra* note 69.

172. See AYNNE KOKAS, *HOLLYWOOD MADE IN CHINA* 28 (2017) (“The 2012 Xi–Biden meeting and related WTO action led the PRC to increase its foreign film import quota from twenty to thirty-four films per year.”). But see *id.* at 61 (“[O]fficial film co-productions circumvent China's film quotas to get more high-profile foreign films into Chinese theaters.”).

173. See Enoch Yiu, *China's Box Office Expands to World's Largest, Defying a Year of Disastrous Takings as Covid-19 Brings Cinemas to Their Knees*, *S. CHINA MORNING POST* (Jan. 1, 2021, 7:29

with over 70,000 movie screens, most of which support 3D, and many of which offer enhanced formats such as IMAX.”¹⁷⁴ During the COVID-19 pandemic, when entertainment venues shut down in Europe and the United States while remaining fairly open in China, the strong performance of U.S. movies such as Christopher Nolan’s *Tenet*¹⁷⁵ in the Chinese market has shown the market’s importance for foreign films.¹⁷⁶ China-based Wanda Group, which acquired Legendary Entertainment a few years ago and owned AMC Theaters until May 2021, has also become a major player in Hollywood.¹⁷⁷ In addition,

PM), <https://www.scmp.com/business/companies/article/3116128/chinas-box-office-expands-worlds-largest-defying-year-disastrous> (reporting that “China overtook the US as the world’s biggest box office market for the first time” in 2020); Steven Zeitchik, *The Chinese Film Business Is Doing the Unthinkable: Thriving Without Hollywood*, WASH. POST (Dec. 30, 2019), <https://www.washingtonpost.com/business/2019/12/30/chinese-film-business-is-doing-unthinkable-thriving-without-hollywood/> (“With nearly \$9 billion in box-office revenue last year, China has swollen to the second-largest film market in the world. It’s more than quadruple the size of third-place Japan and is closing in on the United States (nearly \$12 billion). China is so large that it generates more box office dollars than the next six markets combined.”); see also Todd Lu, *The Emergence of the Chinese Film Market During COVID-19*, USC ANNENBERG MEDIA (Oct. 5, 2020, 1:08 PM), <https://www.uscannenbergmedia.com/2020/10/05/the-emergence-of-the-chinese-film-market-during-covid-19/> (“According to a report from the India China America Institute, China’s domestic box office share as a proportion of the international box office grew from 1% in 2005 to nearly 20% in 2016. PricewaterhouseCoopers’s report on China Entertainment & Media Outlook also acknowledged the ‘very brisk rate’ at which the Chinese film industry had been expanding before the pandemic, with a cited 9.1% growth in box office revenue in 2018, compared to the previous year.”); Lai Lin Thomala, *Film Industry in China—Statistics & Facts*, STATISTA (June 18, 2021), <https://www.statista.com/topics/5776/film-industry-in-china/> (“Even before the emergence of the pandemic, China had been neck and neck with Hollywood, grossing over nine billion U.S. dollars in box office. In terms of production, the country is only second to India’s Bollywood, and is eager to make Chinese blockbuster hits. Given a rising living standard and a massive demand for entertainment, Chinese moviegoers will become more significant for the global film industry.”).

174. INT’L INTELL. PROP. ALL., *supra* note 93, at 12.

175. TENET (Warner Bros. Pictures 2020).

176. See Lu, *supra* note 173 (discussing the importance of Chinese market for foreign films during the COVID-19 pandemic); Yiu, *supra* note 173 (noting the success of the Chinese box office during the COVID-19 pandemic); see also KOKAS, *supra* note 172, at 2 (“*Jurassic World* broke opening weekend records for June 2015 in large part because of the contribution of Chinese box-office receipts.”); Zeitchik, *supra* note 173 (“China is massively consequential to Hollywood. In a climate of flat domestic box office earnings, the Middle Kingdom remains central to studio profits and Hollywood’s ability to keep producing big-budget movies. Last year, China was responsible for more than \$2 billion in ticket sales for studio films. The world’s next-biggest market, Japan, generated only about \$500 million.”).

177. See Patrick Brzeski, *It’s Official: China’s Wanda Acquires Legendary Entertainment for \$3.5 Billion*, HOLLYWOOD REP. (Jan. 11, 2016, 6:18 PM), <https://www.hollywoodreporter.com/news/general-news/official-chinas-wanda-acquires-legendary-854827/> (reporting Wanda Group’s \$3.5 billion acquisition of Legendary Entertainment, which has produced such blockbuster hits as *Godzilla*, *Inception*, *Jurassic World*, and *Pacific Rim*); Alex Weprin, *Wanda Sells Off AMC Theatres Stake for \$426 Million*, HOLLYWOOD REP. (May 21, 2021, 11:53 AM),

the past decade has seen growing outbound Chinese investment in the global film sector, bringing up names such as Alibaba, Huayi Brothers, and Tencent.¹⁷⁸

Given these transformative developments—which few policymakers and commentators foresaw two decades ago when they complained about the Chinese market—it will be worthwhile to explore why foreign movies have made such a quick turnaround in China even though foreign music has not been able to do the same.¹⁷⁹ It will also be useful to engage with the question most foreign companies ask when transacting business in China: does the Chinese market offer attractive profits despite its many shortcomings?¹⁸⁰ Doing business in foreign countries—and China, in particular—is never easy.¹⁸¹ No matter how many rounds of legal reforms a host country undertakes, and no matter how hard policymakers and legislators work to align local standards with those abroad, foreign businesses will always want greater profits, demand deeper legal reforms, and hope that the local business environment will align more closely with that of their home market.¹⁸² So, comparative analysis will help ensure realistic copyright reform demands.¹⁸³

<https://www.hollywoodreporter.com/business/business-news/wanda-amc-stock-sale-1234957189/> (reporting Wanda Group’s sale of “its entire stake in AMC Theaters”).

178. See KOKAS, *supra* note 172, at 164 (noting the increase in China’s outbound investment in Hollywood). For issues and challenges relating to such investment, see generally Li Huailiang, *Chinese Culture “Going Out”: An Overview of Government Policies and an Analysis of Challenges and Opportunities for International Collaboration*, in HANDBOOK OF CULTURAL AND CREATIVE INDUSTRIES IN CHINA 129 (Michael Keane ed., 2016) [hereinafter HANDBOOK OF CREATIVE INDUSTRIES]; Li Wuwei, *The Challenges of China’s Culture “Going to the World,”* in HANDBOOK OF CREATIVE INDUSTRIES, *supra*, at 116.

179. It is worth noting that, despite the incessant complaints from musicians and record labels, China now offers “the seventh largest music market, and the fourth largest music streaming market, in the world by revenue.” INT’L INTEL. PROP. ALL., *supra* note 93, at 12.

180. Cf. CATHERINE SUN, CHINA INTELLECTUAL PROPERTY FOR FOREIGN BUSINESS 5 (2004) (“Although China’s IP enforcement has been criticized as utterly inadequate, [big foreign] brands are still making money with an overwhelming percentage of products being allegedly counterfeited. For these companies, enhanced IP enforcement in China means increasing already acceptable profit ratios.”); Yu, *From Pirates to Partners II*, *supra* note 69, at 983 (“[M]any major Western companies—like Coca-Cola, Kodak, Motorola, and Procter & Gamble—have been enjoying substantial profits for years even though they were confronted with serious piracy and counterfeiting problems.”).

181. See HAROLD CHEE WITH CHRIS WEST, MYTHS ABOUT DOING BUSINESS IN CHINA 29–43 (2d ed. 2007) (dispelling the myth that the Chinese market is easy).

182. See generally John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 693–703 (2002) (discussing how harmonization of legal standards can generate positive externalities associated with the creation of technical information, promote economies of scale in governance and administration, and prevent destructive protectionism).

183. See *supra* note 166 (collecting sources that discuss the benefits of comparative analysis).

The second line of comparative inquiry is cross-country.¹⁸⁴ In this line of inquiry, one could compare the copyright developments in China with those found in other countries, such as the United States. Many of the digital piracy problems that trouble foreign copyright holders are not unique to China; these problems are equally found in other parts of the world.¹⁸⁵ Given these similar challenges, it will be useful to think more about the appropriate benchmarks for evaluating the latest round of copyright law reform in China.

One should not forget that China did not establish a modern copyright regime until three decades ago.¹⁸⁶ By comparison, the United States adopted its first federal copyright statute in May 1790,¹⁸⁷ with state statutes enacted a few years before.¹⁸⁸ The U.S. internet population is also only a third of that of China.¹⁸⁹ To the extent that we expect that a larger internet user population will generate more copyright problems, the problems we now see in the digital environment in China seem to be commensurate with both the youth of its copyright regime and the size of its internet population.

While some policymakers and commentators have quickly dismissed these comparisons as excuses, defenses, or apologies, comparative analyses can help pinpoint problems in the Chinese copyright regime and in turn develop more tailored solutions to support copyright holders.¹⁹⁰ After more than three decades of back-and-forth engagement with China on copyright law

184. See Peter K. Yu, *Intellectual Property and Human Rights 2.0*, 53 U. RICH. L. REV. 1375, 1410–11 (2019) (discussing cross-country comparisons in the intellectual property and human right context).

185. See generally NAT'L RSCH. COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (2000) [hereinafter *DIGITAL DILEMMA*] (discussing the challenges the internet and new communication technologies have posed to the U.S. copyright regime).

186. See Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991), <https://www.mfa.gov.cn/ce/cgsf/eng/kj/wjfg/t43948.htm> (China).

187. Act of May 31, 1790, ch. 15, 1 Stat. 124.

188. See Yu, *Copyright Divide*, *supra* note 15, at 338 (“The first state to enact such legislation was Connecticut, which passed An Act for the Encouragement of Literature and Genius in January 1783.”); *id.* at 338–39 (discussing the copyright statutes in Connecticut, Massachusetts, Maryland, and other states that were enacted before the introduction of federal copyright protection); see also LIBR. OF CONG., *COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783–1906*, at 11–31 (Thorvald Solberg ed., 2d rev. ed. 1906) (reprinting those state copyright statutes that were enacted before the adoption of the 1790 Copyright Act).

189. *Compare Internet Users and 2020 Population in North America*, INTERNET WORLD STATS, <https://www.internetworldstats.com/stats14.htm> (estimating the U.S. internet population to be more than 330 million), with CHINA INTERNET NETWORK INFO. CTR., *STATISTICAL REPORT ON INTERNET DEVELOPMENT IN CHINA* (SEPTEMBER 2020) 13 (2020), <https://www.cnnic.com.cn/IDR/ReportDownloads/202012/P020201201530023411644.pdf> (estimating the Chinese internet population to be close to 940 million).

190. See *supra* text accompanying notes 166–68.

reform, which at times has been quite confrontational,¹⁹¹ it would be naïve to assume that continued or increased use of tough rhetoric and strong-arm tactics would yield better results than what we have already seen.¹⁹² Moreover, China will likely experience high growth in intellectual property activities while continuing to struggle with massive copyright piracy,¹⁹³ due in large part to the country's "vast size, political and economic complexities, and often internally inconsistent laws and policies,"¹⁹⁴ as well as its position as a low-cost provider for both legitimate and pirated products.¹⁹⁵ Thus, if effective

191. See generally Peter K. Yu, *U.S.–China Intellectual Property Trade Wars*, in RESEARCH HANDBOOK ON TRADE WARS 271 (Zeng Ka & Liang Wei eds., 2022) (discussing the first phase of the U.S.–China intellectual property trade war).

192. See Peter K. Yu, *Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. INT'L & COMPAR. L. 143, 149 (2005). As I noted in an earlier article, external pressure from the United States from the late 1980s to the mid-1990s was largely ineffective, creating what I have referred to as a "cycle of futility":

The United States began by threatening China with trade sanctions (often with an ancillary threat of nonrenewal of China's most-favored-nation status). China responded with threats of retaliatory sanctions of a similar amount. After several months of negotiations, both countries agreed to an eleventh-hour compromise that usually led to a written document. While intellectual property protection improved during the first few months immediately following the agreements, piracy and counterfeiting problems worsened once international attention was diverted. Within a short period of time, American businesses again complained to the U.S. government, and the cycle repeated itself.

Id.; see also MERTHA, *supra* note 46, at 15 ("External pressure may have succeeded in getting Beijing to promulgate satisfactory IPR-related laws and regulations, but the enforcement of intellectual property, as with most policy in China, falls within the domain of China's complex bureaucracies and local government officials."); Yu, *From Pirates to Partners I*, *supra* note 1, at 140–48 (discussing the "cycle of futility" generated by the American foreign intellectual property policy toward China).

193. See Peter K. Yu, *Five Oft-Repeated Questions About China's Recent Rise as a Patent Power*, 2013 CARDOZO L. REV. DE NOVO 78, 113 [hereinafter Yu, *Five Oft-Repeated Questions*] ("In the future, China is likely to see both the yin of continued massive piracy and counterfeiting and the yang of China's rise as an intellectual property power at the same time."); Peter K. Yu, *Intellectual Property, Asian Philosophy and the Yin-Yang School*, 7 WIPO J. 1, 12 (2015) [hereinafter Yu, *Yin-Yang School*] (noting the possibility for China to "emerge as a highly innovative power while at the same time remaining as the world's biggest pirate nation").

194. Yu, *Yin-Yang School*, *supra* note 193, at 12.

195. See Yu, *Enforcement*, *supra* note 166, at 13–14. As I noted in an earlier article: [M]any of the piratical and counterfeiting activities occur in China because of its low costs of production, labour and distribution. . . . Given the large amount and variety of products China manufactures, it is understandable why pirates and counterfeiters consider China an ideal location for manufacturing their products. Indeed, if an organised crime syndicate in Europe or the United States, as opposed to China, needs to produce infringing products, they are likely to select China as a place of production for no other reason than it makes simple business sense. It is important to remember that pirates and counterfeiters are rational businesspeople who seek profits and opportunities!

copyright law reforms are to be developed, the law and policy recommendations need to be more precise and tailored.¹⁹⁶ These recommendations should also take account of the dualistic possibility that China will “emerge as a highly innovative power while at the same time remaining as the world’s biggest pirate nation.”¹⁹⁷

B. Recognize the Slow Pace of Copyright Law Reform

As eager as policymakers, industry representatives, and legal commentators are to call for legislative reforms to strengthen copyright protection, it is important that we have realistic expectations about what these reforms can achieve and how quickly they can be carried out. Whether in China, the United States, or other jurisdictions, copyright law reform is slow.¹⁹⁸ As a result, copyright laws frequently have great difficulty catching up with technological change, leading to outdated laws that match neither the present technological conditions nor consumer practices.¹⁹⁹

In an insightful analysis of the process for developing intellectual property laws in China, Li Mingde showed why that process usually takes about

Id.

196. See Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMPAR. L. 1, 18–19 (1996) (“The devil hides in the details; policy lurks in the interstices. Drafters needed a form of justification that rested on reason informed by experience, and which directed attention not only to broad issues (what many denote as ‘policy’), but also to legislative detail.”).

197. Yu, *Yin-Yang School*, *supra* note 193, at 12.

198. For comprehensive discussions of the copyright law revision process in the United States, see generally JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

199. See IAN HARGREAVES, *DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH* 41 (2011) (“In the UK, exceptions have failed to keep up with technological and social change, leading to widespread consequences. Technology has expanded the potential for communication, research, learning and access to resources, but out of date rules mean this potential is not fully realised.”); Yu, *Transplant and Transformation*, *supra* note 4, at 40 (“[L]egal reform may not respond well to rapid technological change. Because of the slow and lengthy deliberative process used by the legislature, outdated legislation that stifles creativity and innovation usually remains on the books even though technology has evolved.”); see also Peter K. Yu, *Trade Agreement Cats and the Digital Technology Mouse*, in *SCIENCE AND TECHNOLOGY IN INTERNATIONAL ECONOMIC LAW: BALANCING COMPETING INTERESTS* 185 (Bryan Mercurio & Ni Kuei-Jung eds., 2014) (discussing the cat-and-mouse chase between trade agreements and new digital technology); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1499–1538 (discussing the proliferation of user-generated content and the emergence of informal copyright practices in this grey area of copyright law).

eight to ten years.²⁰⁰ The recent amendment to the Copyright Law was consistent with this projected timeline.²⁰¹ The NCA launched the revision process in July 2011,²⁰² and the Standing Committee of the National People's Congress finally adopted the amendment in November 2020.²⁰³ Similar comparisons can be made to patent and trademark laws. While the former was adopted in 1984 and amended in 1992, 2000, 2008, and 2020,²⁰⁴ the latter was adopted in 1982 and revised in 1993, 2001, 2013, and 2019.²⁰⁵

200. See Li, *Intellectual Property Law Reform*, *supra* note 160, at 33. As Li Mingde explained: Generally speaking, a competent administration will take one to three years to draft an initial amendment. After "the amendment to be reviewed" is submitted to the State Council, there will be another two to three years in which the State Council and its [Legislative Affairs Office] develops a draft amendment. Again, it will take at least six months or even a year for the Standing Committee to review the draft amendment three times and then pass the amendment. Thus, it takes about eight to ten years to amend an intellectual property law.

Id.

201. See Copyright Law of the People's Republic of China [2020 Copyright Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), <http://www.npc.gov.cn/englishnpc/c23934/202109/63b3c7cb2db342fdadacdc4a09ac8364.shtml> (China).

202. Li, *Intellectual Property Law Revision*, *supra* note 80, at 66–67.

203. See 2020 Copyright Law.

204. Patent Law of the People's Republic of China [2020 Patent Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Oct. 17, 2020, effective June 1, 2021), <http://www.npc.gov.cn/englishnpc/c23934/202109/63b3c7cb2db342fdadacdc4a09ac8364.shtml> (China); Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Dec. 27, 2008, effective Oct. 1, 2009), http://www.npc.gov.cn/zgrdw/englishnpc/Law/2011-02/15/content_1620619.htm (China); Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Aug. 25, 2000, effective July 1, 2001), <https://wipo.lex.wipo.int/en/text/125983> (China); Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Sept. 4, 1992, effective Jan. 1, 1993), <https://wipo.lex.wipo.int/en/text/138095> (China). The last round of patent law reform focused primarily on issues relating to pharmaceuticals and enforcement. See 2020 Patent Law.

205. Trademark Law of the People's Republic of China [2019 Trademark Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Apr. 23, 2019, effective Nov. 1, 2019), <https://wipo.lex.wipo.int/en/text/579988> (China); Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Aug. 30, 2013, effective May 1, 2014), <http://ipr.mofcom.gov.cn/zhuanti/jkblh/iplaws/trademark/sbf2.pdf> (China); Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Oct. 27, 2001, effective Dec. 1, 2001), http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384018.htm (China); Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Feb. 22, 1993, effective July 1, 1993), <https://www.mfa.gov.cn/ce/cgsf/eng/kj/wjfg/t43946.htm> (China). The last round of trademark law reform focused primarily on bad-faith trademark filings. See 2019 Trademark Law.

Given the slow pace of copyright law reform, and a time lag of about eight to ten years in China,²⁰⁶ one has to wonder whether it is the norm, rather than the exception, that the latest round of copyright law reform did not produce any pathbreaking changes to the Chinese copyright regime.²⁰⁷ Here, comparative analysis can again be quite helpful.²⁰⁸ In the United States, the European Union, and many other jurisdictions, the copyright regime has not experienced any major overhaul despite good intentions and ambitious efforts. Although former Register of Copyrights Maria Pallante boldly called for a comprehensive review and revision of U.S. copyright law, using the aspirational moniker “The Next Great Copyright Act,”²⁰⁹ the United States ended up with highly specific legislation, such as the Orrin G. Hatch–Bob Goodlatte Music Modernization Act,²¹⁰ the Protecting Lawful Streaming Act of 2020,²¹¹ and the Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act).²¹² Likewise, while the European Union embraced the promising and innovative concept of a digital single market for copyrighted works, its Directive on Copyright in the Digital Single Market ended up with provisions that are more limited in scope and that have sparked considerable

206. This time lag has led some Chinese commentators to refer to the latest round of copyright law reform as “forging a sword in ten years” (*shi nian mo yi jian*). See, e.g., China Youth Daily, *Forging a Sword in Ten Years: Where Are the Bright Spots of the New Copyright Law?*, CHINA NEWS NET (Dec. 23, 2020), <http://www.chinanews.com/gn/2021/01-13/9385581.shtml> (in Chinese).

207. As I noted in an earlier article:

Today, there is still a frequent assumption on the part of politicians, policymakers and industry leaders that countries can always improve intellectual property protection and enforcement by tightening criminal measures, increasing enforcement resources and enlarging the scope of legal protection. While this assumption may have been valid for countries seeking to build their intellectual property systems from the ground up, similar reform is unlikely to be effective for countries reaching, or having reached, the point of diminishing returns. A greater insistence on the usual demands for tougher laws and penalties may not only fail to result in a significant increase in actual protection, but may also backfire by increasing enforcement and compliance costs while creating resentment among the local populace.

Yu, *Chinese Intellectual Property System*, *supra* note 3, at 8–9. See generally Daniel Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China: How a Flawed Approach Is Making Counterfeiting Worse*, 41 GEO. J. INT’L L. 749 (2010) (criticizing the flawed anti-counterfeiting strategies deployed by multinational corporations).

208. See discussion *supra* Section IV.A.

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

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

211. 18 U.S.C.A. § 2319C (West 2020).

212. 17 U.S.C.A. §§ 1501–1511 (West 2020).

controversy.²¹³

The lack of major breakthroughs in copyright law reforms from around the world calls for a more measured assessment of the latest round of copyright law reform in China.²¹⁴ Particularly illustrative are the contrasts provided by the recent reform demands from the International Intellectual Property Alliance.²¹⁵ Released in January 2021, a few months after the adoption of the Third Amendment but before its entering into effect, the industry group's *Special 301 Report* called on China to "[e]nact additional reforms to enhance the development of the creative industries in China," covering issues such as online intermediary liability, the retransmission of live broadcasts, the term of copyright protection, the treatment of repeat infringers, criminal copyright enforcement, and the availability of injunctions.²¹⁶ While these demands are unsurprising from an industry group whose mission is to push for more extensive copyright law reform in China, and it would not be far-fetched to assume that this group wanted to use the U.S. Trade Representative's Section 301 process to influence the drafting of the pending implementing regulations, the likelihood of China quickly amending the Copyright Law again to meet these demands is close to zero. Even if the NCA were to immediately submit a new amendment draft, the next round of copyright law reform would not be completed until about a decade from now.²¹⁷ By then, the technological conditions and consumer practices will be very different from what we have today.

213. Directive 2019/790, 2019 O.J. (L 130) 92 (EU); see also SECTION 512 STUDY, *supra* note 159, at 63 ("Several provisions of the [Digital Single Market] Copyright Directive, particularly Article 17, have generated significant controversy."); Martin Senftleben, *Bermuda Triangle—Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market*, 41 EUR. INTELL. PROP. REV. 480, 482–85 (2019) (highlighting the challenges posed by the new filtering obligation under the EU Directive).

214. The Copyright Modernization Act of Canada, which revamped the Canadian copyright regime about a decade ago, seems to be the rare exception. See Peter K. Yu, *Increased Copyright Flexibilities for User-Generated Creativity*, in REFORMING INTELLECTUAL PROPERTY (Gustavo Ghidini & Valeria Falce eds., forthcoming 2022) ("[Canada] completed its wholesale copyright reform in June 2012, at a time when policy makers and commentators eagerly looked for solutions to accommodate [user-generated] creativity."). See generally Michael Geist, *The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 169 (Ruth L. Okediji ed., 2017) (discussing Canada's emergence as a champion of user rights in the copyright regime).

215. See INT'L INTELL. PROP. ALL., *supra* note 93, at 14.

216. *Id.*

217. See Li, *Intellectual Property Law Reform*, *supra* note 160, at 31 ("[I]t takes about eight to ten years to amend an intellectual property law.")

C. Appreciate Complementary Models

Incentives for creative endeavors can come from copyright law, but they can also be derived from business models, industry practices, and other non-copyright or non-legal mechanisms. In the past decade, many unique and highly interesting monetization models have emerged in China to support authors and artists and to help them diversify revenue streams.²¹⁸ These models range from tipping and gifting, to target merchandise sales, to karaoke, livestreaming, and other fan interactions.²¹⁹ If we are to fully appreciate the fast-changing creative ecosystem in China, assess its strengths and limitations, and fully understand what incentive frameworks exist to support authors and artists, it is important to take full account of all complementary models, especially those facilitating the monetization of copyrighted works.²²⁰

It is also important to keep in mind that, as far as our effort to ensure

218. See Connie Chan, *16 Observations on Livestreaming in China*, ANDREESSEN HOROWITZ (Sept. 27, 2016), <https://a16z.com/2016/09/27/livestreaming-trend-china/> (discussing livestreaming, virtual gifting, and other models for monetization and fan engagement in China); Connie Chan, *Outgrowing Advertising: Multimodal Business Models as a Product Strategy*, ANDREESSEN HOROWITZ (Dec. 7, 2018), <https://a16z.com/2018/12/07/when-advertising-isnt-enough-multimodal-business-models-product-strategy/> [hereinafter Chan, *Outgrowing Advertising*] (discussing the drastically different business models deployed by Chinese internet companies and the ways these models have helped to increase fan engagement and loyalty while diversifying revenue streams); Jiang Sijia, *Tencent Music, Bound for U.S. IPO, Profits from Social Savvy*, REUTERS (Sept. 27, 2018, 3:38 AM), <https://www.reuters.com/article/us-tencentmusic-ipo/tencent-music-bound-for-u-s-ipo-profits-from-social-savvy-idUSKCN1M718Y> (discussing how Chinese music apps have successfully integrated music streaming with tipping, karaoke, live broadcasts, and other fan interactions).

219. See REBECCA A. FANNIN, *TECH TITANS OF CHINA: HOW CHINA'S TECH SECTOR IS CHALLENGING THE WORLD BY INNOVATING FASTER, WORKING HARDER, & GOING GLOBAL* 19 (2019) (“Video streaming sites from Baidu’s Netflix-like iQiyi and digital entertainment innovator YY are booming and creating online celebrities paid in virtual gifts by addicted viewers.”); *id.* at 81 (“Livestreaming has become a \$5 billion business, and nearly half of China’s internet users have watched a livestream.”). See generally PEOPLE’S REPUBLIC OF DESIRE (Torch Films 2018) (providing a documentary capturing early livestreaming activities in China).

220. See LUCY MONTGOMERY, *CHINA’S CREATIVE INDUSTRIES: COPYRIGHT, SOCIAL NETWORK MARKETS AND THE BUSINESS OF CULTURE IN A DIGITAL AGE* 105 (2010) (“The existence of a formal copyright law is having an impact on the strategies being employed by firms seeking to capitalize on consumer demand for music. However, the use of physical technologies for channeling access and managing micro-payment collection is proving far more influential.”); Yu, *Digital Copyright Reform*, *supra* note 116, at 766 (“In addition to undertaking copyright law reforms, it is worth exploring whether introducing complementary measures would enhance the protection offered through these reforms.”). See generally Henning Grosse Ruse-Khan, *Transition Through Automation*, in *TRANSITION AND COHERENCE IN INTELLECTUAL PROPERTY LAW: ESSAYS IN HONOUR OF ANNETTE KUR* (Niklas Bruun et al. eds., 2020) (discussing the importance of monetization); Kristelia Garcia, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265 (2020) (discussing the benefits of monetizing infringement and related concerns).

adequate support in the creative process, law is only “a means to an end, not an end in itself.”²²¹ As the United States Supreme Court reminded us in both *Twentieth Century Music Corp. v. Aiken*²²² and *Sony Corp. of America v. Universal City Studios, Inc.*,²²³ “the ultimate aim [of copyright] is . . . to stimulate artistic creativity for the general public good.”²²⁴ Likewise, the British Commission on Intellectual Property Rights called on us to view intellectual property rights “as instruments of public policy which confer economic privileges on individuals or institutions solely for the purposes of contributing to the greater public good.”²²⁵

To some extent, the complementary models that have emerged in China outside the copyright regime to support authors and artists can help compensate for the regime’s shortcomings. The existence of these complementary models does not necessarily end the debate about whether these individuals can receive adequate compensation—an important debate in China and among Western commentators.²²⁶ It does caution against overstating the impact of the deficiencies in copyright law, especially those found on statutory books. As far as copyright protection is concerned, we should not overlook the wide gap between “law in books” and “law in action”—both in China and across the world.²²⁷

To be sure, the existence of new business models and other extra-legal

221. COMM’N ON INTELL. PROP. RTS., INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 6 (2002) [hereinafter IPR COMMISSION REPORT]; see also 2 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 267 (1848) (“[P]roperty is only a means to an end, not itself the end.”).

222. 422 U.S. 151 (1975).

223. 464 U.S. 417 (1984).

224. *Id.* at 432.

225. IPR COMMISSION REPORT, *supra* note 221, at 6.

226. Compare Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China’s High-Piracy Environment?*, 27 HARV. J.L. & TECH. 467, 470 (2014) (lamenting the struggle of the Chinese creative industries as “extremophiles” adapting to survive in an otherwise inhospitable environment), with MONTGOMERY, *supra* note 220, at 104 (“One strategy for making money in the absence of strong copyright has been to rely on personal appearances by artists, which cannot be replicated. As a result, there is less emphasis on producing popular albums and more emphasis on gaining popularity and profile through single hits that lead to lucrative product endorsement and live appearance or performance deals.”).

227. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 12 (1910). For discussions of this gap, see generally *id.* at 12–36; Peter K. Yu, *Tales of the Unintended in Copyright Law*, 67 STUD. L. POL. & SOC’Y 1, 15–18 (2015). In the context of intellectual property protection in China, one commentator observed that “law in the mind” could be quite different from either law in books or law in action. See NIE JIANQIANG, THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 24 (2006) (noting “the conflictory and complementary relationships between the law-on-the-books, law-in-operation and law-in-the-mind within Chinese intellectual property laws”).

mechanisms is nothing new.²²⁸ Policymakers and commentators widely explored these models in the late 1990s and the early 2000s when they were desperately looking for responses to the digital piracy problems generated by Napster and other file-sharing technologies.²²⁹ Nevertheless, alternative models seem to have taken hold in China far better than in the United States and other jurisdictions, due perhaps to the heavily mobile communication environment, the large and youthful online population,²³⁰ the pervasive use of digital technology,²³¹ and reduced reliance on copyright protection.²³² Even a decade ago, China was able to generate considerable revenues through ringback tones, a revenue source that was less significant in the United States and other jurisdictions at that time.²³³

It will be interesting to see whether any of the new business models and incentive frameworks now widely used in China can be exported or rejuvenated abroad.²³⁴ If past experience is any guide, many practices in the Chinese digital environment are tailored to the country's unique conditions and

228. See, e.g., Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 862–63 (2001) (discussing voluntary contributions); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 719–20 (2005) [hereinafter Yu, *P2P and the Future*] (discussing the tipping model).

229. See generally DIGITAL DILEMMA, *supra* note 185, at 79–83 (discussing the business model response to digital piracy); Yu, *P2P and the Future*, *supra* note 229, at 732–39 (discussing the use of alternative compensation models to address the problem of unauthorized digital copying).

230. See CHINA INTERNET NETWORK INFO. CTR., *supra* note 189, at 20 (reporting that about 35% of the Chinese internet population was at the age between ten and twenty-nine).

231. See FLORIAN SCHNEIDER, CHINA'S DIGITAL NATIONALISM 211 (2018) (“[T]he degree to which daily practices are today amalgamated with digital tools means that non-participation in digital China would strike most users as a noticeable reduction in quality of life.”).

232. See generally Lucy Montgomery & Eric Priest, *Copyright in China's Digital Cultural Industries*, in HANDBOOK OF CREATIVE INDUSTRIES, *supra* note 178, at 339, 352–53 (discussing efforts to protect digital cultural industries in an environment that offers limited copyright protection).

233. See *id.* As Lucy Montgomery and Eric Priest observed:

Chinese consumers have proved willing to pay substantial sums for music in one peculiar context: mobile phone “ringback tones.” Ringback tones are monetizable because they are integrally tied to mobile phone services. They are not susceptible to piracy because they are centrally controlled and broadcast by mobile service providers. Mobile phone subscribers can add a ringback tone service to their account for an additional fee. Chinese mobile providers gross over US\$4 billion annually in ringback tone fees. That amount is comparable to what the recording industry grosses annually in the US market, which ranks first in the world in recorded music sales.

Id. (footnote omitted); see also Priest, *supra* note 226, at 501–02 (noting that color ringback tones were the most important source of mobile music revenue in China).

234. See *supra* text accompanying notes 218–19.

regulatory environment and therefore irreplicable abroad.²³⁵ For models that rely heavily on fan experience and loyalty, some copyrighted works may also perform better than the others, underscoring our earlier discussion about the need to conduct proper comparative analysis.²³⁶ For example, due to language issues and a wider fan base,²³⁷ local musical works and sound recordings will inevitably be more popular in China than foreign products, even when the latter have been quite successful in the English-speaking world.²³⁸ Likewise, pop and dance music may fare better than songs requiring deep appreciation of lyrics, just as action movies with limited dialogue frequently attain greater box office success in foreign markets than dramas.²³⁹

235. See WANG XINYUAN, *SOCIAL MEDIA IN INDUSTRIAL CHINA* 49 (2016) (“[D]oing business on social media in China seems to match with the very feature of *guanxi*.”); Chan, *Outgrowing Advertising*, *supra* note 218 (“Chinese internet companies have adopted business models that are drastically different than what we see here in the States, especially on mobile.”).

236. See discussion *supra* Section IV.A.

237. Language issues equally affect foreign songs trying to capture the U.S. market, with K-pop being the widely cited recent example. See Aja Romano, *With “Dynamite,” BTS Beat the US Music Industry at Its Own Cheap Game*, VOX (Nov. 24, 2020, 2:05 PM), <https://www.vox.com/21498770/bts-dynamite> (“American radio DJs have expressed some very specific reasons for not giving [BTS] more air time. Chief among them: The band’s refusal to sing in English. . . . [T]he moment they released that English-language song, ‘Dynamite,’ the band suddenly got extensive radio play—over 1,500 plays around the country on its first day of release. . . . BTS finally got their coveted #1.”).

238. See Irene Calboli & George Hwang, *Report on the Online Music Market and Main Business Models in Asia: Overview and General Trends*, at 9, WIPO Doc. SCCR/41/7 (June 1, 2021) (“Languages and local music tastes are . . . directly reflected in the songs which hit the top of the charts. This is evidenced by a straw survey on Spotify of its Top Songs Charts by countries.”). As my colleague Irene Calboli and George Hwang observed in their study on online music markets and business models in Asia:

International music is most often represented by English songs from North America, England, and groups from non-English speaking countries singing in English. However, songs in local Asian languages are the most popular type of music both nationally and across the region. While access to the Internet and mobile connectivity have facilitated streaming popularity, music preferences remain deeply rooted in local language and culture.

Id. at 8.

239. See Tom Brook, *How the Global Box Office Is Changing Hollywood*, BBC (Oct. 21, 2014), <https://www.bbc.com/culture/article/20130620-is-china-hollywoods-future> (“To the dismay of some moviegoers, little effort is being made to deliver sophisticated storytelling with . . . international blockbusters. That’s not totally surprising given that the subtleties of dialogue could easily get lost on non-English speaking audiences relying on subtitles. The movies are crafted mainly to provoke a visceral—as opposed to intellectual—response.”).

D. Emphasize the Economic Contributions of Creative Industries

In China, copyright law developments have historically lagged behind those in the patent and trademark areas.²⁴⁰ While patent law relates to science and technology and trademark law is tied to commerce, copyright law is heavily intertwined with cultural and media control.²⁴¹ It is therefore no surprise that the Copyright Law was not adopted until 1990, even though the Trademark Law and the Patent Law had already taken effect by the mid-1980s.²⁴² It is also no coincidence that the Chinese copyright regime has now undergone only a second major overhaul—and a first overhaul since joining the WTO—even though the patent and trademark regimes have already been completely revamped thrice (and amended four times).²⁴³ Politically, it is quite telling that the NCA is under the Publicity Department of the Central Committee of the Communist Party of China while the State Administration for Market Regulation governs the National Intellectual Property Administration, which handles patent and trademark matters.²⁴⁴

240. See MERTHA, *supra* note 46, at 133–34 (“The copyright bureaucracy . . . is embedded within a *xitong* [functional bureaucratic system] that concerns itself with cultural, ideological, and value-laden media and is therefore involved in a more politically sensitive environment, even if technical copyright issues themselves are no more or less ‘political’ than those pertaining to patents or trademarks.”); Mark Sidel, *The Legal Protection of Copyright and the Rights of Authors in the People’s Republic of China, 1949–1984: Prelude to the Chinese Copyright Law*, 9 COLUM. J. ART & L. 477, 493 (1985) (“Copyright legislation has proven the most controversial of all proposed statutes in the highly charged world of Chinese intellectual property.”); Yu, *From Pirates to Partners II*, *supra* note 69, at 995 (offering suggestions on why China enacted the Trademark Law first and the Copyright Law last after its reopening in the late 1970s); Yu, *Rise and Decline*, *supra* note 3, at 577 (noting that “a widening gap is slowly emerging in the U.S.–China intellectual property debate between those U.S. industries driven by copyright protection, such as the movie and music industries, and those driven by patent protection”).

241. See Yu, *Five Oft-Repeated Questions*, *supra* note 193, at 107–11 (explaining why the progress China made in the patent and trademark areas may not translate to similar improvements in the copyright area).

242. See Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991), <https://www.mfa.gov.cn/ce/cgsf/eng/kj/wjfg/t43948.htm> (China); Patent Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1984, effective Apr. 1, 1985), <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100050884.html> (China); Trademark Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983), <http://www.asianlii.org/cn/legis/cen/laws/tl115/> (China).

243. See *supra* text accompanying notes 204–05.

244. See *Institutional Reform Plan*, *supra* note 134; Wang Yong, *Reorganize the State Intellectual Property Office*, XINHUANET (Mar. 13, 2018), http://www.xinhuanet.com/politics/2018lh/2018-03/13/c_137035637.htm (in Chinese).

To accelerate copyright law reforms in China, it will be worthwhile to emphasize the significant economic contributions of creative industries and how their successful development can drive the Chinese economy.²⁴⁵ Although such contributions are taken for granted in the United States and other jurisdictions, with policymakers, industry groups, and the mass media frequently citing estimates and other data,²⁴⁶ the development and strategic plans in China have historically featured patents and trademarks much more prominently than copyrights.²⁴⁷ Thanks to the extra pushes provided by supportive economic and industrial policies, China is now a world leader in both international patent and trademark applications. Based on the latest WIPO statistics, in 2021 China had the world's largest volume of international applications through the Patent Cooperation Treaty and third largest volume of international trademark applications under the Madrid Agreement Concerning the International Registration of Marks and its related protocol.²⁴⁸ China also

245. See *Creative China Is Booming, Bringing Asia Along*, UNCTAD (May 30, 2019), <https://unctad.org/news/creative-china-booming-bringing-asia-along> (“China’s export of creative goods and services has been a boon for the country’s creative economy—and for the rest of Asia.”).

246. See, e.g., ROBERT STONER & JÉSSICA DUTRA, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2020 REPORT 4 (2020), <https://www.iipa.org/files/uploads/2020/12/2020-IIPA-Report-FINAL-web.pdf> (estimating that “[i]n 2019, the value added by the core copyright industries to U.S. GDP reached more than \$1.5 trillion dollars (\$1,587.16 billion), accounting for 7.41% of the U.S. economy” and that “the value added by the total copyright industries to GDP exceeded \$2.5 trillion (\$2,568.23 billion), accounting for 11.99% of the U.S. economy” (footnote omitted)).

247. Compared with the creative industries and copyright activities, trademark and patent activities have featured more prominently in China’s development and strategic plans, due in large part to the policy emphases on science and technology and on manufacturing. See, e.g., STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, THE NATIONAL MEDIUM- AND LONG-TERM PLAN FOR SCIENCE AND TECHNOLOGY DEVELOPMENT (2006–2020): AN OUTLINE (2006), https://www.itu.int/en/ITU-D/Cybersecurity/Documents/National_Strategies_Repository/China_2006.pdf (listing biotechnology, information technology, advanced materials, advanced manufacturing, advanced energy technology, marine technology, laser technology, and aerospace technology as frontier technologies); STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, MADE IN CHINA 2025 pt. VI (2015), http://www.gov.cn/zhengce/content/2015-05/19/content_9784.htm (in Chinese) (identifying next-generation information technology, high-end numerical control machinery and robotics, aerospace and aviation equipment, maritime engineering equipment and high-tech maritime vessel manufacturing, advanced rail equipment, energy-saving and new energy vehicles, electrical equipment, agricultural machinery and equipment, new materials, and biomedicine and high-performance medical devices as priority sectors); STATE INTELL. PROP. OFF. OF THE PEOPLE’S REPUBLIC OF CHINA, NATIONAL PATENT DEVELOPMENT STRATEGY (2011–2020) (2010), *translated in* Steve Lohr, *When Innovation, Too, Is Made in China*, N.Y. TIMES (Jan. 1, 2011), <https://www.nytimes.com/2011/01/02/business/02unboxed.html> (outlining targets for the State Intellectual Property Office, the predecessor of the National Intellectual Property Administration); see also U.S. CHAMBER OF COM., MADE IN CHINA 2025: GLOBAL AMBITIONS BUILT ON LOCAL PROTECTIONS (2017) (discussing the Made in China 2025 strategic plan).

248. See Press Release, World Intell. Prop. Org., Innovative Activity Overcomes Pandemic

ranked twelfth in the 2021 Global Innovation Index.²⁴⁹ Given these developments and the support the patent and trademark fields have received in the development and strategic plans in China, it would not be far-fetched to suggest that stronger copyright developments will emerge if the national plans feature copyrights and creative industries more prominently.

Indeed, the push for greater recognition of the economic contributions of creative industries is an area in which U.S. industry groups can actively cooperate with local stakeholders. It goes without saying that the Chinese creative industries want greater recognition in the country's development and strategic plans. However, a growing number of local policymakers also subscribe to the belief that greater recognition of these industries would ultimately benefit China. For instance, Li Wuwei, the vice-chair of the 11th National Committee of the Chinese People's Political Consultative Conference, advocated, "Creative industries should be accepted into the national innovation plan: because technological innovation and cultural creativity are the two driving engines of sustainable economic development, creative industries should be incorporated as an important part of the innovation plan."²⁵⁰ The recent release of *An Outline for Building a Powerful Intellectual Property Nation (2021–2035)*, which the State Council published in September 2021, also set the 2025 target for the contributions of the Chinese copyright industries to the country's gross domestic product at 7.5 percent.²⁵¹

E. Avoid Simplistic Binaries

Those handling China policies are always confronted with the challenge of determining "whether the proverbial glass is half full or half empty."²⁵²

Disruption—WIPO's Global Intellectual Property Filing Services Reach Record Levels (Feb. 10, 2022), https://www.wipo.int/pressroom/en/articles/2022/article_0002.html.

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

250. LI WUWEI, HOW CREATIVITY IS CHANGING CHINA 45 (Michael Keane ed., Li Hui & Marina Guo trans., 2011).

251. STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, AN OUTLINE FOR BUILDING A POWERFUL INTELLECTUAL PROPERTY NATION (2021–2035) (2021), http://www.gov.cn/zhengce/2021-09/22/content_5638714.htm (in Chinese).

252. Peter K. Yu, *Editorial*, 8 QUEEN MARY J. INTELL. PROP. 1, 1 (2018). As I elaborated in an editorial in a special issue I guest-edited for the *Queen Mary Journal of Intellectual Property*:

[T]he debate on intellectual property developments in China strongly resembles the debate on whether the proverbial glass is half full or half empty. Having a highly polarized debate is indeed common with respect to law and policy discussions on China—both within and outside the intellectual property field.

Given the longstanding polarization of the U.S.–China debate, it is not uncommon to find panda huggers on one side and China hawks on the other, each talking past the other group.²⁵³ However, a polarized debate that relies heavily on simplistic binaries has not been helpful in crafting effective policies to strengthen copyright protection in China.

A typical binary debate would call for a choice between conflict and cooperation. Those who are concerned about intellectual property thefts would naturally demand more trade sanctions, WTO complaints, and the use of other aggressive tactics.²⁵⁴ During the George H.W. Bush and Clinton Administrations, U.S. policies were filled with threats of economic sanctions, trade wars, nonrenewal of most favored nation status, and opposition to China's entry into the WTO.²⁵⁵ More recently, the Trump Administration mounted a trade war, highlighting the problems of forced technology transfer, discriminatory licensing restrictions, computer hacking, trade secret theft, and industrial espionage.²⁵⁶ By contrast, those who are sympathetic to China, who prefer to avoid confrontation, or who believe in playing the long game would call for greater bilateral or international cooperation.²⁵⁷ To this group, greater engagement with China would be essential to generating win-win outcomes that benefit both China and the United States.²⁵⁸

Whether the focus is on improvements or disappointments will largely depend on one's perspective.

Id.

253. *See id.*

254. *See* Yu, *From Pirates to Partners II*, *supra* note 69, at 923–26 (discussing the demands from politicians and industry groups for the U.S. Trade Representative to take WTO actions to address intellectual property problems in China).

255. *See* Yu, *From Pirates to Partners I*, *supra* note 1, at 140–51 (describing the United States' use of Section 301 sanctions and various trade threats to induce China to strengthen protection of intellectual property rights).

256. *See* SECTION 301 REPORT FINDINGS, *supra* note 149; SECTION 301 REPORT UPDATE, *supra* note 149.

257. As Robert Ross observed:

In recent years, . . . the security competition amid the power transition has infused the entire agenda of US–China relations with a zero-sum perspective. This has been detrimental to cooperation on shared Chinese and American interests on a wide range of non-security issues. Despite the US–China power transition and heightened strategic competition, the United States and China share an extensive agenda of common bilateral and global interests that call for negotiation and cooperation for mutual gain.

Robert S. Ross, *It's Not a Cold War: Competition and Cooperation in US–China Relations*, 2 CHINA INT'L STRATEGY REV. 63, 68 (2020).

258. The win-win rhetoric was widely deployed two decades ago in the U.S. debate on China's accession to the WTO. *See, e.g., U.S.–China Bilateral Trade Agreement and the Accession of China*

Sadly, what is missing in this binary picture is the possibility of a third policy bucket that focuses on competition. For illustrative purposes, consider the policies for strengthening copyright protection in China. As noted earlier, the conflict bucket will likely include measures that seek to reduce the gaps between Chinese and U.S. copyright standards and that would strengthen enforcement in highly problematic areas, such as the use of unlicensed computer software by government agencies.²⁵⁹ By contrast, the cooperation bucket will likely include measures in areas in which China and the United States could cooperate at either the bilateral or global level. Examples of these measures are the development of universal identifiers or global or regional databases that can be used for copyright licensing and management²⁶⁰ and the creation of new norms in areas that have not yet attained international consensus, such as the extensive deployment of artificial intelligence in the creative process.²⁶¹ Finally, the competition bucket—a bucket that a typical binary debate would overlook—will include measures and strategies utilizing the many new complementary models that are now being deployed in China but that may not be found in the United States.²⁶² Because of these distinctively different models, along with the consumer behaviors they induce, one could certainly anticipate

to the WTO: *Hearing Before the House Comm. on Ways and Means*, 106th Cong. 42 (2000) (statement of U.S. Trade Representative Charlene Barshefsky) (“China’s WTO accession is a clear economic win for the United States.”); MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, *TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION* 41 (1999) (“WTO is by no means a panacea to China’s economic problems, but both China and the world trading community will be better served if China is a member.”); Julia Chang Bloch, *Commercial Diplomacy*, in *LIVING WITH CHINA: U.S.–CHINA RELATIONS IN THE TWENTY-FIRST CENTURY* 185, 200 (Ezra F. Vogel ed., 1997) (“Global commerce can ill afford to have a major player like China not playing by market rules and conventions. If China is allowed to pirate whatever products and technology it chooses, the international system could well break down.”). See generally Yu, *From Pirates to Partners I*, *supra* note 1, at 196–206 (discussing the importance of integrating China into the global community).

259. See 2021 SPECIAL 301 REPORT, *supra* note 91, at 32 (“The United States continues to work with other governments to address government use of unlicensed software, particularly in countries that are modernizing their software systems or where there are infringement concerns. Considerable progress has been made under this initiative, leading to numerous trading partners mandating that their government agencies use only legitimate software.”).

260. See, e.g., HARGREAVES, *supra* note 199, at 32–33 (calling for the building of a “Digital Copyright Exchange . . . to establish a network of interoperable databases to provide a common platform for licensing transactions”); Press Release, World Intell. Prop. Org., WIPO Director General Addresses the Future of Copyright (Feb. 24, 2011), https://www.wipo.int/pressroom/en/articles/2011/article_0005.html (“[A]n international music registry—a global repertoire database—would be a very valuable and needed step in the direction of establishing the infrastructure for global licensing.”).

261. See Peter K. Yu, *Can Algorithms Promote Fair Use?*, 14 *FIU L. REV.* 329, 330 n.2 (2020) (collecting scholarship that explores the copyright eligibility of creative works generated by intelligent machines).

262. See discussion *supra* Section IV.C.

parallel developments that result in competition. With respect to these developments, there is neither conflict nor cooperation. Instead, the markets and consumer behaviors are simply different, often due to reasons unrelated to copyright law.²⁶³

V. CONCLUSION

In June 2021, the Third Amendment to the Chinese Copyright Law entered into effect, ushering in stronger protection for copyrighted works—domestic and foreign alike. Although copyright holders, especially those from the United States and other overseas markets, have been traveling on a long and winding road in China for more than three decades, they are now closer to their destination of effective copyright protection than they were the last time the Chinese copyright regime was completely revamped.²⁶⁴ Yet, that road remains fraught with roadblocks and surprises.

To enable copyright holders to accelerate the trip toward their final destination, this Article offers five helpful road tips. While these tips were developed with the long and winding road in China in mind, many—and likely all—of them are useful for similar road trips in other parts of the world. Improving protection for authors and artists requires not only legal upgrades but also a holistic understanding and appreciation of the entire copyright ecosystem.²⁶⁵ The sooner copyright holders and their supportive policymakers and

263. See Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 834 (2007) (encouraging the distinction between intellectual property–relevant and intellectual property–irrelevant factors).

264. See *supra* text accompanying notes 68–72.

265. See MONTGOMERY, *supra* note 220, at 111. As Lucy Montgomery explained:

[A]n evolutionary approach is valuable to those seeking to understand how new ideas and technologies are converted into economic benefit, as well as the impact of major changes in the environment within which particular economic activities occur.

The creative industries are part of just such a complex system. They are inextricably linked to both the broader economy and the complex landscapes of culture, identity, language, trade, law and morality in which they operate. Business models in the creative industries co-evolve with technological developments such as the internet, as well as social technologies . . . as well as the formal legal system and constructs such as copyright law. Thus it seems sensible that any attempt to understand the role that intellectual property plays in promoting economic growth in the creative industries should take into account the dynamic nature of physical technologies available to businesses and consumers operating in the creative industries, the capacity of social technologies to change, and the co-evolution of business models alongside these changing systems.

commentators can develop such an understanding and the needed appreciation, the quicker these right holders can reach their destination of effective copyright protection in China.

Id.; see also MODEL RULES OF PROF. CONDUCT r. 2.1 (AM. BAR ASS'N 1983) (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).