

Comments on the Chinese Fair Use Legislation, Before, In, and After 2020

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A. Background

Over the years, copyright has presented two kinds of directions: on-going copyright expansion and wave-like anti-copyright conflicts. On one hand, copyright expansion has been becoming an irresistible trend in the age of digital revolution; on the other hand, anti-copyright fights reflect that freedom of expression is extraordinarily crucial to people, and that people chase a comparatively fair and liberal creative environment. Thus, copyright cannot be expanded without exceptions and limitations. Exceptions and limitations play significant roles in guarding the concept of freedom of speech, public interest, and importantly, balancing the interests among different parties in the field of copyright. Different types of exceptions and limitations are contained in copyright law. Allowing non-infringing acts of using copyrighted works without consents and remunerations is one type of exception and limitation in terms of copyright laws.

In the context of legally permitted acts of utilizing copyrighted works without permissions and payments, one of the most influential legal rules is the US fair use doctrine, which is a set of legal criteria that allow persons other than copyright holders to use copyrighted works in some special situations without copyright holders' consents and remunerations. In the United States, copyright fair use doctrine is codified in 17 U.S.C. § 107, which stipulates four factors.¹ These

¹ See 17 U.S.C. § 107 (2021) (the US fair use four-factor analysis includes “(1)the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2)the nature of the copyrighted work; (3)the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4)the effect of the use upon the potential market for or value of the copyrighted work”).

four factors are not seen as a rigid checklist, and US courts examine claims of fair use on a case-by-case basis.²

China has its own featured copyright laws relating to non-infringing acts of using copyrighted works without consents and compensations based on its unique political and cultural realities. The Chinese laws concerning permitted acts of freely using copyrighted works never present nor include the US fair use four-factor analysis. However, the words “合理使用” and its English translation “fair use,” are generally used to refer to situations describing consent-and-royalty-free permitted acts of using copyrighted works.³ In the judicial and academic fields, the term “fair use” has already become a custom to refer to non-permissive and non-remunerative allowable acts in Chinese Copyright Law. It is worth noting that the term “fair use” has a different meaning in China than in the United States. To maintain consistency, this comment will use the term “fair use” to discuss Chinese permitted uses without authorizations and compensations.

The first Copyright Law of the People's Republic of China (1990) has undergone two revisions: one in 2001, and another in 2010.⁴ Before 2020, Article 22 of the Copyright Law of the People's Republic of China (2010) listed twelve fair use situations to allow acts of using copyrighted works without permissions and remunerations.⁵ Such a closed and detailed list of non-infringing

² See e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); See e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018); See e.g., *Boesen v. United Sports Pubs., Ltd.*, 2020 U.S. Dist. LEXIS 203682 (E.D.N.Y. 2020).

³ See e.g., WU HANDONG (吴汉东), *RESEARCH ON COPYRIGHT FAIR USE REGIME (著作权合理使用制度研究)* 124 (3rd ed. 2013).

⁴ See *Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法)* [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001), art. 22, CLI.1.37087 (Pkulaw) (China) [hereinafter *2001 Chinese Copyright Law*]. The unofficial English translation is available at https://www-pkulaw-com.proxyiubl.w.uits.iu.edu/en_law/84d2b172f5891e1bbdfb.html; See *Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法)* [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010), art. 22, CLI.1.127326 (Pkulaw) (China) [hereinafter *2010 Chinese Copyright Law*]. The unofficial English translation is available at https://www-pkulaw-com.proxyiubl.w.uits.iu.edu/en_law/b3e0f208f7fa69eabdfb.html.

⁵ See *2010 Chinese Copyright Law*, *supra* note 4, art. 22.

acts resembles “permitted uses” in some jurisdictions, such as Germany.⁶ After that, the one most worth mentioning as to revising Article 22 fair use statutes is the June 2014 effort, in which the Legislative Affairs Office of the State Council of the People's Republic of China published the Copyright Law of the People's Republic of China (Revised Draft for Official Review) (hereinafter “2014 Revised Draft of Chinese Copyright Law”) for public comments,⁷ and people continued to pay attention to it for six long years.⁸

The year 2020 was a busy year for Chinese copyright laws. After the Standing Committee of the National People's Congress’s initial review, Amendment of Copyright Law of the People's Republic of China (Draft) (hereinafter “Draft Amendment of Chinese Copyright Law”) was officially released for public consultation on the website of Chinese National People’s Congress in April.⁹ Surprisingly, most of the amendments made in Article 43 of the 2014 Revised Draft of Chinese Copyright Law were not adopted in this Draft Amendment of Chinese Copyright Law.¹⁰ Even the Chinese fair use catch-all clause was not included in it.

⁶ See Urheberrechtsgesetz [UrhG] [Copyright Act], Sept. 9, 1965, BGBl I at 1273, as last amended by Artikel 1 des Gesetzes vom 28. November 2018 [Article 1 of the Act of 28 November 2018], BGBl I at 2014 (Ger.), §§ 44a-63a. The unofficial English translation is available at https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html.

⁷ See Zhonghua Renmin Gongheguo Zhuzuoquan Fa (Xiuding Caoan Songshengao) (中华人民共和国著作权法 (修订草案送审稿)) [Copyright Law of the People's Republic of China (Draft Revisions for Solicitation of Comments)] (promulgated by the Legis. Affairs Office of the State Council, June 6, 2014), CLI.DL.5730 (Pkulaw) (China) [hereinafter *2014 Revised Draft of Chinese Copyright Law*], available at <http://chinalawtranslate.com/prc-copyright-law-revision-draft-for-solicitation-of-comments/?lang=en>.

⁸ See, e.g., Tian Ruihua & Shao Lu (田瑞华&邵璐), *Discussing Fair Use in Copyright System—Analyzing Fair Use in the Third Draft of Third Revision of PRC Copyright Law* (论著作权法中的合理使用制度—兼评修订草案中的合理使用制), 28 J. OF YUNNAN U. (LAW. ED.) 22 (2015); see, e.g., Jiao Haiyang (焦海洋), *Improvement of Fair Use in the Copyright Law of China—Comment on Article 43 of the Draft Amendment of Copyright Law*, 2017 ELECTRONICS INTELL. PROP. 86 (2017); see, e.g., Shuimei Liu (刘水美), *On the New Legal Application Rules in Expanding the Purpose of Fair Use* (扩张合理使用目的法律适用新规则), 33 INTELL. PROP. 63 (2019).

⁹ See Zhonghua Renmin Gongheguo Zhuzuoquan Fa Xiuzhengan (Caoan) (中华人民共和国著作权法修正案(草案)) [Draft Amendment of Copyright Law of the People's Republic of China (Draft)] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 30, 2020), CLI.DL.14129 (Pkulaw) (China) [hereinafter *Draft Amendment of Chinese Copyright Law*]. PDF available at <https://resources.pkulaw.cn/staticfiles/fagui/20200430/10/22/5/a1a7b0fda34f6b6fc400e38bc59beee3.pdf>.

¹⁰ See *id.* at art. 22.

In August 2020, based on the Draft Amendment of Chinese Copyright Law, Draft Amendment of Copyright Law of the People's Republic of China (Second Reviewing Draft) (hereinafter “Second Reviewing Draft”) was formed after the Standing Committee of the National People's Congress had their first deliberation, and it was published for public consultation.¹¹ The Second Reviewing Draft made some changes to the Draft Amendment of Chinese Copyright Law. Then, the Standing Committee of the National People's Congress conducted their second deliberation, and the Draft Amendment of Copyright Law of the People's Republic of China (hereinafter “Third Reviewing Draft”) was formed and delivered to the Standing Committee of the National People's Congress for third deliberation on November 10, 2020.¹² The next day, Copyright Law of the People's Republic of China was amended for the third time based on the Decision of the 23rd Session of Standing Committee of the Thirteenth National People's Congress, and the effective date of the Copyright Law of the People's Republic of China (2020) is June 1, 2021.¹³ In the Copyright Law of the People's Republic of China (2020), Section 4 “Limitations on

¹¹ See *Zhonghua Renmin Gongheguo Zhuzuoquan Fa Xiuzhengan (Caoan Erci Shenyigao)* (中华人民共和国著作权法修正案(草案二次审议稿) [Draft Amendment of Copyright Law of the People's Republic of China (Second Reviewing Draft)] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 8, 2020), CLI.DL.14682 (Pkulaw) (China). PDF available at <https://resources.pkulaw.cn/staticfiles/fagui/20200817/14/17/5/e65fe68dd8e7b889e1ffebaac9dcfcc2.PDF>.

¹² See *Quanguo Renmin Daibiao Dahui Xianfa He Falv Weiyuanhui Guanyu <Zhonghua Renmin Gongheguo Zhuzuoquan Fa Xiuzhengan (Caoan)> Shenyi Jieguode Baogao* (全国人民代表大会宪法和法律委员会关于<中华人民共和国著作权法修正案(草案)>审议结果的报告) [Report by the National People's Congress Constitution and Law Committee Regarding Reviewing the Draft Amendment of Copyright Law of the People's Republic of China (Draft)] (promulgated by the Nat'l People's Cong. Const. and Law Comm., Nov. 10, 2020), CLI.DL.15162 (Pkulaw) (China).

¹³ See *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai <Zhonghua Renmin Gongheguo Zhuzuoquan Fa> de Jueding* (全国人民代表大会常务委员会关于修改<中华人民共和国著作权法>的决定) [Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 11, 2020, effective June 1, 2021), CLI.1.347848 (Pkulaw) (China). The unofficial English translation is available at https://www-pkulaw-com.proxyiubl.w.uits.iu.edu/en_law/435770ab83ea6f6cbdfb.html.

Rights,” Article 24 pertains to Chinese fair use legislation, which allows non-infringing acts of using copyrighted works without consents and payments.¹⁴

B. COMMENTS ON THE CHINESE FAIR USE REGIME

1. Before 2020

In general, the most updates to fair use situations before 2020 in China were as follows: first, one law, Article 22 of the 2010 Chinese Copyright Law listed twelve fair use situations, which conveyed the highest legal effect in the field of copyright fair use;¹⁵ second, three regulations, one containing Article 21 of the Regulation for the Implementation of the Copyright Law of the People's Republic of China (2013), one containing Article 6 and Article 7 of the Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks (2013), and another containing Article 16 and Article 17 of the Regulations on Computers Software Protection (2013), which play lower legal effects than laws;¹⁶ third, fair-use-related Supreme People's Court judicial interpretations (hereinafter “SPC judicial interpretations”), “where the people's court quotes both laws and judicial interpretations as a ruling basis, judicial interpretations shall be quoted after the law”;¹⁷ fourth, fair-use-related guiding cases issued by

¹⁴ See Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 11, 2020, effective June 1, 2021), art. 24, CLI.1.347867 (Pkulaw) (China) [hereinafter *2020 Chinese Copyright Law*]. The unofficial English translation is available at https://www-pkulaw-com.proxyiublau.uits.iu.edu/en_law/a3b3a54bea64f090bdfb.html?keyword=copyright%20law.

¹⁵ See Zhonghua Renmin Gongheguo Lifa Fa (中华人民共和国立法法) [The Law on Legislation of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015), art. 88, CLI.1.245693 (Pkulaw) (China). The unofficial English translation is available at https://www-pkulaw-com.proxyiublau.uits.iu.edu/en_law/9073d435178b9633bdfb.html.

¹⁶ See Zhonghua Renmin Gongheguo Lifa Fa (中华人民共和国立法法) [The Law on Legislation of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015), art. 88, CLI.1.245693 (Pkulaw) (China). The unofficial English translation is available at https://www-pkulaw-com.proxyiublau.uits.iu.edu/en_law/9073d435178b9633bdfb.html.

¹⁷ Zuigao Renmin Fayuan Yinfa <Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding> de Tongzhi (最高人民法院印发《最高人民法院关于司法解释工作的规定》的通知) [Notice by Sup. People's Ct. on Issuing the <Provisions of the Supreme People's Court on the Judicial Interpretation Work>] (promulgated by the Supreme

the SPC, which could be used as a reference rather than a direct ruling basis, and the key points of guiding case judgments shall be used in reasoning parts of similar judgments;¹⁸ fifth, other published fair-use-related cases, which are not legal basis and will not be quoted in judgments of similar cases.

Chinese courts could adopt fair-use-related statutes, regulations, and SPC judicial interpretations as legal basis to make determinations. However, many problems arise between one legal basis and another. For example, when defendants use plaintiffs' copyrighted works in cyber space, the public could obtain copyrighted works at their selected places and times, and fair use issues are argued by defendants, courts sometimes use Chinese copyright law alone as judgement basis,¹⁹ sometimes use Article 6 of Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks alone as legal basis,²⁰ and sometimes use both law and regulation at the same time as determination basis.²¹ When both statutes and regulations are consistent, it does not matter which legal basis is applied. But consistencies do not always appear between statutes and regulations. For instance, when users provide copyrighted works through the internet for purpose of personal study, research, or entertainment, the 2010 Chinese

People's Court, Mar. 9, 2007, effective Apr. 1, 2007), art. 27, CLI.3.89508 (Pkulaw) (China). The unofficial English translation is available at https://www-pkulaw-com.proxyiubl.w.uits.iu.edu/en_law/e5587f1fe504dd6fbdfb.html.

¹⁸ See Zuigao Renmin Fayuan Yinfa <Guanyu Anli Zhidao Gongzuo de Guiding> Shishi Xize> de Tongzhi (最高人民法院印发《<关于案例指导工作的规定>实施细则》的通知) [Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance] (promulgated by the Sup. People's Ct. May 13, 2015, effective May 13, 2015), art. 10, 11, CLI.3.249447 (Pkulaw) (China).

¹⁹ See Wang Jianjun Su Beijing Yaqilian Xinxu Jishu Youxian Gongsi (王建军诉北京亚汽联信息技术有限公司) [Wang Jianjun v. Beijing Yaqilian Co. Ltd.], 2019 Liao 0203 Min Chu 2891, (Liaoning Province Dalian City Xigang Dist. People's Ct. Aug. 5, 2019).

²⁰ See Han Hua Yi Mei (Tianjin) Tuxiang Jishu Youxian Gongsi Su Baotou Dongbao Shengwu Jishu Gufen Youxian Gongsi (汉华易美(天津)图像技术有限公司诉包头东宝生物技术股份有限公司) [Han Hua Yi Mei (Tianjin) Image Technology Co. Ltd. v. Baotou Dongbao Bio-Tech Co.Ltd.], 2018 Jin Min Zhong 22 (Tianjin Higher People's Ct. June 29, 2018).

²¹ See Han Hua Yi Mei (Tianjin) Tuxiang Jishu Youxian Gongsi Su Shenyang Wenjie Shengwu Keji Youxian Gongsi (汉华易美(天津)图像技术有限公司诉被告沈阳文捷生物科技有限公司) [Han Hua Yi Mei (Tianjin) Image Technology Co. Ltd. v. Shenyang Wenjie Biotechnology Co., Ltd.], 2018 Liao 01 Min Chu 374 (Liaoning Shenyang Mun. Interm. People's Ct. July 26, 2018).

Copyright Law accepts these three purposes as fair use purposes,²² while Article 6 of the Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks (2013) excludes them.²³ Also, when publishing a public gathering speech, the 2010 Chinese Copyright Law will deny fair use when the author makes a claim of prohibition,²⁴ while Article 6 of the Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks (2013) will not consider the author's declaration of permission.²⁵ Courts will likely be confused about whether to apply old general fair use provisions with higher legal effects or to follow new specific fair use regulations with comparatively lower legal effects. Even though legislation will trump regulations based on Chinese Legislation Law,²⁶ these kinds of conflicts among different legal basis regarding same fair use issues are still likely to lead to people's confusion, judges' mistakes, and uncertainties regarding fair use determinations.

Additionally, there are conflicts between statutes and SPC judicial interpretations. The most updated fair use legislation before 2020, the 2010 Chinese Copyright Law, provides a closed list

²² See 2010 Chinese Copyright Law, *supra* note 4, art. 22(1).

²³ See Xinxu Wangluo Chuanboquan Baohu Tiaoli (信息网络传播权保护条例) [Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks] (promulgated by the St. Council, Jan. 30, 2013, effective Mar. 1, 2013), art. 6, CLI.2.194533 (Pkulaw) (China). The unofficial English translation is available at https://www-pkulaw-com.proxyiubl.wu.wu.ac.cn/en_law/01b481c749f70faebdfb.html?keyword=Regulation%20on%20the%20Protection%20of%20the%20Right%20to%20Communicate%20Works%20to%20the%20Public%20over%20Information%20Networks.

²⁴ See 2010 Chinese Copyright Law, *supra* note 4, art. 22(5).

²⁵ See Xinxu Wangluo Chuanboquan Baohu Tiaoli (信息网络传播权保护条例) [Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks] (promulgated by the St. Council, Jan. 30, 2013, effective Mar. 1, 2013), art. 6, CLI.2.194533 (Pkulaw) (China). The unofficial English translation is available at https://www-pkulaw-com.proxyiubl.wu.wu.ac.cn/en_law/01b481c749f70faebdfb.html?keyword=Regulation%20on%20the%20Protection%20of%20the%20Right%20to%20Communicate%20Works%20to%20the%20Public%20over%20Information%20Networks.

²⁶ See Zhonghua Renmin Gongheguo Lifa Fa (中华人民共和国立法法) [The Law on Legislation of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015), art. 88, CLI.1.245693 (Pkulaw) (China). The unofficial English translation is available at https://www-pkulaw-com.proxyiubl.wu.wu.ac.cn/en_law/9073d435178b9633bdfb.html.

of twelve fair use situations.²⁷ Unlike the description of copyrights in Article 10(17) of the 2010 Chinese Copyright Law,²⁸ Chinese fair use provisions do not contain a miscellaneous clause. The legislative intent is likely to be interpreted to show that legislators are unwilling to accept fair use situations that are not clearly expressed in statutes. However, new fair use situations were added in one of the SPC judicial interpretations.²⁹ It is urgent that China resolve conflicts between law and SPC judicial interpretations and make a choice as to whether to insist on a closed fair use list or change to an open fair use list.

Additionally, from the perspective of legal bases themselves, regulations, SPC judicial interpretations, and guiding and typical cases have their own limits and cannot play the same important role as legislation. Thus, the most efficient and practical method to clarify Chinese fair use is to polish the most crucial and highest legal rule: legislation. But this does not mean that SPC judicial interpretations, regulations, guiding cases, and other published cases related to fair use are not important. Their most significant points should be absorbed into legislation, and this comment predicts that more comprehensive, refined, accurate, and reasonable fair use legislation is forthcoming. After nearly ten years' efforts, the third revision of Chinese Copyright Law finally got passed in 2020.³⁰

2. In and After 2020

²⁷ See 2010 Chinese Copyright Law, *supra* note 4, art. 22.

²⁸ 2010 Chinese Copyright Law, *supra* note 4, art. 10(17) (“other rights which shall be enjoyed by the copyright owners”).

²⁹ See *e.g.*, fair use situations for the purposes of web cache or thumbnail, Zuigao Renmin Fayuan Guanyu Shenli Qin Hai Xinxin Wangluo Chuanbo Minshi Jiufen Anjian Shiyong Falv Ruogan Wentide Guiding (最高人民法院 关于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定) [Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks] (promulgated by the Supreme People's Ct., Dec. 17, 2012, effective Jan. 1, 2013), art. 5, CLI.3.191740 (Pkulaw) (China). The unofficial English translation is available at https://www-pkulaw-com.proxyiublau.uits.iu.edu/en_law/99b99d6daf5344ffbdbf.html.

³⁰ See 2020 Chinese Copyright Law, *supra* note 14.

The newest 2020 Chinese Copyright Law changed Article 22 of the 2010 Chinese Copyright Law in several aspects. Article 22 in the 2010 Chinese Copyright Law was about Chinese fair use, but in the 2020 Chinese Copyright Law, Article 24 regulates Chinese fair use.³¹

Article 24 of the most updated Copyright Law reshapes Article 22 of the 2010 Copyright Law in thirteen places. The 2020 version of Chinese fair use legislation demonstrates an expanded trend of Chinese fair use situations, which are carried out in two ways. First, compared with Article 22 of the 2010 Chinese Copyright Law, Article 24 expands the scope of specific fair use statutes.³² Some examples are: “for the purpose of reporting current events” in Article 22 section 3 in 2010 Chinese Copyright Law is amended into “for the purpose of reporting news”;³³ the 2020 Chinese Copyright Law adds three methods, “adaptation, complication, and broadcasting,” to statutes pertaining to classroom teaching or scientific research uses;³⁴ and Article 22 section 12 in the 2010 Chinese Copyright Law, “transliteration of a published work into braille for publication,” is changed and extends to “providing published works for dyslexics in a barrier-free way through which they can perceive”³⁵ in 2020 version. Second, Article 24 expands fair use statutes in a general way by inserting a totally new section 13, which provides that “other circumstances prescribed by laws and administrative regulations” will be considered in fair use analyses.³⁶ Although the fair use expansions made in Article 24 could better ensure public interest to some extent, it is still far from striking balance between copyright holders and the public. Article 24’s newly added section 13, “other circumstances prescribed by laws and administrative

³¹ See *2010 Chinese Copyright Law*, *supra* note 4, art. 22; See *2020 Chinese Copyright Law*, *supra* note 14, art. 24.

³² See *2010 Chinese Copyright Law*, *supra* note 4, art. 22; See *2020 Chinese Copyright Law*, *supra* note 14, art. 24.

³³ *2020 Chinese Copyright Law*, *supra* note 14, art. 24(3).

³⁴ See *2020 Chinese Copyright Law*, *supra* note 14, art. 24(6).

³⁵ *2020 Chinese Copyright Law*, *supra* note 14, art. 24(12).

³⁶ *2020 Chinese Copyright Law*, *supra* note 14, art. 24(13).

regulations,”³⁷ is not the same as a complete catch-all clause, which means Chinese courts cannot determine some situations as fair use if those situations are not explicitly addressed by laws and regulations. The reality is that Article 24 does not add new fair use purposes in the recent copyright law reform, and it is unclear how long the waiting time for new Chinese fair use legislation should be and what the content for other regulations’ amendments will be. Therefore, this comment proposes a real Chinese fair use catch-all clause beginning with “other fair use circumstances” in order to adapt continuously to the development of real needs, as remedies lag behind legislation and regulations. Furthermore, a real Chinese fair use miscellaneous clause can codify Chinese courts’ legal practice, and those case experiences involving new fair use situations could also react to Chinese fair use legislation and regulations enhancement.

As this comment suggests a miscellaneous clause in Chinese fair use legislation, there must be criteria to determine what “other circumstances” constitute fair use situations. The 2020 Chinese Copyright Law incorporates only the second and third steps of the Three Step Test introduced by the Berne Convention: “the normal use of the works, or unreasonably damages the lawful rights and interest of the copyright owner shall not be affected,” in its preamble.³⁸ However, what should be a proper test for the Chinese fair use catch-all clause requires further study. Choices include, but are not limited to, Berne Convention Three Step Test,³⁹ the US fair use four-factor

³⁷ 2020 Chinese Copyright Law, *supra* note 14, art. 24(13).

³⁸ 2020 Chinese Copyright Law, *supra* note 14, art. 24.

³⁹ Discussions on Three Step Test, *see, e.g.*, Okediji Ruth, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75, 114-36 (2000); *see also generally* Patrick R. Goold, *The Interpretive Argument for a Balanced Three-Step Test*, 33 AM. U. INT’L L. REV. 187 (2017).

determination,⁴⁰ fair dealing analysis,⁴¹ other existing tests,⁴² and potentially a comparative novel test for deciding Chinese fair use situations.

C. CONCLUSION

In recent years, China has developed rapidly in the copyright area, most notably the recently approved third revision of Chinese copyright law in 2020. This revision will rectify the deficiencies of Chinese copyright system comprehensively. This comment provides an update on the latest copyright reforms in China, centering on making comments on Chinese fair use laws before, in, and after the year of 2020. As China plays an increasingly important role in the world, and international cultural and business interactions are becoming more and more common around the globe, it is beneficial for other countries to remain informed about the changes of copyright law taking place in China. Since the 2020 revision, commentators have already presented some proposals related to Chinese fair use,⁴³ and more suggestions are on their way.

⁴⁰ Discussions on the US fair use, *see, e.g.*, MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 479-94 (7th ed. 2019); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1393-409 (2011). *See also generally* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

⁴¹ Discussions on fair dealing, *see, e.g.*, Gluseppina D'Agostino, *Healing Fair Dealing - A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L. J. 309, 317-44 & 356-63 (2008); Ariel Katz, *Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?*, in THE CAMBRIDGE HANDBOOK OF COPYRIGHT LIMITATIONS AND EXCEPTIONS 111, 111-39 (Shyamkrishna Balganesh et al. eds., 2021).

⁴² *E.g.*, “EC fair use doctrine”, *see* Martin Senftleben, *Bridging the Differences between Copyright's Legal Traditions - The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y U.S.A. 521, 541-52 (2010); *E.g.*, “Two-Factor balancing test”, *see* Joseph P. Liu, *Two-Factor Fair Use*, 31 COLUM. J.L. & ARTS 571, 578 (2008) (“The determination would focus on two main considerations: the nature of the use and the harm to the market”); *E.g.*, Mixture of Three Step Test and U.S. fair use, *see* Zhang Chenguo (张陈果), *Interpretation of the Three-Step Test and Fair Use: An Analysis on Article 43 of the Copyright Law (Amended Draft for Approval)* (解读“三步检验法”与“合理使用”——〈著作权法(修订送审稿)〉第43条研究), 38 GLOBAL L. REV. 5, 20-23(2016).

⁴³ *See e.g.*, Wang Qian (王迁), *The Revision of the Copyright Law: Interpretation and Analysis of the Key Provisions (Part I)* (〈著作权法〉修改: 关键条款的解读与分析(上)), 35 INTELL. PROP. 20, 28-33 (2021); Jiang Ge (蒋舸), *A Structural Approach to Copyright Liability* (论著作权法的“宽进宽出”结构), Vol. 33, Issue 2, Peking U. L. J. 327, 342-44 (2021).

These proposals could bring Chinese copyright legislation one step closer to achieving fairness and practicality.