
AI translation · View original & related papers at
chinaxiv.org/items/chinaxiv-202308.00338

Institutional Model Selection for Library Empowerment under China's Copyright Law: Post-Print

Authors: Zhang Junhua

Date: 2023-08-26T00:00:00+00:00

Abstract

[Purpose/Significance] Explores the legislative model choices for granting rights to libraries to meet their functional needs in the third revision of China's Copyright Law.

[Method/Process] First, it provides a brief overview of existing research, revealing its deficiencies. Second, through reviewing the origin and development of the special rights-granting system for libraries, it concludes that the logic of copyright legislation is: safeguarding public interest is the purpose, while protecting private interests is the means. Third, taking the U.S. Copyright Act, Australian copyright law, and Hong Kong's copyright law as examples, it analyzes the legislative model of separately establishing special rights-granting and principle-based rights-granting for libraries and its advantages; taking the French Intellectual Property Code, German Copyright Law, and Taiwan's Copyright Law as examples, it analyzes the legislative model of integrating special rights-granting and principle-based rights-granting for libraries and its disadvantages. Finally, it analyzes the institutional needs for libraries to perform their functions in the digital network environment, the latest international legislative trends regarding copyright limitation systems applicable to libraries, as well as the logical relationships among several copyright limitation systems and the country's practical needs.

[Results/Conclusion] The third revision of China's Copyright Law should adopt the legislative model of separately establishing special rights-granting and principle-based rights-granting for copyright limitation systems applicable to libraries, and proposes specific amendment recommendations for library-related provisions in the Copyright Law.

Full Text

Preamble

Volume 62, Issue 8, April 2018

ChinaXiv Cooperative Journal

Institutional Model Selection for Empowering Libraries under Chinese Copyright Law

Zhang Junhua

Library of Central China Normal University, Wuhan 430079

Abstract

[Purpose/Significance] This paper discusses the legislative model selection for empowering libraries under the third revision of China's Copyright Law to enable them to fulfill their functions.

[Method/Process] First, existing research is briefly reviewed to reveal its shortcomings. Second, by examining the emergence and development of special empowerment systems for libraries, the paper concludes that the logic of copyright legislation is: safeguarding public interest is the objective, while protecting private interests is the means. Third, taking the U.S. Copyright Act, Australian Copyright Law, and Hong Kong's copyright law as examples, the paper analyzes the legislative model that separates special empowerment for libraries from principled empowerment and its advantages. Using the French Intellectual Property Code, German Copyright Law, and Taiwan region's copyright law as examples, it analyzes the legislative model that integrates special and principled empowerment for libraries and its disadvantages. Finally, the paper examines the institutional needs for libraries to perform their functions in the digital network environment, the latest international legislative trends regarding copyright limitation systems applicable to libraries, and the logical relationships among several copyright limitation systems and the actual needs of the nation.

[Result/Conclusion] The research shows that the third revision of China's Copyright Law should adopt a legislative model that separates special empowerment from principled empowerment for libraries' applicable copyright limitation systems, and proposes specific amendment suggestions for library-related provisions.

Classification Number: D923.41

Keywords: library functions, institutional model, special empowerment, principled empowerment, three-step test principle, copyright

DOI: 10.13266/j.issn.0252-3116.2018.08.002

China launched the third revision of its Copyright Law in July 2011, but the process remains at the stage where the State Council Legislative Affairs Office is

reviewing the *Copyright Law (Revision Draft for Review)* (hereinafter referred to as the “Draft Amendment”) and soliciting opinions from relevant experts. Given China’s customary ten-year revision cycle for the Copyright Law, proposing amendments to the copyright limitation or exception systems applicable to libraries in the Draft Amendment before it is submitted to the National People’s Congress may not be too late to prevent the revision from inhibiting the goal of “building an innovative nation.”

1 Related Research

Existing research has discussed various aspects such as public management, special groups, and specific usage contexts [2], but has not deeply explored how to legislate fair use for libraries. Wan Hong argues that copyright has become an obstacle to library e-book services and industry development, suggesting that copyright protection awareness should be strengthened, balance between copyright protection and public interest should be emphasized, and copyright licensing should be improved [3]. However, the author believes that concrete suggestions could also be made regarding the overlooked legal issues of library use of works in the third revision of China’s Copyright Law. Qu Hua argues that when Chinese libraries apply the fair use system, they face behavioral constraints, inadequate rule coverage, and increased legal risks. The crux lies in the continuous expansion of copyright under international pressure, increasingly strong copyright protection, limitations in legislative models, and ambiguity in specific rules. For instance, the rule-based legislative model for fair use has strong closure, poor inclusiveness, and slow response to technological development. She proposes reconstructing the library fair use system by establishing general clauses, expanding rights exceptions, accumulating judicial experience, and establishing contract application restriction policies and non-litigation systems [4], but does not explore whether to adopt a separate or integrated model for copyright limitation or exception systems applicable to libraries. Hua Ying suggests that the third revision of China’s Copyright Law should establish a statutory licensing system applicable to digital libraries [5], but does not address the defects in China’s current paid usage standards or the impact of such a system on the current interest structure. Wan Yong argues that China’s current Copyright Law only grants libraries the right to reproduce collection works for preservation purposes, but does not address whether in-library copying, interlibrary loans, and document provision fall under exceptions. He proposes following principles of independence, balance, and internationality, paying close attention to WIPO’s ongoing discussions on library exceptions, adding exceptions for “providing works” and “using works for personal or private purposes,” and elevating the digital preservation provisions of the *Regulation on the Protection of Information Network Transmission Rights* to the Copyright Law, but does not further explore the drawbacks of Chinese legislation and improvements [6].

Overall, existing research from the perspective of library function performance

lacks in-depth investigation into issues such as whether copyright law should separate or integrate special empowerment and principled empowerment for libraries, how to separate or integrate them, and the applicability and impact on interest balance brought by such choices. This paper aims to address these gaps.

2 The Logic Behind Special Empowerment Systems for Libraries

To control the circulation of printed materials for political purposes such as prohibiting heretical, seditious, and rebellious writings, the British Crown issued a Royal Charter in 1557 establishing the Stationers' Company and granting it exclusive privileges to control printing [7]. Subsequent democratic struggles, particularly the *Bill of Rights* enacted by Parliament in 1689, brought about a revolutionary shift in Britain from "sovereignty in the monarch" to "sovereignty in the people" [8]. One manifestation was Britain's enactment in 1709 of the world's first copyright law, *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies* (commonly known as the *Statute of Anne*) [9]. The law described its legislative purpose as "preventing printers from printing, reprinting, or publishing authors' works without their consent, thereby encouraging learned and knowledgeable persons to compile or create beneficial works" [9]. It required depositing nine copies of new publications and revised editions with designated libraries and universities as a prerequisite for printers to obtain exclusive printing rights, facilitating public institutions' preservation of publications and provision for public use. This marked the origin of the British copyright limitation system concept of "fair dealing," signifying a shift in copyright protection focus from politics to economics and enabling libraries' statutory functions of preserving documents and providing access.

Subsequently, based on the needs of public institutions like libraries to perform their functions, Britain first introduced special exceptions for libraries and archives in its 1956 Copyright Act, marking the beginning of special empowerment for libraries in copyright law. Later, due to increasing international cultural exchange and trade, copyright international trade became more active, leading to the successive introduction of international agreements such as the *Berne Convention for the Protection of Literary and Artistic Works* (hereinafter "Berne Convention") [10], the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* [11], the *WIPO Copyright Treaty (WCT)* [12], and the *WIPO Performances and Phonograms Treaty (WPPT)* [13]. These international agreements all stipulate that members have the right to establish necessary copyright limitations to safeguard public interest while protecting intellectual property rights, though the primacy of public interest has quietly receded to a secondary position. For example, Article 9(2) of the Berne Convention states: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such repro-

duction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author” [10], establishing the “three-step test principle” for limiting reproduction rights. Similarly, Article 13 of TRIPS states: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” The textual change from “provided that” to “and” indicates that while the basic concept of the Berne Convention’s three-step test principle was reproduced in other international agreements with some logical modifications, the applicable rights were expanded from reproduction rights to all copyright rights, and the weight of public interest has been decreasing in status.

In fact, the three-step test principle established by international agreements is not only a guiding principle for formulating copyright limitation and exception clauses but also a right granted to members to fully consider basic human rights, freedoms, and public interests when determining copyright limitation and exception circumstances—a “basic national right” corresponding to “basic human rights.” Therefore, as a party to relevant international agreements, China has the right to fully exercise its domestic legislative power under the guidance of the three-step test principle. Today, the economic nature of copyright far exceeds its political nature, and the copyright interest balance concept formed by public interest retreating and private interest expansion has become the most important factor in copyright legislation. The scope of application of the three-step test principle continues to expand, but its guiding, practical, and operational functions are limited. Consequently, copyright legislation practices that may empower libraries beyond the three-step test principle based on their functional needs are common.

3 Legislative Models for Empowering Libraries in Various Countries

3.1 Separate Model of Special Empowerment and Principled Empowerment

3.1.1 The U.S. Separate Model The United States is a nation of immigrants and a technology-driven country. Article 1, Section 8, Clause 8 of its Constitution states: “The Congress shall have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” [14], demonstrating that the purpose of U.S. copyright legislation is to safeguard public interest, while granting authors and inventors exclusive rights for limited periods is the means to achieve this objective. Accordingly, the United States enacted its first Copyright Act in 1790, granting authors 14-year publication exclusive rights for maps, charts, and books, renewable for another 14 years [15]. Later, U.S. publishers and private consumers of copyrighted works established a

“gentleman’s agreement” to define fair use regarding photocopying works using then-advanced technology, balancing copyright holders’ private interests and public interests reflected in personal use of works. This agreement was adopted by judges as a non-exclusive test to determine when and under what circumstances certain items of copyrighted works could be used fairly. Gradually, U.S. judges created four fair use principles based on the “gentleman’s agreement,” which became a statutory defense limiting authors’ exclusive rights [16]. When Congress codified these principles in 1976, they became Section 107, leveraging the flexibility of fair use principles to address the complex reality of copyright usage and technological progress, while avoiding overly strict legal constraints on scientific and useful arts progress—embodying the legislative philosophy of “what is not prohibited is permitted” to fully stimulate social vitality.

The 1968 case *Williams & Wilkins Co. v. United States* [17] directly prompted Congress to specially establish Section 108 for library and archive copying when codifying fair use principles into Section 107. The plaintiff argued that the defendants’ long-term, large-scale, and even whole-volume photocopying of the plaintiff’s magazines for internal researchers constituted attempted substitution for original purchases, weakening the plaintiff’s potential market. In December of the following year, the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee introduced proposed Section 108 to be added to the Copyright Act—special ex ante normative rights for libraries and archives based on their needs to preserve documents and provide social services and their limited capacity to bear infringement liability. The *Williams & Wilkins* case highlighted the necessity of specially empowering libraries based on their functional needs, i.e., clearly defining their reproduction space; otherwise, libraries entangled in lawsuits would be unable to perform their functions, and public finances maintaining library operations would be overburdened.

In summary, Section 108 “Limitations on exclusive rights: Reproduction by libraries and archives” among the numerous copyright limitation provisions in the U.S. Copyright Act clearly constitutes special rights granted by legislators to libraries and archives based on their functional needs, distinct from Section 107 “Limitations on exclusive rights: Fair use,” which contains general fair use provisions [18]731. “Library and archive reproduction” and “fair use” are two different species concepts under the genus concept of “copyright limitation systems” in U.S. law.

3.1.2 The Australian Separate Model Australian copyright law features distinctive special empowerment for libraries, consistently showing special concern for the public interests represented by libraries throughout its continuous revision and evolution, considered “the greatest protection of public interest” [19]. Sections 48-53 of the Australian Copyright Act provide detailed copyright limitation and exception provisions for libraries, archives, and important cultural institutions regarding copying, providing, and transmitting copyrighted works for preservation, replacement of collections, parliamentary members, work users,

and other libraries. However, scholar S. Ricketson's report applying the three-step test principle to examine these provisions section by section shows that most of these copyright limitation and exception provisions may not pass the three-step test [20], indicating that Sections 48-53's empowerment of libraries and other public cultural institutions undoubtedly constitutes special empowerment not strictly bound by the three-step test principle. Beyond Sections 48-53, Section 200AB of the Australian Copyright Act stipulates that "libraries may apply principled fair dealing provisions for the purpose of maintaining library operations, provided they are not for commercial gain or profit, but must simultaneously comply with the three-step test principle." Thus, Sections 48-53 and Section 200AB of the Australian Copyright Act correspond to Sections 108 and 107 of the U.S. Copyright Act, respectively, separating special empowerment from principled empowerment.

3.1.3 Hong Kong's Separate Model Hong Kong's copyright limitation system applicable to libraries adopts a separation between enumerated provisions and principled provisions. Its *Copyright Ordinance* provides detailed special empowerment provisions in Sections 47-53 regarding libraries' reasonable reproduction of journal articles, published works, providing multiple copies, interlibrary loan copying, making replacement copies, certain unpublished works, and important documents. Additionally, Section 41A(2) of the Ordinance separately establishes four principles for determining fair use, enabling full consideration of the reasonableness of libraries' use of copyrighted works beyond the library copyright exception list in Sections 47-53, enhancing the flexibility, expansibility, operability, and adaptability of copyright limitation systems—particularly beneficial for developing new library services under new technological backgrounds and balancing rights among copyright parties [21]. Hong Kong's copyright law thus adopts a model separating special empowerment from principled empowerment for libraries.

3.2 Integrated Model of Special Empowerment and Principled Empowerment

Article L112-5(1) of the French Intellectual Property Code enumerates eight copyright exception provisions, with the eighth being a reproduction right exception for libraries based on preservation and on-site reading needs. However, paragraph 2 of the same article additionally states: "The exceptions revealed in this article shall not hinder the normal exploitation of the work nor unreasonably prejudice the legitimate interests of the copyright holder" [22]32.

The German Copyright Law (2008) revised its previously closed provision on quotation from "Reproduction, distribution, and public reproduction are permitted within the scope allowed for the following purposes: incorporating published individual works in independent scientific works to explain content..." to "For quotation purposes, this law permits reproduction, distribution, and public reproduction provided there is justified reason to use published works within

the scope of this special purpose. This law particularly permits: incorporating published individual works in independent scientific works to explain content...” [18]162. This revision transformed the previously closed enumerative provision into an open illustrative one and introduced fair use judgment standards, greatly enhancing the elasticity of using copyrighted works. However, re-examining the reasonableness of specific fair use circumstances increases legal complexity, and what constitutes “justified reason” remains undefined.

Taiwan region’s *Copyright Law (1985)* first provided in Article 32 for library reproduction of collection works: “Libraries, museums, history museums, science museums, and art museums for public use may reproduce their collected works under the following circumstances: upon request by readers, for personal research, photocopying part of a published work or an entire work published in a periodical, limited to one copy per person; when necessary for data preservation; upon request by institutions of the same nature.” In 1992, during trade negotiations with the United States, Taiwan revised its Copyright Law by adding Article 65, referencing the principled fair use provision in Section 107 of the U.S. Copyright Act: “Whether the use of a work complies with Articles 44-63 shall be determined by considering all circumstances, particularly noting the following matters as judgment standards: the purpose and nature of the use, including whether for commercial or non-profit educational purposes; the nature of the work; the amount and substantiality of the portion used in relation to the work as a whole; the effect of the use upon the potential market for or value of the work” [23]91-92. Like the relevant provisions in the French and German laws mentioned above, this clearly constitutes a repetition of the three-step test, making it difficult to distinguish between the certainty and uncertainty of legal attributes of library use of works, thereby increasing difficulty in legal application.

4 Current Institutional Needs of Chinese Libraries and International Lessons

Libraries bear the responsibilities of preserving human cultural heritage, disseminating scientific knowledge, promoting social civilization, improving national quality, and politically safeguarding basic human rights. Consequently, copyright laws worldwide grant them exceptional consideration. Simultaneously, libraries are both products and guarantors of social democratic politics [25]. Therefore, people have always regarded libraries as social documentation centers and knowledge repositories, shouldering the heavy responsibility of preserving and inheriting human civilization and promoting social progress and educational development. Libraries have consistently upheld the public’s equal right to access and utilize information resources regardless of age, race, gender, belief, or social status. In fact, libraries have always been important social institutions safeguarding both right holders’ interests and public interests. The key issue currently lies in selecting an appropriate empowerment system model for libraries based on their functional performance and the need to balance right holders’

and public interests.

4.1 Institutional Needs for Library Function Performance in the Digital Network Era

In today's era of digitalized works and networked dissemination, libraries remain gateways to knowledge for local communities, providing fundamental conditions for lifelong learning, independent decision-making, and social cultural development for individuals and social groups [25]. However, due to tremendous changes in how knowledge and information are produced, accessed, and obtained, the digital divide caused by disparities in economic capacity or network information equipment usage among regions, nations, urban-rural areas, and populations has aligned with existing fault lines of gender, economic, social, and educational injustice [26]. Libraries' social responsibilities have become increasingly prominent: politically, reducing information gaps and safeguarding the public's free and equal access to knowledge and information; socially, incentivizing creation and improving citizens' scientific and cultural literacy to accumulate development momentum; and economically, enhancing national competitiveness. This highlights the necessity of specially empowering libraries to shoulder these responsibilities. However, Chinese law's closed enumerative legislation has proven insufficient or lacking regarding libraries' rights to digitally preserve and provide documents, challenging libraries' central position as documentation centers. The constraints of technological protection measures have further exacerbated this situation, making copyright legislation more heavily weighted toward right holders' private interests, especially copyright holders, while authors' and public interests are continuously squeezed. The legislative philosophy that has been pursued since its inception—promoting public interest as the objective and protecting copyright holders' private interests as the means—seems to have been inverted.

Professor Hugenholtz once pointed out: “To achieve an appropriate balance, copyright limitation and exception systems are by nature the best tools for adjusting protected copyright. There are three reasons for creating copyright limitation and exception systems: first, protecting human rights, i.e., citizens' basic political rights, particularly freedom of expression, press freedom, and the right to access information, mainly manifested in permitting users to use others' works, including quotation, parody, and press summaries; second, promoting public interest, such as permitting use by libraries, archives, museums, and educational institutions to meet the public's reasonable needs for free access to works and information; third, protecting private interests, especially addressing market failure when right holders cannot practically exercise exclusive rights, with typical examples being individuals' non-public copying of works” [27]. IFLA's *Development and Access to Information (DA2I) Executive Summary (2017)* released on August 23, 2017, regarding information access in the digital network environment states: “Meaningful information access requires four key elements: information and communication infrastructure; active so-

cial usage environment; sufficient capacity of communities and their members; favorable legal and policy environment.” In fact, all four aspects require protection by national laws and policies, and libraries’ unique role makes the need for a favorable legal environment particularly urgent [28].

Therefore, China’s Copyright Law urgently needs to specially empower libraries based on public interest considerations, while also providing principled empowerment considering the complexity of copyright usage circumstances and the unpredictability of technological progress.

4.2 Latest International Legislation on Library Empowerment Worthy of Reference

Given the special nature of library functions and the new characteristics of the digital network environment, some countries and regions have already established, and may continue to establish, copyright limitation clauses applicable to libraries that go beyond the three-step test principle, much like the U.S. Copyright Act and Australian Copyright Law. For example, Denmark, France, Sweden, and other countries have modified their laws and regulations to grant their national libraries the right to collect internet resources under their national domains, improving collection efficiency and reducing infringement risks in information resource preservation [29]. In June and October 2014, the UK increased copyright exceptions to nine items, most innovatively adding a text and data mining exception applicable to libraries [30]. Singapore is re-evaluating its Copyright Law, considering the legality of using services such as VPN (Virtual Private Networks) [31]. For years, the EU has been working on legislation to clarify the concept of mass digitization and reduce authorization costs, attempting to establish a simple, low-cost, and efficient ex ante empowerment mechanism for libraries, including online transmission of digitized collections, and preparing to follow the UK in creating new text and data mining copyright exceptions to promote scientific research through data mining [32]. Finally, on September 14, 2016, the European Commission released the draft *Directive on Copyright in the Digital Single Market*, clarifying three areas of limitations and exceptions all closely related to libraries: big data analysis for scientific research purposes (Article 3), digital and cross-border use for educational purposes (Article 4), and preservation of cultural heritage (Article 5) [33]. Germany’s new *Law on Copyright and Related Rights in the Service of Science* (Urheberrechts-Wissensgesellschafts-Gesetz, UrhWissG), passed on June 30, 2017, and effective March 1, 2018, added special provisions for public institutions like libraries, allowing direct use of copyrighted works for educational and research purposes without following previously vague and cumbersome application procedures, provided that using institutions such as university libraries pay a one-time fee to copyright collection societies to purchase usage rights. This approach both protects copyright holders’ interests and benefits academic prosperity, as libraries cannot practically track usage of documents and materials, making 买断 usage rights a reasonable and feasible solution [34]. Russia’s revised Civil Code IV,

effective in 2016, stipulates that all libraries open to the public may legally copy small works, certain articles, and excerpts onto digital carriers, provided they prevent digital copying through technical means [35].

Against the backdrop of continuously emerging and changing technologies, the U.S. Copyright Act, through the highly elastic Section 107 fair use provisions and the highly definitive Section 108 provisions that effectively protect public interest, implements the copyright philosophy of public interest as objective and private interest as means in judicial practice. When considering issues of archiving, research, and knowledge discovery, courts have explicitly stated that fair use supports core practices of libraries and archives in technological change environments. Simultaneously, fair use continues to play an important role in balancing copyright interests by correcting market failures, especially in emergency situations where obtaining consent before using information is difficult or impractical. Whether copying newly published newspaper articles for student reading or situations where unreasonable transaction costs increase social usage burdens, fair use can ensure sharing of copyright information when information access has significant social meaning. Furthermore, when copyright restricts public access to information needed to maintain democratic culture, fair use provides strong support for archiving and sharing, which not only protects individuals' right to speak but also maximally protects society's right to hear [36].

5 Institutional Model Selection for Empowering Libraries in China's Copyright Law

Reviewing worldwide experiences, the situation where copyright legislation is continuously driven by publishers and other interest groups and technological progress has not changed. As a country that has not developed its own copyright philosophy from its history but imports copyright concepts and legislative models, and having joined relevant international agreements, China faces particular challenges: multiple ethnic groups, unbalanced regional development, relatively backward technology, per capita book collections of only 0.61 volumes and per capita book purchase funds of only 1.43 yuan in 2015 [37], and being at a critical development stage as a major copyright-importing and populous nation. Therefore, it is particularly important to emphasize the political, developmental, and interest-balancing functions of copyright law, empower libraries based on their social functions, learn from relevant countries' practices during their development periods of fully exercising domestic legislative power granted by international law to expand libraries' applicable usage space without strictly adhering to the three-step test conditions, distinguish among concepts such as the three-step test principle, fair use, statutory licensing, and special empowerment for libraries, and create a suitable legal environment for libraries.

5.1 Logical Relationship Between the Three-Step Test Principle and Libraries' Applicable Copyright Limitation Systems

For a long time, Chinese law has not fully embraced the concept of fair use. Academic circles only define it as a way of using works without obtaining right holders' permission or paying remuneration, without strictly distinguishing fair use from special empowerment for libraries, statutory licensing, compulsory licensing, and other statutory exceptions. This has profoundly impacted judicial practice and copyright legislation. The impact on judicial practice can be illustrated by the case *Wang Xin v. Google Inc. and Beijing Guoxiang Information Technology Co.* [38]. In this case, Google digitized the paper version of the involved book *Hydrochloric Acid Lover* obtained through contracts with libraries, while its affiliate Beijing Guoxiang provided indexing information and work excerpts to the public. The case involved multiple rights including reproduction rights, information network transmission rights, and integrity protection rights. The legal application dilemmas encountered highlighted the drawbacks of China's closed enumerative copyright limitation system. In fact, Google's behavior of disseminating indexing information and excerpts to the public benefits both right holders' private interests and public interests. In reality, the three-step test principle, fair use, and statutory exceptions present the logical relationship shown in [Figure 1: see original paper]: the three-step test principle is the basic principle stipulated by international law that must be followed when formulating copyright limitations and exceptions. It is the genus concept of fair use and statutory exceptions, but fair use and statutory exceptions have a completely different relationship. Libraries' applicable copyright limitation and exception systems (library exceptions) are also species concepts under the genus concept of copyright limitations and exceptions (three-step test principle), but they have cross-relationships with both fair use and statutory exceptions. The impact on copyright legislation is analyzed below.

5.2 Incoherence Between Copyright Law and Its Supporting Regulations

After clarifying the logical relationships among these concepts, rational law revision becomes an urgent priority. Article 22(1)(8) of China's *Copyright Law (1991)* specially empowers libraries' preservation functions: "Libraries, archives, memorial halls, museums, art galleries, etc., may reproduce works in their collections for display or preservation purposes." Beyond this, the law does not grant libraries other copyright exceptions, such as interlibrary loans or document provision rights. These provisions remained unchanged in the 2001 and 2010 revisions. However, in response to the era of digital preservation and network dissemination, Article 7 of the *Regulation on the Protection of Information Network Transmission Rights* (2006) stipulates: "Libraries, archives, memorial halls, museums, art galleries, etc., may, without copyright holders' permission, provide legally published digital works in their collections and works digitized for display or preservation purposes to service recipients within their premises

through information networks, without paying remuneration, provided they do not directly or indirectly obtain economic benefits, unless otherwise agreed by the parties...”

This creates incoherence: Article 22(1)(8) of the *Copyright Law* grants libraries certain resources they can provide to users, but the *Copyright Law* does not address libraries’ rights and obligations to provide paper and other types of resources beyond preservation functions, nor can this be reflected through Article 22(1)(1) on personal use. However, Article 7 of the *Regulation on the Protection of Information Network Transmission Rights* defines the location and scope of libraries’ provision of digital resources to users, though it does not grant libraries the right to transmit documents beyond premises for non-profit purposes. This results in the lower-level regulation exceeding its upper-level law, primarily because the *Copyright Law* lacks inclusiveness. This incoherence between law and regulation significantly increases libraries’ infringement risks and, more seriously, restricts libraries’ function performance.

Article 21 of China’s *Copyright Law Implementation Regulations* states: “Using published works that may be used without copyright holders’ permission in accordance with the *Copyright Law* shall not affect the normal exploitation of the works, nor unreasonably prejudice the legitimate interests of copyright holders.” This regulation requires three-step testing for usage items including fair use. However, the 12 fair use circumstances stipulated in Article 22(1) of the *Copyright Law* are special public interest circumstances determined by legislators exercising domestic legislative power granted by international law in accordance with the three-step test principle. The lower-level regulation’s requirement for reasonableness testing of upper-level law items not requiring three-step testing violates the principle that “upper-level law prevails over lower-level law.” The incoherence between the *Copyright Law* and its lower-level implementation regulations is thus highlighted.

5.3 Defects in Library-Related Provisions of the Draft Amendment

The Draft Amendment has not yet provided effective solutions to legal issues brought by new technologies, such as the legal nature of libraries using VPN to provide digital documents to users via networks. For academic works primarily consumed by small groups such as libraries, educational institutions, scholars, and researchers, the impact of digital network dissemination on their rights cannot be underestimated. Permitting libraries to distribute others’ copyrighted works on public networks would greatly damage right holders’ markets, conflicting with normal work exploitation. However, VPN technology merely uses modern technology to provide convenience for users without expanding the user scope. Second, current law and the Draft Amendment still have not defined the legal attributes of libraries’ digital preservation of cultural heritage and permanent collections, nor practices and services such as non-returnable digital document delivery and text and data mining. Third, the Draft Amendment has not yet established a statutory licensing system applicable to libraries as South

Korea and other countries have done, which considerably restricts libraries' function performance. Finally, Article 43(1) of the Draft Amendment adds item (13) [39], i.e., "other circumstances" as a catch-all clause, while paragraph 2 of the same article mechanically incorporates the latter two steps of the three-step test principle: "Using works in the manner specified in the preceding paragraph shall not affect the normal exploitation of the works, nor unreasonably prejudice the legitimate interests of copyright holders." This subjects the previously determined 12 special circumstances, which fully exercised domestic legislative power granted by international law and were determined according to the three-step test principle, to three-step testing again. Like the relationship between Article L112-5 paragraphs 1 and 2 of the French Intellectual Property Code and Articles 44-63 and 65 of Taiwan region's Copyright Law, this repeated testing provision creates extreme uncertainty regarding the legal attributes of library work, increasing libraries' copyright infringement risks. Obviously, the direct consequence of fearing infringement and being unable to bear infringement liability is "inaction," which naturally restricts library function performance, limits conditions for improving national quality, insufficiently sustains national development momentum, and ultimately harms public interests. Of course, some circumstances among the 12 fair use items enumerated in China's current law are indeed overly broad. For instance, item (1) "using others' published works for personal study, research, or appreciation" cannot pass the three-step test in the author's view, and deleting the "appreciation" item in this revision is indeed appropriate.

5.4 Amendment Suggestions for Library-Related Provisions

Addressing the Draft Amendment's issues of parallel means and objectives of copyright protection, repeated testing, and the complexity of copyright usage circumstances and unpredictability of technological progress, and given the drawbacks of the integrated model and advantages of the separate model of special and principled empowerment, and considering China's tradition of concise legislation, China needs to learn from legislative experiences of the United States, Australia, Hong Kong, and others. When formulating copyright limitation systems applicable to libraries, China should adopt a legislative model separating special empowerment from principled empowerment—i.e., under the guidance of the three-step test principle, fully exercise domestic legislative power granted by international law, clearly define exception spaces based on library functional needs through special empowerment, and organically combine this with principled empowerment for libraries applicable to unforeseen circumstances through three-step testing, thereby combining special empowerment for libraries with fair use. To enhance legal applicability's rigidity and elasticity based on safeguarding public interest and library functional needs, the legislative purpose in Article 1 of the Draft Amendment should be revised from "promoting the development and prosperity of socialist culture, science, and economy..." to "in order to promote the development and prosperity of our country's socialist culture, science, and economy..." The addition of "in order to" highlights the legislative

purpose, and “our country’s” defines the scope of application, as China is one of the socialist countries and the legislative purpose is to promote national development and prosperity. This revision can prevent social misunderstanding about inverted or sequential relationships between purpose and means, guiding judicial practice. Furthermore, Article 43(1)(8) of the Draft Amendment should be expanded so that libraries’ compliant use under this provision requires no three-step testing, avoiding infringement concerns and litigation. Simultaneously, to adapt to technological progress such as VPN applications and other unforeseen circumstances, the three-step test principle should be introduced as a general fair use applicable to libraries, enhancing the inclusiveness of the mother law *Copyright Law* and leaving details for lower-level regulations. Specific amendment suggestions are:

1. Upgrade Article 7 of the *Regulation on the Protection of Information Network Transmission Rights* to the *Copyright Law*;
2. Revise item (8) to: “Libraries, archives, memorial halls, museums, art galleries, etc., may reproduce works in their collections or works they use for preservation or replacement purposes”;
3. Insert paragraph 2 of Article 43 of the Draft Amendment into item (13) of paragraph 1—i.e., remove paragraph 2 and revise item (13) of paragraph 1 to: “(13) other specific circumstances that do not affect the normal exploitation of works and do not unreasonably prejudice the legitimate interests of copyright holders.”

Such revisions satisfy libraries’ needs to preserve information in different digital formats in response to technological changes and expand libraries’ preservation functions to include works they “use,” such as publicly available works on the internet, thereby empowering libraries specially for digital network environment functional needs. By revising item (13) of Article 43(1) of the Draft Amendment, unforeseen circumstances such as in-library copying, interlibrary loans, and document provision not covered by current *Copyright Law* and the Draft Amendment are incorporated. Of course, copyright holders’ exclusive rights cannot be unreasonably infringed upon, with evaluation standards being “not affecting normal work exploitation and not unreasonably prejudicing legitimate interests of copyright holders.” This indirectly provides principled empowerment to libraries through their application of this provision, achieving the goal of learning from the U.S. law’s “what is not prohibited is permitted” philosophy to fully stimulate social vitality and promote national innovative development.

References

- [1] Huang Guobin. Applicable copyright exception provisions for libraries in China and their implementation obstacles [J]. *Library and Information Service*, 2012, 56(5): 42-46.
- [2] Zhao Jinhong, Zhang Mengxin. Balance between authors’ private rights and social public rights [J]. *China Publishing Journal*, 2014(1): 25-28.

- [3] Wan Hong. Library e-book copyright protection from the perspective of the third revision of the Copyright Law [J]. *Library Work and Study*, 2015(5): 51-54.
- [4] Qu Hua. Reconstruction of library copyright fair use system in China [J]. *Library Theory and Practice*, 2016(9): 6-10.
- [5] Hua Ying. Reflection and reconstruction of copyright statutory licensing system—From the perspective of the third revision of the Copyright Law [J]. *China Copyright*, 2014(6): 42-45.
- [6] Wan Yong. Suggestions for revising library exception clauses in the Copyright Law [J]. *Journal of Library Science in China*, 2014(2): 13-18.
- [7] Balganes S. Copyright and free expression: Analyzing the convergence of conflicting normative frameworks [J]. *Chicago-Kent Journal of Intellectual Property*, 2004(4): 45.
- [8] An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown [EB/OL]. [2017-06-05]. http://avalon.law.yale.edu/17th_{century}/england.asp.
- [9] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies [EB/OL]. [2017-06-05]. <http://www.copyrighthistory.com/anne.html>.
- [10] Berne Convention for the Protection of Literary and Artistic Works [EB/OL]. [2017-06-02]. <http://www.customs.gov.cn/ipr/ipr2001c/ReadNews.asp?NewsID=542&BigClassL>.
- [11] WTO. Agreement on Trade-Related Aspects of Intellectual Property Rights [EB/OL]. [2017-06-02]. https://www.wto.org/english/tratop_e/trips_e/trips_e.htm.
- [12] WIPO Copyright Treaty [EB/OL]. [2017-06-09]. <http://www.wipo.int/treaties/en/ip/wct/>.
- [13] WIPO Performances and Phonograms Treaty [EB/OL]. [2017-06-09]. <http://www.wipo.int/treaties/en/ip/wppt/>.
- [14] The Constitution of the United States of America [EB/OL]. [2017-06-02]. <http://www.archives.gov/national-archives-experience/charters/constitution.html>.
- [15] Copyright Law of the United States [EB/OL]. [2018-02-28]. <https://www.bitlaw.com/copyright/index.html>.
- [16] Connelly M. The role of the e-book in the library system: A comparative analysis of U.S. fair use and U.K. fair dealing in the e-lending universe [J]. *Cardozo Journal of International and Comparative Law*, 2014(3): 561-593.
- [17] U.S. Court of Claims. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 [EB/OL]. [2017-06-08]. <http://fairuse.stanford.edu/case/c487f2d1345/>.
- [18] Translation Group of Twelve Countries' Copyright Laws, trans. *Copyright Laws of Twelve Countries* [M]. Beijing: Tsinghua University Press, 2011.
- [19] Yang Xiaoyun. Copyright circulation rules for Australian libraries and their reference significance for China's library community [J]. *Library Science Research*, 2013(4): 98-100.

- [20] Ricketson S. The three-step test, deemed quantities, libraries and closed exceptions [M]. Strawberry Hills, Australia: Centre for Copyright Studies, 2002: 108-113.
- [21] Jin Hui. Legislation and evaluation of Hong Kong's library copyright system [J]. Library Work and Study, 2016(12): 15-18.
- [22] Xing Qiumiao. Research on library copyright limitation provisions in the digital era [D]. Beijing: China University of Political Science and Law, 2011.
- [23] Intellectual Property Office, Ministry of Economic Affairs. Compilation of Copyright Laws and Regulations Over the Years [M]. Taipei: Taiwan University Press, 2005.
- [24] Li Jiangli. UK legislation for public cultural institutions' use of copyright and commentary [J]. Lantai World, 2010(2): 16-17.
- [25] UNESCO. Public Library Manifesto [EB/OL]. [2017-06-03]. <http://archive.ifa.org/VII/s8/nunesco/chine.pd>
- [26] IFLA. IFLA Digital Literacy Declaration [J]. Translated by He Lei. Library Tribune, 2017(11): 1-4.
- [27] Hugenholtz PB. The future of copyright in a digital environment [M]. Amsterdam: Kluwer Law International, 1996.
- [28] IFLA. Development and Access to Information (DA2I) [EB/OL]. [2017-08-26]. <https://www.ifa.org/publications/node/11606>.
- [29] Wu Gang. On information preservation rights [J]. Library, 2011(4): 4-7.
- [30] Hu Kaizhong, Zhao Jiabing. Latest revisions to UK copyright exception system and their implications [J]. Intellectual Property, 2014(8): 73-78.
- [31] China Intellectual Property Protection Network. Singapore re-evaluating its Copyright Law [EB/OL]. [2016-10-12]. <http://www.ipr.gov.cn/article/gjxw/lfdt/yz/bqyz/201608/1894485.htm>
- [32] ScienceNet. EU plans to reform copyright law to promote data mining [EB/OL]. [2016-12-11]. <http://www.nipso.cn/oneas.asp?id=33826>.
- [33] European Commission. Proposal for a directive of the European Parliament and of the Council on copyright in the digital single market [EB/OL]. [2017-08-31]. <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>.
- [34] Bundesministerium für Bildung und Forschung. Neues gesetz zum urheberrecht für die wissenschaft beschlossen [EB/OL]. [2017-08-31]. <https://www.bmbf.de/de/neues-gesetz-zum-urheberrecht-fuer-die-wissenschaft-beschlossen-4431.html>.
- [35] Song Zhenjia. Revisions to Russian copyright law and their impact on library undertakings [J]. Library Journal, 2016(7): 73-75.

[36] China Intellectual Property Protection Network. U.S. fair use principle supports preservation and sharing of government information [EB/OL]. [2017-09-26]. <http://www.ipr.gov.cn/article/gjxw/lfdt/mj/bqmj/201709/1911173.html>.

[37] Ministry of Culture of the People's Republic of China. 2015 Statistical Bulletin on Cultural Development [EB/OL]. [2017-01-08]. <http://zwgk.mcprc.gov.cn/auto255/201604/t2016042547>

[38] Beijing First Intermediate People's Court. Civil Judgment (2011) Yi Zhong Min Chu Zi No. 1321 [EB/OL]. [2016-12-30]. http://www.pkulaw.cn/case/pfnl_{1970324839084537}.html?mat

[39] Legislative Affairs Office of the State Council. *Copyright Law of the People's Republic of China (Revision Draft for Review)* [EB/OL]. [2014-06-29]. <http://www.pkulaw.cn/>.

Zhang Junhua

Library of Central China Normal University, Wuhan 430079

The Legislative Model Selection of Chinese Copyright Law Empowering Library

Abstract: [Purpose/significance] In order to help libraries to give full play to their functions, this paper discussed the legislative model selection that the third revision of Chinese copyright law empower library. [Method/process] Firstly, this paper briefly introduced the current study and pointed out the shortcomings. Secondly, by reviewing the development of special empowerment system for libraries, it concluded the logic of copyright legislation: protect public interests is the goal, protect private interests is the method. Again, taking the copyright act of the United States, the copyright law of Australia and the copyright law of the Hong Kong region of our country as an example, this paper analyzes the legislative pattern and its advantages of the special empowerment and principle empowerment of the library. Taking the French intellectual property law, the German copyright law and the copyright law of the Taiwan region of our country as an example, this paper also analyzes the legislative model and its shortcomings of the integration of the special empowerment and the principle empowerment of the library. Finally, this paper analyzes the system demand of Library's function under the digital network environment, the latest legislative dynamics on Copyright restriction system about the library, and the logical relationship between several copyright restriction systems and the real needs of the country. [Result/conclusion] The research shows that the third revision of Chinese copyright law should adopt the legislation pattern that special empowerment and principle empowerment both enabled respectively. Besides, it also provides some suggestions on revision of clause's related to libraries in China's copyright law.

Keywords: library functions; system model; special empowerment; principle empowerment; three-step examination principle; copyright

Note: Figure translations are in progress. See original paper for figures.

Source: ChinaXiv — Machine translation. Verify with original.