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2020 amendment, the "full growth" of the Chinese copyright regime?

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***E.I.P.R. 445 Abstract**

On 1 June 2021, Copyright Law of the People's Republic of China 2020 Amendment came into enforcement and became a milestone in China's short 30-year copyright history. Two revisions in the Amendment are fundamental and of far-reaching implications: the definition of works and copyright subject matter. Since China has acceded to most of the important international copyright treaties, these revisions will also influence the protection of foreign works in China. This Opinion considers the implications of this newest Amendment, with music products as the illustration.

On 1 June 2021, Copyright Law of the People's Republic of China (CLPRC) 2020 Amendment came into enforcement. As a milestone of China's short 30-year copyright history, the 2020 Amendment is appraised by Chinese commenters as "full growth" of the Chinese copyright regime.¹ Two revisions in the Amendment are fundamental and of far-reaching implications: the definition of works and copyright subject matter. As China has acceded to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in 1992, under the principles of national treatment and minimum rights, these revisions will also influence the protection of foreign works in China. This Opinion considers the implications of the 2020 Amendment with music products as an illustration.

Copyright subject matter: from closed list to open list

CLPRC was enforced in 1991. Its first revision in 2001 was for China to join the World Trade Organization (WTO), and the second revision in 2010 was a response to WTO's rule that CLPRC violated the Berne Convention.² In comparison, the third revision in 2020 was proactive without external, international pressures. One significant change in the 2020 amendment is on copyright subject matter. At the international level, the Berne Convention provides a non-exhaustive list of works.³ In civil law tradition, French Intellectual Property Code (LPC)—for example—presents an open list of works.⁴ In common law tradition, the [United Kingdom \(UK\) Copyright, Designs and Patents Act 1988 \(CDPA\)](#) stipulates a closed list of eight work categories.⁵

Like [CDPA](#), CLPRC art.3 used to prescribe a closed list of eight work categories, such as written works, oral works, musical works, and a so-called "ninth category"—"other works as provided in laws and administrative regulations."⁶ Since no laws and regulations had ever set up unenumerated categories, protectable works must fall into the eight categories. The 2020 Amendment art.3 revised the "ninth category" to "other intellectual achievements that meet the characteristics of works."⁷ Thus, any intellectual achievements suiting works' characteristics are possible to attract copyright. The 2020 Amendment changed the closed list to an open list of works.

An open list is flexible to protect unenumerated works, so Chinese commentators praise this revision as a timely legal reaction to emerging new forms of works made with frontier technologies. Nevertheless, the practical effect of this change may not be

significant as declared. As Ricketson and Ginsburg have pointed out, the possibility is scarce that unenumerated categories fall within the scope of *literary and artistic works*—the extensive generalisation of copyright subject matter. *E.I.P.R. 446⁸

Moreover, the 2020 Amendment fails to redress a big flaw—the category criterion is inconsistent. *Written works* and *oral works* are classified by the form of works: fixed or unfixed. In contrast, other work categories, such as musical works, works of fine art, and photographic works, are delimited by art classifications.⁹ This inconsistent category criterion has been ascribed to backward legislative techniques, but the 2020 Amendment does not redress this problem.

The definition of works: are fixation forms required?

The other most fundamental revision in the 2020 Amendment is the definition of works, specifically, whether works must subsist in tangible forms to gain copyright-known as the fixation requirement. The Berne Convention allows national legislation to determine this issue.¹⁰ In civil law tradition, works subsisting in perceptible forms—such as sounds—are copyrightable.¹¹ For instance, LPC protects "all works of the mind, whatever their kind, form of expression, merit or purpose."¹² In contrast, in common law tradition, authorial works, such as literary works and musical works, must be reduced into tangible forms for copyright purpose.¹³ For example, CDPA stipulates that "copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise."¹⁴

CLPRC has had no explicit fixation requirement, such as literal rhetoric "material forms". Nevertheless, an implicit fixation requirement was arguably embedded in the definition of works, which was prescribed in Regulation on the Implementation of the Copyright Law of the People's Republic of China (RICLPRC). RICLPRC art.2 defined works as "original intellectual achievements...capable of being reproduced in a certain tangible form."¹⁵ Chinese scholars hold that the latter half of the definition indicated the prior subsistence of fixation forms of works, only by which subsequent reproduction was possible.¹⁶ In this sense, Chinese copyright law arguably imposed an implicit fixation requirement on works, excluding the category of oral works.

2020 Amendment art.3 defines works as "ingenious intellectual achievements...can be presented in a certain form."¹⁷ Thus, so long as intellectual achievements are *presented* by authors and perceptible to others, they are copyrightable works. The 2020 Amendment clarifies that fixation forms are not required for works to attract copyright. This new definition is inclusive for CLPRC to protect intellectual achievements in unfixed forms.

Good news for music products made and disseminated in unfixed forms

The two fundamental revisions in the 2020 Amendment are likely good news for owners of certain music products. Music products were firstly disseminated and sold in printed form-sheet music and then in digital form-CDs and DVDs. At present, many music products are initially made and immediately disseminated to the audience in unfixed forms through the internet. For instance, a guitarist improvises a tune for her fans on streaming platforms.

Before the 2020 Amendment, it was doubtful whether these music products could be protected as works under CLPRC. On the one hand, they were unlikely to be protected as musical works as they did not meet the implicit fixation requirement. On the other hand, they might not be protected as oral works. The category of *oral works* is arrayed right after *written works* and well before *musical works*. In addition, RICLPRC defines oral works as "impromptu speeches, lectures, and court debates expressed in the form of spoken language."¹⁸ These enumerations indicate that oral works are oral-form literary expressions, paralleling written-form literary expressions. In this vein, it is understood that oral works and musical works are mutually-independent and mutually-exclusive.¹⁹ As music products currently concerned are not literary expressions, they were unlikely to be protected as oral works.

Juridical practice shows that these music products were usually treated as performance, and not as musical works nor oral works.²⁰ The Chinese intellectual property system has the dichotomous construction of copyright and neighbouring rights. Musical works are protected by copyright, and performance of musical works is protected under performers' rights. However, CLPRC now provides more extensive protection to musical works than performance, like other national legislation. Typically, rights owners of musical works can profit from selling printed copies of musical works, licensing public performance of works, and licensing mechanical reproduction of works. In contrast, performers can only benefit from authorising fixation of

performance and may **E.I.P.R. 447* share some profits arising from selling copies of fixation forms, such as sound recordings. Christie has noted that a closed list can "constitute unjustifiable discrimination",²¹ which applies to the current situation.

After the 2020 Amendment made the two fundamental revisions, music products initially made and immediately disseminated in unfixed works are ready to be protected as copyright works since they meet works' characteristics—"original intellectual achievements". In this sense, the two revisions are pragmatic and make the Chinese copyright regime more inclusive to protect music products.

"Full growth" or not?

The 2020 Amendment shows improvements in legislative techniques and reflects China's favourable attitudes to cultural industries. Nevertheless, it should not be ignored that the newest Amendment leaves some long-lasting problems unsolved, such as the inconsistent category criterion of works. Moreover, two important provisions in international treaties have not been implemented and transposed in Chinese copyright law. First, the Berne Convention prescribes that *publishers* whose names appear on anonymous and pseudonymous works shall represent authors to enforce copyright.²² RICLPRC stipulates that *owners of original versions* of anonymous and pseudonymous works shall exercise copyright. It is easy to discern publishers of specific editions of such works, but it is hard to discern original versions and their owners. At this point, Chinese copyright law fails to facilitate the utilisation and dissemination of these works by providing adequate protection.

Second, China has acceded to the World Intellectual Property Organization (WIPO) Performers and Phonograms Treaty (WPPT) in 2007 and the Beijing Treaty on Audiovisual Performances (Beijing Treaty) in 2012. The two treaties protect performers of *literary or artistic works and expressions of folklore* (EoF),²³ but CLPRC and its 2020 Amendment made no prescription for the protection of performers of EoF.²⁴ These performers may find it hard to claim their rights in China. In the long term, the practical effect of the 2020 Amendment remains to be seen.

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Footnotes

- 1 Many leading Chinese scholars hold this view. See Qian Wang, "Copyright Law Amendment: Interpretation and Analysis of Key Provisions (Part 1)" (2021) 1 *Intellectual Property Law* 20–35; Xiaoqing Feng, "Reflections on China's Copyright Object System: Work Connotation, Work Types and Innovation of Legislation" (2022) *Journal of Soochow University Philosophy & Social Science Edition* 80–96; Handong Wu and Xin Liu, "Legislative Arrangements and Implementation Prospects of the Third Revision of Chinese Copyright Law" (2022) *Law Application* 37–46. (Translated by the author)
- 2 CLPRC 1991 and 2001 art.4 was moral value judgment. It prescribed that 'works the publication or distribution of which is prohibited by law shall not be protected by this Law.' CLPRC 2010 art.4 revised this to 'the state shall supervise and administer the publication and circulation of works according to law.'
- 3 Berne Convention art.2.
- 4 LPC art.L. 112-2.
- 5 EU harmonisation of copyright subject matter is partially in software and databases rather than generally towards all works. See *E. Derclaye, Research handbook on the future of EU copyright (Cheltenham: Edward Elgar, 2009), pp.49–76.*
- 6 CLPRC art.3.
- 7 2020 Amendment art.3.
- 8 *S. Ricketson and J. Ginsburg, International Copyright and Neighboring Rights: The Berne Convention and Beyond (Oxford: Oxford University Press, 2006), p.409.*
- 9 2020 Amendment art.3.

- 10 Berne Convention art.2(2).
11 Elizabeth Adeney, "Authorship and Fixation in Copyright Law: A Comparative Comment" (2011) 35
Melbourne University Law Review 677–696.
12 LPC art.L. 112-1.
13 *L. Bently et al, Intellectual Property Law, 5th edn (Oxford: Oxford University Press, 2018), pp.49.*
14 [CDPA s.3.](#)
15 RICLPRC art.3.
16 Weimin Li, "Theoretical Reconstruction of the Concept and Category of Works—Comments on Article 1
and 5 of the Draft of Copyright Law Amendment" (2015) 10 Intellectual Property 55–63; Song Jin, "On
the 'Reproducibility' of Work—the Relationship between the Concept Clause and the Category Clause of
Work" (2019) 1 Intellectual Property 59–68; Yuanyuan Zheng, "The Theoretical and Practical Problems
Caused by the Unclear Work Concept-Comments on Article 3 of the Third Draft of the Copyright Law
Amendment" (2014) 2 Intellectual Property 46–50 (translated by the author).
17 2020 Amendment art.3.
18 RICLPRC art.3(2).
19 Shuxing Yang, "Oral Works after Fixation" (2009) 4 Electronic Intellectual Property 87–89 (translated by the
author).
20 Representative cases include *Shehuo Village v Qiaojia Audio-visual Publishing House (2003) Qinghai Xining*
Intermediate People's Court No.3; and *Anshun Culture and Sports Bureau v Beijing New Picture Company and*
Zhang Yimou (2011) Beijing First Intermediate People's Court No.13010 (translated by the author).
21 Andrew Christie, "A Proposal for Simplifying United Kingdom Copyright Law" (2001) 23 E.I.P.R. 26–43.
22 Berne Convention art.15(3).
23 WPPT art.2(a); Beijing Treaty art.2(a).
24 RICLPRC art.5(6).