

Public Interest and Copyright: Comment on the Third Amendment to Chinese Copyright Law

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Abstract:

Public interest has clear and rich contents and has a close relationship with the national interest, group interest and individual interest. The public interest of copyright system include: order and flourish of the science and culture undertakings; free flow of ideas and information; basic public democratic and cultural rights embodiment in copyright; society morality ethics; the interests of vulnerable groups. Chinese Copyright Law is experiencing the third amendment after two amendments in 2001 and 2010. This amendment is a node of Chinese Copyright Law from the "passive adjustment" to "initiative arrangement". In the process of copyright law amendment, various stakeholders are intensely lobbying, so copyright law is undergoing collision from various interests. How to ensure the rationality of copyright law, and make people pick up the belief of the copyright system is very important. This paper considers that Chinese copyright law should firmly go down the direction of public interest in the process of this and later amendments.

1 Introduction

We have two reasons to emphasize the relationship between public interest and copyright. One is that copyright involves with diverse subjects especially in the internet age that copyright has close connection with people increasingly. Another reason is that the close relationship between copyright system and technology development, the emergence of new technologies often prompts frequent amendments of copyright law. So copyright law must be sure of the direction and basic principles of amendment, it must always adhere to the goal of public interest without deviation. While as the principle of "balance of interests" in intellectual property law, public interest is also regarded as a false proposition¹. This paper argues that public interest is not a vague and general concept but has a relatively stable scope, and has specific judge criteria. Copyright system has its specific content of public interest and a strong methodological significance to copyright legislation and amendment. This paper will define the concept of public interest, explore the content of the public interest of copyright system, and combine with the third amendment to Chinese Copyright Law to discuss the application of the principle.

2 Public interest

2.1 Definition

Human needs are thought to form the natural basis of the interest², "so-called interest is the certain form of social relations which is formed in the allocation between some need objects,

and it is formed when the certain objective needs of objects meet the needs of subjects”³. Marxist interest theory also believes that the pursuit of interest is the motivation of all human social activities⁴.

Public interest profoundly affects humanbeing’s behaviors. Thinkers constantly contemplate on the public interest, only to find it difficult to define it as a concept. Many scholars around the world believe that the most special point of public interest is its uncertainty, it’s really a typically uncertain concept in the field of law^{5,6,7}. Chen Ruixiong, a Taiwan scholar, pointed out: “owing to the abstract characteristic of public interest, different people may own different views towards public interest”⁸. Kadriann Ikkonen, an Estonia scholar in law wrote: “because of the highly abstract and uncertain characteristic of public interest, the most outstanding jurists are even reluctant to investigate its properties. It is impossible to give an absolute accurate definition to public interest. We must admit the fact that public interest is still an uncertain legal concept”⁹. What's more, to define an object or a phenomenon is dangerous, because the reliability of the definition is limited according to the modern philosophy and hermeneutics. Marx Redding once said pessimistically: “those with humble hearts have given up trying to give it a legal definition”¹⁰.

However, as the concept of public interest plays an important role in the theoretical and practical construction of legislation, law and other disciplines, many scholars are willing to take this great condemnation to give a definition of public interests or provide some standards to judge the definition.

In China, the discussion of public interest mainly focuses on its definition and specific content. Some scholars separate the "public interest" and give definition to "public" and "interest" so as to understand the meaning of public interest. According to them, to define "public", we should firstly determine a range, this range is not specifically regional, it can also be professional, identical, religious, and even can be a range of age and gender. Public interest is for the majority within the community and the object is significant to the majority of the community. Community scale can be the entire state, society, or small to a certain group. However, because of the complexity of public interest, after giving the definition, this scholar immediately adds that the definition cannot completely solve the problem due to the uncertainty of community composition but believes that because the value itself is controversial it increases the difficulty to define "public interest". In this point, "public interest" can be regarded as a concept of evidence-based¹¹.

Sun Xiaoxia considers that the public interest is a desire and need for social civilization state. Its content is not as abstract as people once considered. He argues that public interests include: public order, peace and security, economic order, health, safety and efficiency, social resources and opportunities conservation and rational utilization, protection for the interests of the socially weak group, maintenance of public morality and humanity towards the direction of the development of civilization conditions (such as public education, health and career development), etc¹². Jiang Ping, a civil law expert thought "what belongs to public interest cannot be enumerated, but from the negative side, all belong to the business development, for-profit, never belong to the social and public interests"¹³.

Some scholars have put forward analysis method of the concept of public interest from the view of methodology. American scholars such as Huntington proposed three methods which is often cited as other scholars, they are: first, the public interest is equivalent to some abstract, vital, idealistic values and norms; Second, the public interest as a particular group (class) or the interests of the majority; Third, the public interest as a result of competition between individuals or groups¹⁴. But some scholars do not agree with the above methods that they can not reveal the basic content of the public interest, and proposed four levels of analysis: the first level is the community development of productive forces, considering the development of productive forces is the most basic public interest, because it will lead to most people's interests be jeopardized if they are destroyed and lead to zero-sum competition if it is stagnated; the second level is that each member of society is likely to benefit from public goods; the third level is the guarantee of legitimate right and freedom of every social member; the fourth level is the rational public institutions, including political, economic, cultural, legal and other aspects of the system¹⁵. This generalization is more comprehensive and covers different areas, but the objection from other scholars was that although this argument helps to be typed on the public interest analysis, but in the event of a specific dispute in public interest, it is not easy to determine the specific criterion¹⁶.

Canadian Centre for Policy Studies raised five aspects to understand the public interest: first, from the perspective of the process, the public interest can be achieved from the fair and transparent decision-making process; second, public interest is decided by the number and it is the reasonable interest of the majority; third, from the utilitarian point of view that the public interest is a question about the balance and compromise between different interests; fourth, public interest is a series of common interests which people all enjoy, such as clean air, water, defense and security, public safety, strong economic growth; fifth, the shared values, the public interest is a common set of values or principles¹⁷.

In addition to trying to give a definition of the public interest or raise several levels contained in the public interest, some scholars proposed a number of criterias to avoid the difficulty of directly defining the public interest. Professor Mo Yuchuan believed that to understand and apply the concept of the public interest, we should adhere to the following six criterias: (1) legal rationality; (2) public benefit nature; (3) fair compensation; (4) public participation; (5) powers of conditionality; (6) authority uniformity. There is also a scholar who had made a similar judgment that the public interest had six criterias: (1) public; (2) individuality; (3) targeted; (4) rationality; (5) conditionality; (6) compensatory⁸.

As seen from the above, various scholars explored the concept and connotation of public interest from different angles. While there are many scholars have pointed out, "public interest" should be defined as simplistic, practical, and we should take positivist approach, so they believe the interests meeting the majority of people can be identified as the public interest, or the directly identifies the public interest as an aggregate of all private interests.

Public interest is an objective reality and has determined content. The author believes that the public interest, as a legal concept, should be determined and it is a kind of legitimate

interest shared by most people in society. Public interest content is relatively certain, including: public safety; public wealth; public services; economic, technological, cultural, environmental, health and other areas' development and order; public ethics; the reasonable preservation and the equitable utilization of social resources and environmental resources and the protection of social interests of the weak. However, although we can summarize the content of public interest based on current economic and social situation of the public interest to, the content of public interest is not static but an open concept and will develop continuously with development of society. Public interest has different connotations in different social development stages and is affected by national policies and development objectives.

The way to define public interest as a legitimate interest what is shared by the majority of people in society avoids defects defining from the start of "community" concept. As Bentham said, "The community is a fictional body, it constituted with individuals who are considered composed of its membership"¹⁸. From the concept of community we can conclude that the "common interest" concept, in fact, is the interest of majority in a community but public interest. In most cases, public interest is common interest, but common interest is not necessarily public interest. Although common interest be shared by most people in a specific community, but to the whole society it is likely an individual interest and the group interest.

2.2 Public interest and other forms of interest

2.2.1 The public interest and national interest

Some scholars believe that national interests exist only in limited scope and state should not have independent interests¹⁹. But according to the function theory of modern state, the function of a country also includes the management of public affairs, e.g. the development of education, promoting the progress of science and technology, increasing social wealth and so on. Although the purpose of this management is to consolidate the status of the ruling class and maintain the existence of the state, at the same time it is also necessary for the normal life of all the citizens. So national interests and public interests separated in this sense.

Public interest and national interest have gradually formed clear division line since the rise of theory of civil society and the formation of binary structure of political state and civil society. The national interest is only the ruling class "in order to achieve their purpose so to put their own interests as the common interests of all of the members of society"²⁰. Public interest emphasized the breadth of stakeholders while national interests sometimes do not have. Under the condition of market economy, modern states function more in public affairs management. Additionally, when there is gradual integration of political state and the civil society, the state is more representative of public interest. In this case, national interest becomes the generic concept of public interest.

2.2.2 Public interest and group interest

From the standard legal language, "group" should be referred to as a community of interests. As interests of a community, the group interest of the majority is the common interest of the group, with respect to the minority groups. But compared to the group of the larger

community of interests subordinate in most people, the interests of the group have become individual. For example, a village set up a paper mill near the village in order to make the villagers rich and soon the village's economy greatly improved. Otherwise, paper mill effluent not only polluted the village drinking water along the river, but also the waters around, resulting in death of crops, livestock in the coastal villages. In this case, the village can be seen as a community of interests, in order to achieve all the villagers affluence the community bear the expense of the interests of a larger community. Therefore, the interest of the village can only be seen as individual interests.

2.2.3 Public interest and personal interest

The classical economists believe that the individual pursuit of self-interest maximization will promote the social and public interests. They also believe that the original power of social development is people's pursuit of their own interests and the social development eventually resulted in "the first impetus", in an invisible hand (complete market competition), "he pursue their own interests will make him promote social interests more effectively than the real intention"²¹.

In Marx's view, human nature is the sum of social relations, "even when I'm engaged in scientific activities which have rare direct communication activities with others, I am also social, because I do them as a human actually. Not only materials, but also the language that thinkers use to do activities, are social product, and I myself is a social activity"²². In reality, the conflict of interest is always present. When the type of people's interests is not consistent, there will be a conflict of interest then human will be apt to pursuit their own interests, so the conflict of interests do not promote the increment of social and public interests, in most cases, it will reduce the social and public interests.

Some believe that personal interest should be subordinated to the public interest absolutely. As Grotius, he contends that the state has right to use private property more than the property owners if it is good for the public interest²³. Montesquieu said the republic asked "people constantly put public interest above on personal interest"²⁴. Rohrbacher also pointed out: "in a truly free country, every citizen enjoys his welfare or personal interest and the labor rights protection under the law, it does not allow any person who violates the common interests"²⁵. The German scholar M.Layer thought private interest must be subordinate to the public interest²⁶. There are modern scholars believe that, in the contradiction between public interest and personal interest, the public interest is the main aspect of the contradiction; in the relationship of public interest and individual interest, public interest are oriented interests, personal interest has the necessity to obey public interest. However, some people think that public interests are not naturally superior to personal interests. "The only difference between public interest and personal interest is the amount, but not the quality discrimination. In some cases, individual interest has absolute advantage than public interest"²⁷.

As we can see from the above discusses, the emphasis of research of public interest is not only on its concept, but also the value judgment and measurement in the conflict between individual interests and public interests, and construction of interaction and harmonious

development relationship between public interest and personal interest, promoting maximum reasonable personal interests in the process of realization of public interests. In order to protect the individual interest in this process, it is necessary to learn from the master of law methodology -- a German jurist Carle Larenz about principles solving conflict of interest: (1) firstly depends on the basic law's "value order" -- and if one legal interest involved have obvious value superiority than another. Compared with other benefits (especially property interests), human life and dignity have higher value. (2) When their rankings are the same, or the rights involved are so different, so far can not to make abstract comparison, one determined factor is affection degree, the other is: if a certain benefits do concessions, how is the degree of its victim. (3) Finally the principle of proportionality, the slightest violation means or minimal limitation principle are also useful²⁸. So, in this respect that public interest limits the basic rights, the legislature should choose the measures which produce the smallest damage to personal interests which should be given compensation in order to achieve the public interests.

3 The public interest in copyright system

3.1 Order and prosperity of science and culture

Copyright system is an important system in the field of science and culture. The object scope of protected by copyright law is cultural, artistic and scientific works. From the birth of the first copyright law in the world, the law was given task to promote the development of science and culture. In 1709 the British Parliament passed the "Statute of Anne", while as the law mainly focused on the economic rights of authors, it has not completely ignored the interests of the public, which is clearly reflected in its foreword²⁹. Some scholars have pointed out that one of the important features of "Statute of Anne" was that its primary purpose was to encourage creation of more useful work and knowledge. It indeed has the function to protect the economic interest of authors and book owners, but this function arises from the influence of the law to reward for useful books³⁰.

3.2 The free flow of ideas and information

According to the basic principles of copyright protection, that is idea/expression dichotomy, copyright law protects the expression of ideas in the form, not the thought itself, which can be used freely by others. According to this principle, if the thought is similar, but the expression form of work is not the same, then the two works are independent of each other and they can enjoy the protection of copyright law. Others can still use its theme and ideas so as to ensure the freedom of people's thoughts.

3.3 Basic democratic and cultural rights of social public in the copyright law

Fundamental rights of citizens are mainly created by the constitution. Early in the 17th century, the British constitutional documents confirmed the fundamental rights of citizens, such as 1679's "Habeas Corpus Act", 1689's "Bill of Rights", etc. In 1776, Virginia constitution defined the basic rights from the perspective of the constitution for the first time. In 1919 the formulation of "Weimar Constitution" in German marked the development of basic rights, fundamental rights were incorporated into the constitutional system in its

complete form³¹. After the second world war, the fundamental rights of citizens were widely prescribed in the constitution and international conventions.

As a legal system in the field of culture, copyright law mainly involves the fundamental rights of the public in scientific and cultural life, which include freedom of speech, freedom of information access, freedom of artistic creativity, scientific research, self-learning and self-development.

3.4 Social morality ethics

Taking social morality ethics as one of the contents of the public interest is the presentation of public order and good morals in the Copyright Act. Public order and moral is an important part of modern civil law system, playing a major role to construct a modern civilized society. Public order and moral as a civil law concept is usually considered to include public order and good customs^{32,33}. The so-called public order is necessary for social existence and development of general order³⁴, public order is not necessarily the order prescribed by law but extends to fundamental principles of the existing legal order³⁵. Good customs contains the moral meaning and is taken as basic ethical requirements and moral principles a particular society should have, emphasizing that legal or social order should be least "ethical"³⁶. The principle of public order and moral is the general legal principle and it focuses on bottom line of social general order while judging legal behaviors. Therefore it becomes the supplement of the specific legal norms and correction to help achieving the justice goal that legal system pursuit³⁷.

Copyright law puts emphasis on morality, ethics maintenance. First of all, the national copyright laws does not protect works those violating public order and good customs. Secondly, the national copyright law prohibits the copyright owners offending public order and morality in exercising copyright.

3.5 The interest of vulnerable groups

Vulnerable groups are those in a specific period of a particular social condition, due to the natural and social systems, and other reasons, in the political, economic, cultural and other aspects, what are the social groups in a relatively passive and disadvantaged position. The existence of social vulnerable groups is caused by the comprehensive factors, including natural causes, physiological and social system reasons. Social system reason is considered to be the most important cause of the presence of vulnerable groups. Hierarchical social structure differentiation is the root cause of the presence of vulnerable groups, The social resources or opportunities that lower socioeconomic groups occupies are less than other classes. They can be regarded as a structural vulnerable group³⁸.

Copyright law is mainly related to the cultural rights of the public, the legal value of the pursuit of justice require copyright laws reflect on vulnerable groups protection, mainly to protect their full participation in social and cultural life. The relevant provisions of the blind and minorities in Chinese Copyright Law reflect on the copyright protection of vulnerable groups tilt. Paragraph 1 of article 22 of the eleventh and twelfth item stipulated respectively.

4. Public interest pursuit of China copyright system

4.1 Changes of Chinese copyright system

The first copyright law in modern China is thought to be produced under the gun of western imperialism. China was forced to open its door in the second half of the nineteenth century when foreign merchants were gradually aware of the need to impose a legal system of intellectual property to China during trading with China. Meanwhile, Chinese people also absorbed the concept of copyright from western world when they seek the way to make the country strong and rich. So in 1911, the Copyright Code of Great Qing Dynasty is promulgated³⁹. Since the nineteen eighties, China and the United States began bargaining on the issue of intellectual property rights and signed the Memorandum of Understanding in 1989, and then, in 1990, China enacted its copyright law. In nineteen nineties, some developed countries began promoting the Uruguay round of GATT negotiations to conclude a trade related intellectual property rights convention. In 1994, the Agreement On Trade-related Aspects of Intellectual Property Right (TRIPS) was born. After returning to the world trade organization, China revised its copyright law in 2001 in order to perform the WTO accession commitments and to be consistent of the TRIPS' requirements. As an opportunity of revising the copyright law, legislators gave full consideration to the impact that information network technology has brought to copyright law and established the right to network dissemination of information. In 2010, China copyright law experienced its second amendment with partial revision of only two provisions.

In Feb. 2012, the draft text of the third copyright law revision is formed and experts were convened to discuss the draft which been revised many times. In 31 Mar., the State Copyright Administration issued the draft of Copyright Law and began to collect suggestions extensively from the whole society. The third revision of China copyright law is neither the need to join the International Convention nor because of the international pressure but more is the initiative arrangement based on Chinese conditions. China copyright legislation is beginning change from passive adjustment to active arrangement⁴⁰. The third time revision of China copyright law is the requirement of the time changes and its fundamental power come from developing of techniques and economy of China⁴¹.

4.2 Amendment of copyright law should be public interest oriented

The third revision of China copyright law have raised attention and hot debate of the whole society, proving once again that the copyright law is gradually highlight its importance to individual and society. Within two months after the draft issued, the click of websites of the National Copyright Administration and the General Administration of Press and Publication exceeded 20 thousands, search results of the amendment draft are about 140 million in Baidu and more than 26 million in Sina micro-blog. Meanwhile the National Copyright Administration received more than 1560 comments and suggestions of the draft involving 81 articles among the 88 articles of the draft. At the same time, various stakeholders began emergency lobbying.

On one hand, in an era of interest diversification when copyright related interests may conflict, legislators should keep open legislation, democratic legislation and scientific

legislation; on the other hand, legislators should balance the benefits of different parties while public interest should always be the measurement of interests sequence and the ruler in the lawmakers' heart.

Based on the relation between public interests and national interests, group interests personal interests, the revision of copyright law should ensure sovereignty and security of national cultural, to protect the order and prosperity of the cultural market and to ensure of the interests of creators and realize effective compensation. At the same time, public basic cultural rights should be fully guaranteed⁴². Jiang Zhipei, the former chief justice of the supreme court of the P.R.C. proposed that China's network copyright legislation should solve problems of the digital library, distance education, especially the special problems about network reading and education of people in poverty in central and western China. Wang Ziqiang, the director of the National Copyright Administration insisted that unrestricted copyright and strong protect of copyright will increase the cost of access knowledge and information. We should be cautious of those take group interest in the name public interests. Recently there exists a point of view that China copyright industry has become an important part of the GDP, so full consideration should be given to the development of this industry and select favorable rules in respect of the industrial development. In dealing with the relationship between public interest and personal interest, if the copyright chooses to restrict personal interest in the name of public interest, the law needs to cause the smallest damage and give full compensation to the person.

5. Conclusion

Although China's copyright law had undergone only two revisions, the experience from other countries shows that amendment of copyright law is quite frequent. This paper suggests that the amendment of china copyright law should insist of the public interest. The basic principle the third revision is that in the prerequisite to adhere to international standards, fully considering the national conditions and adapting to the development demand of the economic, social, cultural and technological progress, to make creators realize their own interests, works widely spread and the public enjoy more cultural development⁴⁸. From this point, this revision grasps the direction of "public interest first". As we all know that legislation process is always affected by a variety of factors, so only by fully understanding the real meaning of the public interest can make the work of revision now and then shine the light of ration.

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