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Digital Piracy in China-an Analysis from Human Rights Perspective

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Summary

Piracy has been a problem ever since the birth of copyright law. All countries have a certain amount of digital piracy problems, among them China is the most serious one. Before the digital era, piracy was in a form of material copying. However, under the modern era, piracy has transformed into a digital form which can no longer be easily controlled by the monopoly power that the copyright holders are given, according to pre-Internet laws. Therefore, there is a strong call for a more powerful copyright protection. The aim of this research paper is to address the digital piracy problem in China from a human rights perspective, focusing on the balance issue between authors and the public and whether the current copyright law is able to keep the balance between them under the new digital environment. Human rights law will be introduced to the digital piracy problem as an alternative tool to keep the balance. Both domestic and international legislations are presented concerning digital piracy in China as well as how the human rights norms relate to the digital piracy problem. Then this paper will examine which one will prevail over the other, human rights law or copyright law. A research in the implementation of copyright law in China is put forward by providing some landmark cases and analysis through both the authors' and the public's perspective. In China there is one phenomenon that must be mentioned and that is the censorship posed by the government in China in both political and cultural fields which has a great influence on China's implementation of copyright law. At last, based on the research of the digital piracy problem in China, some recommendations are presented with the starting point of the state's obligations under the human rights law framework.

Key words:

Digital piracy, copyright, human rights, censorship, China, State's obligation

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Abbreviations

BBS	Bulletin Board System
BSA	Business Software Alliance
CCP	Chinese Communist Party
CEO	Chief executive officer
CNY	China Yuan
DRM	Digital Rights Management
GAPP	General Administration of Press and Publication of China
GDP	Gross Domestic Product
GUI	Graphical user interface
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICP	Internet content providers
ISP	Internet service provider
NCA	National Copyright Administration of China
P2P	Peer-to-Peer
SARFT	State Administration of Radio, Film and Television of China
SOPA	Stop Online Piracy Act
TV	Tele Vision
UDHR	Universal Declaration of Human Rights
US	The United States of America
USD	The United States Dollar
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

1. Introduction

1.1. Overview

Copyright law is designed to promote the progress of science and the useful arts by protecting the interests of the authors or creators. To achieve this purpose, copyright ownership encourages creators by granting them a temporary monopoly or ownership of exclusive rights for a specified length of time.¹ Copying someone else's work is easy, copyright law was therefore designed to fight against piracy since its birth. It is easy to find how copyright law is used in everyday life by focusing on piracy cases.² As the biggest threat to copyright, piracy seriously harms the creator's and distributor's interests. By punishing the pirates, copyright holders' rights can be protected. However, with the emergence of the Internet, the traditional copyright system has become fragmented. Internet imparts information in an extremely effective way, making piracy more and more popular.

All countries are involved in the war against piracy and the effort to make sure that the enforcement of copyright law is followed. Among them, China³ is the most difficult one. The country has a higher complexity than other countries with its unique cultural, political and social conditions. The piracy issue is therefore complex and difficult to predict in China. As the second biggest economic entity in the world, its national legislation and its implementation directly influences one fifth of the world's population, in addition to having the most online users than any other country. Because of this it is worthwhile to explore the Chinese digital piracy phenomena.

Piracy is often blamed for being illegal and immoral, it is however important to see the whole picture. One important justification for copyright is that it provides means to reward creativity and this does indeed encourage socially beneficial and useful productivity.⁴ The copyright law has other values as well, such as the protection of copyrights, the support and use of public domain, and the promotion and dissemination of culture.⁵

¹ Copyright Basics & Requesting Information, <http://copyright101.byu.edu/module1/page3.htm>

² Lawrence Liang, *Beyond Representation: The figure of the Pirate, (Con)texts of Invention*, Eds. Peter Jaszi, Martha Woodmansee and Mario Biagioli, Chicago, 2009, p. 356.

³ In this thesis, China means the People's Republic of China, exclude the regions of Hong Kong, Macaw and Taiwan.

⁴ Hector L Macqueen, 'Appropriate for the Digital Age'? Copyright and the Internet: 1. Scope of Copyright, Law and the Internet, in Charlotte Waelde, Lilian Edwards (eds) *Law and the Internet* (Hart, 2009), pp. 183-225, p. 187.

⁵ Hector L Macqueen, 'Appropriate for the Digital Age'? Copyright and the Internet: 1. Scope of Copyright, Law and the Internet, in Charlotte Waelde, Lilian Edwards (eds) *Law and the Internet* (Hart, 2009), pp. 183-225, p. 187.

Intellectual work is not simply an individual right, but also a social good. The monopoly power should be limited when it conflicts with more important public interests. It is no doubt that there exists a strong conflict in interests between the public and the copyright holders. The interests should be balanced to achieve progress for the whole community and not only for the copyright holders.

The measures to fight against piracy is a two edged sword, it can be effective but will seriously restrict other human rights which the public have. The optimal copyright law should be effective in taking down digital piracy and at the same time not hinder the public's interests at an unacceptable extent.

The purpose of this thesis is to address the digital piracy phenomena in China from a human rights perspective. First, the history of piracy and digital piracy will be reviewed and then move the focus over to China, to bring about a debate around digital piracy, the clash it brings to copyright law and introduce human rights as an alternative solution. Secondly, following the digital piracy background, I try to find out the deep conflict of interests within the copyright and piracy phenomena. Afterwards an analysis is made about the purpose and contents of relevant laws and its application in practice, considering the State as an interfering element. Lastly some recommendations are provided to ease the unbalance within copyright law, which is triggered by the digital piracy problem, through a human rights framework.

The research question of the paper relates to the delicate balance between copyright and censorship, more closely how digital piracy of copyrighted material can be solved in China with a human rights approach, i.e. the States obligation to balance the interests of authors and the public, without resulting with Internet Censorship.

1.2. Outline

Following the Introduction, Chapter 2 introduces the concept and history of piracy, the digital piracy situation in China and the balance issue between copyright holders and the public, fuelled by the digital piracy phenomena.

Chapter 3 gives a detailed analysis on China's domestic and international copyrights and human rights norms relevant to digital piracy.

Chapter 4 addresses landmark cases in China concerning digital piracy and analyses the cases from a human rights perspective. In addition, this chapter brings up how the state's cultural and political censorship leads to digital

piracy. This chapter is the functional part of this paper; it provides an overview of the reality of this topic.

Chapter 5 is the final section of this paper and provides some possible solutions to the digital piracy in China under a human rights' law framework through the State's obligation.

At the end of this paper, in Chapter 6, are the conclusions.

1.3. Methodology

The research is generally based on deskwork. In order to address the topic phenomena the paper contains large sources of journalist, interview and organization reports. The referred arguments and debates are generally based on academic writings and scholars' publications. This paper also involves the theories concerning the relation between human rights and intellectual property in order to answer the research question. The research also investigates copyright law and human rights law which are relevant to the topic and include interpretations of certain provisions. The paper concludes some cases in China and in the U.S as well. Most of the references are gathered from the library and the Internet.

2. The Digital Piracy Phenomena in China

2.1. Piracy in the Digital Era

Piracy always attracts the most attention from copyright holders when it comes to copyright law. Just like with crimes, it could be controlled at a certain degree but seems impossible to eliminate entirely. National copyright laws used to work quite well in protecting creators and distributors' rights by the licensing regime. However, with the common use of the Internet, with a global arena, piracy goes wild. Online file sharing services and free downloads can be seen everywhere. The intellectual recourses can be obtained with a simple click of button. When a court takes down one piracy website, ten more have already appeared. As a result, piracy is no longer in the same form as it used to be, while international copyright conventions and national copyright laws still have no distinctive difference than before.

2.1.1. A Brief History of Copyright Piracy

Piracy has existed as long as there have been copyrighted works and reproduction technologies.⁶ Regarding digital piracy this new technology-driven problem is not really all that new. It is just the latest wrinkle in a recurring theme, the tension between new machines and authors' rights that dates back to the invention of the printing press.⁷

In the beginning of the first few decades of the printing press invention, the publishing trade was still poorly developed.⁸ To promote the publishing trade, in the latter half of the fifteenth century, governments started granting monopolies and other exclusive rights to encourage the local establishment of printing businesses.⁹ Still, only selected publishers were allowed to print

⁶ Peter K. Yu, Digital Piracy and the Copyright Response, *in* Internet and Governance in Asia—A Critical Reader 340 (Indrajit Banerjee ed., AMIC 2007), p. 1.

⁷ Ralph Oman, How Digital Rights Management Will Save Authorship in the Age of the Internet, 84 Denv. U. L. Rev. 7 (2006-2007), p. 7.

⁸ Bodó Balázs, Coda: A Short History of Book Piracy, Social Science Research Council • Media Piracy in Emerging Economies, Joe Karaganis ed, 2011, p. 401.

⁹ Bodó Balázs, Coda: A Short History of Book Piracy, Social Science Research Council • Media Piracy in Emerging Economies, Joe Karaganis ed, 2011, p. 401.

certain books such as the Bible, alphabet books, grammar books, and law books in the sixteenth century England.¹⁰

Piracy has also a deep rooted relationship with censorship. In the eighteenth-century, conflicts between legal publishers and pirates occurred when state rules diverged from community norms. Guilds could get support if they followed the government's censorship.¹¹ Thus, many smaller publishers were locked out from the most lucrative markets, and made it difficult for them to maintain a living. The key stakeholders, such as authors, were also left out of the bargaining in ways that destabilized the system in the long run.¹² The monopolies led to high book prices and restricted access to classical texts.

With the tensions between wealthy and poor printers increasing, poor publishers began to pirate protected books in large amounts, challenging the market structure and pricing of the incumbent publishers, saying it was "for the benefit of the poor".¹³ Even with the high risk of routine searches, confiscation of illegally printed copies and printing machines destroyed, illegal publishing proved impossible to suppress. Then as now, pirates of intellectual property asserted that they disseminated genius works rapidly and inexpensively, they empowered communities, they gave works a better chance to survive, and they resisted oppressive power.¹⁴

Arguments about piracy in England were divided between competing principles: property or liberty, regulation or free trade. Eventually, piracy disputes were regulated, tried, and enforced on the basis of property rights. In 1710, the England Parliament passed the Statute of Anne, which is usually considered as the first modern copyright law. In the Statute it established the author as the source and original holder of copyright, which put an end to the absolute monopoly power of publishers and clarified the transitions of rights involved in the production of a book.¹⁵ At the establishment of copyright law, the author was used primarily as a weapon against publisher's monopoly and the government's control of information for the interests of the society and public domain, besides preventing piracy.

¹⁰ Bodó Balázs, Coda: A Short History of Book Piracy, Social Science Research Council • Media Piracy in Emerging Economies, Joe Karaganis ed, 2011, p. 402.

¹¹ Bodó Balázs, Coda: A Short History of Book Piracy, Social Science Research Council • Media Piracy in Emerging Economies, Joe Karaganis ed, 2011, p. 402.

¹² Bodó Balázs, Coda: A Short History of Book Piracy, Social Science Research Council • Media Piracy in Emerging Economies, Joe Karaganis ed, 2011, p. 402.

¹³ Bodó Balázs, Coda: A Short History of Book Piracy, Social Science Research Council • Media Piracy in Emerging Economies, Joe Karaganis ed, 2011, p. 404.

¹⁴ Willis G. Regier, Piracy: The Intellectual Property Wars from Gutenberg to Gates (review), MLN, Volume 125, Number 5, December 2010 (Comparative Literature Issue), pp. 1161-1164, <http://muse.jhu.edu/journals/mln/summary/v125/125.5.regier.html>, p. 1163.

¹⁵ Bodó Balázs, Coda: A Short History of Book Piracy, Social Science Research Council • Media Piracy in Emerging Economies, Joe Karaganis ed, 2011, p. 405.

Moving on to the late eighteenth and early nineteenth centuries, the United States became one of the biggest pirating nations in the world.¹⁶ The American copyright law was a clear-cut case of situational piracy—of behaviour legalized under the US law but widely condemned abroad.¹⁷ The US law granted copyrights only and exclusively to US citizens but not to foreigners. The law served the interests of a developing nation and its burgeoning publishing industry. Since works from abroad are as cheap as air, some publishers questioned: shall we build up a dam, to obstruct the flow of the rivers of knowledge?¹⁸ Cheap pirated books helped the improvement of the book publishing industry and the education of the rapidly expanding American reading public.

This situation persisted until the United States complied with international norms. By the 1930s, the US became a giant exporter of knowledge goods and services. Until the 1980s, the Americans began to heavily rely on intellectual property such as the computer, entertainment and pharmaceutical industries. Those industries found both legitimate competition and growing piracy quite frustrating, even with a strong intellectual property protection under domestic law. The US naturally focused on the international trade regime. By the 1980s, the new trade agreements promoted by the United States and other developed countries offered the whole world community higher standards for both protection and enforcement of intellectual property rights.

With the common use of Internet, piracy changed form from material copying into digital copying. Before 1980 one could freely copy computer programs and pirate without any restriction. Even as the computer programs were protected as literary work, law enforcement could do little to stop the trade of illegal software. Most dial-up Bulletin Board Systems (BBS) distributed software for free. Only the few BBSs that attempted to profit from stolen software actually faced criminal investigations.

Now Internet has become the first portal for everyone in search of information, ideas or to simply connect with other people.¹⁹ With the fast development of computer and Internet technology, piracy became easier. The new millennium made copying intellectual works illegally into a fairly common occurrence with programs that simplified file-sharing so that anyone could obtain copyrighted material.²⁰ The rapid broadband Internet connections have allowed people from the far reaches of the globe to

¹⁶ Peter K. Yu, Four Common Misconceptions about Copyright Piracy, Public Law & Legal Theory Working Paper Series Research Paper No. 01-16, <http://ssrn.com/abstract=443160>, p. 8.

¹⁷ Bodó Balázs, Coda: A Short History of Book Piracy, Social Science Research Council • Media Piracy in Emerging Economies, Joe Karaganis ed, 2011, p. 408.

¹⁸ Thorvald Solberg, "International Copyright in Congress." *Library Journal* 11.1886, p. 251.

¹⁹ Hector L Macqueen, 'Appropriate for the Digital Age'? Copyright and the Internet: 1. Scope of Copyright, Law and the Internet, in Charlotte Waelde, Lilian Edwards (eds) *Law and the Internet* (Hart, 2009), pp. 183-225, p. 186.

²⁰ Russell Huebsch, History of Software Piracy, http://www.ehow.com/about_5444918_history-software-piracy.html

download large multimedia files at a much faster speed than ever before. With user-friendly Graphical User Interface (GUI) Peer-to-Peer (P2P) programs anyone can make a simple search to produce desirable results.²¹ Many of the engines and services do not have centralized servers. They allow users to transfer files among various locations. Some of them, like Freenet, also allow users to remain anonymous. Google, Microsoft, Project Gutenberg and the European Digital Library project seeks in different ways to make already published content available online in digital form.²²

All of these changes, old and new, provided the foundations for the present day's pervasive illegal distribution of copyrighted material.²³ Enforcement of copyright law is a major problem, intellectual property right holders and the public are now in a battle of which the outcome is difficult to predict. Three hundred years after the passage of the Statute of Anne, a similar crossroad stands ahead, to seriously think about copyright, access to information and public domain.

2.1.2. The Concept of Piracy

The word “piracy” derives from a distant Indo-European root meaning “trial” or “attempt”—or by extension, “experiment.”²⁴ By the time of Thucydides, *peiratos*, who had formerly been viewed as honorable, came to signify sea-going thieves, ur-criminals or enemies of humanity. The word ‘piracy’ was used as the illicit “capture” of printed materials, or other forms of intellectual property, as a metaphorical extension.²⁵ Not until the printing revolution and the golden age of Caribbean buccaneering in the early modern period, however, did the term “piracy” come to signify intellectual theft.²⁶ Today, the term is ubiquitous and is employed not merely in relation to books but also in relation to music, movies, software, pharmaceuticals and inventions as well as other intellectual properties.²⁷

²¹ History and Overview of Piracy (2010.10.04),

http://youthandmedia.org/wiki/History_and_Overview_of_Piracy

²² Hector L Macqueen, ‘Appropriate for the Digital Age’? Copyright and the Internet: 1. Scope of Copyright, Law and the Internet, in Charlotte Waelde, Lilian Edwards (eds) *Law and the Internet* (Hart, 2009), pp. 183-225, p. 186.

²³ History and Overview of Piracy, 2010.10.04,

http://youthandmedia.org/wiki/History_and_Overview_of_Piracy

²⁴ Adrian Johns, Piracy: The Intellectual Property Wars from Gutenberg to Gates, Review by: By Mark Rose, *The Journal of Modern History*, Vol. 83, No. 3 (September 2011), pp. 620-622, <http://www.jstor.org/stable/10.1086/660309>, p. 620.

²⁵ Adrian Johns, Piracy: The Intellectual Property Wars from Gutenberg to Gates, Review by: By Mark Rose, *The Journal of Modern History*, Vol. 83, No. 3 (September 2011), pp. 620-622, <http://www.jstor.org/stable/10.1086/660309>, p. 620.

²⁶ Christine Haynes, Piracy: The Intellectual Property Wars from Gutenberg to Gates (review), *Configurations*, Volume 19, Number 1 (Winter 2011), pp. 143-146, <http://muse.jhu.edu/journals/con/summary/v019/19.1.haynes.html>, p. 143.

²⁷ Adrian Johns, Piracy: The Intellectual Property Wars from Gutenberg to Gates, Review by: By Mark Rose, *The Journal of Modern History*, Vol. 83, No. 3 (September 2011), pp. 620-622, <http://www.jstor.org/stable/10.1086/660309>, p. 620.

Generally speaking, piracy refers to unauthorized use, or making copies, of creative works. Usually, in essence, this means doing so without acknowledging the originator's copyrights in monetary terms.²⁸ The term 'piracy' is often related to incorporating the idea of 'theft' and 'infringement' and it has negative connotations which rest on the assumptions that the institution of private property rights exists and that such an institution is justified, thereby any noncompliance is to be perceived negatively.²⁹ However, under scrutiny, such assumptions may not necessarily survive. There is currently no specific legal definition of digital piracy, which would be more accurately described as "digital infringement of copyright".³⁰ Digital piracy is the kind of illegal copying or downloading of digital material, such as software, music, videos, audio books, and other copyrighted material.³¹ It is often performed by downloading software from sites that might contain illegal contents, and then using P2P technology to download movies and books in electronic format, or using the torrent software to download one's favourite songs.³² Indeed, piracy has become the largest transgression of the information age.³³

Digital piracy is the extension of traditional copyright piracy. However, it shows different characteristics compared with the traditional one. Traditional piracy has to convey through something such as books and discs. But in the Internet environment, all piracy is in the form of digital code, no matter if the infringed work is an article, music, picture or software. All of them can be processed, stored and disseminated on the Internet in an intangible form. Computers make creative works easy to be copied through the Internet. As long as the works are public on the Internet makes it possible for internet users all over the world to download them. With the intangible character, works can be copied and disseminated without limit. Due to the Internet having no boundary between nations and digital copy and dissemination could complete within a few seconds or minutes, means digital piracy could happen everywhere at any time. Besides the trait of being easily copied on the Internet, the works are also easily modified. It is very likely that the author's name is deleted, thus undermining the integrity of the work while reproducing on the network without authorization.³⁴

²⁸ Betty Yung, Reflecting on the Common Discourse on Piracy and Intellectual Property Rights: A Divergent Perspective, *Journal of Business Ethics* (2009) 87:45-57, p. 45.

²⁹ Betty Yung, Reflecting on the Common Discourse on Piracy and Intellectual Property Rights: A Divergent Perspective, *Journal of Business Ethics* (2009) 87:45-57, p. 49.

³⁰ Piracy of Digital Content, ISBN 978-92-64-06450-8 OECD (2009), <http://www.ifap.ru/library/book443.pdf>, p. 7.

³¹ Al-Rafee, S., *Digital Piracy: Ethical Decision-Making*, University of Arkansas, Fayetteville, AR (2002), p. 2002.

³² Sulaiman Al-Rafee, Kamel Rouibah, The Fight against Digital Piracy: An experiment, *Telematics and Informatics* 27 (2010) 283-292, p. 283.

³³ Adrian Johns, Piracy: The Intellectual Property Wars from Gutenberg to Gates, Review by: By Mark Rose, *The Journal of Modern History*, Vol. 83, No. 3 (September 2011), pp. 620-622, <http://www.jstor.org/stable/10.1086/660309>, p. 620.

³⁴ 关于网络盗版现象之法律问题思考 (Legal Thinking about Online Piracy Phenomenon), <http://www.001lunwen.com/wznr-752.html>

2.2. Digital Piracy in China

Digital Piracy has become one of the biggest threats to the copyright law system worldwide. Certainly, China is not excluded. Different from other countries, China has a deeper piracy tradition ever since intellectual property law arrived to China. At the beginning, Chinese people and the government were not aware about intellectual property rights, thus the enforcement of copyright law has been quite weak. However, under the pressure from developed countries, China has been forced to more actively enforce intellectual property law. Even as China hesitated to fully fulfil the international legal obligations, it is still making progress to fit in the international market.

The debate about piracy has never stopped in China. There is no doubt that the whole society of the country benefits from piracy; on the other hand, some people attribute the Chinese's lack of creation to piracy. The involvement of the Internet seems to make everything more complicated. The Chinese government has the most effective control over the Internet information but generally focuses on political issues. There is a saying that China is a one copy country, in other words, just one copy could satisfy the whole country through its widespread digital piracy.³⁵ China seems to have the best soil for piracy which satisfies the demand for the huge population and the Internet users, as well as the characteristic which all the developing countries have—lack the rule of law. As the second biggest economic entity in the world, China can seriously influence the world community. The wide spreading of digital piracy in China not only hinders the copyright holders' rights domestically but also internationally. The future of piracy or copyright law in China could not only affect the development of the country but also the whole world.

2.2.1. Beginning, Upgrade and Restriction

Due to many years of low domestic production, there has been a significant incentive for China to take a free ride on the intellectual property creations of other countries.³⁶ With China's economy becoming increasingly more open, the inflow of foreign investments has worked to increase the domestic production of intellectual property.³⁷ It was the Chinese government's the

³⁵ Kenneth Ho, A Study in the Problem of Software Piracy in Hong Kong and China, 2.6 (1995), http://info.gov.hk/ipd/eng/information/studyaidspiracy_hk_china.htm

³⁶ Graham J. Chynoweth, Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen Its Copyright Laws, 2 *Duke Law & Technology Review* 1-10 (2003), p. 6.

³⁷ Graham J. Chynoweth, Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen Its Copyright Laws, 2 *Duke Law & Technology Review* 1-10 (2003), p. 6.

Open Door Policy³⁸ in the 1970s that took the first step toward a stronger copyright law.³⁹ Since that time, the Chinese government has taken a series of measures to become a part of the international intellectual property rights community.⁴⁰ China became the member of the World Intellectual Property Organization(WIPO) in 1980,⁴¹ after which China accessioned many international treaties concerning intellectual property protection: China joined the Paris Convention for Protection of Industry Property in 1985, the Madrid Convention for the International Registration of Marks in 1989, the Berne Convention for the Protection of Literary and Artistic Works and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms and the Universal Copyright Convention in 1992, the Patent Cooperation Treaty in 1994 and finally successfully became a member of the World Trade Organization (WTO) in 2001.⁴²

It was not until 1990 that China had its first copyright law, which was revised twice. The latest version is the one revised in 2010.⁴³ The Copyright Law of China together with the General Principles of the Civil Law of China (1986) worked as the basic legislation to protect copyright. After that, the Supreme Court of China promulgated a series of interpretations such as Several Issues Concerning the Laws Applicable to the Trial of Copyright Disputes Involving Computer Networks Interpretations (2000, revised in 2004) and Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Cases of Civil Disputes over Copyright (2002). As to the administrative protection, the government put forward Implementing Regulation of the Copyright Law of the People's Republic of China (2002), Regulations on Computers Software Protection (2002), Measures for the Administrative Protection of Internet Copyright (2005), Regulations on Protection of the Right of Communication through Information Network (2006), etc. Moreover, the Criminal Law of the People's Republic of China (1979, latest revised in 2011), especially in Articles 217-218 set the regulations on the serious copyright infringement.

However, that China joined the treaties of intellectual property protection and set a serious copyright law against piracy does not mean it was ready to grant that much protection as those regulations required for intellectual

³⁸ The Open Door Policy is regarding China's international trade policy introduced after Deng Xiaoping took office in 1978, it is termed as China's policy of opening up to the outside world. BBC News, Open Door Policy, http://news.bbc.co.uk/2/shared/spl/hi/in_depth/china_politics/key_people_events/html/8.stm

³⁹ Naigen Zhan, Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices, 8 Fordham Intell. Prop. Media & Ent. L. J. 63 (1997-1998), p.63.

⁴⁰ Naigen Zhan, Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices, 8 Fordham Intell. Prop. Media & Ent. L. J. 63 (1997-1998), p.63.

⁴¹ The official website of WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?search_what=C&country_id=38C

⁴² The Official Website of WTO, http://www.wto.org/english/thewto_e/countries_e/china_e.htm

⁴³ 第一部著作权法 (The First Copyright Law), 2009.11.30, <http://www.cndfilm.com/20091130/101992.shtml>

property rights. In the late 1990s, as computer and digital products began to play a more important role in business and daily life, traditional piracy of papers, DVDs, CDs and others reached its climax.⁴⁴ Piracy retailers could be easily found on the streets with a various collection of digital products that could not even be found in licensed shops. At that time the Chinese government and digital companies started to focus on the problem and took legal action to close down pirate factories. From 1998 to the end of 2004, different government departments including the General Administration of Press and Publication (GAPP), National Copyright Administration (NCA) and the National Anti-vice Office confiscated all kinds of piracy products which reached to 349 million.⁴⁵ The Chinese government was indeed taking some action against piracy. However, since the demand for piracy remained high, the government's action showed little success. Only in the field of computer software statistics show a 99% piracy rate in the late 1990s.⁴⁶ According to a report from the Business Software Alliance (BSA), the overall piracy rate stayed at around 94% in 2000.

As China's economy kept growing rapidly, more and more people noticed that China had reached a stage in its development where it increasingly recognizes the value of a strong intellectual property protection.⁴⁷ Recently China gradually increased efforts to break down the copyright infringement. For example, on 15th July to 25th October 2006, the 10 ministries of China, namely Ministry of Culture, Press and Publication Administration, State Copyright Bureau, State Administration for Industry and the Ministry of Public Security jointly launched the "Anti-piracy Hundred Days Action". That action investigated pirated audio-visual and computer software products and severely punished the manufacturing and selling activities of the companies and individuals. During that time, all over the country 18,000 illegal companies were dealt with, more than one thousand illegal sites were shut down, nearly 60,000 illegal publications were confiscated and over a hundred people received criminal punishment. Ever since 2005, the action to take down digital piracy continues regularly every year.⁴⁸

The piracy in recent years has however not been effectively curbed, the situation for copyright protection is still not optimistic. Only in computer software piracy, according to China's software piracy rate survey report which was released by the State Intellectual Property Office, China's computer software piracy rate was 41% in 2007, and decreased to 29% in

⁴⁴ Jiong Chen, An analysis of piracy in China: the cause, reason and solution, 2009.8.22, <https://my.hamilton.edu/documents/Jiong%20Chen%20paper.pdf>, p. 4.

⁴⁵ 决策者说： 狙击网络盗版 (Policy Makers Say: Attack on Digital Piracy), <http://www.cctv.com/news/china/20060218/100380.shtml>

⁴⁶ Zheng Xue, Software Protection in China, supra note 34, at 15.

⁴⁷ Graham J. Chynoweth, Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen Its Copyright Laws, 2 *Duke Law & Technology Review* 1-10 (2003), p. 6.

⁴⁸ 中国多年打击网络盗版，能否奏效？ (Can China Success in So Many Years' Fighting with Online Piracy?), http://news.xinhuanet.com/newmedia/2006-11/01/content_5277211.htm

2008, 28% in 2009 and 24% in 2010.⁴⁹ Even if the software piracy rate has decreased compared with previous years, it is still far from the requirement of developed countries. Legislation, law enforcement and other aspects of copyright protection is not perfect, there is a large defect in the anti-piracy efforts and measures, and this has led to some trade friction.⁵⁰

Entering the 2000s, traditional piracy was discouraged by a new type of piracy—internet file sharing.⁵¹ Ever since China connected to the Internet in 1994, the Internet user population grew dramatically each year.⁵² As the development of the Internet progressed, it has become the most important media for Chinese to communicate, entertain, study and exchange information. China has had the largest Internet user population in the world since 2008. By the end of June 2012, the Internet users in China reached 538 million and the cybercrimes rate reached to 39.9% which is more than the world's average level of 30.2% in 2011.⁵³ P2P file sharing software like BitTorrent and Emule is widely used in the country. Pirated digital media files can easily be found on websites and can be downloaded without any cost.⁵⁴ Some download links in Verycd—one of the most popular filesharing websites in China— can be clicked as much as 2 billion times within one night, which indicates a high loss for the movie industry.⁵⁵

According to the statistics of the Chaoyang District People's Court in Beijing, in 2008, the court only received 174 cases concerning digital piracy, an increase with 60% compared with 2007. However the amount of cases still rise up dramatically. It reached to 696 cases in 2009, 776 cases in 2010 and 949 cases in 2011.⁵⁶ According to the statistics in 2010, the amount of literature piracy websites alone was about 530 thousand. Each year the

⁴⁹ “中国软件盗版率调查”研究项目小组 (“China's Software Piracy Rate Survey” Project Research Team), 2007 年度中国软件盗版率调查报告 (Report of China's Software Piracy Rate in the year of 2007), 2008.04; 2008 年度中国软件盗版率调查报告 (Report of China's Software Piracy Rate in the year of 2008), 2009.04; 2009 年度中国软件盗版率调查报告 (Report of China's Software Piracy Rate in the year of 2009), 2010.05; 2010 年度中国软件盗版率调查报告 (Report of China's Software Piracy Rate in the year of 2010), 2011.05.

⁵⁰ 范家巧 (Jiaqiao Fan), 中国著作权保护现状与面对全球化的冲击和机遇 (The Status of Copyright Protection and the Impact of Globalization and Opportunities in China), Publishing science, 2009.1, <http://www.cbkx.com/2009-1/1225.shtml>

⁵¹ Jiong Chen, An analysis of piracy in China: the cause, reason and solution, 2009.8.22, <https://my.hamilton.edu/documents/Jiong%20Chen%20paper.pdf>, p. 5.

⁵² 关于网络盗版现象之法律问题思考 (Legal Thinking about Online Piracy Phenomenon), <http://www.001lunwen.com/wznr-752.html>

⁵³ 2012 年中国信息化进程报告 (The Report of the Process of Information Technology in China), <http://www.cnease.cn/read-htm-tid-34633.html>

⁵⁴ Jiong Chen, An analysis of piracy in China: the cause, reason and solution, 2009.8.22, <https://my.hamilton.edu/documents/Jiong%20Chen%20paper.pdf>, p. 5.

⁵⁵ 网络盗版—中国电影产业的必经之路 (Digital Piracy—the Only Way for Chinese Film Industry), http://blog.sina.com.cn/s/blog_51593cfa0100hyjl.html

⁵⁶ 吴学安 (Xuean Wu), 降法律门槛打击电影网络盗版 (Lower Down the Legal Threshold to Combat Online Piracy), http://www.wenming.cn/wap/sy/201203/t20120331_590994_1.shtml

digital market's profits can reach 5 billion CNY.⁵⁷ The survey from Analysys International⁵⁸ shows that among more than 1400 digital websites only 4.3% have authorized license in 2010.⁵⁹ In other words, most of the websites in China have piracy problems. Generally the proportion of genuine and pirated content on the Internet is 1:50, which means that for every CNY 1 genuine income there is CNY 50 lost due to piracy.⁶⁰ The online video piracy rate in 2010 was nearly 90%, the digital music industry loses tens of billions annually. The software industry loses over a hundred billion CNY annually and the digital literary loss is about CNY 4-6 billion each year.⁶¹

2.2.2. Cause and Consequence

There are some specific reasons why China has become one of the most popular piracy countries in the world. Why is described in the following chapter from a cultural, economical and political perspective.

2.2.2.1. Culture

Cultural barriers might make it difficult for copyright laws to emerge or to develop.⁶² Historically, copyright law concepts have been present in at least some form in China since the Tang Dynasty (618-906 A.D.). Since then, copyright law has existed somewhat irregularly and its potency has always remained a question.⁶³ Even copyright law has existed *de jure*, the cultural norms of the Chinese society played a large role in mitigating its *de facto*

⁵⁷ 中国现存盗版网站约 53 万家 年利润约 50 亿元 (China has Existing over 530 thousands Piracy Websites Gained over 5 billion Profit), 2010.8.20, <http://news.163.com/10/0820/14/6EHN6KD300011229.html>

⁵⁸ Analysys International was established in 2000, it is the leading provider of information product, service and solution in China internet market. See more at: <http://english.analysys.com.cn/alist.php?cid=1439>

⁵⁹ 中国现存盗版网站约 53 万家 年利润约 50 亿元(China has Existing over 530 thousands Piracy Websites Gained over 5 billion Profit), 2010.8.20, <http://news.163.com/10/0820/14/6EHN6KD300011229.html>

⁶⁰ 昊天 (Tian Hao), 代表支持打击盗版 加强网络著作权保护 (Representatives of People's Congress Support to Fight against Piracy and Strength the Protection of Copyright), 2010.8.20, <http://info.it.hc360.com/2010/03/051403329003.shtml>

⁶¹ 昊天 (Tian Hao), 代表支持打击盗版 加强网络著作权保护 (Representatives Support to Fight against Piracy and Strength the Protection of Copyright), 2010.8.20, <http://info.it.hc360.com/2010/03/051403329003.shtml>

⁶² Peter K. Yu, Four Common Misconceptions About Copyright Piracy, Public Law & Legal Theory Working Paper Series Research Paper No. 01-16, <http://ssrn.com/abstract=443160>, p. 1.

⁶³ Graham J. Chynoweth, Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen Its Copyright Laws, 2 *Duke Law & Technology Review* 1-10 (2003), p. 4.

significance.⁶⁴ The Chinese traditional culture was dominated by Confucianism. In Confucianism knowledge was viewed as ‘rediscovery of the ways of ancient sages’⁶⁵ and copying ‘previous intelligence’, even without permission, was neither shameful nor problematic and was in fact conceived to be a ‘noble act’.^{66,67} Besides, the deep-seeded yin-yang (Dao) cultural concepts of Li and Fa lead the Chinese against the concept of copyright.⁶⁸ Mainly, this predisposition comes from the Li notions that the individual should be submerged in the collective, that the individual-society relationship should be non-competitive, and the Fa notion that the state has control over the individual.⁶⁹ China does not have as strong concept as the west about people oriented, private property, the relationship between rights and obligations, etc. In China, individuals’ obligations are more important than rights, the state overrules everything.⁷⁰ Even if one truly ‘created’ something ‘new’, that idea or cultural ‘creation’ could never belong to a certain individual, namely the creator, but should belong to everyone since it is part of the truth, good and beauty which should belong to all.⁷¹ The overall traditional culture of China does not stand on the side of copyright protection.

2.2.2.2. Politics

China is in its development as a burgeoning market economy ensconced within a socialist political system.⁷² Same as the ancient Chinese culture, the ruling Chinese Communist Party (CCP) alleged collective rights to be above the private rights. Of specific importance to this political enshrinement of anti-copyright beliefs was that the collective should own all capital and property such as land, natural resources, etc. Intellectual

⁶⁴ Graham J. Chynoweth, Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen Its Copyright Laws, 2 *Duke Law & Technology Review* 1-10 (2003), p. 4.

⁶⁵ Lehman, J. A.: 2006, ‘Intellectual Property Rights and Chinese Tradition Section: Philosophical Foundations’, *Journal of Business Ethics* 69, 1–9. doi:10.1007/s10551-006-9059-8, p. 2.

⁶⁶ Hamilton, M. A.: 1997, ‘The TRIPS Agreements Imperialistic Outdated and Overprotective’, in A. D. Moore (ed.), *Intellectual Property: Moral Legal and Intellectual Dilemmas* (Rowan & Littlefield, Maryland), pp. 243–268.

⁶⁷ “传先哲之精蕴，启后学之困蒙，亦利济之先务，利善之美谈”。

⁶⁸ Graham J. Chynoweth, Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen Its Copyright Laws, 2 *Duke Law & Technology Review* 1-10 (2003), p. 4.

⁶⁹ Graham J. Chynoweth, Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen Its Copyright Laws, 2 *Duke Law & Technology Review* 1-10 (2003), p. 4.

⁷⁰ 关于网络盗版现象之法律问题思考 (Legal Thinking about Online Piracy Phenomenon), 2010, <http://www.001lunwen.com/wznr-752.html>

⁷¹ Ivanhoe, P. J.: 2005, ‘Intellectual Property and Traditional Chinese Culture’ in J. K. Campbell, M.O’Rourke and D. Shier (eds.), *Law and Social Justice* (MIT Press, Massachusetts), pp. 125–142, p. 127.

⁷² Sanford G. Thatcher, China’s Copy Right Dilemma, *Learned Publishing* Vol.21 No. 4, pp. 278-284 (Penn State University Press, 2008), p. 278.

property of ideas is not excluded.⁷³ China is now changing its form to the market economy; still socialist thoughts are deeply rooted in the political and ruling parties thus widely influencing the whole country. The old feudal dynasties in China liked to ban books, destroy the original edition, forbid private people to print officially printed books and prohibit some books from disseminating.⁷⁴ Now the situation is still not optimistic. The Chinese government censors all the books, news, movies and the Internet, etc. Censorship prevents some content from being released on the legitimate market at all,⁷⁵ which leads to the public seeking for pirates.

Besides the collective political views and strong censorship dominating the country, the legal remedy cannot also satisfy the stakeholders. Time consuming official review processes of the content can take months to complete and low compensation from the infringement make stakeholders hesitant to allege their rights in court. Even if the stakeholder finally gets the judgment, enforcing bodies are generally low effective, understaffed, underfunded and have little experience.

2.2.2.3. Economics

The economic realities of the situation have also played a role in China's resistance to copyright law. A main cause of piracy is the large gap in nominal Gross Domestic Product (GDP)⁷⁶ and personal income between western countries and China.⁷⁷ During the first few decades of China opening its market to the world, the market was in great need of technologies that could increase productivity. Take software as an example, studies typically find a strong negative relationship between economic wealth and the level of software piracy, such that poorer countries tend to have higher levels of software piracy. The high cost of software is often cited as a motivating reason for pirating software.⁷⁸ The disadvantage in GDP per capita made it difficult for companies or individuals to afford genuine software. However, by choosing pirated software instead, firms were able to improve their technology and increase productivity at a much

⁷³ Graham J. Chynoweth, Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen Its Copyright Laws, 2 *Duke Law & Technology Review* 1-10 (2003), p. 4.

⁷⁴ 吴汉东 (Handong Wu), 关于中国著作权法观念的历史思考 (A Historical Perspective on the Concept of China's Copyright Law), 2003,

<http://www.civillaw.com.cn/article/default.asp?id=8065>

⁷⁵ Sanford G. Thatcher, China's Copy Right Dilemma, *Learned Publishing* Vol.21 No. 4, pp. 278-284 (Penn State University Press, 2008), p. 281.

⁷⁶ Gross domestic product is the market value of all officially recognized final goods and services produced within a country in a given period of time. GDP per capita is often considered an indicator of a country's standard of living.

⁷⁷ Jiong Chen, An analysis of piracy in China: the cause, reason and solution, 2009.8.22, <https://my.hamilton.edu/documents/Jiong%20Chen%20paper.pdf>, p. 4.

⁷⁸ Trevor T. Moores, Vatcharaporn Esichaikul, Socialization and Software Piracy: A Study, *Journal of Computer Information Systems*, Spring 2011, pp.1-9, p. 1.

lower cost.⁷⁹ It is also easy to find that American software is usually more expensive abroad, and most often in less developed countries, than it is in the US.⁸⁰ In the Chengdu market, a genuine Microsoft Office 2000 software costs more than CNY 6000(USD 961)⁸¹ at that time, but the pirated software only costs CNY 10(USD 1.6). In 2010, a cheapest genuine Windows 7 costs CNY 399(USD 63.9), which Microsoft alleged as the cheapest price in the world.⁸² While piracy Windows 7 still costs much lower than the genuine one or totally free for individuals. The price advantage make consumers tend to choose the pirated version instead of the genuine one.

Not only is the price of genuine software much more expensive in China than in the developed countries, but the cost of using the information infrastructure is much higher than in other countries. Only to mention the cost of broadband, data shows that in 2011 the Chinese users' monthly expenses for 1MB/s broadband is USD13.1, which was four times more expensive than in the US and four hundred times more than Hong Kong.⁸³ In China's market, a genuine DVD usually cost CNY 50(USD 8), and Blue Ray costs over CNY 200(USD32) per disc.⁸⁴ Until now, after more than 30 years' Open Door Policy, by the year 2011, according to the survey of State Statistics Bureau, the Chinese people average annual disposable income⁸⁵ was CNY21,801(USD3492) in the urban area and CNY6,799(USD1089) in rural area.⁸⁶ Due to the general income is low, the huge gap between rich and poor and the social welfare is inadequate in the country, the public is therefore reluctant to purchase anything beyond basic necessities.

2.2.2.4. Consequences

For the country as a whole, China benefits a lot from the free riding and low protection of others intellectual property rights. On one hand, China is still a

⁷⁹ Jiong Chen, An analysis of piracy in China: the cause, reason and solution, 2009.8.22, <https://my.hamilton.edu/documents/Jiong%20Chen%20paper.pdf>, p. 9.

⁸⁰ Peter K. Yu, Four Common Misconceptions about Copyright Piracy, Public Law & Legal Theory Working Paper Series Research Paper No. 01-16, <http://ssrn.com/abstract=443160>, p. 14.

⁸¹ All the CNY exchange USD rate in this paper is calculated as CNY1= USD0.1602.

⁸² Windows 7 正版操作系统十月一日开始预售 (Windows 7 Genuine Operating System Will be Released in 1st October), 2009.9, <http://www.cnzz.cc/edu/os/winseven/4914.html>

⁸³ 专家称内地宽带费为港 400 倍 垄断致服务质量差 (Experts Said Due to Monopoly the Mainland Broadband Has Poor Quality with Service Fees 400 Times more than Hong Kong), 2012.4, <http://news.sina.com.cn/c/2012-04-29/134524348681.shtml>

⁸⁴ 免费音乐或许仍是主流 收费并非首度尝试 (Free Music Perhaps Still the Mainstream, Charging has not been the First Time) , 2012.10 <http://finance.chinaneews.com/it/2012/10-30/4287103.shtml>

⁸⁵ Disposable income is total personal income minus personal current taxes.

⁸⁶ 人民网 www.people.com.cn, 国家统计局: 城镇居民人均收入十年增 1.8 倍(The State Statistics Bureau: The Average Income of Chinese Residence Increased 1.8 Times in the Past Ten Years), 2012.8.17, <http://finance.people.com.cn/n/2012/0817/c1004-18766610.html>

developing country, especially poor in the beginning of its Open Door Policy. Most of the new technologies were brought in by foreign investments, in other words, foreign investments possess the monopoly power over the technologies which are protected by intellectual property law. Copying is the most effective way to break the monopoly and spread new technologies to all over the country, which is impossible to accomplish with a strong intellectual property protection. On the other hand, the low income of the public makes it also impossible to accept the prices of the genuine products. Piracy contributes with a lot to the fast development of China's economy.

Nowadays, as the country calls for more incentive to a low level of copyright protection is however changing to a stronger one. Nevertheless, the Internet weakens the strong copyright protection regime. Digital piracy makes the government and enforcement organizations devote massive human resources which achieves little success. When the government takes down many websites involving digital piracy, more digital piracy websites will show up in the next few days. The intellectual industries such as movies, music and computer software suffer the most. The intellectual industries provide the public products with a relatively high price, and on the other hand complain about the serious digital piracy. Facing high prices, the public tend to choose piracy as the only way to protest. The public, no doubt, benefits the most from the digital piracy.

The public not only enjoys the free downloading and online service, but some of them also share their resources with others. The Internet has become a platform for Internet users to communicate, spread information and share. The Internet opened a new age for human beings, at the same time challenging the existing copyright legislation system. To make the situation more complicated, the Chinese government imposed the world's strongest censorship over the Internet. On one hand, it takes down massive piracy links and websites and on the other hand it makes the public have no choice but piracy by blocking some information and materials that the public have a desire to reach. Digital Piracy, in China, is not only the symbol of copyright law infringement, but also an obligato part of individuals' daily life.

2.3. Piracy, Prejudice and Price

The serious piracy problem in China has long been condemned by some of the developed countries. However, the developed countries seem to care more about their own interests than other's by utilizing the intellectual property rules set by them. Under the digital environment, copyright law itself shows that it is less effective than before; the copies are no longer trapped in papers but in the digital form that can travel into all computers that are connected to the Internet. It is time to discuss how the copyright law

itself accommodate with the information age and to see what views exist today regarding piracy. The legislation cannot only consider a certain group and individuals but also need to take the whole society's welfare into account. Law is always more hysteretic than the development of the society, the origin of the copyright law was to inspire the creations and reward the creators. But now copyright law encounters with the Internet. The public's demand for free information and knowledge has never been as strong as now. In order to follow the existing copyright rules lots of efforts have been taken, even at the risk of freedom of expression. What is needed now is to think about how the situation currently is and how to draw the line, how to protect the copyright holders and the individuals' interests at the same time.

2.3.1. The Dilemma of Copyright Law

Generally speaking, laws protect intellectual property for two specific reasons: to give creators the opportunity to publicly express his or her creation and to encourage that creation's fair trade.⁸⁷ Copyright law attempts to stimulate creators by granting them monopoly rights over their works so that they can get rewarded from their labour. Only when someone gets a license from the author can the work be copied. At the same time copyright law encourages the creators to publicly give access to the work to make sure the public have access to the knowledge and information. Generally the enforcement of copyright law is focused on the author's and distributor's rights. Piracy is among the most serious infringements. However, because of the improvement of technology which we have enjoyed in recent years, particularly those related to the Internet, enforcement of laws concerning copyright has become increasingly difficult.⁸⁸

Information technology development changes our behaviour and lifestyles in all aspects, and also brings profound changes at the speed of intellectual creations. The Internet has reached the point where users can copy almost everything with a simple click, at no cost whatsoever. With the steady growth of licensed file sharing sites, numerous court decisions around the world find unlicensed providers and individual users liable for copyright infringement. More active prevention measures from Internet service providers (ISPs) are also encouraged by governments, nevertheless, unlicensed activity continues unabated.⁸⁹ Unauthorized copying prevents from obtaining any profit as potential consumers are no longer compelled to

⁸⁷ John Berti, Copyright Infringement and Protection in the Internet Age, Published by the IEEE Computer Society, November/December 2009, p. 42.

⁸⁸ John Berti, Copyright Infringement and Protection in the Internet Age, Published by the IEEE Computer Society, November/December 2009, p. 42.

⁸⁹ Hector L Macqueen, 'Appropriate for the Digital Age'? Copyright and the Internet: 1. Scope of Copyright, Law and the Internet, in Charlotte Waelde, Lilian Edwards (eds) *Law and the Internet* (Hart, 2009), pp. 183-225, p. 183.

buy the work when it's available elsewhere for free.⁹⁰ Most transactions encompassing digital piracy do not involve a goods-for-money transfer, but instead may involve a barter of one copyrighted goods for another.⁹¹ Internet has made unauthorized duplication not only effortless and low-cost, but anonymous as well.⁹²

The digital condition puts the copyright law under a crisis because of its lack of enforcement. If a law loses basic enforcement and infringement can be seen everywhere, it is hard to say it is a law fit for the society. Digital piracy forces copyright law to face up to the problem that copyright law take no adequate consideration of the other stakeholder—the public. Now even governments and legislatures, whether transnational, national or local, have realized the value of the Internet as a place to give out information and interact with people in the provision of services and the collection of data.⁹³ The foundation which copyright law survives on has significantly changed, the Internet triggered copyright law regimes to redistribute the interests among different stakeholders. Copyright law lost its efficiency in either protecting the monopoly rights of authors or guaranteeing the public's access to information.

2.3.2. Debates around Piracy

Piracy is now more controversial than before; some consider it as evil or theft, while some think the society needs a certain amount of piracy.

The predominate view considering piracy is a kind of theft which copies others intelligent fruit without paying the creator. The intelligent work took creators much effort to create, however, as long as it's been put in public, it's very easy to be copied. Piracy deprives the creators from their material rights on the intellectual work. Copying others intellectual works without authorization is the same as stealing someone's property, which is immoral and should be condemned. Besides, those are conducts that violate the existing laws.

Many industry analysts see piracy as one of the key threats to profitability and innovation.⁹⁴ They claim that piracy leads to higher prices for legitimate users, lower profits for the firms, reduced new product

⁹⁰ John Berti, Copyright Infringement and Protection in the Internet Age, Published by the IEEE Computer Society, November/December 2009, p. 42.

⁹¹ Robin Andrews, Copyright Infringement and the Internet: an Economic Analysis of Crime, B.U.J.SCI. & TECH.L. Vol.11.2, p. 4.

⁹² Christopher Johnson, Daniel J. Walworth, Protection U.S Intellectual Property Rights and the Challenges of Digital Piracy, Office of Industries Working PaperNo. ID-05, U.S. International Trade Commission, March 2003, p. 1.

⁹³ Hector L Macqueen, 'Appropriate for the Digital Age'? Copyright and the Internet: 1. Scope of Copyright, Law and the Internet, in Charlotte Waelde, Lilian Edwards (eds) *Law and the Internet* (Hart, 2009), pp. 183-225, p. 186.

⁹⁴ Sanjay Jain, Digital Piracy: A Competitive Analysis, Marketing Science, Vol. 27, No. 4, July–August 2008, pp. 610–626, at p. 610.

innovations and is generally harmful to the society.⁹⁵ Especially the entertainment industry holds the view that digital piracy isn't just about a bunch of kids stealing music. It's about an assault on everything that constitutes the cultural expression of our society.⁹⁶ If we fail to protect and preserve our intellectual property system, the culture will be atrophied.⁹⁷ Besides, companies are not the only ones who get hurt. Artists will have no incentive to create without sufficient material reward. Some described the worst-case scenario as the country ending up in a sort of Cultural Dark Ages.⁹⁸ Piracy could also violate criminal law. The figure of the pirate as a criminal invites the legal attention of the state and of private enforcers.⁹⁹

In the predominant logic of intellectual property enforcers, piracy is demonized, seen as the ultimate embodiment of evil.¹⁰⁰ Since Piracy operates within the logic of profit and within the terms of commerce, it cannot claim the sort of moral ground that other non-legal media practices can.¹⁰¹ Generally speaking, piracy hurts copyright holder's material interests the most. However, the copyright holders are not the only stakeholders; the public is also the stakeholder of copyright law, and the public's voice should also be heard. On the other side of the debate, Peter Yu holds the view that not everybody needs economic incentives to create.¹⁰² The current copyright system is not as perfect as originally thought, it is designed to give an incentive to the creators and the disseminators in order to get the intellectual work to the public. However, mostly, the disseminators are so powerful that they can decide which works can be published; before the Internet age, this also hurt the creators' rights. The entertainment industry has long been able to control the discourse of music production. The emergence of file sharing technology has dramatically transformed the musical playing field around the world.

The Internet provides not simply a heaven for pirates, but also a legitimate avenue for artists to make their works published and accessed by people all over the world which may render the current industrial giants irrelevant.¹⁰³ In the past, even the authors who wanted to dedicated their works to the public always have had to pass through the process of publishers and other media. The development of the Internet allows authors to give up their copyright interests or dedicate their works to the public after the completion

⁹⁵ Sanjay Jain, Digital Piracy: A Competitive Analysis, *Marketing Science*, Vol. 27, No. 4, July–August 2008, pp. 610–626, at p. 610.

⁹⁶ Debora J Halbert, *Resisting Intellectual Property* (Routledge, June 2005), p. 66.

⁹⁷ Debora J Halbert, *Resisting Intellectual Property* (Routledge, June 2005), p. 66.

⁹⁸ Debora J Halbert, *Resisting Intellectual Property* (Routledge, June 2005), p. 66.

⁹⁹ Lawrence Liang, *Beyond Representation: The figure of the Pirate*, *Access to Knowledge In the Age of Intellectual Property*, 2010, p. 356.

¹⁰⁰ Lawrence Liang, *Beyond Representation: The figure of the Pirate*, *Access to Knowledge In the Age of Intellectual Property*, 2010, p. 356.

¹⁰¹ Lawrence Liang, *Beyond Representation: The figure of the Pirate*, *Access to Knowledge In the Age of Intellectual Property*, 2010, p. 357.

¹⁰² Peter K. Yu, *Digital Piracy and the Copyright Response*, in *Internet and Governance in Asia—A Critical Reader* 340 (Indrajit Banerjee ed., AMIC 2007), p. 2.

¹⁰³ Debora J Halbert, *Resisting Intellectual Property* (Routledge, June 2005), p. 67.

of creation through BBS or blogs.¹⁰⁴ No doubt, the Internet has greatly shortened the distance of between authors and the public. The disseminators can no longer be the obstacles for works to meet the public, or to say, the Internet replaces most of the disseminators' work. What's more, piracy can also function as advertisement.

The way to calculate the amount of economic lost is always based on if the pirates do not download pirates, and instead consumers will buy the genuine product. In fact, most people use piracy only to satisfy their curiosity, and if there is exists no free download of resources, they will still not buy it. Not every piracy is necessarily bound to lost sales.¹⁰⁵ As technology continues to evolve, the battle between pirates and copyright holders is going to escalate, and pirates are always going to be one step ahead.¹⁰⁶ While closing down shops and online stores that sell pirated software may restrict the supply, high levels of use may continue if people share copies within their own groups.¹⁰⁷

Copyright aspires to promote creativity, but it actually fails to do this, and excessive protection has actually resulted in a decrease of creativity or a threat to creativity.¹⁰⁸ All the new creations are based on the existed knowledge, over protecting of copyright materials will no doubt restrict the flow of knowledge, in the long run decrease the appearance of new creations. The argument of piracy seriously impairing the authors' enthusiasm is also untenable. Some individuals might keep on inventing regardless of whether they make money or not, companies which invest massive sums of money and effort in product-development are keen to make money out of their inventions.¹⁰⁹ Limitations placed on the circulation of ideas by the institution of intellectual property rights may create barriers for further innovations, and in the end the society as a whole may also suffer as a result.¹¹⁰ As Hettinger said, “[h]ow wasteful private ownership of

¹⁰⁴ 郑成思(Sicheng Zheng), 网络盗版与“利益平衡”(Network Piracy and the “Balance of Interests”), 韶关学院学报(社会科学版) Journal of Shaoguan University (Social Science), Vol.26 No.2, Feb.2005, p. 1.

¹⁰⁵ 知识产权盗版: 感知与领略中国美国及其他地区 (Copyright Piracy: Perception the US and Other Areas), 2007.12,

<http://bbs.kuaiibo.com/viewthread.php?tid=5238&extra=page%3D1&ordertype=1>

¹⁰⁶ You Will Never Kill Piracy, and Piracy Will Never Kill You, 2012.3,

<http://www.forbes.com/sites/insertcoin/2012/02/03/you-will-never-kill-piracy-and-piracy-will-never-kill-you/>

¹⁰⁷ Trevor T. Moores, Vatcharaporn Esichaikul, Socialization and Software Piracy: A Study, Journal of Computer Information Systems, Spring 2011, pp.1-9, at p. 1.

¹⁰⁸ Lawrence Liang, Beyond Representation: The figure of the Pirate, Access to Knowledge in the Age of Intellectual Property, 2010, p. 360.

¹⁰⁹ Betty Yung, Reflecting on the Common Discourse on Piracy and Intellectual Property Rights: A Divergent Perspective, Journal of Business Ethics (2009) 87:45-57, at p. 51.

¹¹⁰ Betty Yung, Reflecting on the Common Discourse on Piracy and Intellectual Property Rights: A Divergent Perspective, Journal of Business Ethics (2009) 87:45-57, at p. 52.

intellectual property is depends on how beneficial those products would be to those who are excluded from their use as a result”¹¹¹.

Actually piracy is more than one might think, the traditional view that piracy is a theft puts intellectual property equal with tangible property. However, traditional views ignore the fact that intellectual property has more than tangible properties, it’s also knowledge and information which can have huge social effect if fully put into use.

2.3.3. Human Rights Acts as a Balance between Authors and the Public

What began as a war on piracy has now become a war against the common sense. No country has ever won a war by fighting battles on all fronts.¹¹² The short-term tactic of halting piracy websites has showed limited effects. Just as the history of copyright law shows, one of the copyright law functions served to break the monopoly power of the government or certain publishers’ control over books. Copyright law not only concerns the interests of authors and disseminators, but also the public and the whole society. Under the current situation, as the file-sharing on the Internet is wildly used, the public’s urgent need for the intellectual resources is seen. One should consider whether the market value of the intellectual product now is close to or goes too far from its social value and whether the price it costs to take down all the piracy content in the Internet is worth the social effect that one could acquire. Now is not only the question of how one can better take down the piracy websites to protect copyright holders’ rights, but also to rethink about the law itself, which not really fits into the information age.

Piracy can be seen as a battle between the shareholders and the public over the change and retention of the status quo. An increasingly digital world has triggered furious debate about how to maintain the appropriate incentives afforded to creators of copyright content, given the ease of digital copying, while continuing to provide for certain non-infringing uses of works for socially beneficial purposes.¹¹³ All the authors, disseminators and the public are the stakeholders of digital copyrights. Generally authors want to obtain the most benefit from their works. Therefore they tend to strengthen the copyright protection further in order to control the free use of works by the public. Disseminators seek to spread the works quickly and easily, in

¹¹¹ Hettinger, E. C.: 1997, ‘Justifying Intellectual Property’, in A. D. Moore (ed.), *Intellectual Property: Moral, Legal and Intellectual Dilemmas* (Rowan & Littlefield, Maryland), pp. 17–38, p. 28.

¹¹² Peter K. Yu, *The Escalating Copyright Wars*, Public Law & Legal Theory Working Paper Series, Research Paper No. 01-06, pp. 907-951, <http://ssrn.com/abstract=436693>, p. 943.

¹¹³ Christopher Johnson, Daniel J. Walworth, *Protection U.S Intellectual Property Rights and the Challenges of Digital Piracy*, Office of Industries Working PaperNo. ID-05, U.S. International Trade Commission, March 2003, p.1.

order to achieve maximum benefits from their investment. However, the public's pursuit for free access to information, which could also be copyrighted works. Different stakeholders pursuing different interests will inevitably lead to a collision and conflict of interests between them.¹¹⁴ When protecting authors' monetary interests one should at the same time notice public's interest safeguards, such as the idea-expression dichotomy, the first sale doctrine and the fair use privilege. They are "just as important as the grant of the right itself".¹¹⁵

It is indeed worthwhile discussing the problem of which width and depth the copyright protection should be granted. If it goes too far and the rights granted is too broad, it might damage the dissemination and use of the work. Copyright law often involves the extent of protection, including those relating to encourage the creation of activities which must be due to the copyright monopoly on public and social costs incurred. These costs can share the price of a particular work, such as theatre performances in the price and the cost of textbooks. If the copyright protection is too broad, they will inhibit the creation of newer works, which hinders rather than promotes the progress of the arts and technology. On the other side, if the copyright protection is too narrow, copyright law will be inadequate to provide a sufficient economic incentive for authors and publishers to enrich our society with works and creations.

Although strong copyright protection can give the author short-term material benefits, the public's interests will be reduced due to the follow-up use of the copyrighted works will be impaired. The society will benefit less from a strong copyright protection. The Copyrighted works, especially works containing knowledge and information, is necessary for people to obtain information and social progress. Overprotection of copyright will result in difficulties in the fields of science and culture. Everyone's education involves the free use of predecessors' achievements. The same goes for academic and scientific exploration and overly broad protection will be a threat to people's common practice.¹¹⁶ Doubtful is the assumption that the current copyright system holds the proper balance between incentives to future creation, the free flow of information and the preservation of the public domain in the interest of potential future creators.¹¹⁷

¹¹⁴ 梁婧 (Liang Jing), 论数字环境下版权保护的利益平衡 (The Balance of the Interests of Copyright Protection in the Digital Environment), 东南传播 (Southeast Communication, 2008.11), p. 61.

¹¹⁵ Peter K. Yu, The Escalating Copyright Wars, Public Law & Legal Theory Working Paper Series, Research Paper No. 01-06, pp. 907-951, available at SSRN: <http://ssrn.com/abstract=436693>, pat. 937.

¹¹⁶ Wendy J•Gordon, On Owning Information: Intellectual Property and the Restitutory Impulse, 78 VA. L. REV. 149, 167 (1992) .

¹¹⁷ Peter K. Yu, Four Common Misconceptions About Copyright Piracy, Public Law & Legal Theory Working Paper Series Research Paper No. 01-16, <http://ssrn.com/abstract=443160>, p. 5.

The balance issue copyright law deals with between the interests of authors and the public also falls in the category of human rights law. Human rights are rights inherent to all human beings, whatever the nationality, place of residence, sex or ethnic origin, colour, religion, language, or any other status.¹¹⁸ Human rights law not only specifies the authors' material and moral rights but also the public's rights to benefit from scientific progress and the enjoyment of cultural life.¹¹⁹ Different from copyright law, human rights law protects all the basic rights a human deserves since the time they live a life. In the human rights law context, one should note that every right has equal value; no right shall be higher than the other. However, those rights are also in conflict with each other, which also calls for a balance. When one tries to keep the balance, all the other rights should also be taken into account. At the time lots of the copyright shareholders struggling for against digital piracy, and copyrights laws shows to be less effective than before. Human rights law can be another balancing tool to deal with the clash in interests between copyright shareholders and the public.

Human rights are often expressed and guaranteed by law in the forms of treaties, customary international law, general principles, etc.¹²⁰ International human rights law lays down obligations on States to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and maintain fundamental freedom for individuals.¹²¹ The enforcement of copyright law and the whole legal system in a country is indispensable from the state. Since the state set the infrastructure of a country and has the administrative power. Moreover, states are members of the international human rights law. Thus, the State plays a vital role in making the balancing of interests between authors and public within the human rights law framework.

The current copyright law regime is trying to protect authors' and disseminators' rights without fully taking the public's interests into account. Under the digital environment, information should be distributed more effectively, without discourage disseminating of information. Copyright law is struggling to protect copyright holders' monopoly rights by controlling the flow of information. By controlling the price and distribution, the public loses chances of getting legal intellectual contents at a reasonable, and relatively low or free, price. The society is protecting copyright holders' right at an expense of other individuals' fundamental rights such as the right to participate in cultural life, to benefit from scientific progress, freedom of expression and others. Therefore, human rights is not only an alternative way to solve the digital piracy problem, but a necessary way to protect individuals' basic rights, including both the public and the authors.

¹¹⁸ Website of UN Human Rights, Office of the High Commissioner for Human Rights, <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>

¹¹⁹ Article 15 of the ICESCR.

¹²⁰ Website of UN Human Rights, Office of the High Commissioner for Human Rights, <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>

¹²¹ Website of UN Human Rights, Office of the High Commissioner for Human Rights, <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>

2.3.4. Concluding Remarks

The improvement of the social welfare is the ultimate goal of copyright law. Excessive copyright protection may impair the public's access to intellectual works at relatively low costs, especially for the individuals in developing or less developed countries such as China. Thereby preventing the spread of creations, and thus hinder the future creation, will ultimately harm the society as a whole. Whereas limiting copyright protection may decrease authors' motivation which directly leads to a decrease of intellectual works will in the long run also harm the public interest. Under the digital environment, public interests shows to have higher importance than before. It is time for copyright law to pay more attention to the public's interests.¹²²

Legal action against websites that promote or involve the illegal transfer of digital content and action against individuals infringing on copyright could still bring some results, and still remains as an important part of how to deal with Internet piracy.¹²³ However, due to the large number of actors that are involved in different jurisdictions or operate in a decentralized manner independent of any central hub, the overall efficiency of such actions will diminish over time. Too much resource has been used in the fight against digital piracy and still there is a relatively high price to buy the legal intellectual works. On both sides, the society contributes too high costs for the copyright shareholders. Thus, it is necessary to find new ways to deal with copyright. Those new ways need to be fair and equitable for all parties, and in particular must reflect a balance between the interests of copyright shareholders and the public.¹²⁴

To keep a balance one should view piracy in a more comprehensive way instead of in a prejudiced way. It is important to consider whether the price of copyright protection is worth the value of its social effects. Intellectual property law is not alone in trying to balance the interests between different copyright stakeholders. Human rights law provides the ideas to give balance, which also shows more concern for the whole human community.

¹²² 梁婧 (Liang Jing), 论数字环境下版权保护的利益平衡 (The Balance of the Interests of Copyright Protection in the Digital Environment), 东南传播 (Southeast Communication, 2008.11), p. 62.

¹²³ Piracy of Digital Content, ISBN 978-92-64-06450-8 OECD 2009, <http://www.ifap.ru/library/book443.pdf>, p. 12.

¹²⁴ Piracy of Digital Content, ISBN 978-92-64-06450-8 OECD 2009, <http://www.ifap.ru/library/book443.pdf>, p. 12.

3. The Adaptability of Human Rights in the Copyright Framework in China

This chapter explains the copyright norms concerning digital piracy applied in China and also the Human Rights rules concerning authors and the public. Specifically, the copyright norms chapter includes both domestic laws in China and international treaties which are ratified by China. Different from the copyright norms, the human rights norms are divided into two parts based on the binding force in China. After introducing the norms, a study of the relationship between copyright law and human rights law in China to show the role of human rights law in the digital piracy problem is done as well as a discussion if the two norms can work together on the digital piracy problem or if one should prevail over the other.

3.1. Copyright Norms Concerning Digital Piracy

Digital piracy is a new form of piracy which only showed up with the use of the computer and the Internet. The copyright law itself does not say too much about digital piracy. However, there are new rules that came out such as the international 1996 WIPO Internet Treaties and the domestic Measures for the Administrative Protection of Internet Copyright which attempt to make the copyright law regime fit better with the digital environment. Generally speaking, the domestic copyright law in China is more specific and complicated. The International copyright law norms mainly show general rules that can apply in all the ratified countries and show more flexibility to fit in the different situations in different countries.

3.1.1. Copyright Norms in China

China is not a case law country, which means that the courts can only refer to laws but not cases. However, judicial interpretations by the Supreme People's Court ("Supreme Court") shall be observed by all of the courts, therefore, they can be referred to as legal grounds in cases.¹²⁵ The administrative bodies are also playing an important role in the

¹²⁵ Jessica Haixia Jia, Internet Copyright Regulation – China, Copyright Infringement in the Network Environment - China's perspective, Computer Law & Security Report Vol. 19 no. 2 2003, p. 111.

implementation of the law. Therefore, the copyright norms in China does not only include the basic copyright laws and interpretations by the Supreme Court of China, they also include the regulations and measures put forward by special government bodies such as the National Copyright Administration, the Ministry of Information Industry, the State Council and others.

3.1.1.1. Principle of Copyright Law

Pursuant to China's copyright system, the Copyright Law shall be the main legal instrument for copyright matters.¹²⁶ Article 1 of the Copyright Law of China explicated the purpose of copyright law, which is to protect the "copyright of authors in their literary, artistic and scientific works and the rights and interests related to copyright, encouraging the creation and dissemination of works conducive to the building of a socialist society that is advanced ethically and materially, and promoting the progress and flourishing of socialist culture and sciences". The article shows that the ultimate goal of copyright law is to promote the state's culture and sciences, which means the public, the state as a whole, is of crucial importance in the copyright law. Copyright holders shall not jeopardize public interests when exercising their copyright.¹²⁷

3.1.1.2. Shareholders' Right of Communication through Information Networks

Under the Copyright Law, copyright holders have wide rights on the intellectual work including the right of publication, authorship, revision, integrity, reproduction, distribution, rental, etc.¹²⁸ Copyright owners may authorize or transfer to others' the rights for reproduction, distribution, rental, exhibition, performance, presentation, broadcasting, communication through information networks, cinematography, adaptation, translation, compilation, etc, and receive remuneration or fees with accordance to the terms of contracts or the relevant provision in the copyright law.¹²⁹ The material rights for the authors' work lasts for a life time and 50 years after his or her death.¹³⁰ Since the copyright law was modified in 2010, the right of communication through information networks had been added in the copyright law to adapt to the digital environment. The term "right of communication through information networks" means that the right to make

¹²⁶ Jessica Haixia Jia, Internet Copyright Regulation – China, Copyright Infringement in the Network Environment - China's Perspective, Computer Law & Security Report Vol. 19 no. 2 2003, p. 101.

¹²⁷ Article 4 of the Copyright Law of China.

¹²⁸ Article 10 of the Copyright Law of China.

¹²⁹ Article 10 of the Copyright Law of China.

¹³⁰ Article 21 of the Copyright Law of China.

available to the public a work, performance, or sound or video recording, by wire or by wireless means, in such a way that members of the public may access the said work, performance, or sound or video recording from a place and at a time individually chosen by them.¹³¹

Digital piracy infringement of copyright consists of: (1) reproducing, distributing, performing, presenting, broadcasting, compiling a work or making it available to the public through information networks without permission of the copyright owner; (2) publishing a book where the exclusive right of publication belongs to another person; (3) reproducing or distributing a sound recording or video recording of a performance, or making a performance available to the public through information networks without permission of the performer; (4) reproducing or distributing a product of sound recording or video recording or making it available to the public through information networks without permission of the producer; (5) rebroadcasting a radio or television program or reproducing such a program without permission; (6) intentionally circumventing or sabotaging the technological measures adopted by a copyright owner, or an owner of the rights related to the copyright, to protect the copyright, or the rights related to the copyright, of the work or the product's sound recording or video recording, without permission of the owner.¹³²

Anyone who infringes the copyright shall, depending on the circumstances, bear civil liabilities such as ceasing the infringement, eliminating the bad effects of the act, making an apology or paying compensation for the actual losses suffered by the rightful owner.¹³³ When the actual losses are difficult to calculate, the compensation shall depend on the amount of the unlawful gains by the infringer.¹³⁴ When the actual losses cannot be determined, the Court shall in light of the circumstances of the infringement, decide on a compensation amount no more than 500,000 CNY.¹³⁵ When public rights and interests are harmed by the copyright law infringement, the administrative department for copyright may order the person to discontinue the infringement, confiscate his unlawful gains, confiscate or destroy the copies produced through infringement and may also impose a fine.¹³⁶ When the circumstances are serious, the administrative department may, in addition, confiscate the material, tools and instruments mainly used to produce copies through infringement.¹³⁷ The copyright law grants copyright holders the same amount of rights as the time when Internet was not widely used. But the compensation to the copyright shareholders is difficult to calculate in the digital environment. It is especially difficult in the situation when the copyright infringer does not share or use the work to gain profits.

¹³¹ Article 26 of the Regulations on Protection of the Right of Communication through Information Network.

¹³² Article 48 of the Copyright Law of China.

¹³³ Articles 48-49 of the Copyright Law of China.

¹³⁴ Article 49 of the Copyright Law of China.

¹³⁵ Article 49 of the Copyright Law of China.

¹³⁶ Article 48 of the Copyright Law of China.

¹³⁷ Article 48 of the Copyright Law of China.

3.1.1.3. Digital Piracy in the Criminal Law

More than ever before, lawmakers and copyright owners are viewing copyright violations as not just lost profits or “free riding” by consumers, but rather as criminal acts posing a serious threat to financial stability, employment and creative innovation.¹³⁸

Digital piracy may also constitute a crime with sentences from detention or fine and up to seven years in prison if the infringement is severe and the purpose is to make a profit and the amount of illegal gains is large.¹³⁹ Since the criminal law is too vague to apply, the Supreme People’s Court, the Supreme People’s Procuratorate and Ministry of Public Security put forward more specific rules which resulted in Opinions on the Application of Laws in Criminal Cases of Intellectual Property Rights Violations. This has specified in what conditions digital piracy constitutes a crime: “For the purpose of making profits, without the authorization of copyright holders, utilizing information networks to publicly disseminate others literary works, music, movies, television programme, photography, video works, computer software and other works constitutes a crime if it has one of the following circumstances: (1) the amount of illegal business volume is more than CNY50,000 (USD8,025); (2) disseminating more than 500 pieces of other’s work;(3) publicize other’s works which is clicked by the public more than 50,000 times; (4) above 1000 registered members; (5) the amount or quantity does not reach to any of it but reaches half of the two conditions listed above; (6) other serious circumstances.”¹⁴⁰

The criminal laws and regulations indicate how much the Chinese government focuses on digital piracy. As mentioned earlier, China has the largest population of Internet users. According to this Opinion, it is not difficult for individuals or companies to reach the level of a crime in China. However, the essential condition to constitute digital piracy as a crime is for the purpose to gain profits. This means that Internet users who made copyrighted resources available on the Internet for the sake of sharing with others will not constitute a crime; it is only a violation of the copyright law.

3.1.1.4. Obligation of Network Service Providers

Network service providers are always involved in the digital piracy, since they provide the available link and content to the public. Article 36 of the Tort Law of the People’s Republic of China also makes it clear that network service providers who infringes upon the civil right or interest of another

¹³⁸ Robin Andrews, Copyright Infringement and the Internet: an Economic Analysis of Crime, B.U.J.SCI. & TECH.L. Vol.11.2, p. 1.

¹³⁹ Article 217 of the Criminal Law of China.

¹⁴⁰ Article 13 of Opinions on Some Issues concerning the Application of Law for Handling Cases of the Crime of Intellectual Property Infringement, 2011.01.10, the Supreme Court of China, the Supreme Procuratorate of China, the Ministry of Public Security.

person through the network shall assume the tort liability. In accordance with the international rules, China also has the procedure of safe harbour principle which deeply narrows down the obligation of the network services providers such as Google, Baidu, Sina, etc. In the Regulations on Protection of the Right of Communication through Information Network, Article 14 states “Where a right owner believes that a work, performance, or sound or video recording that exists in one of the services of a network service provider, who provides information storage space or provides searching or linking service, has infringed on the right owner’s right of communication through information networks, or that the right owner’s electronic rights management information attached to such work, performance, or sound or video recording has been removed or altered, the right owner may deliver a written notification to the network service provider, requesting it to remove the work, performance, or sound or video recording, or disconnect the link to such work, performance, or sound or video recording.” After receiving the notification, a network service provider shall promptly remove the work, performance, or sound or video recording suspected of infringement, or disconnect the link to such work, performance, or sound or video recording, and shall, at the same time, transfer the notification to the service recipient who made the work, performance, or sound or video recording available.¹⁴¹ The network service provider has no obligation to compensate if it disconnects or removes the works concerned by the notification. If it is known or there are reasonable grounds that the linked content is an infringement, the network service provider shall bear the liability for contributory infringement.¹⁴² Besides that, the Measures for the Administrative Protection of Internet Copyright also have similar rules for network service providers.¹⁴³

3.1.1.5. Limitation of the Rights

Copyright law grants copyright owners the exclusive right to copy and disseminate copyrighted works. Fair use is an exception to this exclusive right that allows copying for certain limited purposes including commenting on, criticizing, reporting about, or parodying a copyrighted work.¹⁴⁴ Through fair use, another person’s work can be made available through the

¹⁴¹ Article 15 of the Regulations on Protection of the Right of Communication through Information Network.

¹⁴² Article 23 of the Regulations on Protection of the Right of Communication through Information Network.

¹⁴³ Article 12; “Where there is no evidence to prove that an Internet information service provider clearly knows the facts of tort, or the Internet information service provider has taken measures to remove relevant contents after receipt of the copyright owner’s notice, the Internet information service provider shall not assume the administrative legal liabilities.”, Measures for the Administrative Protection of Internet Copyright, the National Copyright Administration, the Ministry of Information, Industry on 2005.4.29.

¹⁴⁴ Megan M. LaBelle, The “Rootkit Debacle” The Latest Chapter in the Story of the Recording Industry and the War on Music Piracy, *Denver University Law Review* 84 *Denv. U. L. Rev.* (2006-2007), p. 117.

Internet without permission from, and without payment of remuneration to the copyright owner.¹⁴⁵ Thus, fair use protects the public's interest in a free exchange of ideas and discourse.¹⁴⁶

In some countries fair use is a deliberately imprecise and flexible doctrine.¹⁴⁷ Courts make decisions case-by-case and based on: 1. The purpose of the use, such as whether the use is of a commercial nature or is for nonprofit educational purposes; 2. The nature of the copyrighted work; 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; 4. the effect of the use upon the potential market for, or value of, the copyrighted work.¹⁴⁸

However, China has specific regulations on fair use for the Court to apply. Both Article 22 of the Copyright law and Articles 6-7 of the Regulations on Protection of the Right of Communication through Information Networks clarified the fair use content. Fair use can be applied in the precondition that the name of the author and the title of the work are provided and the other rights enjoyed by the copyright owner in accordance with this law are not prejudiced.¹⁴⁹ According to the Regulations on Protection of the Right of Communication through Information Networks, fair use may be applied: (1) when a published work is appropriately quoted, for the purpose of introducing or commenting a certain work or explaining a certain point; (2) when a published work is unavoidably included or quoted, for the purpose of reporting current events; (3) when a small quantity of copies of a published work are made available to a small number of teachers or scientific researchers for the purpose of classroom teaching or scientific research; (4) when a published work is made available to the public by a state organ to a justifiable extent for the purpose of fulfilling its official duties; (5) when a translation is made of a published work of a Chinese citizen, legal entity or any other organization from Han language into a national minority language; (6) when a published written work is made available to blind persons for a non-profit purpose; (7) when an article published over an information network on current political or economic topics is made available to the public; or (8) when a speech delivered at a public gathering is made available to the public.¹⁵⁰ Since the fair use conditions are specifically listed by law, the usefulness of fair use is not that flexible. Article 7 particularly sets fair use clauses for libraries, archives, memorials, museums and art galleries. The fair use is limited to standardize

¹⁴⁵ Article 6 of the Regulations on Protection of the Right of Communication through Information Network.

¹⁴⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (fair use doctrine is necessary to fulfill copyright's very purpose, to promote the Progress of Science and useful Arts).

¹⁴⁷ Megan M. LaBelle, *The "Rootkit Debacle" The Latest Chapter in the Story of the Recording Industry and the War on Music Piracy*, *Denver University Law Review* 84 *Denv. U. L. Rev.* (2006-2007), p. 117.

¹⁴⁸ *Campbell*, 510 U.S. at 577 (alteration in original)(quoting *Stewart v. Abend*, 495 U.S. 207,236 (1990)).

¹⁴⁹ Article 22 of the Copyright Law of China.

¹⁵⁰ Article 6 of the Regulations on Protection of the Right of Communication through Information Network.

its collections of digitized works. The libraries and other institutions still need authorization to provide digital works to the public on the Internet no matter if they gain a profit or not, which may affect the function of the library and other institutions as the public cultural institutions.

However, the fair use clause in the Regulation on Protection of the Right of Communication through Information Networks is different from the context of fair use in copyright law. Especially the “use of another person’s published work for purposes of the user’s own personal study, research or appreciation” which listed in Article 22 of the Copyright Law no longer exists in the Regulation. In the information age, there is less fair use content along with the new particular rules to protect copyright shareholders’ rights, which states that right owners may adopt technological measures in order to protect their right of communication through information networks.¹⁵¹ The Regulation fully takes copyright shareholders’ rights into account but ignore the public’s fair use rights. This makes the extent of “digital piracy” much broader than it should be. The effect of fair use in the digital environment is thus severely narrowed down by law and the public’s right of fair use is at stake.

Besides the fair use regime to limit the copyright holders’ rights there are still compulsory licenses which are for the purpose of implementing the plan of nine-year compulsory education or the plan of national education through the Internet. Through these licenses works can be used without permission from the copyright owner.¹⁵² Also, the copyright holder should be paid for it.¹⁵³

3.1.2. International Norms on Digital Piracy—1996 WIPO Internet Treaties: WCT, WPPT

The Bern Convention for the Protection of Literary and Artistic Works is the base for the first international copyright law. It has regulations about the extent of protected works, copyrights and related rights, possible limitations of protection of certain works, criteria of eligibility for protection, moral rights, certain free use of works, etc.¹⁵⁴ Since the latest revision of the Bern Convention was in 1979, all of the legislation was made before the common use of the Internet. TRIPS is another important treaty concerning intellectual property law, it encourages more countries, especially developing countries such as China, to join the world’s intellectual property protection regime. It

¹⁵¹ Article 4 of the Regulations on Protection of the Right of Communication through Information Network.

¹⁵² Article 8 of the Regulations on Protection of the Right of Communication through Information Network.

¹⁵³ Sam Ricketson: Threshold Requirements for Copyright Protection, *The WIPO Journal: Analysis and Debate of Intellectual Property Issues*, 2009 ISSUE NO:1, p. 53.

¹⁵⁴ Bern Convention for the Protection of Literary and Artistic Works, September 9, 1886.

has provisions concerning computer software and compilation of data, which shows more concern toward the new technology. However, it still lacks specific rules on digital piracy.

In 1996, WIPO put forward two treaties: WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) which together are called WIPO Internet Treaties, in order to protect copyright holders' rights in the Information age. China joined them in 2007.¹⁵⁵ The preamble of the WCT and WPPT provides the goal of the two treaties, which is to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments.¹⁵⁶ Both treaties admit the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.¹⁵⁷

The WCT specifically protects rights holders of literary and artistic works¹⁵⁸ including art, books, software, movies, and music. The WPPT safeguards the interests of performers and producers of phonograms.¹⁵⁹

WIPO Internet treaties require member states to provide a basic framework of rights that allows creators to control in which ways their works can be used by others on the Internet and be compensated for it. Moreover, contracting states has obligations to provide adequate legal protection and remedies against the circumvention of technological protection measures and against alteration or removal of rights management information.¹⁶⁰ However, the treaties do not specify how such protection and remedies must be provided; this is left for member states to determine.

Particularly for the digital environment, the WIPO Internet Treaties make clear that the traditional right of reproduction continues to apply, including the storage of material in digital form. The treaties further confirms the "making available" right of communication, in which right holders have the right to control the digital transmission of their works to the public.¹⁶¹ The Treaties also ensure that rights holders can use technology to protect their rights on the Internet.

The treaties' "anti-circumvention" provisions prevent security and piracy risks by requiring member countries to provide adequate legal protection and remedies against the circumvention of effective technological measures used by authors in connection with the exercise of their rights under the

¹⁵⁵ WIPO official website:

http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16

¹⁵⁶ Preamble of the WCT and WPPT.

¹⁵⁷ Preamble of the WCT and WPPT.

¹⁵⁸ Article 1 of the WCT.

¹⁵⁹ Article 3(1) of the WPPT.

¹⁶⁰ Articles 11-12 of the WCT.

¹⁶¹ Article 6 of the WCT.

WCT or the Berne Convention.¹⁶² Providing a user with directions to decrypt the content, or software that allows a user to bypass the password screen are examples of acts of circumvention prohibited under Article 11.¹⁶³

A “rights management” provision in the treaties requires member countries to prohibit the deliberate alteration or deletion of electronic rights management information. This is the information that can be embedded into the digital code of a creative work and used to identify the work, its author, performer or owner, the terms and conditions for its use, and any other relevant attributes.¹⁶⁴

WIPO Internet Treaties pose obligations on member states regarding the protection of technological measures and rights management information, as means of exercising and enforcing rights.¹⁶⁵ Digital Rights Management (DRM) has been widely used by copyright holders to prevent the works from piracy. DRM technologies can control file access altering, sharing, copying, printing and saving.¹⁶⁶ However, it is impossible for DRM systems to incorporate fair use principles because they are difficult to define, and evolve over time.¹⁶⁷

The treaties strengthened international copyright protection in the online environment. The anti-circumvention and rights management are very strict, especially when applied to the opportunities for public access to digital works. The technical methods allow the rights-owner to determine access to and use of content regardless of whether the copyright terms have expired, never existed or the user is entitled to benefit from an exception to copyright.¹⁶⁸ Fair use and other limitations on copyright holders’ rights have therefore been constrained. The provisions can thus be applied in a way which may conflict with legitimate users’ privileges and fundamental freedoms, especially free flow of information and access to knowledge.¹⁶⁹

¹⁶² Article 11 of the WCT.

¹⁶³ Ruth L. Okediji, Development in the Information Age, Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce, Issue Paper No. 9, UNCTAD-ICTSD Project on IPRs and Sustainable Development, May 2004, p. 1.

¹⁶⁴ Chris Gibson, WIPO Internet Copyright Treaties Coming Into Force, 2002; and USTR official, Washington International Trade Association, National Foreign Trade Council, and Global Business Dialogue Program: “TRIPS Implementation: Intellectual Property and the WTO,” Washington, DC, July 17, 2002.

¹⁶⁵ M. Ficsor, Mangalia, Sub-regional Seminar on the Protection of Computer Software and Databases, Topical 12: Digital Rights Management and Its Co-existence with Copyright Exceptions, August 25-27, 2010, p.10.

¹⁶⁶ DRM Law Issue,

<http://www.cmlab.csie.ntu.edu.tw/~ipr/ipr2005/data/material/DRM%20Law%20Issue.pdf>

¹⁶⁷ DRM Law Issue,

<http://www.cmlab.csie.ntu.edu.tw/~ipr/ipr2005/data/material/DRM%20Law%20Issue.pdf>

¹⁶⁸ Copyright and human rights, Report prepared by the Group of Specialists on Human Rights in the Information Society (MC-S-IS), September 2008, Directorate General of Human Rights and Legal Affairs Council of Europe, Strasbourg, June 2009, p. 9.

¹⁶⁹ Copyright and human rights, Report prepared by the Group of Specialists on Human Rights in the Information Society (MC-S-IS), September 2008, Directorate General of Human Rights and Legal Affairs Council of Europe, Strasbourg, June 2009, p. 9.

Moreover, no matter how sophisticated these softwares are, up to now, none of them has proved to be impossible to crack by at least some users.¹⁷⁰

So far China already has the copyright regime in accordance with the international law with regard to the copyright protection of digital works. In China, the courts can quote the provisions of the WIPO Internet treaties directly when deciding a case. As a developing country, China enjoys certain flexibility in deciding domestic law. However, there are still many issues left behind. China still needs to comply with the minimum standards set by TRIPs and the Internet treaties. Flexibility is necessary in order to keep abreast with the fast moving pace of technological development but the international laws show little flexibility when it comes to digital piracy. Instead of adapting to the technology, both the domestic and international legislations are trying to restrict the freedom of Internet. The intellectual property lawmakers seem to worry too much about the copyright holders that they grant more exclusive rights to the right holders while ignoring the purpose of the copyright

3.2. Human Rights Norms Concerning Digital Piracy

Human rights are rights and freedoms enjoyed inherently by every individual which is the foundation of freedom, justice and peace in the world.¹⁷¹ Human rights law is an international law, states have the obligation to comply with the international treaties or conventions which are ratified by them. Included is the construction of domestic laws and regulations and provide effective remedy for individuals. It is always reflected in the constitution, the criminal procedural law and others when it comes to human rights law domestically. Human rights law not only cares about the interests of authors and disseminators but also the public. Human rights benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions and safeguards the personal link between authors and their creations and between people, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, while intellectual property regimes primarily protect business and corporate interests and investments.¹⁷² At the time human rights law originated there was no digital

¹⁷⁰ Copyright and human rights, Report prepared by the Group of Specialists on Human Rights in the Information Society (MC-S-IS), September 2008, Directorate General of Human Rights and Legal Affairs Council of Europe, Strasbourg, June 2009, p. 9.

¹⁷¹ Preamble of the Universal Declaration of Human Rights.

¹⁷² General Comment No. 17 (2005), Economic and Social Council, E/C.12/GC/17, para. 2.

piracy problem at all, however, the internal rules of rights and freedoms possessed by everyone should always be applied.

Since human rights laws try to protect individual's rights by restricting the states' power, China is hesitating to ratify certain human rights laws. So far the basic two human rights conventions: International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR), China has only ratified the first one. Both of the two conventions come from the Universal Declaration of Human Rights (UDHR). Even if the Declaration applies to every state, it still has no binding force. The two Conventions make the content in UDHR have binding force on the ratified states and is more detailed on the description of each rights and freedoms.

3.2.1. Human Rights Norms Which are Bind in China-ICESCR

Article 15 of the ICESCR specifically states the author's rights, the right to enjoy the benefits of scientific progress and the right to participate in cultural life. ICESCR Article 15(1) recognizes everyone's rights: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. However, the provisions of Article 15 was simple, and not explicit, therefore the Economic and Social Council put forward General Comment No.17 and No.21 to interpret Article 15. As General Comment No.17 says, this provision seeks to encourage the active contribution of creators to the arts and sciences and to the progress of the society as a whole.¹⁷³

Article 15(1)(c) does, by no means, prevent the State's parties from adopting higher protection standards on the protection of the moral and material interests of authors or in their domestic laws than the international treaties, provided that these standards do not unjustifiably limit the enjoyment by others of their rights under the Covenant.¹⁷⁴

The range of material interests protected in the human rights law is also different from the copyright law, the material interests of authors contribute to the enjoyment of the right to an adequate standard of living.¹⁷⁵ Thus, human rights law does not require states to provide copyright protection over the entire lifespan of an author, but the purpose of enabling authors to

¹⁷³ General Comment No. 17 (2005), Economic and Social Council, E/C.12/GC/17, para. 4.

¹⁷⁴ General Comment No. 17 (2005), Economic and Social Council, E/C.12/GC/17, para. 11.

¹⁷⁵ General Comment No. 17 (2005), Economic and Social Council, E/C.12/GC/17, para. 15.

enjoy an adequate standard of living can also be achieved through one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his intellectual works.¹⁷⁶ The limitations of the right must be balanced with other rights recognized in the ICESCR.¹⁷⁷ The limitations must be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim and must be strictly necessary for the promotion of the general welfare in a domestic society.¹⁷⁸ Moreover, the limitations must be proportionate, and under certain circumstances, require compensatory measures for the use of scientific, literary or artistic productions in the public interests.¹⁷⁹

Under the right for individual's right to take part in cultural life, the expression "cultural life" is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.¹⁸⁰ According to the General Comment No. 21, the scope of "culture", encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence and build their world view through their encounter with the external forces affecting their lives.¹⁸¹ The terms "to participate" and "to take part" include participation in, access to and contribution to cultural life. Among them, *Access* covers in particular the right everyone has — alone, in association with others or as a community — to know and understand his or her own culture and that of others through education and information and to receive quality education and training with due regard for cultural identity.¹⁸² Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources and to benefit from the cultural heritage and the creations of other individuals and communities¹⁸³

¹⁷⁶ General Comment No. 17 (2005), Economic and Social Council, E/C.12/GC/17, para. 16.

¹⁷⁷ General Comment No. 17 (2005), Economic and Social Council, E/C.12/GC/17, para. 22.

¹⁷⁸ General Comment No. 17 (2005), Economic and Social Council, E/C.12/GC/17, para. 22.

¹⁷⁹ General Comment No. 17 (2005), Economic and Social Council, E/C.12/GC/17, paras. 23-24.

¹⁸⁰ General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, para. 11.

¹⁸¹ General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, para. 13.

¹⁸² General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, paras. 6 and 11.

¹⁸³ General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, para. 15 (b).

There is no general comment on the right to enjoy the benefits of scientific progress and its applications yet, but it is widely recognized that it has a deep relation with the right to seek, impart and receive information.¹⁸⁴

Article 15 also has close links to the right to education since scientific, literary or artistic productions constitute a part of knowledge, which is what people are educated for. Article 13(1) provides that “The States Parties to the present Covenant recognize the everyone’s right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnical or religious groups, and promote the activities of the United Nations for the maintenance of peace.” For many developing countries, education is a priority for development in the information age. The Internet plays an important role, especially institutional alliances between developed and developing countries using education over a distance which offers a real prospect of educating a vast number of the world’s poor. Thus, copyright legislation in some developing countries may need to be modified to legitimize policies that seek to use the Internet to give access to educational materials available in digital format.¹⁸⁵ As the WIPO Internet treaties seriously limit the scope of fair use, right to education is also at risk.

3.2.2.Human Rights Norms Which are not Bind in China-ICCPR

On the other hand, it is acknowledged in both doctrine and case-law that protection of copyright and related rights in certain cases may involve restrictions to freedom of expression and information.¹⁸⁶ Freedom of expression is indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society.¹⁸⁷ Assuming that every copyrighted work consists of “information and ideas”, a potential impact on freedom of expression may occur as a result of the exercise by a rights-holder of exclusive rights, granted under copyright law, to authorize

¹⁸⁴ Report of the Experts’ Meeting on the Benefits of Scientific Progress and its Applications, 2007, p. 34.

¹⁸⁵ Ruth L. Okediji, Development in the Information Age, Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce, Issue Paper No. 9, UNCTAD-ICTSD Project on IPRs and Sustainable Development, May 2004, p. 4.

¹⁸⁶ Copyright and human rights, Report prepared by the Group of Specialists on Human Rights in the Information Society (MC-S-IS), September 2008, Directorate General of Human Rights and Legal Affairs Council of Europe, Strasbourg, June 2009, p. 5.

¹⁸⁷ General comment No. 34(2011), International Covenant on Civil and Political Rights, CCPR/C/GC/34, para. 2.

or prohibit use of the work.¹⁸⁸ The Internet is not only an engine for free expression; it is a way to access culture and enhance education. Although, freedom of expression does not include a right to access a particular copyrighted work (except in exceptional circumstances).¹⁸⁹ Article 19(2) of the ICCPR provides “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” In other words, a broad right to access the Internet resources is covered, as freedom of expression includes the right to receive and impart information. It should be noted that freedom of expression includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others.¹⁹⁰ A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.¹⁹¹ When a State party imposes restrictions on the exercise of freedom of expression, they are not allowed to put the right itself in jeopardy.¹⁹² The restrictions must be “provided by law”,¹⁹³ they may only be imposed for one of the grounds: for respect of the rights or reputation of others or for the protection of national or *ordre public*, or of public health or morals. They must be “necessary” for a legitimate purpose and must not be too broad and must conform to the principle of proportionality.¹⁹⁴

3.3. The Relationship between Copyrights and Human Rights

When designing domestic laws, states should attempt to unite copyright rules and human rights law. Both human rights law and WIPO Internet treaties set limitations on what states can and cannot do. The CESCR through its General Comment No. 3 contains economic measures in a broad

¹⁸⁸ Copyright and human rights, Report prepared by the Group of Specialists on Human Rights in the Information Society (MC-S-IS), September 2008, Directorate General of Human Rights and Legal Affairs Council of Europe, Strasbourg, June 2009, p. 5.

¹⁸⁹ Alain Strowel, Internet Piracy as a Wake-up Call for Copyright Law Makers—Is the “Graduated Response” a Good Reply?, the WIPO Journal: Analysis and Debate of Intellectual Property Issues, 2009 ISSUE NO:1, p. 82.

¹⁹⁰ General comment No. 34(2011), International Covenant on Civil and Political Rights, CCPR/C/GC/34, para. 11.

¹⁹¹ General comment No. 34(2011), International Covenant on Civil and Political Rights, CCPR/C/GC/34, para. 13.

¹⁹² General comment No. 34(2011), International Covenant on Civil and Political Rights, CCPR/C/GC/34, para. 21.

¹⁹³ General comment No. 34(2011), International Covenant on Civil and Political Rights, CCPR/C/GC/34, para. 24.

¹⁹⁴ General comment No. 34(2011), International Covenant on Civil and Political Rights, CCPR/C/GC/34, paras. 33-34.

sense, and did not preclude the use of a certain economic system for the achievement of the rights in the Covenant.¹⁹⁵ Copyright law is also in the economic system. In this sense, copyright and human rights can be deemed fusible.¹⁹⁶ However, in practice they tend to be in conflict with each other more than working together.

As the human rights listed above, Article 15 of the ICESCR also confirmed copyright as a human right. However, when one sees the provision closer, the scope of copyrights protection in human rights law is very different from the one in the copyright law. Human rights law confirms the author's moral rights just like the copyright law. As to author's material rights, human rights law only confirms the author's rights to get remuneration from the works to satisfy an adequate standard of living. In other words, human rights law only protects the author's right to get paid from the intellectual work but does not mention anything about granting authors' monopoly power over the works and limit the public use or access to the works.

Copyrights are generally of a temporary nature and can be revoked, licensed or assigned to someone else.¹⁹⁷ While under the copyright system the copyrights, except moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited. Human rights are timeless expressions of fundamental entitlements of the human person.¹⁹⁸

A conflict between human rights law and copyright law could happen when copyright, in the context of copyright law, restrains other human rights such as the right of access to cultural life, the right to enjoy the benefits from scientific progress and its application, the right to education, freedom of expression and others. The emerging global copyright system appears to exclude, quite literally, humankind itself from access to important knowledge assets; moreover, it appears to exclude humankind from what might be considered a part of its essence.¹⁹⁹ When conflicts between the two happen, which one will prevail over the other?

Human rights represent more than ethical values, which enjoy widespread consent and acknowledgment under international law. In the context of globalization, they offer a "human" legal framework for the advancement of intellectual property, which so far has been exclusively regarded exclusively from an economic point of view. The different legal systems show various cultural differences despite their convergences whereas the moral and cultural values of the UDHR are undisputed and could represent the basis of

¹⁹⁵ General Comment No.3, 1990.12.14, UN Committee on Economic, Social and Cultural Rights, E/1991/23, para. 8.

¹⁹⁶ Report of the Experts' Meeting on the Benefits of Scientific Progress and its Applications, 2007, p. 34.

¹⁹⁷ General Comment, Economic and Social Council, No. 17 (2005), E/C.12/GC/17

¹⁹⁸ General Comment, Economic and Social Council, No. 17 (2005), E/C.12/GC/17

¹⁹⁹ Volker Heins, Human Rights, Intellectual Property, and Struggles for Recognition, *Hum Rights Rev* (2008) 9:213–232, at p. 224.

a worldwide harmonization.²⁰⁰ Generally, human rights possess a prominent position among other legal systems. In other words, the exclusive nature of copyright should not be barriers for the expression of opinions and thoughts and for information exchange.²⁰¹ As to the domestic level, international human rights provisions often already exist in the constitution. In China, the constitution enunciates that the state respects and protects human rights²⁰², rights that specifically in the constitution includes freedom of expression, right to education and others.²⁰³ The constitution is considered as the fundamental law of China, as the preamble of the constitution states: “it is the fundamental law of the state and has supreme legal authority” thus it ranks higher in the hierarchy of norms. When other laws conflicts with the constitution the constitution prevails. Therefore, both in the domestic and international level, when a conflict happens, human rights norms prevail over copyright norms in China.

However, theoretically human rights provisions should enjoy a higher hierarchy in China does not mean the reality human rights law has superior enforcement than other legislation in the implementation. The implementation of copyright law and human rights law concerning digital piracy in China will be discussed in the following chapters of the thesis.

²⁰⁰ 吴汉东, 肖尤丹 (Handong Wu, Youdan Xiao), 网络传播权与网络时代的合理使用 (Network Dissemination Right and Fair Use in the Information Age), 2009.2, <http://www.fengxiaqingip.com/ipluntan/lwxd-zz/20090221/3609.html>

²⁰¹ 吴汉东, 肖尤丹 (Handong Wu, Youdan Xiao), 网络传播权与网络时代的合理使用 (Network Dissemination Right and Fair Use in the Information Age), 2009.2, <http://www.fengxiaqingip.com/ipluntan/lwxd-zz/20090221/3609.html>

²⁰² Article 33, Constitution of the People’s Republic of China(1982).

²⁰³ Article 35,46, Constitution of the People’s Republic of China(1982).

4. The Reality Approach of Digital Piracy in China

In the previous chapters, this thesis introduced the general piracy problem, phenomena of digital piracy in China and the copyright legal framework as well as the international human rights law concerning digital piracy. In this chapter, the thesis researches the reality of how the law concerning digital piracy is implemented from two aspects: typical cases on digital piracy and China's censorship phenomena. In the cases part, the thesis first introduces some typical cases in the US, then move to the cases that happened in China. After concluding the facts and reasoning by the courts, comments will be made on the implementation of copyright law and the judge's concern of the public. In the following subchapter, the thesis shows a picture of the censorship in China, particularly in the cultural and political fields. Ideally, censorship should be the most effective way to eliminate digital piracy if the public's interests are not taken into account. But the phenomena in China is that the censorship functions more as a tool to delete works or speeches that contain opposing and extreme views against the CCP and a tool to protect the domestic cultural industry. In the end, censorship in China provides a solid soil for digital piracy and on the other hand seriously restricts individuals' right to participate in cultural life and their freedom of expression.

4.1. Cases on Digital Piracy

China has long been condemned by developed countries for its weak copyright protection and serious piracy problem. The US is among the most active ones. The US thinks that China has already placed a framework of laws and regulations on the protection of copyright holders against digital piracy; however the effective enforcement of China's copyright laws and regulations remains a significant challenge.²⁰⁴ Contrary from China, the US is famous for its strong copyright protection and its landmark cases have great influence all over the world. Therefore, some digital piracy cases in the US will first be introduced.

²⁰⁴ 2011 Report to Congress on China's WTO Compliance, United States Trade Representative, December 2011, p.4.

4.1.1. Digital Piracy Cases in the U.S.

Digital piracy has long been a problem for all countries. Yet, there are many landmark cases concerning digital piracy worldwide, especially in the US. The US has a strong copyright protection compared with other countries, especially developing countries.

*A&M vs. Napster*²⁰⁵ was the first case that involved P2P technology. Napster is the epitome of what has become known as P2P file sharing.²⁰⁶ Users may load files onto their own computers and by connecting to the Napster system it allows any other user in any location to retrieve that file on demand.²⁰⁷ Napster represents an innovative and powerful tool for sharing information. However, this tool can generate legal quandaries when the files are protected by copyright law and the owner of the copyright has not given permission for the dissemination of the works.²⁰⁸ The court concluded that Napster users are not fair users.²⁰⁹ The court first concluded that downloading MP3 files does not transform the copyrighted work. Secondly, Napster users download MP3's and this was shown to be profitable. Although the people who downloaded the files were anonymous, the Napster users got for free something they would ordinarily have to buy. Direct economic benefit is not required to demonstrate a profitable use. The people who receive files are financially motivated since it includes trading these copies of a work for other items. Napster benefited from having as many users as possible exchanging music and they did not prevent the exchange of copyrighted material. They were also aware that the files available were in fact copyrighted.²¹⁰ In the end, the courts prevented Napster "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing copyrighted musical compositions and sound recordings, without express permission of the rights owner" and Napster had to post a bond for damages at USD 5 million by the year 2000.²¹¹

²⁰⁵ *A&M RECORDS, Inc. v. NAPSTER, INC.*, 239 F.3d 1004 (9th Cir. 2001), available at http://www.law.cornell.edu/copyright/cases/239_F3d_1004.htm

²⁰⁶ Kenneth D. Crews, *A&M Records, Inc. v. Napster, Inc.: Implications for the Digital Music Library*, available at <http://variations2.indiana.edu/pdf/AnalysisOfNapsterDecision.pdf>, p. 2.

²⁰⁷ Kenneth D. Crews, *A&M Records, Inc. v. Napster, Inc.: Implications for the Digital Music Library*, available at <http://variations2.indiana.edu/pdf/AnalysisOfNapsterDecision.pdf>, p. 2.

²⁰⁸ Kenneth D. Crews, *A&M Records, Inc. v. Napster, Inc.: Implications for the Digital Music Library*, available at <http://variations2.indiana.edu/pdf/AnalysisOfNapsterDecision.pdf>, p. 2.

²⁰⁹ *A&M RECORDS, Inc. v. NAPSTER, INC.*, 239 F.3d 1004 (9th Cir. 2001), available at http://www.law.cornell.edu/copyright/cases/239_F3d_1004.htm, para. 21.

²¹⁰ *A&M RECORDS, Inc. v. NAPSTER, INC.*, 239 F.3d 1004 (9th Cir. 2001), available at http://www.law.cornell.edu/copyright/cases/239_F3d_1004.htm, para. 1.

²¹¹ *A&M RECORDS, Inc. v. NAPSTER, INC.*, 239 F.3d 1004 (9th Cir. 2001), available at http://www.law.cornell.edu/copyright/cases/239_F3d_1004.htm, para. 1.

In another similar case, called *MGM studios, Inc. v. Grokster, Ltd.*²¹² raised a fundamental question at the border between copyright and innovation: When should the distributor of a multi-purpose tool be held liable for the infringements that may be committed by end-users of the tool?²¹³ The Supreme Court’s summary of its decision in the *Grokster* case was: “One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”²¹⁴ In another P2P case in Sweden called the *Pirate Bay* case, the court found that the defendants were all guilty of accessory to crime against the copyright law, strengthened by the commercial and organized nature of the activity.²¹⁵

There are also cases with verdicts against individuals to pay for downloading illegal content. A woman in the US was ordered to pay 222,000 dollars for illegally downloading 24 songs.²¹⁶ Many individuals include children, grandparents, unemployed single mothers, college professors—random selections from the millions of Americans who have used P2P networks have been sued in the past years.²¹⁷

The cases in China are in some ways similar with the cases in the US. However, as a developing country, the copyright protection in China is not as strict as in the US. Three landmark cases in China concerning digital piracy will be examined regarding the public’s and copyright holders’ roles in these cases.

4.1.2. The Kuro Case

The plaintiff, the Shanghai Busheng Company, was the producer of the sound recording and rights owner of the 53 sounds involved in this case. The Busheng Company has the right to the licenses to reproduce, distribute, rent, disseminate through information networks and get remuneration from those songs. Others are not allowed to disseminate the 53 sounds to the public through information networks without the plaintiff’s license, and the plaintiff did never itself disseminate the works on the Internet, or licensed that right to others. However, the website “Kuro.com.cn” provided a music sharing platform through P2P technology, including those 53 songs. With the P2P technology, the Internet users could upload the music they have and

²¹² *Metro-Goldwyn-Mayer Studios Inc. ET AL. v. Grokster, Ltd., ET AL.* Available at https://w2.eff.org/IP/P2P/MGM_v_Grokster/04-480.pdf

²¹³ *MGM v. Grokster*, https://w2.eff.org/IP/P2P/MGM_v_Grokster/

²¹⁴ Roland L. Trope, E. Michael Power, *The Lessons of MGM v. Grokster*, January 2006 | *IEEE Spectrum* | NA, p. 58.

²¹⁵ Jenny Stiernstedt, Astrid E Johansson, Fredrik Soderling, translated by Oliver Grassman, *The Pirate Bay Sentenced to One Year in Prison*, 2009.04.17, available at <http://www.dn.se/kultur-noje/musik/the-pirate-bay-sentenced-to-one-year-in-prison>

²¹⁶ *Capitol v. Thomas*, Case No.: 06cv1497-MJD/RLE.

²¹⁷ *RIAA v. The People: Five Years Later*, 2008.09, <https://www.eff.org/wp/riaa-v-people-five-years-later>

download music uploaded by others under the context of “sharing content”. The Internet users could download music as long as he or she registered the membership on Kuro.com.cn which only cost CNY 20(USD 3.2) per month. By 2003, the website had already 200,000 registered members. In the end, in 2006, the court decided that the defendant must stop the infringement conduct and compensate the plaintiff with CNY 210,000(USD 33,691).²¹⁸

The court held the opinion that the defendant had subjective intentions because the defendant could not prove that the upload of music is legal, nor did the defendant take any measures to prevent the dissemination of the 53 sounds without the authorization of the plaintiff. Besides, the defendant gained a profit directly from registered members. The court came to the conclusion that the defendant assisted the Internet users by them utilizing Kuro software to disseminate the 53 sounds without the authorization of the actual copyright owner. Thus the defendants infringed the plaintiff’s right of producers of phonograms.²¹⁹

The court’s judgment indicate that the general Internet users are those who directly infringe on copyright law, the defendant was only in the assisting position. Copyright shareholders have the right to disseminate through information networks and the right of reproduction. The Internet users can not constitute fair use when it comes to P2P file sharing since the use of another person’s published work for purposes of the user’s own personal study, research or appreciation was no longer the situation of fair use in the digital environment in China.²²⁰ However, the ones who actually commit the infringement, the public, has a low risk of facing law suits due to the large amount of population and the small compensation copyright holders can get from them. The one who provides the information exchange platform takes the legal consequences, Internet users have never received any legal punishment in China so far.

It should also be emphasized that the plaintiff in this case did not themselves disseminate the 53 songs on the Internet nor did it license others to disseminate those songs on the Internet. Thus, all those songs found online which provide the public to download them, could be considered as piracy. The monopoly power the plaintiff has over those songs makes the public to have no legal resources of those songs on the Internet at all.

²¹⁸ 北京市第二中级人民法院,民事判决书(The Civil Judgment of Beijing Second Intermediate People’s Court), (2005)二中民初字第 13739 号.

²¹⁹北京市第二中级人民法院,民事判决书(The Civil Judgment of Beijing Second Intermediate People’s Court), (2005)二中民初字第 13739 号.

²²⁰ Article 6 of the Regulations on Protection of the Right of Communication through Information Network.

4.1.3.The Tomato Garden Case

During the period of December 2006 to August 2008, the defendant Chengdu Software and Network Technology Co., Ltd, for the sake of gaining a profit, its manager, defendant Sun Xianzhong, encouraged defendants Zhang Tianping, Hong Lei and Liang Zhuoyong to collaborate together to copy Microsoft's Windows XP software without Microsoft's permission. To fit the Chinese home users, they edited the software, deleted the useless parts and added more useful tools. They named the copied version Tomato Garden, which was free for the public to download. The court confirmed that the pirate software had been downloaded 196,909 times by Internet users. In the end, the company gained a profit of CNY 2,924,287.09(USD 452,233.3) through plug-in bundles and advertisements over the Internet.²²¹ Finally the Court convicted all the defendants for copyright infringement, sentenced the company to pay a CNY 8,772,861.27(USD 1,404,736.8) fine and confiscated all the illegal income. The court sentenced the four individual defendants from 2 years to 3 and a half years in prison and they were fined, ranging from CNY100 thousand to CNY 1 million.²²²

The judgment itself only contained facts and a list of evidence, the merits generally focused on the sentence of the offenders. It shows that the court without any doubt sees the conduct as a crime since the conduct satisfied all the characteristics listed by Article 217 of the Criminal Law of China. The case has been considered as one of the most important digital piracy cases in China since it shows the attitude the Chinese courts hold towards digital piracy, that China seriously complies with its international copyright law obligations.

However, beyond the facts listed in the judgment, the offenders did not only provide free download resources of a pirate Microsoft Windows software but also modified the software itself. The offenders designed new themes, desktops and buttons to the system, installed some useful tools, deleted some useless software for family users and made the system faster.²²³ The Tomato Garden Microsoft system only needs a few minutes to install which is popular among the Internet users in China.²²⁴ However, without the conduct of gaining a profit from providing free pirate software, modifying Microsoft's Windows system without the authorization of Microsoft itself had already constituted copyright infringement. However, the public held a different opinion on the defendants' copyright infringement. There was a survey, answered by more than 150 people, with the question "What is your

²²¹ 江苏省苏州市虎丘区人民法院刑事判决书(The Criminal judgment of Huzhou District People's Court, Suzhou City, Jiangsu Province), (2009) 虎知刑初字第 0001 号.

²²² 江苏省苏州市虎丘区人民法院刑事判决书(The Criminal judgment of Huzhou District People's Court, Suzhou City, Jiangsu Province), (2009) 虎知刑初字第 0001 号.

²²³ 番茄花园判决还缺少什么?, http://blog.sina.com.cn/s/blog_4e8581890100etyz.html

²²⁴ 百度百科 (Baidubaike), <http://baike.baidu.com/view/75258.htm>

attitude towards the arrested of Hong Lei” at the time when the offender Hong Lei was arrested. The result showed: 79.88% supported Tomato Garden, 15.4% were neutral and only 4.7% supported Microsoft. As to the sentence, there was a survey on Shouhu.com, in which 27,163 people were involved, that showed 85.9% thought the sentence was too severe. Some people even considered Hong Lei as a “pirate hero”.²²⁵ Now, even if the website of Tomato Garden provide free downloading of Windows no more, the free downloading of its version of Windows XP can still be found in different websites.

4.1.4.Hanhan v. Baidu Ltd.,

Baidu is the top search engine in China who also provides a service called Baidu Library. Baidu Library is an open platform for users to share documents such as paper reports, professional information, exam resources, courseware, all types of document templates etc.²²⁶ The plaintiff Hanhan, who is one of the most read writers in China, alleged that Baidu infringed on his copyright by not deleting the unlicensed novels, which he was the author of, in Baidu Library. Hanhan asked the Baidu Company to pay a compensation of CNY 760,000(USD 121,693), apologize and close down the Library. The court thought Baidu was passively waiting for the right’s holder to provide evidence of anti-works or notice. It did not ensure the function of its’ anti-piracy system or take other necessary measures to stop the dissemination of the infringed works in the Baidu Library. Besides, Baidu’s manual reviewers should have known the existence of infringed works. Therefore, the court decided that the Baidu Company had subjective faults and needed to pay a compensation of CNY 95,800(USD15,339.7). However, the court did not support the plaintiff’s request of closing down the Baidu Library due to the lack of legal basis.²²⁷

These years, Baidu has taken different methods to stop the spread of piracy works, including prompting users not to upload infringing works on its’ page, set the infringement compliant report channel, manually review and delete infringement documents and utilize the anti-piracy system.²²⁸ In the hearing, Baidu expressed it opposes to the measure of censoring the entire document with the key word of authors and works’ name in the title. The court also agreed that that may put legal works in danger. Moreover, Baidu

²²⁵ 番茄花园案：洪磊背后的民间情绪 (The Tomato Garden Case: The Public Emotions behind Hong Lei), 2009.9, <http://news.skycn.com/article/23679.html>

²²⁶ 百度百科:百度文库 (Baidu Baike: Baidu Library), <http://baike.baidu.com/view/3066550.htm>

²²⁷ 韩寒诉百度文库案胜诉：获赔9万余元 (Hanhan v. Baidu Library Case: the Plaintiff Got RMB 90,000), 2012.9, <http://book.hebei.com.cn/system/2012/09/20/012104820.shtml>, (2012)海民初字第5559号韩寒诉北京百度网讯科技有限公司侵犯著作权纠纷一案; (2012)海民初字第5560号韩寒诉北京百度网讯科技有限公司侵犯著作权纠纷一案.

²²⁸ 百度文库败诉：避风港原则之辩 (The Losing of Baidu Library: A Haven Principle Debate), 2012.9, <http://tech.cn.yahoo.com/yopen/20120918/1315818.html>

Library is an effective tool to spread knowledge; it contains a lot of education resources and information, it has substantial uses beyond infringement. Individuals can easily access free knowledge even in remote areas; all they need is to have a computer connected with the Internet.

4.1.5. Comments

From the cases which happened both in China and US one can see that the legal rulings in China basically are consistent with US's cases, when it comes to the infringement committed by Internet Content Providers (ICP). From the landmark cases mentioned above, one can see that China fights against digital piracy in both civil and criminal lawsuits. However, compared with the cases in the US, the courts' compensation to the copyright holder is much lower, and copyright piracy is still viewed by most government policy-makers as a problem to be dealt with through administrative rather than criminal means.²²⁹ The good thing for copyright holders is that the big ICPs are giving more and more attention on eliminating digital piracy by various ways and are trying to experiment with new market ways to cooperate with copyright holders, not only to ensure free or low price access of the works to the public, but also for the economic reward of the copyright holders. The legal obligation of network service providers also urged those companies to censor and prevent the distribution of infringing works more actively and broadly. Copyright law is now in a major role in restricting the free flow of information in China.

Different from US cases, individual Internet users have never been judged to pay compensation for uploading or downloading unlicensed works by courts in China. There is a gap between copyright law in China and its implementation. The copyright law grants the copyright holders rights of reproduction and communication through information networks. Any organization or individual that makes another person's work available to the public through the Internet should obtain permission from, and pay remuneration to, the right owner.²³⁰ Individuals upload works without the permission of the author means it already infringed the law. In practice however, the individuals never receive any legal consequences due to that it takes too much effort to track down the massive and widespread Internet users and that the compensation can be very limited compared with the cost of a lawsuit. The legal provisions of copyright law and tort liability law do not explicit downloading unlicensed works from the Internet as an infringement, this behavior is still in a grey zone. It is no doubt an infringement on copyright to use pirate software and works for commercial profit, but legislation does not state the liability of only viewing an unlicensed content. It will be too much of a burden for the Internet users to

²²⁹ Sanford G. Thatcher, *China's Copy Right Dilemma*, Learned Publishing Vol.21 No. 4, pp. 278-284 (Penn State University Press, 2008), p. 281.

²³⁰ Article 2 of the Regulations on Protection of the Right of Communication through Information Network.

check whether a work is licensed first and then decide to access that knowledge or information, this is not good for the spread of information and culture.²³¹

All these digital piracy cases that happened in China shows the public's strong eagerness to access cultural life and enjoy the benefits of scientific progress. Under Article 15 of the ICESCR, everyone has the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources and to benefit from the cultural heritage and the creation made by other individuals and communities²³² and apparently, the public is not willing to pay as much as the works are priced. In the case of Kuro, every registered member needed to pay CNY20 each month to enjoy all the music in that website. The huge membership of Kuro shows that most of the individual Internet users accept to pay a certain amount of money to get the music, but it is much lower than the copyright holders expected. In the human rights law, individuals' right to cultural life require individual access to the cultural product at an acceptable price. Or else, even if the works are available in the market, individuals do not have enough money to support different kinds of cultural products. China is a developing country, the public earns much less than individuals from developed countries. The most of the income is spent on accommodation, food and other basic life-needed products, not to mention the insufficiency of the public welfare system. Most Chinese individuals are living in a condition where they save money just in case of sickness and after retirement but have similar prices on CDs, DVDs, movie tickets, software, etc, as developed countries. Apparently individuals have availability to certain works, but in fact that availability is based on an unreasonable high price for most of the citizens compared with their income and daily expense, which is an effective obstacle for individuals' access to cultural goods. In addition, overly restrictive copyright laws in the western states further prevent access to the information and materials that developing countries need in order to increase the education and skills of their own populations.²³³ On the other side, digital piracy material shows to be more convenient and easily accessible by those who use the Internet. In Kuro case, the copyright holder did not disseminate legal music in the Internet at all. It means it was impossible for the public to get those legal music on the Internet. While piracy provides those resources which individuals can easily access. Thus, most individuals have to turn to digital piracy. The digital piracy problem in China is also a problem of the public's accessibility to a reasonably priced copyright works. Copyright holders excessively use their

²³¹ 李德成: 未经许可上传他人音视频作品构成侵权 (Decheng Li: Unauthorized Upload Audio and Video Works of Others Constitute Infringement), 2012.7, <http://news.iqilu.com/other/20120719/1275278.shtml>

²³² General Comment No.21 (2009), Economic and Social Council, E/C.12/GC/21, para. 15(b).

²³³ Lucy Montgomery, Space to grow: Copyright, cultural policy and commercially-focused music in China, Chinese Journal of Communication Vol. 2, No. 1, March 2009, 36-49, p. 41.

monopoly power, granted by copyright law, to keep a high price and restrict the spread of information which in the end becomes the most important factor that individuals choose pirate works.

4.2. Cultural & Political Censorship and Digital Piracy

Digital piracy is like a chronic disease that can only be constrained a little while but then becomes rampant again. The character of free flow of information on the Internet seems now to be the biggest problem for the effective control of digital piracy. The authors' and other related shareholders' monopoly power is challenged by the Internet. Some people still believe the most effective way to control digital piracy is to control the flow of information on the Internet itself in order to keep the effectiveness of copyright law in the digital environment.

The US representative Lamar S. Smith tried to introduce a bill called Stop Online Piracy Act (SOPA) to expand the ability of the US law enforcement to fight digital piracy in 2011, which aroused fierce public debate.²³⁴ It contained heavy-handed measures that were intended to fight foreign pirate sites which are outside the reach of the US law. The idea was to come down hard on American portals and distributors, reducing the ability of overseas pirates to reach the US consumers.²³⁵ The SOPA contains provisions which request court orders to bar search engines that link to infringing websites and court orders requiring the Internet service providers to block access to the websites.²³⁶ The opponents of the Bill considered it a failure in sufficient Intellectual Property protection and that it goes too far in squelching the freedom of speech and expression.²³⁷ It would put innocent third parties in danger of being blocked, cost huge expenses for closing pirate sites and the list of pirated material could very easily grow beyond copyrighted video, music or other works.²³⁸ Website proprietors would be risking their fortunes by linking to anything.²³⁹ Moreover, the opposing side

²³⁴ SOPA (Stoop Online Piracy Act) debate: Why are Google and Facebook against it?, 2011.11.17,

http://www.washingtonpost.com/business/sopa-stop-online-piracy-act-debate-why-are-google-and-facebook-against-it/2011/11/17/gIQAvLubVN_story.html

²³⁵ Congress must use care in fighting internet piracy, Human Events, the Week of 01.23.2012, p. 3.

²³⁶ Stop Online Piracy Act, Wikipedia, http://en.wikipedia.org/wiki/Stop_Online_Piracy_Act

²³⁷ Paul Scrom, SOPA & PIPA: Human Rights in Intellectual Property & Freedom of Speech, Posted by Paul Scrom on February 10 2012,

<http://www.thehumanrightsblog.com/?p=1202>

²³⁸ Congress must use care in fighting internet piracy, Human Events, the Week of 01.23.2012, p. 3.

²³⁹ Congress must use care in fighting internet piracy, Human Events, the Week of 01.23.2012, p. 3.

thinks SOPA could put the US in a similar situation with China and Iran regarding Internet censorship.

When the US was considering the costs of complying with the SOPA, such as the loss of human rights and financial costs on controlling the Internet to protect intellectual property, Chinese government already had the most effective Internet control in the world.²⁴⁰ It is reasonable to ask why the digital piracy problem in China is so serious even if China already has the most effective Internet censorship in the world and what role censorship plays in China's digital piracy problem.

4.2.1. Cultural & Political Censorship in China

Censorship, narrowly defined, is a state suppression of expression or information where the state surrogates might be oversight panels and bodies or governmental agencies.²⁴¹ Normally, censorship happens for example when a performance is closed or forbidden, a script is edited to remove offensive material, a television station is shut down or a certain press is forbidden to publish and so on.²⁴²

China has a wide range of what is censored, from political to cultural content, also all the information dissemination areas including newspapers, literature, movies, music, theaters, television, radio and the Internet are censored. China's control over the domestic news media is achieved through a complex combination of the CCP monitoring news content, legal restrictions on journalists and financial incentives for self-censorship.²⁴³ Even if the WTO confirmed in 2009 that China violates its state's obligation under TRIPS by the import restrictions on video, DVD, music and books, China still makes little improvements these years.²⁴⁴

As to the movie industry, since China has no motion picture rating system²⁴⁵, thus films must be deemed suitable for all audiences to be allowed to see it on the screen. The major movie censorship body is the State Administration

²⁴⁰ Barney Warf, Geographies of global Internet censorship, *GeoJournal* (2011) 76:1–23, DOI 10.1007/s10708-010-9393-3, p. 8.

²⁴¹ Janelle Reinelt (2007), *The Limits of Censorship*. *Theatre Research International*, 32, pp3-15 doi:10.1017/S0307883306002471, http://journals.cambridge.org/abstract_S0307883306002471, p. 4.

²⁴² Janelle Reinelt (2007), *The Limits of Censorship*. *Theatre Research International*, 32, pp3-15 doi:10.1017/S0307883306002471, http://journals.cambridge.org/abstract_S0307883306002471, p. 4.

²⁴³ Freedom House: *New Report Details China Censorship Mechanisms* (2008), <http://www.freedomhouse.org/article/freedom-house-new-report-details-china-censorship-mechanisms?page=70&release=329>

²⁴⁴ WTO Report of the Panel, *China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, 26 January 2009, p. 133-134.

²⁴⁵ A motion picture rating system is designated to classify films with regard to suitability for audiences in terms of issues such as sex, violence, substance abuse, profanity, impudence or other types of mature content.

of Radio, Film and Television (SARFT). If a film deals with special topics such as diplomacy, ethnicity, religion, military, state security, legislature or historical celebrities, additional approval must be granted by the relevant government offices.²⁴⁶ In 2009, SARFT promulgated the Notice on Strengthening the Management of Internet Audio-visual Program Contents which clearly states “without obtaining a license, movies, television (TV) series, and animations will not be allowed to spread on the Internet”.²⁴⁷ Every year, a very small amount of foreign TV series can broadcast on Chinese TV and most of them are years old. Before 2012, China only imported 20 American movies to the cinema each year.²⁴⁸ Most of the Hollywood movies are cut before they reach the audience in the cinemas in China. Because of the strict censorship, some movies do not even have a chance to reach the audience in a legal way without having to self-censor first.

As to literature, China's state-run General Administration of Press and Publication (GAPP) screens all literature that are intended to be sold on the open market in China. All the publishers also need a license from GAPP to run their business. GAPP has the power to deny people the right to publish, and completely shut down any publisher who fails to follow its' dictates.²⁴⁹ Continued control over broadcast and print media also allows the authorities to prevent access to promotion opportunities for artists, businesses and products that offend political, ideological or moral sensitivities.²⁵⁰

Also music cannot escape the destiny of being censored in China. In July 17, 2008, an announcement by the Ministry of Culture proclaimed that the political backgrounds of all foreign performers would be checked and those considered a threat to China's sovereignty would not be granted permission to perform in China.²⁵¹ Regulations require permits, not only for large-scale concerts, but also for obtaining publishing licenses for legal sales of music²⁵².

²⁴⁶ Laikwan Pang, *The State Against Ghosts: A Genealogy of China's Film Censorship Policy*, *Screen* 52:4 Winter 2011, pp. 469 and 450.

²⁴⁷ Article 4 of the Notice on Strengthening the Management of Internet Audio-visual Program Contents, SARFT, 2009.03.30.

²⁴⁸ 中国增加进口电影政治考量多(China Increased Import Films for More Political Consideration) , 2012.2.20, <http://www.voachinese.com/content/article-20120221-more-hollywood-films-set-for-china-139876483/810019.html>

²⁴⁹ Agencies Responsible for Censorship in China, <http://www.cecc.gov/pages/virtualAcad/exp/expcensors.php>

²⁵⁰ Lucy Montgomery, *Space to grow: Copyright, cultural policy and commercially-focused music in China*, *Chinese Journal of Communication* Vol. 2, No. 1, March 2009, 36–49, at p. 40.

²⁵¹ Lucy Montgomery, *Space to grow: Copyright, cultural policy and commercially-focused music in China*, *Chinese Journal of Communication* Vol. 2, No. 1, March 2009, 36–49, at p. 42.

²⁵² Lucy Montgomery, *Space to grow: Copyright, cultural policy and commercially-focused music in China*, *Chinese Journal of Communication* Vol. 2, No. 1, March 2009, 36–49, at p. 40.

Essentially, Internet censorship involves control over Internet access, functionality, and contents. Roughly one-quarter of the world's people and Internet users live under governments that engage in very heavy censorship, the vast bulk of whom are located in China.²⁵³ China has the world's most advanced and sophisticated system of Internet censorship, comprised of technological and legislative controls used to regulate the flow of speech and information on the Internet.²⁵⁴ The state has encouraged Internet usage, but only within an environment that it controls. However, cyberspace in China remains relatively free compared to the traditional media.²⁵⁵

The main motivation for Internet censorship in China is to maintain political repression of dissidents, human rights activists or comments insulting to the state.²⁵⁶ The Chinese government has been blunt in its justification of censorship, asserting its necessity to maintain a 'harmonious society.'²⁵⁷ The government deploys a vast array of measures collectively, informally they are known as the "Great Firewall", which includes publicly employed monitors and citizen volunteers who screens blogs and e-mail messages for potential threats to the established political order.²⁵⁸ Many government departments have the authority to censor Internet content including the Ministry of Information Industry, the State Counsel Information Office and the Propaganda Department.²⁵⁹ Instead of directly regulating the Internet Content Providers (ICP), the Chinese government formed a regulation that requires all ICPs to be licensed to operate and then makes the ICPs responsible for preventing the transmission of politically objectionable or illegal information.²⁶⁰ To survive in the market, those ICPs have to stay in line with Chinese laws and regulations. Thus the Chinese Internet censorship also includes ICPs self-censor who develop and maintain keywords and phrases that must either be blocked or monitored. Since the criteria of what should be censored are too vague, this system often leads to over-censoring.

²⁵³ Barney Warf, Geographies of global Internet censorship, *GeoJournal* (2011) 76:1–23, DOI 10.1007/s10708-010-9393-3, p. 5.

²⁵⁴ Jessica E. Bauml, It's a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship, 63 *Fed. Comm. L.J.* 697 2010-2011, <https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0163-7606>, p. 704.

²⁵⁵ Barney Warf, Geographies of global Internet censorship, *GeoJournal* (2011) 76:1–23, DOI 10.1007/s10708-010-9393-3, p. 8.

²⁵⁶ Barney Warf, Geographies of global Internet censorship, *GeoJournal* (2011) 76:1–23, DOI 10.1007/s10708-010-9393-3, pp.3-4.

²⁵⁷ Barney Warf, Geographies of global Internet censorship, *GeoJournal* (2011) 76:1–23, DOI 10.1007/s10708-010-9393-3, p. 8.

²⁵⁸ Barney Warf, Geographies of global Internet censorship, *GeoJournal* (2011) 76:1–23, DOI 10.1007/s10708-010-9393-3, p. 8.

²⁵⁹ Jessica E. Bauml, It's a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship, 63 *Fed. Comm. L.J.* 697 2010-2011, <https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0163-7606>, p. 704.

²⁶⁰ Jessica E. Bauml, It's a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship, 63 *Fed. Comm. L.J.* 697 2010-2011, <https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0163-7606>, p. 705.

However, so far, the Chinese government has not started to massively censor copyright infringement as it does with the political censorship on the Internet. One reason China puts heavy censorship upon foreign movies and music legally accessible to the Chinese market is for the sake of restricting the spread of western concepts²⁶¹ which goes different from the Chinese Communist concept. The other reason is to protect the domestic industry from the competition of foreign cultural industries. In this situation, the Chinese government does not impose too much Internet censorship on those cultural contents. The strict Internet censorship is only applied to political sensitive issues no matter if it is within or outside the border of China.

The problem with China's censorship is that the regulations are needlessly vague, seeking to regulate all the content that "might harm the state's honor, cause ethnic oppression, spread rumors, disrupt social stability, spread pornography, undermine the state's religious policies, or preach the beliefs of evil cults."²⁶² Licensed print media and Internet service providers are easily over-censored by utilizing those vague regulations in their self-censoring. What makes it worse is that there is no effective remedy for the victims of wrongful censorship, since all the censorship procedures are done by administrative departments and not through courts. Neither individuals in China nor foreign corporations can get effective remedy against wrongful censorship. The courts in China do also stand in line with the government, given that "China reportedly has the largest recorded number of imprisoned journalists and cyber-dissidents in the world."²⁶³

4.2.2. The Effect Censorship have on Authors, the Public and Digital Piracy

Under the censorship, individuals' human right to take part in cultural life and freedom of expression in China has been seriously violated.

Literature, music and movies are the most common cultural goods. Everyone has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activities.²⁶⁴ In other words, individuals have the right to seek for cultural knowledge and expression, and authors and creators

²⁶¹ 陆杨 (Yang Lu), 中国多年打击网络侵权, 能否奏效? (China Has Been Fighting with Online Piracy for Many Years, Does It Work?), 2012.7,

<http://www.boxun.com/news/gb/china/2012/07/201207050025.shtml#.UI2NyKGPUWk>

²⁶² Jessica E. Bauml, It's a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship, 63 Fed. Comm. L.J. 697 2010-2011,

<https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0163-7606>, p. 706.

²⁶³ Background Information on Freedom of Expression in China, AMNESTY INT'L, <http://www.amnestyusa.org/individuals-at-risk/priority-cases/background-information-on-s-hi-tao/page.do?id=1361025>; see also Israel, supra note 14, at p. 618.

²⁶⁴ General Comment No.21 (2009), Economic and Social Council, E/C.12/GC/21, para. 15 (a).

have the right to share their cultural creations and goods to others as well. However, with the existence of censorship, individuals cannot receive the information they want but only those which has been approved by the government. The legal way of obtaining cultural goods for individuals is very limited after the cultural censorship. Individuals can only watch limited numbers of foreign movies which get the legal permission of SARFT. Only a limited amount of TV series has been bought by Chinese television channels or websites, not only due to the high price but also because of China's political condition.²⁶⁵ The accessibility to cultural life for individuals is denied by the government.

When it comes to authors, they cannot participate in, or contribute to, the cultural life without the government's censorship. In China, cultural life and writing can be a dangerous occupation. Writers are not allowed to talk about certain history or criticize too much about the present circumstances. Many words cannot be written, many things cannot be spoken. Movies, music and games are not exceptions for this censorship. The copyright law grants the copyright holders have the right of publication, integrity and distribution.²⁶⁶ However, the state's censorship denies the authorship of copyright holders to some extent. Moreover, according to the spirit of the right to participate in cultural life, everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication to benefit from the cultural heritage and other individuals' and communities' creations.²⁶⁷

Despite of the fact that China hasn't ratified ICCPR, China's constitution recognizes the freedom of expression. Freedom of expression includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression and much more.²⁶⁸ The authors have been denied their freedom of expression and the public individuals have been denied the right to access the information. Individuals' freedom of expression has been trampled on by the state.

Although the right to participate in cultural life and the freedom of expression can be restricted in some circumstances, the restrictions must be "provided by law"; for the protection of national security or of public order (*ordre public*), or for public health and morals; the restrictions must be "necessary" for a legitimate purpose. Obviously, the Chinese government goes much beyond the reasonable boundary to restrict the freedom of expression by the large range of censorship. Strictly speaking, China's

²⁶⁵ 视频网站为上市急删盗版 海外渠道受限 (Video Sites Are Anxious Deleting Pirates For Stock Listing), 2011, <http://www.tyintel.com/news/News-275.html>

²⁶⁶ Article 10 (1); (4); (6), Copyright Law of China.

²⁶⁷ General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, para.15(b).

²⁶⁸ General comment No.34, 2011.09.12, UN Human Rights Committee, CCPR/C/GC/34, para. 11.

copyright regulations are not prescribed by law.²⁶⁹ They are only based on administration regulations and the government shows little tolerance to the public opinion and cultural diversity. Even as the Chinese constitution recognizes the freedom of expression, China's courts do not have the authority to process judicial reviews of violations against the constitution. China ignores the ICESCR which requires that the states parties must abolish the censorship of cultural activities in the arts and other forms of expression.²⁷⁰ Moreover, China does not have any specific regulation that recognizes the right to participate in cultural life, which makes it more difficult for individuals to get remedy under the Chinese legislation.

If the Chinese government can block politically objectionable material on the Internet, they should be able to control the file sharing.²⁷¹ Censorship can be the most effective way to fight against digital piracy, but in China, censorship constitutes the main reason for the wild ongoing piracy. The censorship of movies, music and games only reinforces the public's desire for imported entertainment. Without the legal resources to access it, the inevitable result is piracy. It's also clear that new technologies are pushing the boundaries to places where the government can no longer exert control. Pirated versions of banned books circulate via digital equivalents of the samizdat channels of old; banned works can be sporadically downloaded from the Apple Store; and China's version of Twitter, Weibo, has a shared drive feature that allows users to trade forbidden literature until the censors catch up.²⁷² Keeping legitimate products away from the Chinese consumers may in the end benefit piracy.²⁷³

Controlling digital piracy is like squeezing a balloon: holding one part tightly simply results in the balloon expanding in another direction.²⁷⁴ If China starts censoring Copyright infringements on the Internet, without a doubt, the public's and authors' freedom of expression and right to participate in cultural life will be hindered further.

Concluding remarks

Apparently, Chinese individuals receive no punishment from the courts by downloading or uploading digital piracy content and cause the copyright

²⁶⁹ Jessica E. Bauml, It's a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship, 63 Fed. Comm. L.J. 697 2010-2011, <https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0163-7606>, p. 706.

²⁷⁰ General Comment No.21 (2009), Economic and Social Council, E/C.12/GC/21, para. 49 (c).

²⁷¹ Steve McClure, Waiting on China, 00062510, 7/15/2006, Vol. 118, Issue 28, Academic Search Complete, p. 2.

²⁷² Louisa Lim, Jeffery Wasserstorm, The Grey Zone, New York Times Book Review; 6/17/2012, p. 31.

²⁷³ Case Note, Squaring Free Trade in Culture with Chinese Censorship The WTO Appellate Body Report on China- Audiovisuals, Melbourne Journal of International Law, Vol 11 2008, p. 121.

²⁷⁴ Trevor T. Moores, Vatcharaporn Esichaikul, Socialization and Software Piracy: A Study, Journal of Computer Information Systems, Spring 2011, pp.1-9, at p. 5.

shareholder, both inside and outside of China, to lose a lot of income. A big reason for the common use of digital piracy is that the individual's right to participate in cultural life is not guaranteed. Chinese citizens live under poor conditions and have low income but have to pay similar or only a little lower prices than the developed countries for the copyright goods. In addition to the Chinese government's censorship of cultural and political life, there is less legitimate ways for individuals to access the cultural goods they want.

Authors under the censorship system cannot fully express themselves. Their right to participate in cultural life is also hindered by the state. In the copyright infringement cases they cannot get enough compensation since the Chinese law sets the upper limit to 500,000RMB. Generally, authors care more about their remuneration than the monopoly power over their works to control the dissemination.

Therefore, digital piracy is a problem about the right to participate in cultural life. Without the government's strict restriction of information there will be more legitimate cultural goods for the public to access. A more strict way to enforce copyright on the Internet will push China's Internet issue into a more dangerous situation. Without the high price that is beyond the possibilities of most individuals, more will prefer to purchase legal versions.

The digital piracy in China is not only relevant whether the state has fulfilled its international intellectual property obligations, but it also relevant to the lack of rule of law in the country itself. The copyright goods market in China does not operate in the ideal "free market" from which the notion of intellectual property supposedly derives. Copyright law itself makes the interests between authors and public unbalanced under the digital environment. Moreover, China's censorship makes it even worse. Both the public and author's rights under copyright law and human rights law have been harmed by the state.

5. An Effort to Ease the Digital Piracy problem in China Trough Human Rights Law Framework

In the digital environment, piracy is not only an infringement of copyright law but also reveals the conflict of interests between copyright holders and the public. With the large amount of digital piracy and the traits of the free flow of information on the Internet, the copyright law mechanism itself now shows to be inefficient in preserving the monopoly power that it grants to the copyright shareholders. Also, the copyright law focuses on the rights of authors and disseminators while paying little attention to the public. Under the threat of being disseminated freely on the Internet, the limitation of copyright is increasing day by day. Copyright law has not opened itself to new technology but instead confronts it, putting more and more restrictions on the Internet to ensure the monopoly power that the copyright grants to the copyright holders.

Different from copyright law, human rights law shows concern to all human beings, it not only considers the author's interests but the public's as well. With the inefficiency of copyright law, human rights law provides an alternative solution to the digital piracy problem, especially when it comes to rights of the public.

In this chapter, some recommendations to ease the digital piracy problem in China will be provided, based on Helfer and Austin's idea under the human rights law framework: the state's obligation under a human rights law system.

5.1. Towards a Human Rights Framework for Copyright (digital piracy) in China

Helfer and Austin considered human rights and copyrights to be two communities that speak very different languages.²⁷⁵ Copyright in the intellectual property system is an applied utilitarian system and based on welfare economics to evaluate the trade-offs between incentives and access

²⁷⁵ Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property Mapping the Global Interface*, Cambridge University Press 2011, p. 504.

and the consequences for the individuals and firms that create, own and consume intellectual property products.²⁷⁶ Human rights law seeks to delineate the negative and positive duties of states to respect and promote inalienable individual freedoms.²⁷⁷ Copyright owners, especially big companies, will invoke the copyright and property rights provisions to use maximalist copyright rules to further concentrate the wealth of a few at the expense of the many. Scholars and commentators have offered numerous suggestions to enhance the economic development and foster local creation but they are limited to the context of copyright law, they are insufficiently connected to the protection of fundamental rights and freedoms.

In the existing copyright system, authors and disseminators are the only “right” holders. The monopoly power that accompanies copyrights enables copyright holders to maximize profits by offering knowledge goods at supracompetitive prices that excludes consumers who would have purchased or licensed the goods, had they been offered it in a competitive market.²⁷⁸ The result is that individuals with greater financial means can afford knowledge goods whereas those with fewer economic resources cannot.²⁷⁹ All the other stakeholders such as consumers, future creators, and the public are in an inferior status. Digital piracy is another way for individuals to access knowledge, this is however an illegal way according to copyright law. The digital piracy phenomena triggered to the rethinking of the copyright balance system. The digital piracy problem has no easy solution with a proper balance of the interests between authors, disseminators and the public. The international treaties concerning copyright are more and more making exceptions and limitations mandatory rather than being permissive to the public’s access to copyrighted works, which also leads to member states having a more restrictive copyright law towards individuals. The Chinese state is also a developing country with other fundamental human rights problems, such as the right to education, the right to cultural life, freedom of expression, etc, than to make sure a strong copyright protection.

However, one should not turn a blind eye to the severe digital piracy problem in China, since copyright is an incentive for creations. Human rights law can provide another framework to balance the interests between authors and individuals other than the copyright laws. Helfer and Austin thought about what measures to take, to urge decision makers to begin from the premise that the human rights and intellectual property regimes share the same core objective- to encourage creativity and innovation that benefits the

²⁷⁶ Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property Mapping the Global Interface*, Cambridge University Press 2011, p. 504.

²⁷⁷ Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property Mapping the Global Interface*, Cambridge University Press 2011, p. 504.

²⁷⁸ Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property Mapping the Global Interface*, Cambridge University Press 2011, p. 520.

²⁷⁹ Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property Mapping the Global Interface*, Cambridge University Press 2011, p. 521.

society as a whole.²⁸⁰ The starting point of human rights law is to protect the fundamental rights and freedoms that should be enjoyed by every individual. The protective dimension under the international human rights law requires states to: (1) recognize and respect the rights of individuals and groups to enjoy a modicum of economic and moral benefit from their creative activities; (2) refrain from bad faith and arbitrary interferences with copyrights that the state itself has previously granted or recognized.²⁸¹ The human rights law framework is grounded in member states' obligation under the ICESCR and ICCPR to respect, protect and fulfill individuals' human rights.

Under international human rights law, the state is an actor that should be restrained since states are more powerful and united compared with individuals. In China, the state has shown more unity because only one ruling party is allowed and the Communist concept puts collective rights over pirate rights. Individuals should obey the collective. Moreover, after analyzing the digital piracy problem in China, it is easy to find that the Chinese government plays an important role. Even if China joined the WTO, thus starting the copyright protection all over the country, the government still decides everything and prevents certain information flow into the territory of China and the courts have an indispensable relationship with the government. The balance between authors and the public is not only regulated by copyright law but also the state's information policy. Both the public and authors' interests have been hindered under the censorship. Therefore, the government's will is extremely important in solving the digital piracy problem in China. China is a member state of the ICESCR, while it has not ratified ICCPR so far. Thus, in this thesis, the state's obligation under ICESCR, especially Article 15, will be applied towards individuals' right to participate in cultural life and authors material rights and to give recommendations on how to solve the digital piracy problem.

5.2. Recommendations based on China's Obligation under Human Rights Law

ICESCR imposes three types, or levels, of obligations on the states: (a) the obligation to respect; (b) the obligation to protect; and (c) the obligation to fulfill.²⁸² The digital piracy problem is also a problem of an imbalance of interests between copyright stakeholders. Here, utilizing the framework of

²⁸⁰ Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property Mapping the Global Interface*, Cambridge University Press 2011, p. 520.

²⁸¹ Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property Mapping the Global Interface*, Cambridge University Press 2011, p. 512.

²⁸² General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, para. 48.

human rights law, the thesis will illustrate some recommendations to balance interests between copyright stakeholders.

5.2.1. Respect

The obligation to respect requires states to take steps to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life.²⁸³ To ease the digital piracy problem, China has to first make sure that individuals have access to different cultural contents. The state itself should respect copyright as a private right. Lots of information and cultural goods that has been censored contains a large amount of copyright works, however, the authors' rights to have their work published have been denied by the state. Article 4 of the Copyright Law in China states "The State shall supervise and administrate the publication and dissemination of works in accordance with the law", which provides an excuse for the government to censor cultural goods without a court's judgment. To balance the rights between authors and the public, states should first respect the rights that are enjoyed by every individual, no matter if it concerns their human rights, copyrights etc. The copyright law in China grants the government power to control the flow of information thus seriously hindering individuals' right to participate in cultural life, as well as other rights. According to the General Comment No.21, the states obligation to respect also includes the individuals' freedom of opinion, expression, and the right to seek, receive and impart information.²⁸⁴ This implies the right of all persons to have access to, and to participate in, varied information exchanges and to have access to cultural goods and services.²⁸⁵ Therefore, under the obligation of ICESCR, China should release the strict control of the cultural goods including literature, movies, music, games and the others.

However, it is not easy for the government to lose the control on the cultural and political fields. At least, the basic thing China can do now is to respect its own constitution. So far courts cannot apply the constitution directly in verdicts even if the constitution is considered as the fundamental law and has the most supreme position in the Chinese legal system. The constitution itself says nothing about whether courts can apply it or not. The best way to make sure individuals have access to different kinds of information and cultural goods is to provide them an alternative. Censorship is mostly conducted by the government departments; neither the public nor authors have the ability to make the information available to the public or on the market again. Without, or lack of, legal content on the market or The Internet, individuals have to turn to piracy. Therefore, the best way for individuals to have legal access to information is to allow courts to apply the

²⁸³ General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, para. 48.

²⁸⁴ General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, para. 49 (b).

²⁸⁵ General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, para. 49 (b).

constitution and review constitution violations in legal practice. In that way, individuals and authors can get legal remedy from the government's censorship.

5.2.2.Protect

The obligation to protect requires the states parties to take steps to prevent third parties from interfering in the right to take part in cultural life.²⁸⁶ Under the obligation to protect, the state works to keep the balance between authors and the public. Authors have the right to get remuneration from the society for their creativity. On the other hand, the public has the right to access information and participate in cultural life.

It will most likely be considered illegal to gain a profit from illegally selling other's intellectual fruits, such as the cases of Kuro and Tomato Garden. Even they made improvements to the original product it did not mean it is allowed to gain money from it without paying remuneration to the authors and creators. China should set a clearer rule to define what constitutes a copyright infringement on the Internet to gradually establish a complete, clear standard for digital copyright infringements. Also, the implementation should increase the financial punishment on those who use digital piracy to gain money. An increase to the cost of infringement can curb digital piracy to some extents. Moreover, the copyright holders, especially authors, should be ensured that they can get the illegal income, which was gained from the infringing conduct, as compensation.

In other words, the best model is if individuals are free to upload and download but those who gain profit from digital piracy or file sharing, usually the website service provider, should pay to the creator. After all, the aim of copyright law is not to restrict the flow of information, but to encourage the dissemination of information and give an incentive to new creations.

On the other hand, individuals have the right to participate in cultural life and to enjoy the benefits of scientific progress and its applications. Fair use under the digital environment shows more importance than before. The "fair use" doctrine emerged to allow the sharing of small portions of publications, and even copying small sections of copyrighted works, for different purposes such as reporting, criticism, commentary or quotation and other scholarly and journalistic uses.²⁸⁷ Fair use is a legal guarantee of the freedom of information and dissemination of knowledge. Individuals have the right to access and acquire information and knowledge. Since public dissemination of information is very important, one should not suppress the

²⁸⁶ General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, para. 48.

²⁸⁷ Christopher Johnson, Daniel J. Walworth, Protection U.S Intellectual Property Rights and the Challenges of Digital Piracy, Office of Industries Working PaperNo. ID-05, U.S. International Trade Commission, March 2003, pp. 3-4.

freedom of individuals and democratic society under the traditional concept of private exclusive rights.²⁸⁸ Copyright protection should be used against illegal competitors and should not impede the fair use of individuals. Unfortunately, the DRM technology prevents users and consumers to use their fair use rights on the Internet. In most cases, encryption technologies do not even allow the fair use of reviewing or learning by copying a small amount of work. Technology cannot tell the difference between pirate and legal use, thus it bans any kind of copy. Those who attempt to crack the system for the sake of fair use will still be considered violators of the law.²⁸⁹

A well balanced copyright should allow the public's reasonable use at a cheap or free price. Thus users can enjoy the benefit of cultural prosperity at a low price under a copyright holder's limited monopoly. Copyright law should allow users to copy a certain number of works without the consent of the author's permission while not considering it as an infringement.²⁹⁰ To be balanced with authors' copyright, there are alternative ways to reward authors. For example, Internet service providers can offer to give copyright owners a portion of their advertisement revenue in return for licensing the content.²⁹¹ The best way is to allow consumers to access normal information goods for free and pay for better quality ones. Piracy can be constrained only in the situation that the general society thinks there is a good balance between copyright and social dissemination.²⁹²

Thus, states should focus on making sure authors get adequate remuneration from their works but not at an excessively expensive price. Trying to block individuals' access to all the digital piracy contents to prevent digital piracy is not wiser than a cultural and political censorship.

²⁸⁸ 余娜 (Na Yu), 网络环境下著作权“合理使用”制度探讨 (A Discussion of 'Fair Use' under the Digital Environment),

<http://wenku.baidu.com/view/9cdebfe102de2bd960588e9.html>

²⁸⁹ 陈凤兰 (Fenglan Chen), 数字版权管理背景下的公众与著作权人利益平衡之问题 (The Changing Balance between Access and Ownership under Digital Rights Management), 北京印刷学院学报 *Journal of Beijing Institute of Graphic Communication*, Vol.15 No.5, Oct. 2007, p. 63.

²⁹⁰ 陈凤兰 (Fenglan Chen), 数字版权管理背景下的公众与著作权人利益平衡之问题 (The Changing Balance between Access and Ownership under Digital Rights Management), 北京印刷学院学报 *Journal of Beijing Institute of Graphic Communication*, Vol.15 No.5, Oct. 2007, p. 62.

²⁹¹ Dan Harris, China To Crack Down On Online Piracy — Does It Matter?, *Legal News*, May 30th 2006,

http://www.chinalawblog.com/2006/05/china_to_crack_down_on_online.html

²⁹² 宋苏晨, 徐剑 (Suchen Song, Jian Xu), 新媒体时代版权保护与知识传播的结构性矛盾--基于音像盗版的社会意义解读 (On Structural Contradiction of Copyright and Knowledge Sharing in Digital Era--Interpreting the Social Meaning of Audiovisual Piracy), 上海交通大学学报(哲学社会科学版) *JOU RNA L OF SJTU (Philosophy and Social Sciences)*, No. 1, 2007 Vol. 15 SUM, No. 53, p. 77.

5.2.3.Fulfill

The obligation to fulfill requires states to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures, aimed at the full realization of the rights.²⁹³ One way could be if the state focuses on lowering the prices of copyrighted products, encourage open source systems and develop individuals' copyright awareness.

First, the state should make sure the public has access to cultural goods at a reasonable price which adapts to their salary and living expenses. Gone Hoffman, the Chief Executive Officer of E music, Inc, said: "We think the best way to stop piracy is to make music so cheap it isn't worth copying."²⁹⁴ At least, this way will encourage some to switch to legal copies. Mass digital piracy also suggests that individuals do not consider the product worth that price, thus turn to piracy. Copyright holders, especially disseminators, should rethink whether the price they labeled are reasonable for consumers. Specific methods could include that websites decreases the price for downloading legal content, improvement of the quality of digital products. The state under its obligation should encourage disseminators and authors to label the price of copyright goods at a reasonable ground and not excessively expensive for the public. Moreover, states could construct more digital libraries, especially with online access to educational materials, the widespread accessibility of nonproprietary alternatives should not be assumed.²⁹⁵ Also, encouraging companies to pay the copyright content, in return for advertisement space, will let the public get free or low cost access.

Secondly, the state should encourage open access systems. The concept of open access is poorly developed due to the massive digital piracy and the lack of copyright knowledge in China. The state should notice that open access systems respects copyright law and is also compatible with the digital environment. Open access systems²⁹⁶ that require follow-on innovators to share their contribution to collectively produced knowledge goods should be encouraged, provided that their systems polices are fully disclosed to participants.²⁹⁷ The state should also encourage individuals to share literature and music online for those who already have renounced their copyright protection. Authors should be able to choose to what extent of the monopoly power they want within the context of copyright law. Under the

²⁹³ General Comment No.21(2009), Economic and Social Council, E/C.12/GC/21, para. 48

²⁹⁴ Moores, T.T. and Chang, J.C.-J. "Ethical Decision Making in Software Piracy: Initial Development and Test of a Four-Component Model," *MIS Quarterly* (30:1), 2006, pp. 167-180.

²⁹⁵ Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property Mapping the Global Interface*, Cambridge University Press 2011, p. 521.

²⁹⁶ Open-access literature is digital, online, free of charge, and free of most copyright and licensing restrictions. By Peter Suber, *Open Access Overview: Focusing on Open Access to Peer-Reviewed Research Article and Their Preprints*, First put online June 21, 2004. Last revised October 7, 2012, <http://www.earlham.edu/~peters/fos/overview.htm>

²⁹⁷ Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property Mapping the Global Interface*, Cambridge University Press 2011, p. 521.

digital environment, disseminators can no longer control the spread of works.

Lastly, the state should provide education to individuals on the concept of copyright. Since China has a lack of intellectual property in both their tradition and culture, individuals are not very respectful towards other's intellectual fruit. Since all the copyright works are devoted by the authors' mental labor, Chinese government should provide individuals education to respect other's copyrights including material and moral rights. Accessibility to copyrighted works is built on the foundation of respect for other's intellectual property works. The public needs intellectual property awareness to respect others creations, in the same way, authors and the intellectual industry should also see the general human rights that belongs to the public. And copyright works as a part of knowledge and cultural goods should be promoted and easily accessible to everyone. The copyright owner should also respect the public's rights of fair use under the copyright law. To fully restrict the content which should or could be free is not a good way to promote future creativity.

6. Conclusions

On the one hand information wants to be expensive, because it's so valuable. The right information in the right place just changes your life. On the other hand, information wants to be free, because the cost of getting it out is getting lower and lower all the time. So you have these two fighting against each other.

--Stewart Brand

Digital piracy in China make unscrupulous traders rich but also acts as a price leverage, promoting the spread of information. With digital piracy interfering, copyright law has been unable to keep its enforcement on protecting copyright holders' rights even when the law tried harder by granting copyright holders legal basis to technologically control Internet users free access to legal intellectual contents. On the other hand, the current copyright restricts the public's fundamental right of access to information by narrowing their fair use rights on the Internet. It is doubtful that the current copyright law system creates equality between copyright holders and the public. The current copyright law is going further and further away from its ultimate goal—the maintenance of social welfare.

As to the copyright legislation in China, after joining the WTO China put forward laws and regulations to ensure copyright protection. China already had the copyright regime in accordance with the international law with regard to the digital form copyright protection. The TRIPS shows some flexibility to developing countries. However, the treaty's particular application to the digital environment, the WIPO Internet Treaties, show less flexibility to developing countries which leads to China's copyright legislation restricting the public's interests on unreasonable grounds. As a developing country, China is still in the stage of fighting against poverty and other basic social problems. It is impossible for individuals to afford those intellectual goods which go far beyond their financial capacity.

The complexity of the digital piracy phenomena in China shows in both the implementation of copyright law and how the information disseminates in China. Individual Internet users have never received a verdict by courts in China to pay compensation for uploading or downloading unlicensed works. As to copyright holders, they cannot get too much compensation from a lawsuit of copyright infringement. What is worse, different from other countries, China has the strongest censorship over the Internet, especially on sensitive political contents. On one hand, the public cannot fully participate in cultural life and gain access to certain information. On the other hand, authors' rights of freedom of expression are seriously hindered. With some

certain contents being censored and not enough free or low cost copyright materials, individuals have to turn to piracy content on the Internet.

This thesis tries not to legitimize the digital piracy but hopes to bring up a discussion regarding copyright law, triggered by the digital piracy phenomena. Tightly controlling the copyright materials on the Internet by setting legal standards is not a good idea, it requires too many technological, human and financial resources. China gives the world the best example of how to effectively control the Internet. However, China's censorship's aim is not preventing the spread of digital piracy but focused more on controlling sensitive political and cultural issues. The restriction of the information is a violation of both authors' and the public's human rights. The restriction of individual's cultural life stimulates the public to turn to digital piracies which makes the problem in China even worse. Further controlling the copyright materials on the Internet could only lead to another kind of censorship—another way to restrict individuals freedom of expression and right to participate in cultural life.

Instead of the restriction caused by copyright law, human rights law provides an alternative solution to balance the interests between authors and individuals. Under the human rights law framework, the question is not how to regulate the Internet to eliminate digital piracy. The question instead should be how to assure authors get paid, and at the same time grant the public free or low costs to access those intellectual works.

To achieve a proper balance between authors and the public, states are in an important role. In China's case, the State has absolute administrative, judicial and legislative authority. The balance between authors and the public is not only under the regulation of copyright law and also the state's political policy. The Chinese digital piracy problem can be to some extent attributed to the state by restraining individuals to participate in cultural life and to access information. In China, only the state has the ability to ease the digital piracy problem.

In closing, it should be noted that free flow of information is an unpreventable trend under the fast developing technology. One should not limit itself in excessively control the dissemination of information only to protect the copyright holders' rights but instead should focus on providing better and more competitive intellectual goods at a reasonable price to the public. A strict control of information would only lead the public seeks for illegal ways, than get legal contents.

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