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Difficulties in the Application of 'Public Interest' Provisions in Chinese Copyright Law and System Optimisation

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Abstract: *Article 53 of China's Copyright Law is an important provision for the protection of public interest, which faces many dilemmas in its application, such as the insufficient circumscription of infringement as the factual basis for the damage of public interest, the unclear criteria for the definition of the scope of public interest, and the restricted functioning of the administrative penalty system in realising the multi-value objectives. The root of the problem lies in the fact that the basis of interest, the standard of attribution and the way of relief have not yet formed a smooth chain of institutional logic. The article argues that structural adjustment of the system is of great value in realising the balance between private interest and public interest, in which the expansion of the factual basis of public interest damages, the clarification of the definition of the criteria for attributing responsibility for public interest damages, the extension of the dual-track model of 'administrative+judicial' protection to the scope of public interest, and the introduction of public interest litigation are the key paths to solving the problem. The key path to solving the problem.*

Keywords: *balance of interests, textual interpretation, prejudicial behaviour, scope of interests, consultative system*

1. Introduction

Due to the expansion of the scope of copyright, the abuse of rights, the subject of the right is not clear, resulting in the erosion of the public sphere, which urgently need to improve the regulatory rules, change the function of the administrative organs and other paths to protect the public interests. [1-2] In the face of the imbalance between the interests of right holders and the public, the judicial process is the best way to repair the damaged public interests. [3] Article 53 of the Copyright Law takes copyright infringement as the factual basis of the damage to the public interest of the legislative expression, can not extend the abuse of rights, violation of public order and morals and other acts of damage to the public interest of the situation. In the face of the demand for protection of public interest in traditional copyright and emerging copyright, the public interest protection system should be structurally adjusted and optimised to eliminate the dilemma in the application of the law.

2. Textual interpretation of "public interest" clauses

Article 53 of the Copyright Law, which provides that "infringement that also harms the public interest" shall be subject to administrative penalties to be exercised by the department in charge of copyright, is controversial in its application, and its interpretation is the key to solving the problem of its application. The semantic meaning of "infringement that also harms the public interest" includes at least the following three aspects.

2.1. Copyright infringement as one of the prerequisite bases for the establishment of public interest damages

The content of Article 53 of the Copyright Law takes copyright infringement as an important basis for determining damage to the public interest, and maintains the logical consistency of the system of private rights protection in copyright law. The fundamental purpose of Article 53 is to serve the administrative enforcement of copyright and to clarify the scope of administrative enforcement, while

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the addition of the precondition of "simultaneously damaging the public interest" is more to prevent excessive administrative intervention in the field of copyright protection. [4] In addition, the third amendment process of the Copyright Law had deleted the "simultaneous" condition of "simultaneously harming the public interest" and then re-added the provision, reflecting that only when the infringement of copyright reaches a certain level of harm can it be regarded as harming the public interest. This reflects the legislative attitude that copyright infringement can only be regarded as damaging the public interest if it reaches a certain degree of harm. Under the situation that the connotation and extension of public interest in the field of copyright law are still not clear enough, if Article 53 does not specify the premise of infringement, on the one hand, it may damage the rank between civil liability and administrative liability for copyright infringement,[5] and on the other hand, it is not conducive to the development of copyright administrative enforcement work.

2.2. Copyright law strictly limits the scope of "infringement that also harms the public interest"

Article 53 of the Copyright Law establishes copyright infringement as a prerequisite for the establishment of damage to the public interest in relation to copyright, and at the same time expressly provides for eight types of copyright infringement. This shows that the legislator believes that only these eight types of copyright infringement can cause damage to the public interest when it occurs. When the eight types of copyright infringement in Article 53 are divided into types, it can be found that: the first type of behaviour is the infringement of seven types of copyright property rights. The second to fifth categories are acts that infringe the four types of copyright neighbouring rights in a specific way. The sixth and seventh categories are acts of intentionally avoiding or destroying technical measures and acts of intentionally deleting or changing rights management information. The eighth type of behaviour is the production and sale of works that pretend to be signed by others. All of the above types of behaviour have one thing in common, which is that there is a high degree of probability between the infringing behaviour and the damaging result of making the infringing work available to the public. Although some scholars have argued that the public interest harmed by copyright infringement involves a variety of aspects such as public communication, public order, fair competition, public safety, and public morality. [6] The legislator's intention is that only when the occurrence of the result of making infringing works available to the public is highly probabilistic, it can be included in the category of possible damage to the public interest.

2.3. "Concurrent harm to the public interest" as a condition for the commencement of administrative penalty proceedings

The reason for the involvement of administrative power in the field of copyright is the need to protect the public interest, which is determined by the legitimacy of the administrative system, i.e., administrative power should be operated for the public interest. In this way, in the public interest damage relief, administrative punishment must be based on the fact of public interest damage, otherwise it will face the legality and legitimacy of the consideration. In the case of the law has not yet defined the scope of the boundaries of the public interest, the realisation of the public interest, there is an urgent need for the administrative power to intervene. Since the administrative subject is not the representative of the public interest of course, coupled with the natural expansiveness of the administrative power, which may bring about the abuse of discretion in administrative law enforcement. [7] As the realisation of public interest often involves the restriction of private rights, in order to strictly limit the administrative organs to the public interest as a reason for arbitrary intervention in the field of copyright, this article also contains the copyright infringement to be identified as "at the same time" to the extent of the damage to the public interest should have the corresponding definition of the standard.

3. Difficulties in the application of the "public interest" clause

Based on the textual interpretation of the "public interest" clause, the setting of the clause is based on the theoretical basis of separating individual interests from public interests. It starts from the private property of copyright, and strictly limits the setting of the path of public interest protection to the logic of private law of copyright, i.e., "establishing rights - infringing rights - defending rights". This limitation makes the provision face some difficulties in application, such as the factual basis of public interest damage is not sufficiently extensive, the definition of the scope of public interest is limited, and there is a mismatch between the way of public interest relief and the realisation of diversified value objectives, and so on.

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3.1. Factual basis for the failure to circumscribe the public interest harm caused by a tortious act

Interpretation of the text reveals that the formulation premised on the fact of copyright infringement reflects the dependence of public interest damage attribution on the fact of infringement. In law enforcement practice, law enforcement officers in a certain place reflected that the administrative law enforcement process found that there were eight types of infringing behaviours stipulated in Article 53, and that the behaviours had disturbed the market economic order. However, the infringer and the copyright holder by signing a licence agreement after the fact to dissolve the existence of the fact of infringement. This forced the law enforcement officials to end the administrative penalty procedure due to the lack of facts and evidence to determine the relevant infringing behaviour. Through the exercise of the free disposal right, the copyright holder eliminates the infringement attributes of the original act, which objectively leads to the disappearance of the factual basis of infringement in the attribution of public interest damages. Indirectly circumventing the administrative responsibility of the infringer, making the private interest and public interest imbalance. Article 53 sets the basic premise of public interest damage in strict accordance with the private law logic of copyright "infringement - rights", ignoring the fact that the public interest has an independent value judgement standard. There is a dilemma, that is, if it cannot be determined that copyright infringement is established, even if the objective existence of the phenomenon of disruption of public order can not be determined as damage to the public interest.

In terms of systematic interpretation, article 4 of the General Provisions of the Copyright Law provides that: "The exercise of rights by copyright holders and copyright-related rights holders shall not be contrary to the Constitution and the law, and shall not be detrimental to the public interest." Although there are no specific provisions regulating this type of "behaviour detrimental to the public interest", it is clear that unlawful or inappropriate behaviour by copyright holders in the exercise of their rights may also cause damage to the public interest. The factual basis for the establishment of public interest damage in the Copyright Law is only the infringement of copyright as stipulated in article 53, which is only one of the factual bases for public interest damage. As such, it is not possible to circumscribe article 4, which deals with the circumstances in which the exercise of rights by copyright holders and copyright-related rights holders harms the public interest.

3.2. The institutional function of administrative penalties does not fully fulfil the purpose of balancing interests

Article 1 of the Copyright Law specifies the legislative purpose of "encouraging the creation and dissemination of works beneficial to the construction of socialist spiritual civilisation and material civilisation as well as the development and prosperity of socialist cultural and scientific undertakings", which implies that the establishment and implementation of the relevant system should be committed to safeguarding a good social ecology that is conducive to the creation and dissemination of works as well as the development and prosperity of cultural and scientific undertakings. Development and prosperity. A favourable copyright ecosystem is the fairest public product and the most inclusive benefit to people's livelihood. The established copyright ecology may be damaged by infringement, abuse of rights or the dissemination of works against public order and morals to the public resulting in damage to the public interest. The functional position of the administrative penalty system determines that it lacks functional support in repairing the damage to the copyright ecosystem. The system structure of the copyright law, which limits the protection of public interest through administrative punishment as a "rigid" administrative means, highlights the relationship between command and obedience among subjects, and lacks the space for consensual expression, which has systemic limitations for the realisation of dynamic balance of interests.

4. Optimisation of the public interest protection system

Through analysing the difficulties in applying the "public interest" provisions, it is found that the protection of the public interest cannot be fully achieved by amending article 53 alone, and on the contrary, it is prone to such situations as cumbersome legislation and poor enumeration. From an institutional perspective, optimising the path of public interest protection on the basis of existing legislation is more conducive to the protection of public interest in practice.

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4.1. Broadening the factual basis of the harm to the public interest

In order to create a healthier and more orderly copyright ecology, and also to regulate the path of administrative power intervention, the factual basis of public interest damage should be expanded in an orderly manner. Analysis of the applicable dilemmas reveals that, in addition to acts of infringement, acts such as abuse of rights and violation of public order and morals by copyright holders and copyright-related rights holders should also be included in the factual basis.

4.1.1. Increase in the number of types of violations that may cause harm to the public interest

On the one hand, infringement of the right to exhibit is included in the eight categories of infringement. The right of exhibition is the right to display the original or a copy of a work of art or a photographic work to the public by way of public display. Excluding fair use and statutory licences, the act of displaying the original work or a copy of the work in public without the permission of the right holder should be regarded as "communicating the infringing work to the public". As this previous behaviour would restrict the original copyright holder from exercising the right of exhibition in the same or similar venues and obtaining the corresponding revenues, it constitutes unfair competition and damages the market economic order.

On the other hand, while enumerating the eight categories of infringement, a touting clause should be added. With the development of digital technology, the field of creation and dissemination of works has undergone great changes, and the establishment of the underpinning clause can solve the problem of possible inadequacy of the existing legislation. Attention is also being paid to how to strictly limit the exef administrative power by defining the scope of public inrcise oterest.

4.1.2. Clarifying the factual basis for abuse of rights as a public interest injury

Academics have different views on whether there is an abuse of rights in the field of copyright, with proponents arguing for the existence of copyright abuse mainly from the perspective of the competitive market order. [2][8-11]Although the issue of copyright abuse is controversial, this does not affect the judgement of abusive behaviour developed in the understanding and application of copyright law. Its main manifestations are copyright owners restricting licensees from developing competing products, exercising rights beyond the term of copyright protection, abusing copyright technical protection measures, abusive copyright litigation, and improper exercise of copyright to the detriment of consumers' legitimate rights and interests. [12-13] For example, in the case of digital platforms aggregating a large number of digital resources, it is a typical abuse for the platforms to bundle sales and divide the sales market with the help of technological measures, and even if the technological measures have the function of preventing copyright infringement or preventing the use of the works without paying for them, the copyright law should not provide protection for them. [14] As a legally recognised and protected technical means of private remedies, the use of technological protection measures should be conducive to maintaining the balance of copyright interests. [15] The restriction by the right holder of the public to utilise the work or other protected rights in a particular way is to a certain extent a deprivation of the legitimate interests of an unspecified subject, and there is a practical necessity to take it as the factual basis for the damage to the public interest.

4.1.3. Clarify the factual basis for breach of public order and morals as an injury to the public interest

The widespread dissemination of works that run counter to public order and morals will inevitably result in damage to the spiritual culture of the public, and will not be conducive to the prosperity of scientific and cultural endeavours. Although the Copyright Law deleted the provisions of Article 4(1) of the 1990 Copyright Law in the third amendment, Article 3 of the Regulations on the Protection of the Right to Information Network Distribution, which states that "works, performances, and audio-visual recordings that are prohibited from being made available in accordance with law shall not be protected by these Regulations", responds positively to the fact that works that are contrary to public order and morals are not protected. Are not protected. Public order and morality is a fundamental principle established in the Civil Code. Although the Copyright Law does not directly specify the protection of public order and morals, from the perspective of purpose interpretation, in order to realise the purpose of balancing private rights and public interests, the Copyright Law has to impose restrictions on the exercise of copyright so as not to harm public interests. From the perspective of systemic interpretation, coordination between sectoral laws is one of the types of systemic interpretation,[16] coordination between copyright law and civil law, whether based on the "general law and special law" or "whole and part" doctrine, the principle of public order and morality should be

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reflected in the copyright law. The principle of public order and good morals should be reflected in copyright law.

4.2. Defining the public interest in copyright law

The key to the definition of public interest is the question of its relationship with individual interests and the interests of the State (government). From a static point of view, the public interest can be embodied as a relatively independent form of interest, and the latter two present a pluralistic and complex state of inclusion, juxtaposition and antagonism. From a dynamic point of view, the public interest can also be embodied as a state after the balance of interests. [17] In the field of copyright, the understanding of the relationship between the public interest, individual interests, and national (government) interests should be based on the content of the rights and obligations stipulated in the copyright law and specific historical conditions. Through the method of positive and negative interpretation, the content of public interest and the criteria for defining it are expressed figuratively.

4.2.1. Definition of public interest in the enjoyment of copyright and related rights by general subjects

The infringement of copyright enjoyed by natural persons, legal persons and unincorporated organisations is generally based on the infringement of the legal rights of specific copyright holders, and whether the act has a negative impact on the market economic order, the order of scientific and cultural dissemination, fairness and justice, and public morality is the criterion for judgement. For the abuse of rights to harm the copyright ecosystem, such as fair competition and honest business practices, there must be obvious abusive behaviour of the copyright right, and there must be a state of restriction of competition, monopoly, restriction of rights, and harm to the rights and interests of many consumers.

As the monopoly issue of "platform economy + digital intellectual property rights" is discussed in greater depth, the actual monopoly position based on innovative competition and the legitimate monopoly effect of digital intellectual property rights should be recognised and protected. Only when the legal limit is exceeded, resulting in damage to the interests of others and social public interests, can it be regarded as an "abuse of rights" regulated by the antitrust law.[18] Furthermore, it is important that the antitrust law should not be applied to the monopoly of digital intellectual property rights. [For example, the frequent phenomenon of "copyright cockroaches" is based on the relief of enjoying legitimate copyright rights, to carry out abusive litigation behaviour in order to achieve the purpose of profit-making. The abusive behaviour should be distinguished from the general abuse of civil litigation, and should not be defined as abusive solely on the basis of the number of lawsuits and profits, otherwise it is easy to damage the legitimate rights and interests of copyright holders and the enthusiasm to defend their rights. This requires a criterion of judgement, that is, when the realisation of individual rights and interests and the maintenance of the copyright ecology have reached a relatively balanced state, a large number of lawsuits are still filed within a short period of time, which disrupts the order of the litigation and creates a clear adverse impact at the social level.

4.2.2. Definition of public interest in the enjoyment of copyright and related rights by the State

According to article 21, paragraph 2, of the Copyright Law, the State may acquire copyright and related rights by inheritance; and article 16 of the Regulations for the Implementation of the Copyright Law stipulates that: "The use of works in which the State enjoys copyright shall be managed by the administrative department of the State Council for the administration of copyright." How to understand the attributes of the act of "administration", whether it is an act of administration or an act of exercising the rights under the Copyright Law, will directly affect the relationship between the public interest and the interests of the state (government), whether it is included or juxtaposed. If "management by the administrative department of copyright under the State Council" is interpreted as the exercise of management authority, and since the legitimacy of the exercise of management authority should be judged by the public interest, it can be regarded as damaging to the public interest as long as there are circumstances that damage the copyright rights enjoyed by the State. Such a judgement will inevitably expand the scope of public interest without limitation. From the perspective of the accuracy and effectiveness of copyright protection, for the copyright rights attributed to the state due to the copyright owner's lack of inheritance, the copyright rights of protected orphan works, the infringement of which has not yet substantially harmed the public interest, should still be recognised as a general copyright infringement, and it is not appropriate to define it as a public interest directly. As for the works created by the state finance or local expenditures and used for the purpose of public welfare, the infringement of their copyright rights should be defined as the scope of public interest protection. Such as

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state-owned museums, libraries and other collections of digitised works, the source of funds for the creation of national or local financial expenditure to achieve the public cultural services, scientific research and education and other public welfare functions as the core purpose of the copyright infringement of such works should be included in the scope of the public interest. In particular, it should be noted that the state-owned collection units have a natural advantage in the use of collection resources, and this special legal status does not mean that they can make a statement that the copyright of the digital resources on the platform is enjoyed by the collection units. Because for the preservation of the original characteristics and no room for originality of the digitised results should not be identified as a work,[19] regardless of whether the original collection of works in the term of copyright protection, the collection of units do not have the right to limit the status of copyright holders of the public on the use of the digital results, or else it is easy to cause the reasonable use of the scope of the statutory licensing limitations.

4.2.3. Definition of public interest in other cases

Copyrightable intangible cultural heritage and folk literature and art works without a clear copyright owner carry the excellent traditional Chinese culture and are the common achievements of human civilisation, and most of their works are characterized by intergenerational inheritance and innovation or the joint participation of an unspecified majority of people in their creation, so it is only justified to put them under the scope of protection of public interests to reflect the legitimacy of protection of rights and interests. When the copyright of such works is infringed upon, the objective fact that the interests have been harmed should be respected, so as to avoid the protection of public interests in the field of copyright entering the circle of nihilism due to the lack of clarity of the right holders. Illegal dissemination of works containing obscene and terrorist content, distorting and altering the deeds of heroes and characters in the works and other behaviours are involved in violating public order and morals,[16] but whether they belong to the scope of public interest in the copyright law should be based on whether the works are disseminated in the public domain resulting in the order of cultural dissemination, damaging the spirit of the Chinese nation, hurting the feelings of the Chinese nation and other factors as a criterion for judgement, such as only damaging the name, portrait, reputation, honour of the heroes and martyrs should still be respected, so as to avoid the situation where the interest is damaged. For example, if the work only damages the name, portrait, reputation and honour of the heroes and martyrs, it should still fall within the scope of protection of the Law on the Protection of Heroes and Martyrs.

4.3. Diversified public interest relief methods

A consensus has been reached on the protection of public interests by administrative organs in their capacity as subjects of public power, but the tension between the legal nature of the exercise of the powers of administrative subjects and the diversity and relative flexibility of the contents and methods of interest protection needs to be resolved through diversified remedial methods. In view of the different forms of damage to the public interest and the demand for interest protection, the 'administrative + judicial' dual-track protection is extended to the public interest, based on the principle of administrative priority to build a combination of administrative relief and public interest litigation diversified public interest relief methods, to achieve the effect of physical protection of the public interest and dynamic balance of interests.

4.3.1. Optimising administrative relief by adding a consultation system

The restoration of the ecological function of copyright is a process of adjusting the dynamic balance of interests. Based on the principle of 'no more penalties for one offence', administrative penalties shall not be imposed more than twice for the same offence, and when the amount of penalties is not sufficient to repair the damaged copyright ecosystem, it will fall into the predicament that the public interest cannot be effectively protected. Based on this, it is recommended that the traditional private law adjustment method be partially or indirectly introduced into the field of public law, the establishment of an institutional framework dedicated to the formation of equal subjective structure and sharing of resources for the attribution of responsibility, and the addition of a more dynamic approach to consultation and democracy. [20] By making full use of the natural advantages of the administrative organs in protecting public interests, and giving the subject of authority the right to claim damages in addition to the right to administrative penalties, to make up for the inadequacy of the function of the administrative penalty system. Refinement is the copyright ecological damages introduced into the public law relief mechanism, in the exercise of public functions, the administrative penalty 'rigid administration' and contains the consensual characteristics of the right to claim damages 'flexible

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administration', jointly committed to the public interest protection goal. In the process of administrative punishment, the 'rigid administration' is combined with the 'flexible administration' of the right to claim damages, which contains consensual characteristics, to jointly work towards the realisation of the goal of public interest protection. Regarding the determination of the right to claim damages, the provisions of Article 6 of the Administrative Provisions on Compensation for Damages to the Ecological Environment on the right to compensation can be learnt from the provisions of the Administrative Provisions on Compensation for Damages to the Ecological Environment on the right to compensation. Specific proposals are as follows: the State Council shall authorise the provincial and prefectural governments to act as the right holders of copyright damages, and the copyright administration department shall act as the designated department to carry out specific work. A consultation system based on the right to claim damages should be constructed with the concept of 'peace and reasonableness', with consultation based on the premise of voluntariness, equality and legality, so that an agreement on damages can be reached through benign communication between the administrative organ and the person who has suffered damage to the public interest.

4.3.2. Introducing public interest litigation and establishing a system of procedural convergence

Judicial power to intervene in the protection of public interest in the field of copyright has a realistic and urgent need. According to the Opinions of the Supreme People's Procuratorate on Comprehensively Strengthening the Work of Intellectual Property Procuratorship in the New Era, to carry out public interest litigation in the framework of prosecuting public interest litigation in copyright is an effective path to realise the work of the copyright procuratorate. On the one hand, the public interest litigation system can make up for the inadequacy of administrative penalties in realising the ecological restoration of copyright, and on the other hand, the public interest litigation can to a certain extent avoid the occurrence of administrative organs abusing the name of public interest to harm the interests of individuals, so that the public interest can be substantially protected. In order to effectively avoid overlapping functions, misplaced roles, and unclear powers and responsibilities among relief mechanisms, and to fully realise the function of multiple relief mechanisms to jointly safeguard the public interest, it is also necessary to establish a consultation system and copyright public interest litigation procedures. In the case that the public interest harmer refuses to consult or fails to reach a consensus, the administrative organ should start the public interest litigation procedure, and safeguard the realisation of the public interest through the intervention of judicial power.

5. Conclusions

Public interest is a relatively abstract concept, and the definition of public interest in copyright-related legislation should be interpreted in the context of the legislative system of copyright and related rights, and ultimately return to the perspective of protecting copyright and related rights and incentivizing creation. At the same time, the relief path of public interest should also follow the principle of judicial finality and be included in the scope of public interest litigation, so as to systematically design the definition of public interest and the relief path.

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