

# CRIMINAL COPYRIGHT ENFORCEMENT IN CHINA AND SOUTH KOREA – A COMPARATIVE PERSPECTIVE

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*This paper describes criminal copyright enforcement in South Korea and China, arguing that the different position of copyright in both countries is explained by internal differences in goals and institutional mechanisms in the two countries, not by Confucian notions of authorship and originality or by socialist ideology or by external pressures from the international trading system.*

*The paper assembles data regarding copyright enforcement that show dramatic differences between China and South Korea. Moreover, the paper describes the legal differences between the coverage of criminal copyright in the two countries, differences that would at least allow for major differences in enforcement.*

*In addition to filling in the data, the paper also adds a more qualitative description of the position of copyright in the governance and ideological structure of the two countries. In particular, the paper contrasts China's goal of controlling content for censorship purposes and Korea's goal of increasing the exports of Korean cultural products. The former has led to weak protections of authors and targeting infringement actions against 'prohibited conduct'; the latter to strong protection to protect the entities that produce copyrights products.*

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## I. INTRODUCTION

For almost four decades, the international community and national leaders have focused on strengthening substantive copyright laws. Their focus is now rapidly shifting towards the enforcement aspects of copyright law instead, as global piracy rates remain problematic.<sup>1</sup> Policy makers in developed countries today pay particular attention to the criminal enforcement of copyright and seek to export the practice to piracy-prone countries.<sup>2</sup> However, with continuing disputes over the appropriateness of applying criminal law to protect copyright,<sup>3</sup> new questions arise as to what influences a country's commitment to criminal copyright enforcement.<sup>4</sup>

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1. For instance, despite the Agreement on Trade-Related Aspects of Intellectual Property Rights' (TRIPS) success in raising the minimum standards of intellectual property (IP) protection, within ten years of the commencement of TRIPS in 1994, loss to piracy and counterfeiting increased tenfold. Michael Blakeney, *Covert International Intellectual Property Legislation: The Ignoble Origins of the Anti-Counterfeiting Trade Agreement (ACTA)*, 21 MICH. ST. INT'L L. REV. 87, 89 (2013).

2. See Shujen Wang, *The Cloud, Online Piracy and Global Copyright Governance*, 20 INT'L J. CULTURAL STUD. 270, 276 (2017) ("Developed countries have bypassed the WTO to seek stronger enforcement at the bilateral and regional level, or through forum shopping at the multilateral level."). See generally Christophe Geiger, *The Rise of Criminal Enforcement of Intellectual Property Rights . . . and Its Failure in the Context of Copyright Infringements on the Internet*, in THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE 113, 122–27 (Susy Frankel & Daniel Gervais eds., 2014) (discussing the multiple attempts to strengthen criminal enforcement of intellectual property rights through international, regional, and bilateral treaties); Jun-Seok Park, *Hanguk jjeokjaesangwonbeobui kwageo, hyeonjae, mirae [The Past, Present, and Future of the Korean Intellectual Property Law]*, 136 JUST. 121, 128–32 (2013) (pointing out that FTA negotiations have become a popular forum for eliciting compromises for strong IP commitments).

3. See Geiger, *supra* note 22, at 116 ("This trend [of strengthening criminal sanctions for IP infringements] has been widely criticized as ignoring the complexity of criminal law and the need for a differentiation between intellectual property rights, infringing situations and the sanctions involved."); *id.* at 116–17 (surveying the literature on the issue); see also *id.* at 127–38 (discussing the limitations of criminal-law-based remedies in the context of copyright infringements on the Internet, especially for peer-to-peer file-sharing).

4. See *id.* at 116.

China and South Korea (Korea) offer important testing grounds for the viability of criminal copyright enforcement practices. China and Korea both are prominent economies in East Asia renowned for their rapid growth rates. They share a common reputation for harboring high piracy rates and both have faced strong pressures from abroad to strengthen their national copyright regimes, including their criminal copyright enforcement practices.<sup>5</sup> The two countries are also similar in that their legal systems did not provide for copyright protection for most of their respective histories; it was only fairly recently that national copyright law itself developed, much less the idea of criminally punishing copyright infringement.<sup>6</sup>

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5. Pressures against China have been exerted most markedly by the USTR through its Special 301 Reports, see *Special 301*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/intellectual-property/Special-301> (last visited Oct. 28, 2018) (providing access to annual reports from 1989 to 2018), and its complaint before the WTO tribunal in 2007 with respect to China's weak criminal copyright enforcement standards, see Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/1 (Apr. 16, 2007); see also Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009) [hereinafter *China—Intellectual Property Rights*] (finding China's Copyright Law inconsistent with the TRIPS Agreement); Dexin Tian, *Innovation and Copyright Protection in the USA and China: A Model for Cooperation*, 12 CHINA MEDIA RES. 37, 37 (2016) ("Since the implementation of China's policy of economic reform and opening up to the outside world in 1979, there have been repeated IPR, especially copyright disputes between China and the USA . . . . For years, the USA repeatedly threatened trade wars or economic sanctions if China failed to improve its IPR protection status"). Pressures against Korea have similarly been expressed through USTR's Special 301 Reports, see *Special 301*, *supra* (listing Korea under either the Priority Watch List or Watch List from 1989 through 2008), and also through the negotiations of the copyright chapter of the 2011 U.S.-Korea FTA, Free Trade Agreement, S. Kor.-U.S., *first signed* June 30, 2007, *renegotiated version signed* Dec. 3, 2010, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [hereinafter KORUS FTA]. See generally Heesob Nam, *Jayumuyeoekhyeopjeong (FTA) ihaeng-eul wihan gaejeong jeojakkwonbeobeui munjaejeom [Problems of the Copyright Act as Amended to Implement Free Trade Agreements]*, 8 L. & TECH. 18 (2012) (explaining that the copyright chapter of the KORUS FTA not only mirrored, but also set higher standards than that under the United States Copyright Act).

6. For China, see, e.g., Agreement on Trade Relations Between the United States of America and the People's Republic of China, China-U.S., art. VI, Oct. 23, 1979, 31 U.S.T. 4652 (guaranteeing mutual protection of

Despite historical similarities, however, the two countries stand on very different grounds with respect to their criminal copyright enforcement practices today. Lawmakers and scholars alike recognize China's weak commitment to the practice.<sup>7</sup> Less well known, however, is the starkly opposite trend in Korea. There, criminal enforcement features prominently in the national copyright regime and has for more than a decade.<sup>8</sup> While very few studies compare these trends,<sup>9</sup> scholars attribute China's weak enforcement tendencies to Confucian traditions and socialist legacies.<sup>10</sup> Meanwhile, scholars attribute Korea's rapid progress on the same front to the country's adher-

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intellectual property); *see also* GE CHEN, COPYRIGHT AND INTERNATIONAL NEGOTIATIONS: AN ENGINE OF FREE EXPRESSION IN CHINA? 83 (2017) (describing that the United States "threatened not to sign the agreement without IP protection clause"). It took an additional decade after the enactment of this Agreement before China finally promulgated its Copyright Law. *See infra* Section VIII.B. .1 for a history of China's Copyright Law.

For Korea, *see, e.g.*, Ilhyung Lee, *Culturally-Based Copyright Systems?: The U.S. and Korea in Conflict*, 79 WASH. U. L. REV. 1103, 1150–51 (2001) ("Both Korean and American observers generally agree that pressure from the United States caused the new, comprehensive Korean copyright policy beginning in 1986.").

7. *See infra* Section II (Criminal Copyright Enforcements in China and Korea).

8. *See id.*

9. Specifically, two studies are on point. Both were conducted by the Korean researchers. HOHONG LEE ET AL., KOREA COPYRIGHT COMM'N, HANJUNGIL JEJAKKWONBEOB PIGYOYEONGU: JIPHAENGGYUJEONG JUNGSHIM [KOREA-CHINA-JAPAN COPYRIGHT LAW COMPARATIVE STUDY: ENFORCEMENT REGULATIONS] 9–68, 123–36 (2015) [hereinafter LEE ET AL., KOREA COPYRIGHT COMM'N]; KISOO LEE, POLICE SCI. INST., JUNGUGUI JUYO JJEOKCHAESANGWON HYEONGSABOHOE GWANHAN YEONGU [A STUDY ON THE CRIMINAL PROTECTION OF CHINA'S MAIN INTELLECTUAL PROPERTY RIGHTS] 37–46 (2009) [hereinafter Lee, POLICE SCIENCE INSTITUTE STUDY]. Kisoo Lee's study contrasts the criminal copyright enforcement regimes of China and Korea, focusing on the statutory bases of liability and administrative enforcement authority. Hohong Lee et al.'s study provides a similar analysis, within the broader context of copyright enforcement more generally and also contrasts Japan's copyright enforcement regime. The study specifically points out the significant lack of research within Korea's academia on China's intellectual property regime in spite of the close economic relations between the two countries. LEE ET AL., KOREA COPYRIGHT COMM'N, *supra*, at 1–2.

10. *See infra* Section III.A (Copyright Enforcement in China: The Relevance of History and Traditional Ideology).

ence to external pressures and pursuance of strategic considerations.<sup>11</sup>

These existing arguments, however, offer only a partial explanation of the diverging paths in China and Korea regarding criminal copyright enforcement. While acknowledging the potential influence of cultural and historical factors, as well as external pressures and strategic considerations, on the respective enforcement decisions of China and Korea, this paper finds that full understanding remains incomplete without considering institutional and ideological factors. These factors include the actual scope of the criminal copyright liability, availability of administrative remedies, inter-authority cooperation, incentives behind complaint filing patterns, and domestic policy ideas and interests about criminalizing copyright infringement.

Ultimately, this paper provides a better understanding of the forces shaping the dramatic differences between the criminal copyright enforcement patterns in China and Korea by emphasizing the multitude of legal, institutional, and ideological factors that bear directly on enforcement ability or decisions. In so doing, this paper assembles a comprehensive array of data regarding copyright enforcement in China and Korea, drawing on existing literature as well as original sources and foreign-language sources. In addition to providing data, this paper provides a qualitative description of the position of copyright in the governance and ideological structures of the two countries, relying on “process tracing.”<sup>12</sup> Lastly, this paper contributes to the literature on copyright enforcement in Asia, particularly to the field of comparative analysis, which currently lacks substantial consideration as between China and Korea.

The paper proceeds as follows. Section II provides an overview of the criminal copyright enforcement trends in

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11. See *infra* Section III.B (Copyright Enforcement in Korea: External Pressures and Strategic Considerations).

12. David Collier, *Understanding Process Tracing*, 44 POL. SCI. & POL. 823, 823 (2011). Process tracing is a method of qualitative analysis, which can “add inferential leverage that is often lacking in quantitative analysis.” *Id.* In particular, “[p]rocess tracing requires finding diagnostic evidence that provides the basis for descriptive and causal inference,” and “[a]s a tool of causal inference, process tracing focuses on the unfolding of events or situations *over time*.” *Id.* at 824.

China and Korea. Section III reviews existing explanations for the respective trends. Together, sections IV through VIII examine institutional and ideological differences between China and Korea with respect to their criminal copyright systems and assess their impact on the enforcement trends. Section IV compares the scope of the criminal copyright provisions in China and Korea. Section V compares the strength of administrative enforcement mechanisms. Section VI compares the cooperative dynamic between administrative agencies and criminal enforcement authorities. Section VII compares the incentives for copyright holders to file criminal complaints. Section VIII examines the Chinese and Korean governments' ideas and interests regarding the criminal copyright institution, and specifically addresses their evolution and influence on policy decisions. Section IX concludes by synthesizing the findings and suggesting areas for further research.

## II. CRIMINAL COPYRIGHT ENFORCEMENT IN CHINA AND KOREA

Both China and Korea enforce their copyright laws on three distinct fronts: civil, administrative, and criminal.<sup>13</sup> However, the extent to which each country relies on criminal enforcement markedly differs.

In China's copyright regime, criminal enforcement generally plays a peripheral role. Only a tiny proportion of copyright cases enter the Chinese criminal judicial system each year. Instead, administrative agencies process the vast majority of the cases.<sup>14</sup> As Haiyan Liu, an active scholar on China's IP policy, suggests, criminal enforcement of copyright is the exception

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13. See HEESUNG TAK, KOREAN INST. OF CRIMINOLOGY, JEJAKKWON-CHIMHAE-E DAEHAN HYEONGSAJEOK BOHOU-I HYEONGHWANGGWA KAESEONBANGAN [STATUS AND IMPROVEMENT OF CRIMINAL PROTECTION OF INFRINGEMENT OF COPYRIGHT] 9, 39 (2009) (explaining these divisions in Korea); Haiyan Liu, *The Criminal Enforcement of Intellectual Property Rights in China: Recent Developments and Implications*, 5 ASIAN J. CRIMINOLOGY 137, 141 (2010) (explaining the divisions in China).

14. See Haiyan Liu, *Consequences of Legal Transplantation: The Unique Justifications and Roles of Enforcement of Intellectual Property Rights in China*, 3 J.L. TECH. & PUB. POL'Y 1, 10, 45 (2015) (observing so based on aggregate official statistics on criminal and administrative enforcement of intellectual property rights China); Haiyan Liu, *The Policy and Targets of Criminal Enforcement of Intellectual Property Rights in China and the United States*, 24 WASH. INT'L L.J. 137, 168 (2015) (same).

rather than the rule in China. Such enforcement generally occurs only for a narrow set of cases—such as where the copyright holder involved is a proactive foreign corporation.<sup>15</sup>

By contrast, in Korea's copyright regime, criminal enforcement plays a significant role. The criminal authorities of Korea process a vast and rapidly increasing number of copyright cases each year.<sup>16</sup> As noted by many IP researchers in Korea, it is exceptional *not* to see a copyright infringement criminally enforced in Korea.<sup>17</sup> For a comparative perspective, Table 1 displays the number of criminal copyright cases in China and Korea, respectively, between 2012 and 2015.

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15. See Liu, *The Policy and Targets of Criminal Enforcement of Intellectual Property Rights in China and the United States*, *supra* note 14, at 162, 168 (asserting that corporate victims play a crucial role in prompting the relatively limited criminal prosecutions that take place).

16. See TAK, *supra* note 13, at 37.

17. See, e.g., *id.*; SANGJO JUNG ET AL., SEOUL NAT'L UNIV. TECH & LAW CTR., JEJAKKWON CHIMHAEUI HYEONGSACHAEGIME KWANHAN PIGYOBEOJJEOK YEONGU [A COMPARATIVE LEGAL STUDY ON THE CRIMINAL RESPONSIBILITY OF COPYRIGHT INFRINGEMENT] 93 (2009).

TABLE 1: CHINA AND KOREA – NUMBER OF CRIMINAL  
COPYRIGHT INFRINGEMENTS CASES BETWEEN  
2012 AND 2015.

	2010	2011	2012	2013	2014	2015
China	n/a	n/a <sup>18</sup>	3,018 <sup>19</sup>	1,418 <sup>20</sup>	735 <sup>21</sup>	565 <sup>22</sup>
Korea <sup>23</sup>	20,686	24,650	30,246	26,445	27,132	29,169

China and Korea’s overseas trading partners have also noted the two country’s opposing copyright enforcement tendencies. The World Trade Organization (WTO), for instance, has repeatedly noted that the enforcement of intellectual property rights (IPR), “continues to be a major challenge for China”<sup>24</sup> in spite of the country’s signing of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 2001.<sup>25</sup> The TRIPS Agreement, which countries are required to implement as part of their accession to the WTO,

18. The publications for years prior to 2012 only provide aggregate data of all intellectual property crimes without separating copyright crimes specifically.

19. Supreme People’s Court, Zhongguo Fayuan Zhishiquan Sifa Baohu Zhuangkuang 2012 (中国法院知识产权司法保护状况 (2012)) [Chinese Courts Judicial Protection of Intellectual Property Rights Situation 2012] (2013), [http://zscq.court.gov.cn/bhcg/201304/t20130426\\_183661.html](http://zscq.court.gov.cn/bhcg/201304/t20130426_183661.html).

20. SUPREME PEOPLE’S COURT, ZHONGGUO FAYUAN ZHISHIQUAN SIFA BAOHU ZHUANGKUANG 2013 (中国法院知识产权司法保护状况 (2013)) [CHINESE COURTS JUDICIAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS SITUATION 2013] (2014), <http://www.fengxiaqingip.com/jieshi/zscqsfjs/20150303/10201.html>.

21. Supreme People’s Court, Zhongguo Fayuan Zhishiquan Sifa Baohu Zhuangkuang 2014 (中国法院知识产权司法保护状况 (2014)) [Chinese Courts Judicial Protection of Intellectual Property Rights Situation 2014] (2015), <http://www.court.gov.cn/zixun-xiangqing-14207.html>.

22. Supreme People’s Court, Zhongguo Fayuan Zhishiquan Sifa Baohu Zhuangkuang 2014 (中国法院知识产权司法保护状况 (2014)) [Chinese Courts Judicial Protection of Intellectual Property Rights Situation 2014] (2015), [http://www.china.com.cn/legal/2016-04/21/content\\_38294352.htm](http://www.china.com.cn/legal/2016-04/21/content_38294352.htm).

23. KOREA COPYRIGHT COMM’N, JEJAKKWON THONGGYE [2017 KOREA COPYRIGHT STATISTICS] 150 (2017) (citing data obtained from *Beonjoebunseok* [Crime Analysis Reports], SUPREME PROSECUTORS’ OFFICE, [www.spo.go.kr/spo/info/stats/stats02.jsp](http://www.spo.go.kr/spo/info/stats/stats02.jsp)). The Supreme Prosecutor’s Office is Korea’s national-level prosecutor’s office.

24. WTO Secretariat, *Trade Policy Review: China*, ¶ 3.259, WTO Doc. WT/TPR/S/375 (June 6, 2018).

25. *Id.*; WTO Secretariat, *Trade Policy Review: China*, ¶ 3.243, WTO Doc. WT/TPR/S/342 (June 15, 2016).

sets minimum standards for copyright enforcement in criminal actions.<sup>26</sup>

The United States Trade Representative (USTR) similarly pointed out that “effective IPR enforcement remains a serious problem throughout China”<sup>27</sup> and that addressing deficiencies in China’s criminal IPR enforcement measures is a key area in which reform is needed.<sup>28</sup> In the same spirit, the USTR listed China under its Special 301 report’s Watch Lists, a classification system that identifies countries that do not provide adequate protection for U.S. intellectual property interests. The USTR has produced these lists almost every year since 1989.<sup>29</sup> The reports that the USTR prepares, including its reports to Congress on China’s WTO compliance and its Special 301 reports, offer an informative supplementary source of data about China’s copyright enforcement practices, especially as the USTR largely bases its reports on information from foreign copyrights-holders in China.<sup>30</sup>

Separately, and by contrast, the WTO and the USTR have underscored the markedly different copyright enforcement environment of Korea. The USTR removed Korea from its Watch Lists in 2009.<sup>31</sup> Remarking on the development, the USTR commented that Korea “transformed itself from a country in need of intellectual property rights enforcement into a country with . . . state-of-the art standards of intellectual property rights protection and enforcement.”<sup>32</sup> Korea, like China, is also a member of the WTO and a signatory of the TRIPS

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26. Geiger, *supra* note 2, at 117.

27. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE 107 (2018).

28. *Id.*

29. See *Special 301*, *supra* note 5 (providing access to reports since 1989).

30. KRISTIE THOMAS, ASSESSING INTELLECTUAL PROPERTY COMPLIANCE IN CONTEMPORARY CHINA: THE WORLD TRADE ORGANISATION TRIPS AGREEMENT 94 (2017).

31. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2009 SPECIAL 301 REPORT 14 (2009). Korea, which was listed under the USTR’s Special 301 Report’s Watch Lists continuously between 1989 and 2008, has not been listed since 2009. While the USTR did not elaborate on the specific reasons for delisting, many of the legal, institutional, and ideological changes with regards to copyright law described *infra* Sections IV through VIII, started occurring around 2007.

32. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2014 SPECIAL 301 REPORT 1 (2014).

Agreement. The WTO, referring to USTR's assessment of Korea, confirmed that "Korea generally provides strong IPR protection and enforcement."<sup>33</sup>

### III. EXISTING EXPLANATIONS FOR CRIMINAL COPYRIGHT ENFORCEMENT TRENDS

#### A. *Copyright Enforcement in China: The Relevance of History and Traditional Ideology*

While China's high piracy rates are a point of concern for many countries, there is only scant research on the actual IPR enforcement dynamics within China, including criminal copyright enforcement.<sup>34</sup> Instead, many scholars explain China's weak IPR protection by emphasizing China's unique culture and history, particularly Confucianism and socialism, which are at odds with the concept of IPR.<sup>35</sup>

Scholars, such as William Alford, have identified two interrelated doctrines of Confucianism that may explain "why

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33. WTO Secretariat, *Trade Policy Review: Republic of Korea*, ¶ 3.221, WTO Doc. WT/TPR/S/346 (Sept. 6, 2016). The WTO also noted the International Property Rights Index (IPRI), which ranked Korea 8th in Asia and the Pacific, out of 20 countries, and 38th in the world, out of 129 countries, in 2015. The IPRI, since 2007, has served as a barometer for the status of property rights across the world and consists of three core components: legal and political environment, physical property rights, and intellectual property rights. *Id.* ¶ 3.221 n.272.

34. Most work on China's intellectual property rights (IPR) protection focus on the legal analysis of substantive laws—as opposed to enforcement-related laws—and Sino-U.S. trade negotiations. See Liu, *Consequences of Legal Transplantation*, *supra* note 14, at 5–6.

35. See generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 9–94 (1995) (asserting that China never developed a comprehensive protection for its intellectual creations because of its Confucian teachings that saw ideas as coming from nature and considered copying as essential to moral and intellectual elevation); Peter K. Yu, *The Second Coming of Intellectual Property Rights in China* 17–26 (Benjamin N. Cardozo Sch. Law, Occasional Papers in Intellectual Property, No. 11, 2002) (asserting that China's piracy problem and history of weak copyright law is attributable to its Confucian beliefs and socialist economic system, among others); see also Liu, *Consequences of Legal Transplantation*, *supra* note 14, at 6, 15–22 (asserting that Confucianism, Marxism, and socialism play a crucial role in explaining why transplanted IP laws were marginalized by both the public and enforcement agencies for decades after their introduction in China). For further details on the "right-based conception of copyright," see *infra* note 40 and accompanying text.

Chinese civilization . . . did not generate more comprehensive protection for its intellectual creation”<sup>36</sup> and why copyright protection remains weak in China despite strong international pressures.<sup>37</sup> First, while the IPR policies of most developed countries forbid free copying, Confucianism considers copying or imitating a noble art that effectuates transformative learning.<sup>38</sup> Throughout pre-modern Chinese history, Confucian theory encouraged the act of copying and an author usually felt honored when another copied his or her work.<sup>39</sup> Second, in contrast to the individualistic or classical liberal approaches to property rights that animate mainstream justifications of IPR in the United States and other countries with Anglo-American traditions,<sup>40</sup> Confucianism prioritizes collective interests

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36. ALFORD, *supra* note 35, at 3.

37. *Id.*; see also Jia Lu & Ian Weber, *Chinese Government and Software Copyright: Manipulating the Boundaries Between Public and Private*, 1 INT’L J. COMM. 81 (2008) (analyzing the Chinese government’s response to external and internal pressures related to IPR); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 243 (2000) (stressing the benefits of cooperation for the United States).

38. See Deli Yang, *Culture Matters to Multinationals’ Intellectual Property Businesses*, 40 J. WORLD BUS. 281, 286 (2005) (Chinese culturally “perceived copying and imitation as an effective way of learning in a transformative way . . . monopoly of such knowledge was therefore, disagreeable to the moral standards in China”); Yu, *supra* note 35, at 17 (“Unlike Westerners today, the Chinese in the imperial past did not consider copying or imitation a moral offense. Rather, they considered it a “noble art,” a “time-honored learning process” through which people manifested respect for their ancestors”).

39. Tian, *supra* note 5, at 41.

40. See, e.g., ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 13 (2011) (recognizing “(1) Lockean [labor theory of] appropriation, [and] (2) Kantian (liberal) individualism” as the fundamental principles of IP law). John Locke’s labor theory of property rights provides that a person who labors upon resources that are neither owned nor “held in common” has a natural property right to the fruits of his labor. William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 184–86 (Stephen R. Munzer ed., 2001). Kant, on the other hand, emphasizes “the unique contribution of each creative person” in producing IP and, thus, the state acknowledges individual freedom and autonomy by recognizing IPR. MERGES, *supra*, at 20. See generally Liu, *The Policy and Targets of Criminal Enforcement of Intellectual Property Rights in China and the United States*, *supra* note 14, at 144 (surveying the key literature on the justifications of IPR in the United States). Classical liberal thought considers private property rights including IPR, as natural and inalienable. Under that view, therefore, individual rights are more precious than collective welfare, social harmony, and public order. *Id.* at 145.

over individual rights.<sup>41</sup> Confucianism, based on holistic conceptions of human nature<sup>42</sup> cautions restraint against self-interest. Further it conceptualizes entitlements as one's share of the communal interest as a whole, which an individual must sacrifice if required by the community.<sup>43</sup> Within the context of the Confucian teaching, intellectual creations are therefore characterized as products of nature and treated as public goods, rather than the private property of authors.<sup>44</sup>

Similarly, scholars suggest that socialism contributed to weak IPR protection in China by impeding the development of the concept of individualism and individual rights.<sup>45</sup> Socialism, China's dominant ideology since the foundation of the People's Republic of China (PRC) in 1949, is based on the notion that property belongs to the state rather than the individual.<sup>46</sup> Under the socialist regime, arts, culture, and sciences were means for the ruling elite to achieve ideological control and produce propaganda.<sup>47</sup> Citizens generally conducted creative activities collectively, with the government organizing and funding these activities.<sup>48</sup> Furthermore, with the government and society targeting intellectuals at various times, especially

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41. See Yu, *supra* note 35, at 16–18 (describing Confucian cultural practices); see also Liu, *Consequences of Legal Transplantation*, *supra* note 14, at 15–18 (describing philosophical basis of the Chinese disinclination towards individual rights).

42. Liu, *Consequences of Legal Transplantation*, *supra* note 14, at 15–16.

43. See RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* 6 (2003) (“Individual rights in China were one’s share of the rights of the community as a whole . . .”). For further explanation of the Confucian conception of an individual embedded in the community, see Liu, *Consequences of Legal Transplantation*, *supra* note 14, at 15–18. Interestingly, the Chinese translation for the word “individual right” itself carries the negative connotation of “self-interest.” *Id.* at 16.

44. See generally Liu, *Consequences of Legal Transplantation*, *supra* note 14, at 15–20.; *supra* note 35.

45. See *infra* notes 48 & 49 and accompanying text.

46. Xiang Ren, *Copyright, Media and Modernization in China: A Historical Review, 1890-2015*, 7 *INTERACTIONS: STUD. COMM. & CULTURE* 311, 314 (2016). Capitalism was the dominant ideology in China pre-1949. *Id.*

47. *Id.* at 315.

48. See generally RICHARD CURT KRAUS, *THE PARTY AND THE ARTY IN CHINA: THE NEW POLITICS OF CULTURE* 37–72, 49 (2004) (describing how the Communist Party established various institutions to administer the arts, believing that “revolution was not simply a material process, but also a matter of ideological commitment”).

during the Cultural Revolution (1966–1976), creators and innovators in China became reluctant to acknowledge their creations.<sup>49</sup>

These existing views indicate that Confucianism and socialism predisposed China to be adverse to a right-based concept of copyright. Under these views, China's high piracy rates and weak commitment to enforcing copyright laws are, to some extent, a natural consequence of the country's entrenched culture.

### B. *Copyright Enforcement in Korea: External Pressures and Strategic Considerations*

Scholars have also paid little attention to Korea's copyright enforcement practices, which is surprising in light of the high criminal copyright enforcement rates in the country. Most studies conducted on Korea's copyright regime focus on the substantive provisions that Korea adopted following the signing of the United States–Korea Free Trade Agreement (KORUS FTA) in 2011.<sup>50</sup> These studies explore the factors behind Korea's faithful transplantation of the KORUS FTA's copyright provisions into national law, rather than Korea's actual enforcement of the transplanted provisions. They project enforcement as a corollary to those same factors.

Korean scholars and media mainly emphasize two explanations for Korea's acceptance of strong copyright laws via the KORUS FTA. The first explanation relates to the external pressures exerted by the United States.<sup>51</sup> Historically, the United States significantly influenced the shape of Korea's copyright law. The Korean Copyright Act was enacted in 1957, but re-

49. See Yu, *supra* note 35, at 18–19.

50. KORUS FTA, *supra* note 5. As a result of the KORUS FTA, Korea, among other things, expanded copyright protections to include temporary copies, i.e., files that are automatically copied by computers, strengthened protection for technology protection measures, and reduced OSP safe harbors. Nam, *supra* note 5, at 18. Korea thereby effected a more protective copyright regime than that offered in the United States. *Id.* For further details on Korea's protection against temporary copies, which is generally an unusual policy among copyright regimes, see *id.* at 34–35.

51. See Kwon Dohyuk & Ryu Seokjin, *Hanmi jayumuyeokhyeopjeongeun suneungeui sanmul-inga animyeon seontaekui gyeolgwainga?* [*Is the Korea-US. FTA a Product of Compliance or a Result of Choice?*], 23 KUKKA JEONNYAK [NAT'L STRATEGY] 35, 35–39 (2017).

mained virtually “dead law” with little enforcement until the mid-1980s.<sup>52</sup> In 1986, faced with possible trade sanctions by the USTR,<sup>53</sup> Korea signed an agreement with the United States under which it would comprehensively amend its Copyright Act.<sup>54</sup> Korea perceived the KORUS FTA of 2011 and its IP chapter as similar to the 1986 agreement: Korea was compelled to accept and implement the United States’ demands for stronger IP standards, or risk being disadvantaged in the global market.<sup>55</sup>

The second explanation points to internal pressures within Korea to successfully conclude and maintain the KORUS FTA for economic and geopolitical reasons.<sup>56</sup> Economically, the KORUS FTA was a central part of Korea’s new trade policy, which encouraged the pursuit of Free Trade

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52. Lee, *supra* note 6, at 1119–20.

53. Initiation of Investigation Under Section 302, Adequacy of Korean Laws for the Protection of Intellectual Property Rights, Office of the U.S. Trade Representative Docket No. 301-52, 50 Fed. Reg. 37,609 (Sept. 13, 1985).

54. The agreement also required Korea to accede to the Universal Copyright Convention and the Geneva Phonograms Convention. Record of Understanding on Intellectual Property Rights, S. Kor.–U.S., art. A(2), Aug. 28, 1986, T.I.A.S. No. 11948; *see also* Lee, *supra* note 6, at 1119–20 (describing the historical non-enforcement of copyrights in Korea).

55. *See* Kwon & Ryu, *supra* note 51, at 35–39. Pressures from the United States persisted post-1986 with USTR’s continued inclusion of Korea on its Watch Lists and calling for specific changes to the regime. *See Special 301, supra* note 5 (providing access to Section 301 reports since 1989).

56. *See, e.g.,* Seungjoo Lee & Chung-in Moon, *South Korea’s Regional Economic Cooperation Policy: The Evolution of an Adaptive Strategy*, in *NORTHEAST ASIA: RIPE FOR INTEGRATION?* 37, 51–56 (Vinod K. Aggarwal et al. eds., 2009) (discussing motivations behind KORUS FTA); Sunghoon Jeon, *Hanmi FTA chaegeolgwa tongmaeng-ui kanghwa* [*Conclusion of the Korea-U.S. FTA and Strengthening of Alliance*], *RADIO FREE ASIA* (Apr. 6, 2007), [www.rfa.org/korean/commentary/csh/us\\_korea\\_fpa-20070406.html](http://www.rfa.org/korean/commentary/csh/us_korea_fpa-20070406.html) (discussing the importance of KORUS FTA as a complement to the military alliance between Korea and the United States); Min Gyo Koo, *Partisanship and Korea’s Trade Policy: New Soul Searching Between Neo-Developmentalism and Neo-Liberalism* 46–49 (Workshop on Democratic Accountability & Diplomacy in Asia, Presentation Paper Sept. 16, 2011) (discussing motivations behind KORUS FTA); Hyun-seok Yoo, *Hanmi FTA-ui jeongchijeok ui-ui: yeonghyanggwa koryeongsahang* [*The Political Meaning of the Korea–U.S. FTA: Effect and Considerations*] (Korea Ass’n of Int’l Studies Symposium 2006) (discussing the political importance of the KORUS FTA).

Agreements (FTAs).<sup>57</sup> The geopolitical considerations linked to concerns that the military alliance between Korea and the United States, which formed the bedrock of Korea's defense strategy against North Korea, was weakening. Of particular concern was the increasing tension between the two countries over an agreeable policy towards North Korea, as the United States disagreed with Korea's passive diplomacy tactics.<sup>58</sup> By strengthening economic ties, Korea sought reparation and reinforcement of its security alliance with the United States.<sup>59</sup>

To the extent that this factor—pressure from the United States and strategic benefits to conceding to them—explains why Korea agreed in the first place to and continues to closely implement the copyright provisions of the KORUS FTA, which is largely a copy of the U.S. copyright regime,<sup>60</sup> it may also account for Korea's dedication to enforcing the rules.

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57. This policy, instituted in the late 1990s, represented an important break from Korea's past policies that favored multilateralism and mercantilist thinking, and its success was considered crucial for preserving Korea's export-based economy. See Lee & Moon, *supra* note 56, at 51–56 (discussing Korea's ideological shift from mercantilism to liberalism); Koo, *supra* note 56, at 46 (examining Korea's move from a mercantilist trade policy to a liberal one). Concluding an FTA with the United States was a priority for the Korean government not only in terms of securing greater access to United States markets, but also as a means to gain leverage in future negotiations with other trade partners, particularly in Asia. Lee & Moon, *supra* note 56, at 51–56; Koo, *supra* note 56, at 46–49.

58. See Jeon, *supra* note 56; Yoo, *supra* note 56, at 4.

59. The FTA also represented an opportunity for Korea to address the more fundamental concerns that the United States' security pledge to Korea, which was made at the end of the Korean War, was ultimately limited to a political and moral sense of duty. See Jeon, *supra* note 56 (suggesting that at least on some occasions, the United States helping Korea on security issues resulted from the United States' sense of responsibility in light of its predominant position in the international realm, and the trust and prestige that attaches to such position, rather than a genuine desire to help); see also JOO-HONG NAM, *AMERICA'S COMMITMENT TO SOUTH KOREA: THE FIRST DECADE OF THE NIXON DOCTRINE 2–3* (1986) (identifying the American commitment to South Korea as having a "fundamental moral dimension" which derives from two interrelated concerns: (1) a determination to protect the values of "the free world" – i.e., to oppose Communism, and (2) a moral obligation to help the divided country because it was created by the US as a part of the post-war territorial settlement in Asia).

60. See Nam, *supra* note 5, at 33–38 (explaining that the KORUS FTA required Korea to implement standards that were even higher than those required under the United States Copyright Act); *supra* note 50 (listing specific implementations).

### C. *Limitation of Existing Explanations*

This paper seeks to fill the gap in the existing literature on the copyright enforcement dynamics in China and Korea. In particular, this paper does not deny the historical and ideological factors that influence China's weak enforcement of copyright. Nor does this paper ignore the influence that pressures from the United States and the strategic importance of conceding to those pressures have on Korea's strong enforcement of copyright. Instead, the paper seeks to highlight additional influencing factors.

First, Confucianism does not fully explain China's weak copyright enforcement, as Korea also adheres to Confucianism. In fact, Confucianism may be even more strongly entrenched in the Korean society, which has adhered to the philosophy continuously since the Joseon dynasty (1392–1897). In the Chinese society, the communist government largely discredited Confucianism during its rise.<sup>61</sup> Similarly, while socialism strongly influenced the initial development of the concept of intellectual property in China, particularly in the years immediately following the establishment of the PRC in 1949, this influence clearly diminished by the turn of the twenty-first century.<sup>62</sup> Socialism as an explanation for China's weak copyright enforcement tendencies is also limited: Korea also had adhered to state-centric policies following the Korean War until the 1980s under the Park Jung Hee administration.<sup>63</sup>

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61. See HEONIK KWON & BYUNG-HO CHUNG, *NORTH KOREA: BEYOND CHARISMATIC POLITICS* 20 (2012) (“Korea traditionally harbored a stronger, more orthodox ideology of neo-Confucianism than China”); Jeong Geun Shin, Professor, Sungkyunkwan Univ., Lecture Four: Implications of Confucianism in Contemporary China, Japan and Korea 4 (June 25, 2014), [http://www.tcs-asia.org/data/file/publication/977998899\\_r0c12Tfq\\_5\\_Three\\_Strands\\_of\\_Asia\\_Lecture\\_Four.pdf](http://www.tcs-asia.org/data/file/publication/977998899_r0c12Tfq_5_Three_Strands_of_Asia_Lecture_Four.pdf) (stating for China that “[i]n 1949, Confucianism was stigmatized as a feudalistic remnant to be eradicated”); see also THOMAS, *supra* note 30, at 112 (interviewing industry officials in China about China's weak copyright enforcement and finding that most respondents considered the influence of Confucianism on China's modern IP system to be minimal).

62. See THOMAS, *supra* note 30, at 113 (noting that the influence of socialism seems to have faded generally in other areas also, particularly following the reform and opening-up policies under Deng Xiaoping throughout the 1980s).

63. See Minji Jeong & Youseop Shin, *Post-War Korean Conservatism, Japanese Statism, and the Legacy of President Park Chung-hee in South Korea*, 16 *THE KOREAN J. INT'L STUDIES* 57, 68 (2018) (describing the state-centric policies of

Explaining Korea's strong copyright enforcement tendencies solely in terms of adherence to pressure from the United States and the strategic importance of implementing and maintaining the KORUS FTA is equally erroneous. Korea already had a strong criminal copyright regime before signing the KORUS FTA.<sup>64</sup> Moreover, China has also faced equally strong or even stronger pressures from the United States to strengthen copyright enforcement. The United States insisted on copyright protection in its agreements with China at least as early as 1979.<sup>65</sup> The development of China's first copyright law, promulgated in 1990, was triggered by the signing of the China–United States Trade Agreement in 1979.<sup>66</sup> In 2007, the United States challenged China before the WTO tribunal for violation of TRIPS, alleging that China set too high of a criminality threshold.<sup>67</sup>

Thus, explanations that indicate that China is inherently destined to develop weak copyright enforcement tendencies due to its history and ideology are unsatisfactory. Similarly unsatisfactory is the position that Korea's strong copyright enforcement tendencies are a mere byproduct of the country's consideration of strategic factors external to the copyright regime.

#### D. Objectives

Building a more comprehensive narrative of the differences in criminal copyright enforcement dynamics between China and Korea requires examining factors that bear more

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Park Chung-hee); Edward M. Graham, *The Miracle with a Dark Side: Korean Economic Development under Park Chung-hee* 11, 16, in *REFORMING KOREA'S INDUSTRIAL CONGLOMERATES* (2008) (same).

64. With respect to criminal copyright provisions in particular, Korea already had in place a robust criminal copyright regime by the early 2000s. See JUNG ET AL., *supra* note 17, at 154 (noting that Korea arguably did not need to make any significant adjustment in implementing the KORUS FTA's criminal copyright provisions in 2011). For a discussion of how this robust regime was created by Korea's copyright administrative body, see *infra* Section VIII.C (Korea's Approach to Copyright Law).

65. Dong Han, *How the Copyright Law Was (Not) Made: Intellectual Property and China's Contested Reintegration with Global Capitalism*, 8 INT'L J. COMMUNIC. 1516, 1522 (2014).

66. See *infra* note 221 and 223, and accompanying text for a fuller description of the developments in China around this period.

67. See *China—Intellectual Property Rights*, *supra* note 5, ¶ 2.2.

directly on the enforcement regime itself. To this end, the forthcoming sections examine the legal, institutional, and ideological differences between the two countries, which help explain differences in criminal copyright enforcement.

Scholars must consider legal and institutional factors—including the criminal copyright provisions, administrative enforcement mechanisms, and complaint filing patterns—as they directly influence enforcement authorities’ ability or willingness to pursue copyright cases. These factors also influence the copyright holders’ willingness to file criminal copyright complaints. Considerations of policy ideas help garner an understanding of the fundamental reasons underlying China and Korea’s policy choices with respect to the criminal enforcement of copyright law.<sup>68</sup>

#### IV. THE SCOPE OF CRIMINAL COPYRIGHT LAWS

##### A. *Criminal Copyright Laws: Korea*

##### 1. *Copyright Act of Korea—Articles 136, 137, and 139*<sup>69</sup>

Chapter XI of the Copyright Act of Korea (Korean Copyright Act) specifies criminal liability. Specifically, Articles 136, 137, 139, and 140 set the parameters. Article 136(1) prescribes a maximum five year sentence and/or a fine of up to fifty million won for anyone “who infringes on copyright or other property rights protected pursuant to this Act . . . by means of

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68. Literature on constructivism in the field of international political economy provides an in-depth discussion of the importance of considering the role of ideas in the formation of an actor’s interest. See, e.g., Arthur T. Denzau & Douglass C. North, *Shared Mental Models: Ideologies and Institutions*, 47 *KYKLOS* 3 (1994) (describing constructivism). Constructivism contrasts with State-centric approaches such as neo-realism and regime theory, which consider interest to be defined exogenously by structural constraints. See Judith Goldstein & Robert O. Keohane, *Ideas and Foreign Policy: An Analytical Framework*, in *IDEAS & FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* 3 (Judith Goldstein & Robert O. Keohane eds., 1993) (criticizing rationalistic models that deny the importance of ideas).

69. Jeojakkwonbeob [Copyright Act], Act No. 432, Jan. 28, 1957, *amended by* Act No. 14634, Mar. 21, 2017, arts. 136–37, 139 (S. Kor.), *translated in* Korea Legislation Research Institute online database, [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=32626&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=32626&lang=ENG).

reproduction, performance, public transmission,<sup>70</sup> exhibition, distribution, lease, or preparation of derivative works.”<sup>71</sup>

Article 137 prescribes, among other penalties, a maximum one year sentence and/or a fine up to ten million won for anyone who “makes a work public under the real name or second name of a person other than the author,” “presents or publicly transmits a performance, or distributes reproductions of performance under the real name or second name of a person other than the performer,” or “obstructs the business of an online service provider by making a demand by intention for the suspension or resumption of a reproduction or transmission . . . .”<sup>72</sup>

Article 139 prescribes that “reproductions made by infringing on copyright or other rights protected pursuant to this Act and tools and materials mainly used for the production of such reproductions, those owned by the infringing person, printer, distributor or public performer shall be confiscated.”<sup>73</sup>

Section IV.C below deals separately with Article 140, in discussing the Antragsdelikt requirement.

## B. *Criminal Copyright Laws: China*

### 1. *Criminal Law of China—Articles 217 and 218*<sup>74</sup>

The Chinese Copyright Law does not explicitly include a specific provision on criminal liability. However, Article 48 of the Copyright Law provides that where a person “commits any of the [eight] acts of infringement” listed under the Article and where the case is serious as to “constitute . . . a crime, the

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70. “The term ‘public transmission’ means “transmitting works, stage performances, music records, broadcasting or database . . . by means of radio communication or wire communication so that the public may receive them or have access to them . . . .” Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 2(7).

71. *Id.* art. 136(1).

72. *Id.* art. 137.

73. *Id.* art. 139.

74. Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997), arts. 217–18, 1997 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 491 (China) [hereinafter PRC Criminal Law].

infringer shall be prosecuted for his criminal liability . . . .”<sup>75</sup> Correspondingly, the Chinese Criminal Law Articles 217 and 218 define when a copyright infringement constitutes a crime. Article 217 provides that certain specified acts of copyright infringement are subject to criminal procedures and penalties. The specified acts of copyright infringement are (1) the reproduction and distribution of written, musical, movie, televised, and video works; computer software; and other works without the permission of their copyrighters; (2) the publication of books where others exclusively own their copyrights; (3) the duplication and distribution of audiovisual works without the permission of their producers; and (4) the production and sale of artistic works bearing another’s fake signature.<sup>76</sup>

Criminal procedures and penalties apply to the above-mentioned acts of copyright infringement if (1) the infringer’s purpose was to reap profits, and (2) either the amount of illegal gains<sup>77</sup> is “fairly large” or “when there are other serious circumstances.”<sup>78</sup> The maximum sentence is less than three years of “fixed-term imprisonment, criminal detention, and may in addition or exclusively be sentenced to a fine.”<sup>79</sup> Alternatively, an infringer is subject to between three and seven years of fixed-term imprisonment and a fine, if the illegal gains are “huge” or when there are “other particularly<sup>80</sup> serious circumstances.”<sup>81</sup> As to anyone who “knowingly sells the duplicate works described in Article 217,” Article 218 provides a fine and a three year prison sentence, given (1) profit purpose and (2) if the infringer “gains a huge amount of illicit income.”<sup>82</sup>

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75. Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国刑法) (promulgated by the Standing Comm. of the Nat’l People’s Cong., Feb. 26, 2010, effective Apr. 1, 2010), art. 48, 2010 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 159 (China) [hereinafter PRC Copyright Law].

76. PRC Criminal Law, *supra* note 74, art.217.

77. This term is also translated as “illicit income.”

78. PRC Criminal Law, *supra* note 74, art. 217.

79. *Id.*

80. This term is also translated as “especially.”

81. PRC Criminal Law, *supra* note 74, art. 217.

82. *Id.* art. 218.

## 2. 2004<sup>83</sup> and 2007<sup>84</sup> Judicial Interpretations

Although the Chinese Criminal Law itself does not define the terms “serious,” “especially serious,” “fairly large,” or “huge” as used in Articles 217 and 218, the Supreme People’s Court and the Supreme People’s Procuratorate have issued Judicial Interpretations.<sup>85</sup> These bodies specifically define each of these terms by reference to “illegal business volume,” stated in terms of the value of products produced, stored, transported, and sold. They define “illegal gains” in terms of profit, or number of “illegal copies.”<sup>86</sup>

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83. Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guanyu Banli Qinfan Zhishichanquan Xingshi Anjian Juti Yingyong Falü Ruogan Wenti de Jieshi (最高人民法院、最高人民检察院关于办理侵犯知识产权刑事案件具体应用法律若干问题的解释) [Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate Concerning Some Issues on the Specific Application of Law for Handling Criminal Cases of Infringement Upon Intellectual Property Rights] (promulgated by the Sup. People’s Ct. & Sup. People’s Procuratorate, Dec. 12, 2004, effective Dec. 22, 2004), CLI.3.56358 (EN) (Lawinfochina) (China) [hereinafter December 2004 Judicial Interpretation].

84. Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guanyu Banli Qinfan Zhishichanquan Xingshi Anjian Juti Yingyong Falü Ruogan Wenti de Jieshi (II) (最高人民法院、最高人民检察院关于办理侵犯知识产权刑事案件具体应用法律若干问题的解释(二)) [Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate Concerning Some Issues on the Specific Application of Law for Handling Criminal Cases of Infringement Upon Intellectual Property Rights (II)] (promulgated by the Sup. People’s Ct. & Sup. People’s Procuratorate, Apr. 4, 2007, effective Apr. 5, 2007) 2007 SUP. PEOPLE’S CT. GAZ., May 1, 2007, at 16 (China) [hereinafter April 2007 Judicial Interpretation].

85. “A judicial interpretation is believed to be a soft law, *i.e.* guidance or recommendation issued by the Supreme People’s Court and the Supreme People’s Procuratorate and observed by courts and procuratorates throughout China.” Jianjun Guo, *Protection and Enforcement of Intellectual Property Rights: A WTO Case Against China*, in ITALIAN INTELLECTUAL PROPERTY 33, 44 (2007). Two judicial interpretations for criminal enforcement of IPRs have been issued, in 2004 and 2007, to give meaning to the terms used in Articles 213 through 219 of the PRC Criminal Law. *Id.* at 44–47.

86. They interpreted criminal copyright liability in China under Article 217 as follows: illegal income that is “fairly large” means illegal income of RMB 30,000 or more; “huge” means illegal income of RMB 150,000 or more; “other serious circumstances” means illegal income valued at RMB 50,000 or more, or reproduction and distribution of 500 or more illegal copies of a copyrighted work; “other especially serious circumstances” means illegal income of RMB 250,000 or more, or reproduction and distribution of 2,500 or more illegal copies of a copyrighted work. December 2004 Judicial

### C. *Criminal Copyright Laws: Korea and China*

#### 1. *A Comparison*

There are four main points of difference between the scope of criminal copyright laws in Korea and China. The first three derive from the observations above and relate to the explicit contours of the law that circumscribe criminalized infringement. The fourth point relates to the Antragsdelikt requirement—a more implicit restriction relating to the government authorities’ discretion when deciding whether to initiate a case.

(1) Profit motivation: in China, criminal copyright infringement requires the infringer have had a “purpose of reaping profits.”<sup>87</sup> Infringement without such purpose is not a crime. On the other hand, in Korea, the infringing act alone constitutes a crime; a purpose to reap profits is not necessary.<sup>88</sup>

(2) Criminality thresholds: in China, to qualify as criminal, an infringing activity must meet the threshold specified in terms of illegal business volume, illegal gains, or number of illegal copies reproduced or distributed.<sup>89</sup> Korean law contains no such thresholds.

(3) Range of criminal acts: China limits the range of criminally infringing acts to reproduction and distribution;<sup>90</sup> publication;<sup>91</sup> and production and selling.<sup>92</sup> Korea extends criminal liability to performance, transmission, exhibition, rental, and production of derivative work.<sup>93</sup>

(4) The Antragsdelikt requirement: an important prosecutorial requirement that directly impacts the scope of criminal enforcement is the requirement that there be a complaint by the victim (Antragsdelikt).<sup>94</sup> In the context of crimi-

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Interpretation, *supra* note 83, arts. 5–6. Further, under Article 218, “huge” means illegal income of RMB 100,000 or more. *Id.* art. 6.

87. PRC Criminal Law, *supra* note 74, art. 217.

88. Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 136(1).

89. See December 2004 Judicial Interpretation, *supra* note 83 (defining these thresholds).

90. PRC Criminal Law, *supra* note 74, art. 217(3).

91. *Id.* art. 217(2).

92. *Id.* art. 217(4).

93. Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 136(1)(1).

94. Antragsdelikt denotes a category of offence which cannot be prosecuted without a complaint by the victim.

nal copyright enforcement, this means that prosecuting authorities may initiate legal action only if there is a complaint by copyright holders.

Under the Chinese Criminal Law, copyright related crimes are not subject to the Antragsdelikt requirement.<sup>95</sup> By contrast, under the Korean Copyright Act, Antragsdelikt is the general rule.<sup>96</sup> However, the rule is subject to exceptions, such as Article 140(2) introduced in 2006, which provides that prosecuting authorities may initiate legal action without a formal complaint by copyright holders if an accused infringer violates copyright habitually and for profit-making purposes.<sup>97</sup>

## 2. Observations

### a. Korea provides a broader basis for criminal copyright liability than China

Overall, Korea's criminal provisions for copyright infringement are significantly broader than China's, both in terms of the size or value of infringement, and the types of infringing acts the provisions cover. Under the Korean Copyright Act, infringing acts are subject to criminal prosecution and penalty regardless of the existence of a commercial purpose, the harm caused, or the profit made by the infringing activity.<sup>98</sup> Also, the criminal provisions cover most of the infringing acts specified in the Korean Copyright Act.<sup>99</sup>

The scope of China's criminal provisions for copyright infringement, in contrast, is more limited. First, the law only permits criminal prosecution if the infringer acted with a commercial purpose.<sup>100</sup> The Chinese law also filters out frivolous infringement cases from the criminal system via statutory

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95. That is, criminal authorities may initiate a case without the copyright holder's consent. LEE, *supra* note 9, at 21.

96. Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 140; see LEE ET AL., KOREA COPYRIGHT CMM'N, *supra* note 9, at 21 (explaining article 140 of the Korean Copyright Act). Antragsdelikt is referred to as “чин고죄” (chingojoe) in Korean.

97. Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 140(2).

98. *Id.* art. 136(1).

99. See, e.g., *id.* art. 136(1); see JUNG ET AL., *supra* note 17, at 93 (explaining that it is actually an exception under the Korea Copyright Act for infringements to fall outside of the criminal provisions).

100. See PRC Criminal Law, *supra* note 74, art. 217 (“purpose of reaping profits”).

thresholds, such as “serious” or “particularly serious,”<sup>101</sup> and judicial interpretations that set specific criteria in terms of infringement value, and/or illegal copies reproduced or distributed.<sup>102</sup> Meanwhile the law also limits the range of infringing acts and protected works subject to criminal penalties.<sup>103</sup>

- b. *Korea’s Antragsdelikt requirement is not an obstacle to criminal copyright enforcement.*

Some may argue that the Korean Copyright Act’s general adherence to the Antragsdelikt requirement effectively limits the broad scope of the Act’s criminal copyright provisions. However, practice contradicts this view. The number of copyright complaints submitted by copyright holders to the criminal authorities is exceptionally high in Korea. The average number of criminal complaints filed between 2011 and 2013, for instance, was 40,024—a figure which, as a Korean scholar indicates, is the highest of its kind of any country.<sup>104</sup>

- c. *Criminalizing End Users in Korea and China*

The differing coverage of Korea’s and China’s criminal copyright provisions is particularly consequential for criminalizing infringement activities by end users online. Infringement activities by individual end users are often for private, non-

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101. *Id.* arts. 217–18.

102. See April 2007 Judicial Interpretation, *supra* note 84; December 2004 Judicial Interpretation, *supra* note 83.

103. PRC Criminal Law, *supra* note 74, art. 217; see *supra* note 74 and accompanying text.

104. Specifically, there were 36,852 cases filed in 2011, 46,359 in 2012, and 36,879 in 2013. *Jeojakkwon ‘habuigeum jangsa bangjibeob’i tonggwadoe-eo-ya hal 8-gaji iyu [Eight Reasons Why the ‘Regulation Against Copyright Settlement Business’ Should be Passed]*, OPENNET (July 14, 2014), <https://opennet.or.kr/9617> (citing data published by the Supreme Prosecutor’s Office). Prior to 2011, the figures were even higher—in 2008 and 2009, there were 90,979 and 89,410 complaints respectively. See *id.* (explaining that these abnormally high rates were caused by copyright owners’ indiscriminate filing of criminal enforcement complaints as a means of obtaining a high settlement payments, see *infra* Section VII.B (Complain Dynamics: Korea), and that the rates dropped to the 2011–2013 average following the establishment certain regulations and guidelines that somewhat reduced the copyright owners’ leverage).

commercial purposes.<sup>105</sup> When such individual infringement does cause harm or generate profit, the value is often frivolous.<sup>106</sup> End user infringements also often involve interactions generally considered transmissions, since many websites or programs induce or allow user sharing of copyrighted files saved on their own computers with other users via Peer-to-Peer (P2P) servers.<sup>107</sup>

Korea's expansive criminal copyright provisions facilitate the criminalization of end users. Under the Korean system, a criminal enforcement authorities need show neither commercial purpose nor infringement value, and transmissions themselves are specifically criminalized.<sup>108</sup> Criminal enforcement authorities in Korea face fewer obstacles in pursuing an end user than criminal enforcement authorities operating under the Chinese copyright system. Chinese law requires a showing of a commercial purpose and a showing that case value meets a specified seriousness threshold. Importantly, the law does not cover transmissions.

Indeed, in Korea, many end user infringement cases are processed as criminal cases.<sup>109</sup> This pattern of enforcement, in turn, disproportionately impacts minors, who are the primary P2P users in Korea. This phenomenon has been an acute soci-

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105. See HAEMIN CHOI, KOREA COPYRIGHT COMM'N, GYEONGMIHAN JE-OJAKGWON CHIMHAE DAEHAN HYEONGSACHEOBEOL GAESEONEUL WIHAN YEONGU [IMPROVING PROSECUTION OF FRIVOLOUS COPYRIGHT INFRINGEMENTS] 9–15 (2014) (concluding that most copyright infringements reported in Korea are due to ignorance, rather than a purpose to profit, and linking the conclusion to the increase in end user infringements in the country).

106. LEE ET AL., KOREA COPYRIGHT COMM'N, *supra* note 9; see also CHOI, *supra* note 105, 9–15 (reporting that most of copyright complaints filed to criminal authorities in Korea are likely of frivolous value and suggesting that this is due to the public's increased access to internet, particularly through smart-phones and like machines).

107. See JUNG ET AL., *supra* note 17 (noting that this type of infringement frequently occurs without an end user's actual knowledge).

108. Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 136(1)(1). This exceeds coverage under the United States copyright law. The United States copyright law does not provide a transmission right that would prevent streaming.

109. JUNG ET AL., *supra* note 17, at 111–12.

etal problem since at least 2007.<sup>110</sup> In China, by contrast, law enforcement barely addresses individual end users.<sup>111</sup>

Overall, the scope of the criminal provisions provides an important insight when considering the divergent enforcement trends in Korea and China. Korea's expansive and indiscriminate criminal provisions for copyright infringement make for an environment conducive to sweeping criminal liability—especially for those end users within the provisions. In contrast, China's criminal copyright provisions allow prosecutors to bring criminal charges on a much more limited basis.

## V. ADMINISTRATIVE ENFORCEMENT

### A. *Administrative Enforcement: Korea*

In Korea, the Ministry of Culture, Sports and Tourism (MCST) is the main government ministry in charge of formulating and enforcing copyright policies. Generally, the Korean Copyright Act grants the MCST authority in the following areas:

(1) Collection, Destruction and Deletion of Illegal Copies:<sup>112</sup> the MCST, upon discovering “reproductions<sup>113</sup> . . . that infringe on the copyright or other rights protected pursuant to [the Korean Copyright Act], or machinery, equipment, information and programs manufactured to circumvent techno-

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110. For instance, in 2008, over twenty thousand minors—about fifteen percent of all minors investigated for a crime—were investigated for suspected violation of the copyright law. OPENNET, JEJAKGWONBEOB ILBUGAEJEONGBEOBRYULAN(DAEAN) GEONTO-UIGYUN [A REVIEW OF THE BILL TO AMEND THE COPYRIGHT LAW: SUGGESTION OF AN ALTERNATIVE] 18 (2014) (citing the Supreme Prosecutor Office's 2009 Crime Analysis Report and raising serious concerns about the Korean copyright system's tendency to over-criminalize generally, particularly minors). The criminalizing of minors also is a consequence of copyright holders taking advantage of the criminal copyright system to extract settlements, see *infra* Section VII.B (Complaint Dynamics: Korea), and also the general government mandate to crack down on online piracy for the good of the economy, see *infra* Section VIII.C (Korea's Approach to Copyright Law).

111. Benjamin Van Rooij et al., *Comparative Compliance: Digital Piracy, Deterrence, Social Norms, and Duty in China and the United States*, 39 L. & POL'Y 73, 75 (2017).

112. Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 133.

113. *See id.* (excluding copies which are interactively transmitted through information and communication networks).

logical protection measures<sup>114</sup> of works, etc.,” may have relevant public officials “collect, destroy or delete them . . . .”<sup>115</sup> The MCST entrusts the duties of collection and destruction to the Korea Copyright Commission (KCC)<sup>116</sup> or “other corporations and organizations that the MCST recognizes as having a capability and qualifications for the duties of collection, destruction and deletion of illegal copies, etc.”<sup>117</sup> The MCST may

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114. Technological protection measures, otherwise known as anti-circumvention or anti-piracy devices, are in general terms, software, components, and other devices that copyright owners use to protect copyright material. See Gwen Hinze, *Seven Lessons from a Comparison of the Technological Protection Measure Provisions*, ELECTRONIC FRONTIER FOUND., [https://www.eff.org/pages/seven-lessons-comparison-technological-protection-measure-provisions#\\_ednrefl](https://www.eff.org/pages/seven-lessons-comparison-technological-protection-measure-provisions#_ednrefl) (last visited Oct. 28, 2018).

115. Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 133. Under the Korean copyright law, ‘confiscation’ and ‘collection’ differ in the following ways. Confiscation is a criminal measure, which involves obtaining a confiscation warrant from a judge. It leads to depriving of possessory rights and making the object of confiscation state property. Law enforcement officers acting pursuant to the confiscation warrant may compel the accused infringer to produce the allegedly infringing good or otherwise conduct authorized searches pursuant to the warrant. On the other hand, collection is an administrative measure, by which an administrative agency obtains the infringing property temporarily for investigation. Unlike with confiscation, if an accused infringer resists or otherwise does not cooperate with collection efforts (for instance, by refusing to hand over the suspected goods or by refusing to disclose where they are located), an administrative agency has no further recourse in its administrative capacity—it may not compel or conduct searches. In this case, usually, given the copyright holder’s consent, the administrative agency sends a request to the Copyright Special Judicial Police, see *supra* note 170–171, 339–340 and accompanying text, to obtain a confiscation warrant. At this point, the case becomes a criminal case. Upon this request by the administrative agency (usually MSCT or KCC), Copyright Special Judicial Police and the participating prosecutor will obtain a confiscation warrant through the court and proceed to compel or search the alleged infringer. Telephone call with Hun-Ki Hong, Manager, Korea Copyright Protection Agency, Management Planning Office/Strategic Planning Team (Feb. 13, 2019).

116. Jeojakgwonbeob sihaengryung [Copyright Act Enforcement Decree], Presidential Decree No. 1482, Apr. 22, 1959, *amended by* Presidential Decree No. 28251, Aug. 22, 2017, art. 70(1) (S. Kor.). The Korea Copyright Commission is a subordinate body under the Ministry of Culture, Sports and Tourism (MCST), staffed by government employees. See *Organization*, KOREA COPYRIGHT COMM’N, <https://www.copyright.or.kr/eng/about-kcc/organization.do> (last visited Oct. 28, 2018).

117. Copyright Act Enforcement Decree, *supra* note 116, art. 70(3) (translated by the author).

also set up and operate structures necessary for the duties of collection and destruction.<sup>118</sup>

(2) “Orders, etc. for Deletion of Illegal Copies, etc. through Information and Communications Networks:”<sup>119</sup> the MCST, or the KCC, may also suspend the accounts of repeated infringers or file-sharing offenders, as adjudged by the KCC, and block or delete infringing content or users online for six months, after providing three takedown notices.<sup>120</sup>

(3) “Recommendation of Correction:”<sup>121</sup> where the KCC, as a result of investigation into the information and communications network of an online service provider, discovers interactive transmission of illegal copies, it may recommend an online service provider (OSP) to take corrective measures. These measures include: “(1) Warnings to reproducers or interactive transmitters of illegal reproductions, etc.; (2) Deletion and suspension of interactive transmission of illegal reproductions, etc.; (3) Suspension of accounts of reproducers and transmitters who have repeatedly transmitted illegal reproductions, etc.”<sup>122</sup> An OSP “shall notify [the KCC] of the result of measures taken” within five days of receiving a warning or recommendation to delete or suspend the transmission of illegal copies, or within ten days of receiving recommendation for suspension of account.<sup>123</sup> If an OSP fails to comply with the KCC’s recommendation, then the KCC may request that the MCST re-issue the same recommendation as an order.<sup>124</sup>

### B. *Administrative Enforcement: China*

Under the China Copyright Law, an administrative department under the State Council is responsible for the nationwide administration of copyright and “[t]he copyright administration department of the People’s Government of each province, autonomous region and municipality directly under

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118. Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 133(5).

119. *Id.* art. 133-2.

120. *Id.* art. 133-2(1).

121. *Id.* art. 133-3.

122. *Id.* art. 133-3(1).

123. *Id.* art. 133-3(2).

124. *Id.* art. 133-3(3).

the Central Government shall be responsible for the administration of copyright in its respective administrative region.”<sup>125</sup>

At the central level, the National Copyright Administration of China (NCAC) was established in 1985 under the State Council pursuant to this provision.<sup>126</sup> Local governments established numerous copyright administrative departments at provincial, municipal, and county levels.<sup>127</sup>

The NCAC and its branches at the local level have the authority to register copyrighted works,<sup>128</sup> register pledged copyright works,<sup>129</sup> approve the establishment of copyright collective societies<sup>130</sup> and supervise their operation,<sup>131</sup> and set the remuneration rate for the exploitation of a work.<sup>132</sup> They also have quasi-judicial power over some violations of copyright law. When the copyright holders’ rights are infringed and the public interest is impaired, these copyright administrative agencies may step in.<sup>133</sup> The agencies may order that the infringer cease the infringement, confiscate any unlawful gains, confiscate or destroy any illegal copies, and may also impose a fine on the infringer.<sup>134</sup> Additionally, in “serious” cases the agencies may confiscate any material, tools, and instru-

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125. PRC Copyright Law, *supra* note 75, art. 7.

126. *Lishi Yangde* (历史沿革) [*Historical Development*], NAT’L COPYRIGHT ADMIN. CHINA, [www.ncac.gov.cn/chinacopyright/channels/476.html](http://www.ncac.gov.cn/chinacopyright/channels/476.html) (last visited Oct. 28, 2018).

127. See Luo Li, *Administrative Enforcement of Copyright Law in China: A Characteristic Deserving of Praise or Repeal?*, in *THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE* 143, 144 (Susy Frankel & Daniel Gervais eds., 2014) (“For example, more than forty copyright administrations have been established at county level in Anhui Province since 2003.”).

128. *Jisuanji Ruanjian Baohu Tiaoli* (计算机软件保护条例) [Regulations on Computer Software Protection] (promulgated by St. Council, Dec. 20, 2001, effective Dec. 20, 2001), art. 7, 2002 ST. COUNCIL GAZ., Jan. 30, 2002, at 14 (China).

129. PRC Copyright Law, *supra* note 75, art. 26.

130. Bodies for collecting and distributing royalties for reproduction.

131. *Zhuzuoguan Jiti Guanli Tiaoli* (著作权集体管理条例) [Regulations on Copyright Collective Management] (promulgated by the St. Council, Dec. 28, 2004, effective Mar. 1, 2005), art. 5, 2005 ST. COUNCIL GAZ., Mar. 10, 2005, at 6 (China).

132. The rate may also be agreed upon by the parties. PRC Copyright Law, *supra* note 75, art. 28 (“The standard of remuneration for the exploitation of a work may be fixed by the interested parties or may be paid according to the standard established by the copyright administration department . . .”).

133. *Id.* art. 48.

134. *Id.*

ments used for production of illegal copies.<sup>135</sup> Further, “the copyright administrative department may impose a fine one to five times the amount exceeding RMB 50,000 of illegal business turnover,” and “[w]here there is no amount of illegal business turnover or the amount of it is lower than RMB 50,000, it may impose a fine of no more than RMB 250,000 depending on the seriousness of the case.”<sup>136</sup>

### C. *Administrative Enforcement: China and Korea*

The scope of administrative authority with respect to copyright enforcement in China and Korea differs in three distinct ways. The first aspect relates to the authority to confiscate or collect.<sup>137</sup> In China, the copyright administration may confiscate and potentially destroy infringing materials, illegal gains, or tools used to produce them when the case is “serious.”<sup>138</sup> In Korea, by contrast, the MCST may only “collect, destroy or delete” infringing copies;<sup>139</sup> the confiscation of infringing materials is categorized as a criminal sanction under the Korean Copyright Act.<sup>140</sup>

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135. *Id.* For further discussion on the types of cases that constitute “serious” cases, see *supra* notes 83–86 and accompanying text.

136. Zhonghua Renmin Gongheguo Zhuzuoquan Fa Shishi Tiaoli (中华人民共和国著作权法实施条例) [Regulation on the Implementation of the Copyright Law of the People’s Republic of China] (promulgated by the St. Council, Aug. 2, 2002, effective Sept. 15, 2002), art. 36, 2002 ST. COUNCIL GAZ., Sept. 20, 2002, at 12 (China) [hereinafter PRC Implementation Regulations].

137. See *supra* note 115 for an explanation of the difference between confiscating and collecting.

138. PRC Copyright Law, *supra* note 75, art. 48.

139. Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 133.

140. *Id.* art. 139; see also LEE, POLICE SCI. INST., *supra* note 9, at 18 (explaining this distinction). The distinction between confiscation and collection is in effect only meaningful when the potential infringing material is a physical good. For online materials, the MCST may send take-down warnings, recommendations, and orders to the OSP that is transmitting the allegedly infringing material, see *supra* notes 119–124 and accompanying text. (By ‘take-down,’ the author refers to the deletion or suspension of the transmission of the infringing material). Interestingly, Hun-Ki Hong of the Korea Copyright Protection Agency stated that “99.9%” of the OSPs that receive take-down warnings comply with the warning. Telephone call with Hun-Ki Hong, Manager, Korea Copyright Protection Agency, Management Planning Office/Strategic Planning Team (Feb. 13, 2019). This high compliance rate is unlikely an indication of the administrative ‘power’ of the agencies per se, but rather an indication of the close relationship between the administrative

The second aspect concerns the treatment of illegal gains. In China, illegal gains are specified as objects that the copyright administration may confiscate and potentially destroy.<sup>141</sup> The Korean Copyright Act, by contrast, does not provide for MCST collection of illegal gains. The MCST may collect only infringing copies or Technology Protection Measure-circumventing tools, devices, or programs.<sup>142</sup>

A third aspect relates to the authority to fine. Under the Chinese Criminal Law, the copyright administration has the authority to directly impose an administrative fine on an infringer.<sup>143</sup> The Korean Copyright Act, in contrast, does not provide for an administrative fine issued directly by the MCST on infringers. That said, the Korean Copyright Act does provide a *criminal* fine for OSPs that fail to implement an MCST order to stop or suspend transmissions of illegal copies or fail to suspend particular user accounts.<sup>144</sup> The Korean Copyright Act requires that the MCST impose and collect this criminal fine, as opposed to other criminal enforcement authorities.<sup>145</sup>

The above comparison highlights three important points. First, the design of the Korean administrative remedy system encourages criminal copyright complaints. Under the Korean system, a copyright holder who wishes to have an infringer's copies confiscated would not find a pertinent remedy at the administrative level. Instead, the copyright holder is incentivized to seek criminal enforcement, which provides for such confiscation remedy. The same would be the case if a copyright holder seeks imposition of a fine on the infringer.<sup>146</sup> Second, the Korean Copyright Act's provision granting the MCST

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agencies and the criminal authorities, see *infra* Section VI.B (Inter-Authority Cooperation: Korea), and the statutory scheme that allows the MCST to collect criminal fines for OSPs that fail to implement and MCST take-down order, see Jeojakkwonbeob [Copyright Act], *supra* note 69, arts. 142(1)–(2), 142(5). The ease with which an administrative warning can trigger confiscation or a criminal fine ought to encourage OSPs to act defensively.

141. PRC Copyright Law, *supra* note 75, art. 48.

142. Jeojakkwonbeob [Copyright Act] *supra* note 69, art. 133.

143. PRC Implementation Regulations, *supra* note 136, art. 36.

144. Jeojakkwonbeob [Copyright Act], *supra* note 69, arts. 142(1)–(2), 142(5).

145. *Id.*

146. If the infringer is an Online Service Provider (OSP), the copyright holder may resort to administrative processes to have a criminal fine levied on the OSP. See *supra* note 144 and accompanying text.

to impose a criminal fine on OSPs that fail to comply with its orders effectively expands prosecutorial authority of the MCST.

Lastly, the design of China's administrative remedy system provides a robust alternative to criminal enforcement. China's copyright administration provides for a range of remedies, including confiscation with potential destruction of illegal copies and tools used to produce them, confiscation of illegal gains, and imposition of a fine.<sup>147</sup>

Overall, considerations about the scope of administrative enforcement powers in Korea and China adds an informative angle to understanding the higher prevalence of criminal enforcement cases in Korea as compared to China. The limited remedial powers of the MCST in Korea, along with the fact that the MCST may administer criminal remedies in some instances, encourage increased resort to criminal enforcement measures in many cases. In contrast, in China, the wide remedial powers of the copyright administration and the high threshold for criminal enforcement proceeding encourage more cases to come before the administrative agencies.

## VI. INTER-AUTHORITY COOPERATION

### A. *Inter-Authority Cooperation: China*

In China, the public security departments investigate and the Procuratorate authorities prosecute copyright crimes.<sup>148</sup> There is weak evidence of a cooperative relationship between the copyright administrative bodies and these criminal copyright enforcement authorities. Factors such as low case transfer rates, overlapping jurisdictions, and local protectionism

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147. While administrative proceedings require a showing that the copyright infringement has impaired the "public interest," PRC Copyright Law, *supra* note 75, art. 48, this in fact is not considered a burdensome standard. It is a much lower standard than the commercial purpose requirement, PRC Criminal Law, *supra* note 74, art. 217, or criminal proceedings. Thus, it is a factor that contributes to the expansive enforcement powers of the administrative enforcement agencies. *See* Li, *supra* note 127, at 146–53 (discussing the public interest requirement).

148. *See generally* Ryan Ong, *Tackling Intellectual Property Infringement in China*, CHINA BUS. REV. (Mar. 1, 2009), <https://www.chinabusinessreview.com/tackling-intellectual-property-infringement-in-china> (explaining how criminal copyright cases are initiated and handled).

suggest an environment that is particularly unfavorable for fostering cooperation.

(1) Low case transfer rates: under the Chinese Copyright Law, the copyright administrative authorities are expected to transfer serious infringement cases to the criminal enforcement authorities.<sup>149</sup> These transfers are important because although the police or prosecutors may theoretically self-initiate criminal cases, criminal IP cases in China are almost always transferred from an administrative agency to the police.<sup>150</sup>

In practice, however, administrative authorities tend not to make such transfers for criminal prosecution.<sup>151</sup> For instance, in 2015, the authorities transferred just 7.8% of the total cases filed by copyright enforcement and monitoring departments at all levels for consideration for criminal liability.<sup>152</sup> The corresponding transfer rates in the previous years were 2.2% in 2002, 1% in 2003, 3.9% in 2005, 8% in 2006, and 5% in 2010.<sup>153</sup>

(2) Overlapping jurisdiction and inter-bureaucratic rivalries: the Chinese regime generally confers broad copyright enforcement authority to administrative agencies.<sup>154</sup> This results

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149. THOMAS, *supra* note 30, at 92.

150. China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy, Inv. No. 332-514, USITC Pub. 4199 (Nov. 2010) (Amended) [hereinafter China: Intellectual Property Infringement].

151. See THOMAS, *supra* note 30, at 92 (observing that in practice, administrative authorities rarely made such transfers).

152. The 7.8% reflects 92 out of 1,177 cases. YIMEI GUO, MODERN CHINA'S COPYRIGHT LAW AND PRACTICE 134 (2017); STATE INTELLECTUAL PROP. OFFICE OF CHINA, 2015 INTELLECTUAL PROPERTY RIGHTS PROTECTION IN CHINA 17, <http://english.sipo.gov.cn/laws/whitepapers/201607/P020160721403876149335.pdf>.

153. Li, *supra* note 127, at 155. These rates are calculated based on data from the website of the National Copyright Administration of China (NCAC). The transfer rates for other years cannot be estimated due to lack of data. See *Zhongguo Guojia Banquan Ju* (中国国家版权局) [Copyright Statistics], NAT'L COPYRIGHT ADMIN. CHINA, [www.ncac.gov.cn/chinacopyright/channels/484.html](http://www.ncac.gov.cn/chinacopyright/channels/484.html) (last visited Feb. 12, 2019) (providing annual statistics); see also Li, *supra* note 127, at 155 (expressing the belief that there should have been significantly more administrative cases transferred to the public security departments according to the current law and stating that “[o]ne significant reason for the limited number of transfers is a lack of cooperation between copyright administrative bodies and public security departments.”).

154. See *supra* Section V.B (Administrative Enforcement: China).

in areas of overlapping jurisdiction between the administrative and prosecutorial authorities. Overlapping jurisdiction in turn fosters inter-bureaucratic rivalry because agencies reap significant but mutually exclusive benefits from handling IP infringement cases. China's administrative enforcement agencies, like prosecutorial authorities,<sup>155</sup> have the power to fine and confiscate infringing material.<sup>156</sup> These agencies would lose the revenue associated with such remedial measures by transferring cases for criminal prosecution. Loss of revenue from confiscated goods, on which the operation of administrative agencies relies, reportedly makes agencies extremely reluctant to transfer cases.<sup>157</sup>

(3) Local protectionism and inter-agency rivalries: in China, copyright administrative bodies divide at the local level. Each local copyright administration is in turn beholden to local authorities,<sup>158</sup> which generally are reluctant to treat harshly the infringers that benefit the local economy.<sup>159</sup> Transferring cases for criminal enforcement deprives copyright administrative bodies the ability to act flexibly according to the economic goals of their local authorities.<sup>160</sup>

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155. See *supra* Section IV.B (Criminal Copyright Laws: China).

156. See *supra* Sections V.B (Administrative Enforcement: China).

157. See DANIEL C. K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 217 (2002) (explaining that the agencies' reluctance to transfer cases stems particularly from concerns over loss of revenue from confiscated goods); MARTIN K. DIMITROV, PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 147–48, 157–58 (2009) (explaining that agencies' reluctance also stems from concerns over loss of revenue from administrative fines); China: Intellectual Property Infringement, *supra* note 150, at 1–10 (referring to USITC staff's interviews with industry officials, Hong Kong, September 21, 2010).

158. Andrew Evans, *Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws*, 31 GA. J. INT'L & COMP. L. 587, 590 (2003).

159. See THOMAS, *supra* note 30, at 123–24 (observing that IP infringement is often an ingrained part of the local economy).

160. See *id.* (observing that IP enforcement agencies in areas where IP infringements played a major role in the local economy were "extremely reluctant to enforce intellectual property rights, at the expense of their own interests").

### B. *Inter-Authority Cooperation: Korea*

In Korea, on the other hand, there is evidence of a fairly dynamic cooperative relationship between the copyright administration agencies (the MCST and its sub-bodies) and the criminal enforcement authorities. This evidence includes the relatively high case transfer rates. Additionally, the administrative agencies' limited enforcement powers and centralized structure suggest an environment conducive to cooperation. Moreover, the Korean administrative and criminal authorities have already engaged in a significant joint venture with the goal of maximizing cooperation.

(1) High case transfers rates: like their counterparts in China, the copyright administrative authorities in Korea are expected to transfer infringement cases that meet the criminal enforcement requirements to the criminal enforcement authorities.<sup>161</sup> The transfer rates in recent years show a meaningful number of transfers from administrative to criminal authorities: 38% of total cases were transferred in 2015, 55% in 2014, 39% in 2013, and 47% in 2012 (Table 2).

TABLE 2<sup>162</sup>

	2012	2013	2014	2015
Investigative matters received by the copyright administration <sup>163</sup>	3,870	3,091	3,883	2,897
Matters transferred to criminal enforcement authorities <sup>164</sup>	1,803	1,192	2,136	1,091
Transfer rate	47%	39%	55%	38%

(2) Institutional design: in contrast to China, the institutional design of Korea's administrative copyright enforcement agencies minimizes inter-bureaucracy rivalry and friction. First, the administrative agencies' enforcement powers are

161. Telephone call with Hun-Ki Hong, Manager, Korea Copyright Protection Agency, Management Planning Office/Strategic Planning Team (Feb. 13, 2019).

162. MINISTRY OF CULTURE, SPORTS AND TOURISM & KOREA COPYRIGHT COMM'N, 2015 JEJAKKWON BAEKSEO [2015 KOREA COPYRIGHT WHITE PAPER] 53, 63 (2016) [hereinafter MCST & KOREA COPYRIGHT COMM'N], <http://www.korea.kr/common/download.do?tblKey=EDN&fileId=211859>.

163. *Id.* at 63.

164. *Id.* at 53.

much more limited than those of criminal authorities.<sup>165</sup> Discussions of problems arising from overlapping jurisdictions and inter-bureaucratic rivalries are generally absent in relation to Korea's copyright enforcement regime. Korea's copyright enforcement regime also does not have the problems of local protectionism. Unlike in China where the law creates disparate copyright administrative agencies in each locality, in Korea the Korean Copyright Act centralizes administrative authority in one agency at the national level—the MCST.<sup>166</sup> Thus, the MCST copyright team and its sub-bodies like the KCC, discharge most of the administrative functions.<sup>167</sup> Organizations explicitly chosen by the MCST administer any remaining functions.<sup>168</sup>

(3) Cooperative initiative: in 2008, the MCST and the Ministry of Justice, which represents the criminal enforcement authorities in Korea, agreed to coordinate their investigative activities for pursuing online infringers.<sup>169</sup> Pursuant to this initiative, the government established a special police unit, called the Copyright Special Judicial Police. These special police officers cooperate with administrative enforcement agencies<sup>170</sup>

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165. For instance, Korean copyright administrative authorities lack the power to fine or confiscate infringing materials or tools. *See supra* Section V.A (Administrative Enforcement: Korea); *supra* Section IV. A (Criminal Copyright Laws: Korea).

166. *See supra* Section V.A (Administrative Enforcement: Korea). Korea is a relatively small country. The land mass of the country is 100,210 km<sup>2</sup> and it has a population of approximately 51.5 million. WORLD BANK, *World Bank Open Data: Population, Republic of Korea*, <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=KR> (last visited Feb. 17, 2019) (population data as of 2017). China, on the other hand, may be considered more like a series of smaller countries, rather than a single country. The mass of the country is 9.8 million km<sup>2</sup> and it has a population of 1.39 billion. WORLD BANK, *World Bank Open Data: Population, China*, <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=CN> (last visited Feb. 17, 2019) (population data for mainland China as of 2017).

167. *See generally supra* Section V.A. (Administrative Enforcement: Korea).

168. Jeojakkwonbeob [Copyright Act], *supra* note 69, arts. 133(2)–(3); Copyright Act Enforcement Decree *supra* note 112, art. 70(3); *see supra* note 117 and accompanying notes.

169. The initiative was led by the MCST. *See generally infra* Section VIII.C (Korea's Approach to Copyright Law); *infra* note 339–340 and accompanying text.

170. In particular, the Korea Copyright Protection Agency (KCOPA). Jeojakguon Bohochaegae-eui Ilwonhwa – Korean Copyright Protection Center culbom [Integration of the Copyright Protection System – Establishment of

to help them investigate suspected infringements, and transfer cases and information to the prosecutorial offices. The Copyright Special Judicial Police is a central part of the copyright enforcement system in Korea.<sup>171</sup>

### C. *Inter-Authority Cooperation: Summary*

Korea seemingly has a more cooperative dynamic between copyright administration agencies and criminal enforcement authorities than does China. Case transfer rates are higher in Korea, there is less structural friction between agencies, and interactive initiatives are more robust. Administrative agencies' cooperation in identifying criminal copyright cases supplies criminal authorities with more opportunities for enforcement and alleviates investigative burdens.

The fact that the relationship between administrative and criminal authorities in China is more competitive than cooperative, whereas in Korea it is more cooperative than competitive, also helps understand why Korea exhibits robust criminal enforcement tendencies while China exhibits the opposite.

## VII. COMPLAINT DYNAMICS

Under the copyright regimes of both China and Korea, copyright holders may seek enforcement on three levels: civil, administrative, and criminal. Notwithstanding this choice, copyright holders in China tend to opt for administrative enforce-

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Korean Copyright Protection Center], KCOPA STORY (Jan. 25, 2017), <https://m.blog.naver.com/PostView.nhn?blogId=KCopastory&logNo=220920066800&proxyReferer=https%3A%2F%2Fwww.google.com%2F> (official KCOPA blog) (explaining the history and purpose of KCOPA's establishment and its support functions for the Copyright Special Judicial Police). KCOPA is an organization under the jurisdiction of the MCST engaged in various activities to prevent the distribution of illegal reproductions on- and off-line. It is staffed by government officials. *See generally* Korea Copyright Protection Agency, <https://www.kcopa.or.kr> (last visited Nov. 12, 2018) (official website).

171. *See* Heeseob Nam, *Migugaeseo 900 nyeon keonnil ili . . . 2008 nyeone museun ili isseonna?* [*It Would Have Taken 900 Years in the United States . . . What Happened in 2008?*], HUFFPOST (June 30, 2015), [http://www.huffingtonpost.kr/open-net/story\\_b\\_7687884.html](http://www.huffingtonpost.kr/open-net/story_b_7687884.html) (observing that the Copyright Special Judicial Police spent approximately 4.4 billion won in investigation expenses between 2009 and 2013).

ment,<sup>172</sup> while those in Korea look primarily to criminal enforcement.<sup>173</sup>

This section examines what brings copyright holders in China and Korea before these respective forums.

### A. *Complaint Dynamics: China*

Copyright holders in China apparently prefer administrative enforcement over judicial enforcement—both civil and criminal—mainly because they perceive it as offering the greatest chance of quickly stopping infringement, among the enforcement options.<sup>174</sup>

With respect to civil enforcement, many IP practitioners in China express two main concerns: first, the process is too costly in terms of time and money, and second, the process significantly lacks reliability due to the lack of expertise of the judges.<sup>175</sup> Copyright holders' concerns about the process time stem from the fact that many court cases, including copyright cases, regularly last several years due to heavy caseloads and limited court personnel.<sup>176</sup> As to expenses, copyright holders do not wish to incur the significant investigative costs associated with proving infringement and more generally the legal costs associated with a protracted proceeding. Concerns about reliability relate to perceptions that judges lack sufficient IP

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172. See Li, *supra* note 127, at 145.

173. TAK, *supra* note 13, at 37. For instance, about twelve times more cases were filed before the criminal authorities than before the administrative authorities, in 2012 and in 2013. Calculated based on data from MCST & KOREA COPYRIGHT COMM'N, *supra* note 162, and *Eight Reasons Why the 'Regulation Against Copyright Settlement Business' Should be Passed*, *supra* note 104. See also *supra* note 104 and accompanying text.

174. See THOMAS, *supra* note 30, at 127 (observing that experienced lawyers in the field of IP in China, “actually commended the speed with which some IP enforcement actions could be concluded”).

175. *Id.* (surveying IP practitioners in China and citing one of the responses: “[f]oreign rights holders are not willing to litigate in order to protect their rights; firstly, because they think it takes too much time and money and secondly, they don't really believe in China's courts.”).

176. Li, *supra* note 127, at 153. This is in spite of what is written in the Chinese Civil Procedure Law: that cases of copyright infringement should be concluded within six months after docketing, with an extension of up to two years. *Id.*

knowledge, particularly due to their lack of real-life experience with IP cases.<sup>177</sup>

As to criminal enforcement, the public's general reluctance to consider copyright infringement as a crime and the uncertainty that enforcement authorities will pursue the cases act as obstacles to copyright holders seeking criminal enforcement. In thinking about copying, many people in China appear to focus not on whether the activity is unethical, but on the practicality of obtaining a sub-standard product for a lower price.<sup>178</sup> Thus for many, copying is a low-grade harmless crime and this sentiment is shared among the prosecutors as well.<sup>179</sup> The public and prosecutors alike also perceive investigating copyright infringement as a major task that requires a lot of resources given the complexity and size of the country.<sup>180</sup> While copyright holders may submit complaints to criminal enforcement authorities, the awareness that their case will be treated as a relatively low priority likely further discourages them from filing criminal complaints.<sup>181</sup>

Against these considerations, many copyright holders perceive administrative enforcement as offering a plausible alternative route. Specifically, they believe that administrative pro-

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177. THOMAS, *supra* note 30, at 108.

178. See, e.g., Lee C. Simmons & Brian R. Tan, *Understanding Software Piracy in Collectivistic Countries* 252–57, in 5 ASIA PACIFIC ADVANCES IN CONSUMER RESEARCH (Rami Zwick & Tu Ping eds. 2002), [acrwebsite.org/volumes/11811/volumes/ap05/AP-05](http://acrwebsite.org/volumes/11811/volumes/ap05/AP-05) (explaining that, with respect to software, a pirated version “is perceived as just a cheaper version without the usual guarantee, and it is not unethical should an individual, who purchases pirated software, decides to take the risk of obtaining a sub-standard product for a lower price”).

179. Ling Li, *The Sky Is High and the Emperor Is Far Away: The Enforcement of Intellectual Property Law in China*, 36 BOLETÍN MEX. DERECHO COMPARADO 951, 964 (2003); see also Vincent Didiek Wiet Aryanto, *Intellectual Property Rights Theft in Far East Countries*, 2 J. BUS. ADMINST. (2003) (study based on interviews with U.S. companies actively engaged in fighting IPR theft in Far-East countries, including China) (reporting responses that China's difficulties in enforcing IPR protection is due to “the public perception that piracy and counterfeiting were low-grade harmless crimes” and that IP theft is “not yet considered to be equivalent to other property crimes.”). Some scholars observe that the perceptions are changing. See, e.g., Yu, *supra* note 35, at 26 (observing that “the Chinese people have become increasingly aware of the basic functions of, and the rationales behind, intellectual property rights”).

180. Li, *supra* note 179, at 964.

181. *Id.*

ceedings are more efficient than judicial proceedings—they can usually receive administrative decisions within several weeks, a much shorter time period than the average court judgment.<sup>182</sup> In addition, copyright holders believe the administrative track may save them significant expenses, especially investigative costs, since administrative agencies usually undertake the financial burden during their investigation of the infringing activities.<sup>183</sup> In so far as the volume of IPR-cases signals greater experience and expertise to copyright holders, the fact that administrative enforcement is the most popular option for dealing with infringement may itself bolster the copyright holders' preference for administrative enforcement.

Copyright holders in China also value the administrative bodies' comparable or even stronger powers in comparison to their judicial counterparts—especially powers relating to confiscation.<sup>184</sup> Confiscation is a popular remedy among copyright holders in China because they perceive the difficulty of establishing criminal liability,<sup>185</sup> and civil and administrative fines are too low to have a meaningful deterrent effect.<sup>186</sup> In

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182. Li, *supra* note 127, at 153 (observing such belief among copyright holders and also explaining that “[w]hile there is no legally prescribed time limit to administrative proceedings,” according to personnel at copyright administrative bodies, “most administrative copyright cases are . . . concluded within several weeks”); Ong, *supra* note 148 (“Whereas administrative cases can reach resolution in just a few weeks, court cases can easily take a year or longer . . .”). Faster proceedings may not necessarily mean that they are more efficient. See Li, *supra* note 127, at 153–54 (suggesting that administrative proceedings are faster because of their lower standard of evidence).

183. See Li, *supra* note 127, at 145 (“Many copyright holders also prefer administrative enforcement because . . . copyright holders do not have to provide as expensive evidence to an administrative body as they do in court . . .”); *id.* at 153 (observing that copyright holders only need to provide preliminary evidence while the rest of the work will be done by the copyright administration); see also THOMAS, *supra* note 30, at 109 (citing a comment by a Chinese lawyer working for an international law firm: “The big advantages between administrative approaches to judicial proceedings are that administrative measures tend to be more expedited and more cost-effective, then they can take, the agencies themselves, can take initiative in investigating the infringing activities so that saves costs for the client also.”).

184. THOMAS, *supra* note 30, at 127–28.

185. For further details on the requirements for criminal liability for copyright infringement in China, see *supra* Section IV.B (Criminal Copyright Laws: China).

186. See THOMAS, *supra* note 30, at 127–28 (observing the dissatisfaction among IP practitioners in China with the lack of effective penalties against

addition to confiscating unlawful gains and illegal copies, copyright administrative bodies in China may confiscate any tools or materials used for infringements.<sup>187</sup> This extended power to confiscate is significant because even the courts do not have this explicit power.<sup>188</sup> Consequently, when copyright holders petition courts for the confiscation of tools or materials used for infringements, courts may reject these.<sup>189</sup> As a Chinese lawyer working for a large international law firm commented, the administrative approach of enforcement appeals to practitioners because it allows the speedy seizure of not only the infringing materials, but also the tools used to make them, and can thus deliver a “tangible result.”<sup>190</sup>

Taken together, concerns associated with the Chinese judicial system in terms of cost and expertise at least partially drive preference for administrative enforcement among copyright holders. These concerns stem partly from the perceived futility of pursuing copyright criminal enforcement, and partly from the understanding that the administrative route is an acceptable alternative to judicial enforcement in light of cost, expertise, and available remedies. This does not mean that copyright holders in China find the copyright administrative

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infringers generally); see also Ong, *supra* note 148 (advising that “[a]dministrative agencies often issue small fines that infringers view as the cost of doing business rather than as an effective deterrent.”). Furthermore, “[p]enalties levied against infringers are rarely sufficient to deter piracy [sic] they are now simply part of the cost of doing business.” Li, *supra* note 179, at 965.

187. PRC Copyright Law, *supra* note 75, art. 48; see notes 134–135 and accompanying text.

188. Compare PRC Copyright Law, *supra* note 75, art. 48 (providing that copyright agencies may, in “serious cases,” confiscate any material, tools, and instruments used for production of illegal copies) with *id.* art. 52 (“The People’s Court hearing a case may confiscate the unlawful income, infringing reproductions and materials used for committing the illegal act of infringement of copyright or copyright-related rights”).

189. Li, *supra* note 127, at 146 (citing cases where copyright holders petitioned the court for the confiscation of tools or materials used for infringements but the court rejected the petition on the grounds that it did not have explicit power to effect confiscation of such kind).

190. See, e.g., THOMAS, *supra* note 30, at 127 (quoting the interviewee: “[o]ne good thing about the administrative approach besides the speediness of resolution will be the fact that you can (seize) the infringing goods or even the tools used to make the infringing goods really quickly and that actually it’s a tangible result.”).

bodies particularly reliable in themselves,<sup>191</sup> but that they understand these bodies as offering an enforcement option that is more practical and tangible, namely in stopping infringement activity quickly, compared to that offered by the judicial or criminal enforcement bodies.

### B. *Complaint Dynamics: Korea*

In Korea, copyright holders strongly prefer filing complaints with the criminal enforcement authorities when they detect suspicious infringing activity.<sup>192</sup> This appears to be not because copyright holders wish to impose harsh punishments on infringers and see lasting deterrent effects, but because they aim for settlement and wish to gain the largest possible leverage entering into settlement negotiations.

Copyright holders may pursue this strategy because of the Korean Copyright Act's classification of copyright infringement as generally an Antragsdelikt offense. Unlike the Chinese or the U.S. criminal justice systems, in which the prosecuting agency has sole discretion in determining whether to prosecute certain defendants regardless of the victims' wishes, the Korean legal system, with the exception of murder and other violent crimes, allows victims to initiate and drop charges against the violators.<sup>193</sup> For copyright holders, this means that they may initiate and drop charges against the infringers at their will.<sup>194</sup>

Korean scholars, legislators, and political commentators agree that law firms and companies seeking profit from settle-

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191. Copyright holders in China have expressed their low expectation of the Chinese legal copyright enforcement environment on the whole, particularly noting concerns about transparency and local protectionism. *See id.* at 120 (transparency); *id.* at 124 (local protectionism).

192. HEESOB NAM, HANKUK SAHUEHSUH JEJAKGUON JAEDO GAEHYUKEUH PLYOSEONGGUA BANGHYANG [COPYRIGHT REFORM IN KOREAN SOCIETY], KOREAN INTELLECTUAL PROPERTY SOCIETY FALL CONF. 43, 67 (2014).

193. *See* Yunjeong Choi, *Development of Copyright Protection in Korea: Its History, Inherent Limits, and Suggested Solutions*, 28 BROOK. J. INT'L L. 643, 668 (2003); Jeojakkwonbeob [Copyright Ac], *supra* note 69, art. 140(2); *see supra* note 97 and accompanying text (exception to Antragsdelikt apply in the copyright context where infringements are committed habitually with the intention of making profit). *See generally supra* notes 94–101, 104.

194. Choi, *supra* note 193, at 668.

ments spear-head this trend.<sup>195</sup> They emphasized this phenomenon extensively in the deliberations that accompanied the various bills proposed between 2009 and 2016 for reducing the scope of Korea's criminal copyright provisions.<sup>196</sup> Experts who submitted supporting briefs for the bill spoke of the existence of a new business model that emerged since around 2007 in response to the oversaturation of Korea's legal market.<sup>197</sup> This model referred to the law firms' practice of aggressively seeking out collaborative arrangements with software companies on copyright-related issues as a means for generating extra revenue.<sup>198</sup> Under these arrangements, law firms carry out investigations and identify targets potentially engaging in infringing activities, file criminal complaints on behalf of the companies, and arrange for settlement.<sup>199</sup>

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195. See, e.g., JUNG ET AL., *supra* note 17, at 18; Heeseob Nam, *Hanguk sahui-eseo jeojakkwon jaedo kaehyeogui pillyoseonggwa panghyang* [Copyright Reform in Korean Society], COPYRIGHT Q. (Winter 2014); Sang-eun Lee, *Naethijeun teopchineun jeojakkwon sseunami* [The Copyright Tsunami Devours Netizens], SISA PRESS (Jan. 21, 2008), <http://www.sisapress.com/journal/articlePrint/122300>. This so-called settlement business is still going on as of 2018. See Jeong Hyun Lee, *Habuigeum norin mubumbyeolhan jeojakkwon chimhae kososageon' jeuksi kakha* [New Prosecutorial Guidelines for Immediate Dismissal of Indiscriminate Complaints Targeting Settlements], LAW TIMES (Mar. 12, 2018), <https://www.lawtimes.co.kr/Legal-News/Legal-News-View?serial=140997>; Haeyeon Park, *Piyeonnidanchae ullineun 'phontheu jeojakkwon'* [Font Copyright That Makes NGOs Cry], BETTER FUTURE (July 23, 2018), <https://www.futurechosun.com/archives/34909>.

196. See, e.g., CHOI, *supra* note 105, at 3–4; NAT'L ASSEMBLY & KOREAN LEGAL SOC'Y, *HABUIGEUM JANGSA BANGJILEUL WIHAN JOJAKGWONBEOB GAEJEONGAN TORONHOE* [DEBATE ON COPYRIGHT LAW AMENDING BILL TO PREVENT SETTLEMENT BUSINESS] (Feb. 15, 2016), <https://opennet.or.kr/wp-content/uploads/2016/02/자료집-저작권법-개정안-토론회20160215.pdf> (explaining the history of the Copyright Law). However, none of these bills that attempted to resolve the settlement business were enacted. For information on the bills, see *Bill Information*, NAT'L ASSEMBLY S. KOR., [likms.assembly.go.kr/bill/BillSearchResult.do](http://likms.assembly.go.kr/bill/BillSearchResult.do) (last visited Oct. 28, 2018); Heeseob Nam, *Jasalkkaji bureun jeojakkwon habui jangsaneun eonje meomchulkka* [Settlement Business Causing Suicides—When Will It Stop: Legislation Blocked by One Prosecutor], HUFFPOST (July 1, 2015), [https://www.huffingtonpost.kr/open-net/story\\_b\\_7696472.html](https://www.huffingtonpost.kr/open-net/story_b_7696472.html) (summarizing the content of the bill).

197. See, e.g., OPENNET, *supra* note 110, at 1–23.

198. See *id.*

199. *Id.* In addition to the experts, many National Assembly members similarly echoed their concerns over the abnormally high number of copyright-related complaints filed for prosecution, the high-settlement rates of these complaints, and evidence suggesting that the allegedly infringing activities in

Consequently, criminal enforcement serves not as an end in itself, but as a means for gaining leverage in a settlement action. Korea Supreme Prosecutor Office's processing data suggest that this incentive to settle significantly drives the overall number of complaints filed to the criminal authorities by copyright holders. In 2012, for instance, the rate of disposition of non-indictment for copyright infringement cases was 79.4% of the total, and 45.2% case of all cases processed were classified as without an arraignment right.<sup>200</sup> The high non-indictment rate and high rate of cases without an arraignment right suggest that the prosecution stayed many cases due to after-the-fact factors such as settlement among the parties.<sup>201</sup>

There are also reasons to believe that the settlement incentives are adverse in nature, targeting frivolous cases or infringements that are unlikely to render meaningful remedies should the criminal authorities follow through with the case. With respect to the 2012 data above, Choi Hae Min, a KCC (MCST) researcher, observes that a large volume of copyright complaints were not promptly indicted. This, Choi suggests, is likely indicative of the fact that the complaints were relatively frivolous.<sup>202</sup> Choi further underscores that even where authorities indicted the infringer, the infringements in question were so minor that the cases were not included in the separate case category for copyright infringement in the prosecutor office's final official statistic.<sup>203</sup>

With respect to the minority of Korean copyright holders who do seek legal remedies, Korean scholars identify two inter-related reasons for their reliance on criminal proceedings. First, many copyright holders perceive civil liability as too difficult to prove and civil damages as too low.<sup>204</sup> Instead, they opt

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many of these settled cases were either frivolous or in the grey areas of the copyright law. JUNG ET AL. *supra* note 17, at 19–21; *see also* Hyemi Gwon, *Jeojakkwonbeob, hoksi habuigeum jangsaleul wihan beobingayo?* [*Copyright Law, a Law for Settlement Business?*], BLOTTER (Apr. 16, 2014), [www.bloter.net/archives/189192](http://www.bloter.net/archives/189192).

200. CHOI, *supra* note 105, at 13.

201. *Id.*

202. *Id.* at 9–11.

203. *Id.* at 12–15.

204. Dae-Hee Lee, *KORUS FTA and Copyright Protection in Korea*, in *INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION* 355, 373 (Christoph Antons & Reto M. Hilty eds., 2015) [hereinafter Lee, *KORUS FTA and Copyright Protection in Korea*] (observing that criminal sanc-

for a mechanism that they perceive will provide the second best alternative: stopping the infringing activities.<sup>205</sup> Copyright holders perceive criminal sanctions as having greater merit in this regard than civil sanctions.<sup>206</sup> For those copyright holders who still wish for civil damages, criminal enforcement alternatively provides a means for working around the high burden of proving civil damages.<sup>207</sup>

### C. *Complaint Dynamics: Summary*

Scholars and practitioners must consider the factors driving or deterring copyright holders' decision to file criminal copyright complaints because they directly affect the pool of opportunities available for application of criminal enforcement measures. Separately, such factors also assist in developing better understanding of criminal enforcement patterns and data.

In China, copyright holders mainly file complaints before the administrative bodies because they believe that these bodies offer a fairly certain chance of attaining at least the mini-

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tions have had "greater merit" than civil sanctions for copyright owners in Korea who have found civil enforcement difficult and ultimately futile, and consequently are just looking for an effective way to stop infringing activities in the least).

205. *Id.*

206. *Id.* The literature generally does not mention copyright holders' perceptions about the administrative enforcement mechanisms in the same context, perhaps because their effect in stopping infringement is perceived as much weaker than those of criminal and civil sanctions. The copyright administrative enforcement bodies of Korea may generally act in ways that would (or may) stop infringement only temporarily. *See supra* Section V.A (Administrative Enforcement: Korea).

207. The high burden generally is a consequence of the fact that all evidence is usually in the ambit or control of the accused infringers, who in turn are very difficult to track down, particularly on the Internet. Lee, *KORUS FTA and Copyright Protection in Korea*, *supra* note 204, at 373. Meanwhile, "by filing a criminal complaint, right-holders can push prosecutors to take actions such as a raid and seizure of the infringing products. If the raid is successful and the infringer is convicted, the right holder can bring a civil action for damages, using the criminal conviction as evidence." Sang-Hyun Song & Seong-Ki Kim, *The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 PAC. BASIN L.J. 118, 134 (1994); *see* Lee, *KORUS FTA and Copyright Protection in Korea*, *supra* note 204 (noting that the Korean Copyright Act allows authors seeking civil damages against the violators to initiate criminal sanctions against these violators).

imum remedy of stopping infringing activities.<sup>208</sup> This belief results from the copyright holders' general distrust that the judicial—civil and criminal—copyright enforcement proceedings will yield any worthwhile or tangible result and also their perception that the administrative processes provide acceptable efficiency and expertise.<sup>209</sup> A similar incentive explains why some, albeit a relative minority, of the copyright holders in Korea choose criminal enforcement over civil and administrative enforcement.<sup>210</sup>

In Korea, the majority of copyright complaints filed before criminal tribunals is a product of the popular trend among copyright holders and their law firms of using these complaints as a bargaining chip for extracting large settlements from accused infringers. The fact that Korea generally allows copyright holders to initiate and drop of criminal charges drives this unique incentive.

The divergent complaint filing dynamics of China and Korea generally hinge on divergent expectations and goals of the copyright holders in the respective countries. Many Chinese copyright holders are reluctant to file criminal complaints due to the lack of assurance that their case will be pursued and also the general uncertainty of perceiving copyright infringement as a crime equivalent to other property crimes. In place, copyright holders tend to pursue administrative enforcement, which is seen as the relatively more effective method over civil enforcement in stopping infringement. Civil enforcement tends to be disfavored due to generally low expectations in China's judicial enforcement system for copyright. Alternatively, at the core of many Korean copyright holders' preference for criminal enforcement is the motivation to leverage the most effective bargaining chip and make a profit.

#### VIII. THE ROLE OF GOVERNMENT IDEAS AND INTERESTS

The following section examines the policy ideas underpinning China and Korea's respective approaches to copyright law.

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208. THOMAS, *supra* note 30, at 127.

209. *Id.*

210. See Lee, *KORUS FTA and Copyright Protection in Korea*, *supra* note 204, at 373.

### A. *Methodological Considerations*

In terms of research methodology, the analysis relies on the method of process tracing, which focuses on “drawing descriptive and causal inferences from diagnostic pieces of evidence—often understood as part of a temporal sequence of events or phenomena.”<sup>211</sup> This qualitative methodology is particularly well-suited for understanding processes that are not easily quantifiable, such as ideas and interest formation. This section draws information from a number of data streams, analyzing mainly journal articles, books, newspaper reports, and government publications and speeches. It maintains a special focus on original Korean language sources.

### B. *China’s Approach to Copyright Law*

#### 1. *Censorship Goals*

A primary consideration for the Chinese government in developing its copyright law is the law’s compatibility with, and capability of furthering, China’s censorship regime. For centuries, the Chinese government has privileged censorship and speech regulation as an indispensable means for maintaining societal order.<sup>212</sup> The censorship regime gained particular prominence with the establishment of the PRC in 1949.<sup>213</sup> The PRC administered censorship policies ruthlessly in its early decades, deploying harsh government campaigns against dissidents on a regular basis.<sup>214</sup> Whereas the PRC’s Marxist-Leninist ideology condoned government control of ideas,<sup>215</sup> it provided little justification for the recognition of property-like rights in art or literature.<sup>216</sup> The PRC historically sought con-

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211. Collier, *supra* note 12, at 824. *See supra* note 12 and accompanying explanation of process tracing.

212. Stephen McIntyre, *The Yang Obeys, but the Yin Ignores: Copyright Law and Speech Suppression in the People’s Republic of China*, 29 PAC. BASIN L.J. 75, 84–87 (2011).

213. *See id.* at 124 (stating that China remains devoted to the philosophy that media is “an instrument for those who control it,” and that cultural paternalism is necessary in order to prevent societal chaos); *see also* Richard Cullen & Hua Ling Fu, *Seeking Theory From Experience: Media Regulation in China*, 5 DEMOCRATIZATION 155, 163 (1998).

214. *See McIntyre, supra* note 212, at 88–89.

215. *Id.*

216. *Id.* at 91; ALFORD, *supra* note 35, at 56.

trol over the intellectual class,<sup>217</sup> and viewed literature and art as “subordinate to politics.”<sup>218</sup> Such pursuit fundamentally undergirds the PRC’s disinclination towards copyright, particularly because the beneficiaries of intellectual property rights would typically be the intellectuals. Against this background, developing a copyright law was not a priority for the Chinese government for the first three decades following the establishment of the PRC.<sup>219</sup>

The government’s first significant undertaking for creating a copyright system occurred after Chairman Mao Zedong’s death in 1976. With momentum created by the new administration’s Open Door policy, the government signed a trade agreement with the United States in 1979.<sup>220</sup> Under this agreement, China committed itself to promulgating intellectual property laws “with due regard to international practice.”<sup>221</sup> The government passed trademark and patent legislation relatively swiftly following the signing of the agreement.<sup>222</sup> Codifying copyright legislation, on the other hand, proved to be a mammoth task. Copyright law needed to be reconciled with the state’s censorship regime and the government’s desire to keep out certain Western cultural products and influences.<sup>223</sup>

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217. McIntyre, *supra* note 212, at 97.

218. Mao Zedong, Speech at the Yanan Forum on Literature and Art (May 2, 1942), in *Talks at the Yanan Forum on Literature and Art*, MARXISTS INTERNET ARCHIVE, [http://www.marxists.org/reference/archive/mao/selected-works/volume-3/mswv3\\_08.htm](http://www.marxists.org/reference/archive/mao/selected-works/volume-3/mswv3_08.htm) (last visited Oct. 28, 2018).

219. China had no copyright law at this time. The Communists had declared all existing laws null and void upon taking control of the government. Mark Sidel, *The Legal Protection of Copyright and the Rights of Authors in the People’s Republic of China, 1949–1984: Prelude to the Chinese Copyright Law*, 9 COLUM. J. ART. & L. 477, 478 (1985). A few copyright friendly initiatives did pass some muster, such as the drafting of preliminary regulation on copyright in the 1950s and the establishment of a contract-based royalty system for authors—following the Soviet model—but were ultimately short-lived. They were quashed by pressures from political campaigns and the Cultural Revolution in the late 1950s. See McIntyre, *supra* note 212, at 88–89; Sidel, *supra*, at 485–87.

220. McIntyre, *supra* note 212, at 89.

221. Agreement on Trade Relations Between the United States of America and the People’s Republic of China, *supra* note 6, art. VI(3); PETER FENG, INTELLECTUAL PROPERTY IN CHINA 66 (2003).

222. See McIntyre, *supra* note 212, at 89.

223. *Id.* at 93.

Exactly how the government should or could achieve the dual goals was unclear.<sup>224</sup>

The ensuing debate among Chinese lawmakers and scholars, which ultimately lasted for over a decade,<sup>225</sup> engendered a unique discursive framework through which the government could rationalize copyright within the PRC's communist ideology and political imperatives.<sup>226</sup> The framework reflected two key complementary arguments by copyright advocates: one rhetorical, characterizing copyright in socialist terms, and the other more substantive.<sup>227</sup> The former argument emerged from the idea that copyright provided a useful tool for the advancement of socialist goals. For example, a 1985 academic article expressed that since the development of each individual is a prerequisite to the development of the society according to the Marxist position, protecting an author's personal rights in essence protects the public's "basic rights."<sup>228</sup> A 1990 academic article expressed a similar idea that copyright law promotes the "socialist . . . civilization,"<sup>229</sup> and satisfies "the cultural needs of the masses."<sup>230</sup>

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224. See *id.*; Naigen Zhang, *Intellectual Property Law in China: Basic Policy and New Developments*, 4 ANN. SURV. INT'L & COMP. L. 1, 7–8 (1997) (explaining the difficult balance of trying to control ideology through censorship and sufficiently protecting copyright).

225. Lasted throughout the 1980s (the so-called 'reform era' under Deng Xiaoping).

226. See ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 121–24 (2005) (describing the reasons for the copyright controversy and identifying different camps in the copyright debate).

227. McIntyre, *supra* note 212, at 91–93.

228. Xiaohang Gong & Lisha Shi, *Banquan Lifa Yu Gongmin Jiben Quanli de Baozhang* (版权立法与公民基本权利的保障) [*Copyright Legislation and the Ensuring of Citizens' Basic Rights*], 1985 HEBEI FAXUE [HEBEI L. SCI.], no. 3, at 2, 3, translated in McIntyre, *supra* note 212, at 91 ("[T]he free development of all people is conditioned upon the free development of every individual . . . [P]rotecting an author's personal rights is prerequisite to the protection of the entire public's basic rights").

229. Qinnan Huang, *Baohu Zhuzuoquan Lun* [Protecting Copyright], 1983 FAXUE YANJIU [CHINESE J.L.], no. 2, at 47, 47, translated in McIntyre, *supra* note 212, at 91 (stating that copyright law would promote "the construction of socialist spiritual and material civilization").

230. Angran Gu, *Xin Zhongguo Di Yi Bu Zhuzuoquan Fa Gaishu* (新中国第一部著作权法概述) [*An Overview of the New China's First Copyright Law*], 1990 ZHONGGUO FAXUE [CHINA L. SCI.], no. 6, at 52, 56 (1990), translated in McIntyre, *supra* note 212, at 92.

The latter argument derived from the related notion that copyright norms, in content and scope, are flexible and may be tailored to China's political and national circumstances.<sup>231</sup> For instance, academics consistently emphasized that the potential copyright law would be a "socialist copyright law"<sup>232</sup> with "Chinese characteristics."<sup>233</sup> Such a law, they advanced, could complement other speech and publication controls by discouraging undesirable media and punishing those who produce it.<sup>234</sup> Chinese authorities and policymakers often conflated publication law and copyright law in official debates and remarks, and generally regarded copyright "more as a means of regulating the publishing industry than a mechanism for protecting the rights of authors."<sup>235</sup>

Proponents of a new Chinese copyright law simultaneously downplayed the author's place in the copyright regime.

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231. See McIntyre, *supra* note 212, at 93–95 (explaining that this position was a substantial compromise strategically made by many copyright advocates in China at the time in order to accelerate the government's acceptance of the notion of copyright); see also Yin Lantian (尹蓝天) & Chen Hong (陈虹), *Jinkuai Zhiding Shihe Woguo Guoqing de Banquan Fa* (尽快制定适合我国国情的版权法) [*Quickly Establish a Copyright Law Suitable to Chinese National Conditions*], 1983 FAXUE ZAZHI [LAW SCI. MAG.], no. 3, at 35, 35, translated in McIntyre, *supra* note 212, at 93 ("[A] copyright law suitable to Chinese national conditions").

232. Haiqing Guo, *Shilun Woguo de Zhuzuoquan Baohu* (试论我国的著作权保护) [*Discussing Copyright Protection in China*], 1987 XUCHANG SHIZHUAN XUEBAO [J. XUCHANG TEACHERS COLL.], no. 3, at 93, 97, translated in McIntyre, *supra* note 212, at 93.

233. Xuejun Ding, *Guanyu Jianli Woguo Banquan Falü Zhidu de Gouxiang* (关于建立我国版权法律制度的构想) [*A Vision for the Establishment of China's Copyright System*], 1989 FALÜ KEXUE [LAW SCI.], no. 1, at 73, 73, translated in McIntyre, *supra* note 212, at 93.

234. See Guo, *supra* note 232, at 93, translated in McIntyre, *supra* note 198, at 95 n.133 ("[T]hose works that oppose the socialist system, corrupt socialist values, and harm socialist countries' sovereignty or reveal state secrets should not be recognized or protected by socialist countries' laws, [for] the circumstances are grave, and [the purveyors of these works] should be held legally accountable . . ."); Huang, *supra* note 229, at 50, translated in McIntyre, *supra* note 198, at 95 n.133 ("Not only should [the law] not bestow a copyright on any reactionary or pornographic works, but it should also hold the creators accountable.").

235. See MERTHA, *supra* note 226, at 121. Some Chinese authorities even argued that copyright legislation ought to be rolled into publication law. See *id.* (observing that in December 1979, the group responsible for drafting China's copyright law proposed a draft that combined copyright and publication legislation).

For instance, the 1980's literature often speaks of the PRC's new copyright regime as one encouraging creative freedom in authors, but only to the extent that the work in question was politically and socially acceptable—i.e., supportive of the officially-defined ideology.<sup>236</sup>

Meanwhile, copyright exception doctrines, such as fair use,<sup>237</sup> were discussed primarily as means that could: (1) help the government in controlling content—through a selective application of the fair use exception, the government can promote access to and use of only those works deemed beneficial to society, and (2) preserve government appropriation powers.<sup>238</sup> The Trial Regulations, which the government published as a preliminary copyright guidance to judges in 1984, reflected the idea of fair use as a means for ensuring censorship exceptions for the government.<sup>239</sup> While the Trial Regulations created exceptions for eight specific fair uses, only two could be exercised by individuals for private purposes.<sup>240</sup> The remaining six broader exceptions applied to a myriad of state organs and objectives, such as news reporting by state-run me-

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236. See, e.g., Ding, *supra* note 233, at 74, translated in McIntyre, *supra* note 198, at 96 n.136 (“Creative freedom is not unlimited, and all creators must be diligent in creating excellent works that are beneficial to the people’s bodily and spiritual health, and to the construction of socialist spiritual civilization . . .”).

237. Fair use is a doctrine that permits limited use of copyrighted material without acquiring permission from the copyrights holders. It is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work, intended to promote freedom of expression. Examples of fair use in the U.S. include commentary, search engines, criticism, news reporting, research, teaching, library archiving and scholarship. See *More Information on Fair Use*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/fair-use/more-info.html> (last visited Oct. 29, 2018).

238. Yu Zuo, *Zhuzuoquan he Zhuzuoquan Fa Qianlun* (著作权和著作权法浅论) [*On Copyright and Copyright Law*], 1990 QUN YAN [POPULAR TRIB.], no. 7, at 23 (1990), translated in McIntyre, *supra* note 212, at 99 (asserting that fair use safeguards against authors using their rights in a manner inconsistent with “societal” interests and that “the people” would have access to the “spiritual wealth” accumulated in copyrighted works).

239. FENG, *supra* note 221, at 65–66; see Trial Regulations on Copyright Protection of Books and Periodicals, CHINA COPYRIGHT & MEDIA, arts. 14–15 (June 5, 1984) [hereinafter Trial Regulations], <http://chinacopyright-andmedia.wordpress.com/1984/06/05/trial-regulations-on-copyright-protection-of-books-and-periodicals/> (last updated June 15, 2010).

240. Copying for personal study and limited quotation for commentary. Trial Regulations, *supra* note 239, arts. 15(1)–(2).

dia, teaching and research within official work units,<sup>241</sup> archiving by libraries, and duplication in the service of propaganda.<sup>242</sup>

China's decade-long dialogue on copyright finally culminated in the PRC's first official Copyright Law in 1990.<sup>243</sup> The statute implemented the position that emerged during the 1980s, namely that copyright served primarily as a tool to further government regulation of public expression.<sup>244</sup> For instance, Article 1 of the Copyright Law explicitly stated that the ultimate goal of the statute was "the construction of socialist spiritual and material civilization . . ."<sup>245</sup> Article 4, meanwhile, explicitly denied copyright protection of prohibited works and forbade copyright holders from exercising their rights inconsistent with the Constitution, laws, or public interest.<sup>246</sup>

The statute also contained an expansive fair use provision and a statutory license regime as safeguards ensuring contin-

241. A work unit (*danwei*) is a government-controlled work unit that provides individuals employment and welfare benefits. Today, the term is generally used in the context of state-owned enterprises. See Xiao Geng, *Reforming the Governance Structure of China's State-Owned Enterprises*, 18 PUB. ADMIN. & DEV. 273, 274–75 (1998).

242. Trial Regulations, *supra* note 239, arts. 15(3)–(8); McIntyre, *supra* note 212, at 100.

243. PRC Copyright Law, *supra* note 75.

244. The statute's substance reflected foreign influence as well. See MERTHA, *supra* note 226, at 118–19 ("China's first copyright law was shaped by foreign pressure, with the result that foreigners enjoyed greater legal protection under China's Copyright Law than China's own citizens").

245. PRC Copyright Law, *supra* note 75, art. 1 ("This Law is enacted, in accordance with the Constitution, for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and the rights copyright-related rights and interests, of encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and of promoting the development and prosperity of the socialist culture and science.").

246. *Id.* art. 4 ("Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests. The State shall supervise and manage the publication or distribution of works, in accordance with the law.") (originally promulgated in 1990 and reaffirmed in 2001). This clashed with the principle that copyright automatically vests in all works at the moment of creation as required by international treaties. See Berne Convention for the Protection of Literary and Artistic Works, art. 5(2), Sept. 9, 1886, *revised* July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 ("The enjoyment and the exercise of these rights shall not be subject to any formality . . .").

ued government control over copyrighted content. Taken together, these effectively instituted sweeping limitations on authors' rights and ensured broad latitude for state-owned enterprises, especially in the media sector, to gain free access to copyrighted works. Specifically, Article 22 enumerated twelve specific fair use exceptions,<sup>247</sup> which largely mirrored the exceptions listed in the Trial Regulations.<sup>248</sup> In the same vein, the statute's licensing regime permitted media outlet reproduction, performance, recording, and broadcasting of copyrighted works without permission as long as they paid remuneration.<sup>249</sup>

China has produced many iterations to its Copyright Law in the past two decades, most markedly in response to criticisms that the regime does not provide adequate protection for copyright holders. However, China has ensured that the changes are merely superficial and that the copyright regime as a whole remains faithful to the core idea that copyright exists primarily as a mechanism for servicing the government's censorship policies.<sup>250</sup>

This is illustrated in the way China responded to criticisms against Article 4 and the provisions on fair use and statutory licensing. Following the WTO Dispute Resolution Panel's (Panel) holding in the U.S.–China WTO dispute in 2007, international pressures compelled to China to amend Article 4 of its Copyright Law.<sup>251</sup> In that dispute, the Panel found Article 4's denial of copyright for "prohibited" works inconsistent

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247. PRC Copyright Law, *supra* note 75, art. 22. The excepted uses included reprinting published articles for reporting current events; printing public speeches in newspapers or periodicals; rebroadcasting by radio stations or television stations; and copying by state organs for the purpose of fulfilling official duties. *Id.* arts. 22(3), (5), (7).

248. See FENG, *supra* note 221, at 127 (observing that Article 22 largely mirrors the fair use exceptions stipulated in the Trial Regulations, although it narrows them somewhat). For details on the Trial Regulations, see *supra* note 239 and accompanying text.

249. PRC Copyright Law, *supra* note 75, arts. 32, 35, 37, 40.

250. See McIntyre, *supra* note 212, at 103–104 ("Although the Copyright Law has since been amended and supplemented with regulations, guidelines, and official interpretations, [PRC's first copyright law] remains the backbone of China's copyright regime . . . . [I]nterpretation and substance have evolved over the past two decades, and yet the PRC continues to view copyright as a means of regulating public expression.").

251. See *China – Intellectual Property Rights*, *supra* note 5.

with international standards.<sup>252</sup> However, since the holding concerned only the first of the two clauses that comprised Article 4<sup>253</sup> and the second clause was essentially redundant of the first clause,<sup>254</sup> China simply removed the first clause of Article 4 and claimed compliance with the Panel's holding without compromising Article 4's essential effect.<sup>255</sup>

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252. *Id.* ¶¶ 7.139, 7.181 (holding that Article 4's copyright denial violates both the Berne Convention—article 17—and the TRIPs Agreement); *see also id.* ¶ 7.126—7.127 (explaining that while some censorship is appropriate “for reasons of public order,” the Berne Convention does not permit “the denial of all copyright protection in any work”); *see infra* note 246 and accompanying text.

253. The second clause of Article 4, which the Panel's holding left untouched, stipulated that authors are prohibited from exercising their copyrights in a manner that violates the Constitution or laws or prejudices the public interest. *See* 253. Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Congress, Sept. 7, 1990, effective June 1, 1991), art. 4, 1990 SUP. PEOPLE'S CT. GAZ., Dec. 20, 1990 (China) [hereinafter 1990 PRC Copyright Law]; *supra* note 246 and accompanying text; *see also China – Intellectual Property Rights*, *supra* note 5, ¶ 7.130 (stating that the latter clause of Article 4 “does not deny copyright protection but, as China acknowledges, obliges copyright owners and authorized parties to respect the law in the exercise of their rights”).

254. *See* Kai Chen, *Jiedu Xin Zhuzuoquan Fa* (解读新著作权法) [*Interpreting the New Copyright Law*], ZHONGGUO WANG [CHINA NEWS NETWORK] (Mar. 3, 2010), <http://finance.sina.com.cn/roll/20100303/16587493860.shtml>, translated in McIntyre, *supra* note 212, at 107–08 (observing that Article 4's copyright denial was “seemingly superfluous,” since the Article's second clause “also achieves the goal of not protecting those works the publication and dissemination of which is prohibited on account of their illegal content.”); McIntyre, *supra* note 212, at 107 (noting that “[w]hile stopping short of a total denial of copyright, [the second clause of Article 4] precludes authors of pornographic or reactionary works from benefiting from the Copyright Law.”).

255. PRC Copyright Law, *supra* note 75, art. 4. In fact, as a part of the Article 4 amendment, the PRC additionally inserted a clause stipulating that the state retains the right to “supervise and manage the publication or distribution of works, in accordance with the law.” *Id.* art. 4; *see* Song Huixian (宋慧献), *Yiyi yu Quehan: “Zhuzuoquan Fa” Er Xiu zhi Guanjian* (意义与缺憾《著作权法》二修之管见) [*Meanings and Shortcomings: A View of the Second Amendment to the Copyright Law*], 2010 DIANZI ZHISHICHANQUAN [ELECTRONIC INTEL. PROP.], no. 4, at 90, 90–91, translated in McIntyre, *supra* note 212, at 108 (explaining that the 2010 amendment of Article 4 specifically reflected lawmakers' desire to preserve the philosophy which Article 4 originally embodied, namely, “restricting the creation, distribution, and publication of politically or morally flawed opinions and works”).

With respect to the fair use provisions under Article 22 and the statutory licensing regime, many scholars criticized China for its preferential treatment of state-owned enterprises and lack of genuine consideration for author's rights.<sup>256</sup> China finally did revise these provisions in 2001 to join the WTO, which required compliance with the TRIPS Agreement.<sup>257</sup> The revisions, however, were without much practical consequence.<sup>258</sup> For example, with respect to the fair use provision, the new Article 22 simply repeats and provides caveats to the twelve original exceptions. Article 22 still permits media outlets use of copyrighted works in reporting current events, but now specifies that the use must be for "unavoidable reason[s]."<sup>259</sup> Similarly, it permits copying by state organs performing official duties, but now only if the copying is of a "proper scope."<sup>260</sup>

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256. See, e.g., CHENGSI ZHEN & MICHAEL PENDLETON, COPYRIGHT LAW IN CHINA 163 (1991) ("It seems unreasonable to allow all newspapers and journals to reprint published contributions. There is no limit to such reprints and they could extend to the whole article . . . [Additionally, t]he author has lost the right to negotiate a higher royalty. There is also the position of the newspaper or journal which first publishes a work; they will be the victim of this unfair statutory competition"); MERTHA, *supra* note 226, at 125 (observing that the World Intellectual Property Organization criticized the Copyright Law as violating the Berne Convention).

257. Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001), 2001 ST. COUNCIL GAZ., Nov. 30, 2001, at 10 (China) [hereinafter 2001 PRC Copyright Law]. See generally THOMAS, *supra* note 30, at 87 (explaining that in order to comply with the substantial obligations associated with WTO entry, China began overhauling its intellectual property laws beginning in 1999, before the official accession in December 2001).

258. The new provisions did not do much more than pass muster with the TRIPS Agreement. See, e.g., OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2003 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 49 (2003) (stating that despite China's efforts to implement TRIPS obligations into domestic legislation being "largely satisfactory . . . IPR enforcement, however, remains ineffective"); see also FENG, *supra* note 221, at 131-32 (observing so for the statutory licensing regime).

259. 2001 PRC Copyright Law, *supra* note 257, art. 22(3).

260. *Id.* art. 22(7); see McIntyre, *supra* note 212, at 117 (observing that the 2001 amendment at most made Article 22 "modestly less inimical to authors" or otherwise simply just "less accommodating of unauthorized speech," and that it did nothing to make the provision more accommodating to ordinary citizens—as opposed to the state's—interest in accessing copyrighted works).

The 2001 amendments to the statutory licensing provisions were similarly limited, merely making the regime only slightly, but not uniformly,<sup>261</sup> more favorable to authors.<sup>262</sup> For example, the National People's Congress (NPC) clarified that statutory licensing does not extend to the internet.<sup>263</sup> In doing so, the NPC specifically rejected the Supreme People's Court's official interpretation of the copyright law, issued in 2000, which stipulated otherwise.<sup>264</sup>

As this historical survey demonstrates, the state's censorship imperatives dominate China's changing copyright law. The copyright law that finally emerged has only superficially

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261. Notably, the 2001 amendment eliminated copyright holders' option to opt out of licensing to broadcasting organizations. *Compare* 1990 PRC Copyright Law, *supra* note 152, art. 40 (not permitting a radio or television station's broadcast license "where the copyright owner has declared that such exploitation is not permitted") *with* 2001 PRC Copyright Law, *supra* note 257, art. 40 (not allowing a copyright owner to opt out of a radio or television station's broadcast license).

262. For a discussion of the specific amendments made to the statutory licensing scheme, see FENG, *supra* note 221, at 131.

263. *See* McIntyre, *supra* note 212, at 117 (providing the legislative history of National People's Congress). Such a prohibition against Internet-based statutory licensing, including websites, not only heavily limits the flow of information among private parties, but also ensures that the statutory licensing scheme's traditional focus on serving the interests of state-owned media outlets is not compromised. *See id.* at 110 (describing the PRC's efforts to preserve the "long standing socialist practice" embodied in its earlier statutory licensing provisions: efforts which were indicative of the PRC's trepidation about the flow of information among private parties).

264. *See* Zuigao Renmin Fayuan Guanyu Shenli Sheji Jisuanji Wangluo Zhuzuoquan Jiufen Anjian Shiyong Falü Ruogan Wenti de Jieshi (最高人民法院审理涉及计算机网络著作权纠纷案件适用法律若干问题的解释) [Judicial Interpretation by the Supreme People's Court Concerning Some Issues Relating to the Application of Law in Adjudication of Cases of Disputes Over Domain Names on Computer Networks] (promulgated by the Sup. People's Ct., Dec. 19, 2000, effective Dec. 21, 2000), art 3, 2001 SUP. PEOPLE'S CT. GAZ. 26 (China) (stating that the Copyright Law permits websites, which may be privately operated, to republish articles without authors' permission, so long as they have paid remuneration, as newspapers and periodical publishers also can). After the State Council (the highest administrative authority in the PRC) issued new regulations expressly precluding Internet-based statutory licensing in May 2006, the Supreme People's Court repealed Article 3 of its Copyright Law interpretation. *See* Jerry Yulin Zhang, *Supreme People's Court Changes its Position on Copyright Law*, CHINA LAW & PRACTICE (Jan. 31, 2007), <https://www.chinalawandpractice.com/sites/clp/2007/01/31/supreme-peoples-court-changes-its-position-on-copyright-law/>.

evolved over time, and only in ways that do not compromise the law's compatibility with the state's censorship goals.

## 2. *Enforcement*

A comparison of the patterns by which China allocates resources to administrative copyright enforcement and to the censorship regime further illustrates the dominance of censorship goals in China's copyright regime.

### a. *Institutions: Copyright Enforcement versus Censorship Enforcement*

In China, copyright enforcement and censorship enforcement agencies overlap by design, with the former dependent on the latter's resources.<sup>265</sup>

With respect to censorship, China maintains a "vast and complex interconnected system of control."<sup>266</sup> The system is guided by several key national institutions and their local affiliates, and its policies are administered in cooperation with other agencies throughout the government.<sup>267</sup> In March 2018, the government effected a major recalibration of the censorship bodies at the national level with the purpose of strengthening the Communist Party's control over censorship.<sup>268</sup>

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265. See MERTHA, *supra* note 226, at 146 (providing a graphical overview of the relationship of China's various copyright agencies to the censorship authorities); *id.* at 133–34 (explaining that the copyright agencies are "embedded within a [system] that concerns itself with cultural, ideological, and value-laden media"); McIntyre, *supra* note 212, at 124 ("[C]opyright authorities are understaffed, underfunded, and subservient to China's larger censorship bureaucracy. . .").

266. ANNE-MARIE BRADY, *MARKETING DICTATORSHIP: PROPAGANDA AND THOUGHT WORK IN CONTEMPORARY CHINA* 9 (2008).

267. *Id.*

268. Sophie Beach, *Media, Film, Publishing Put Under Direct CCP Control*, CHINA DIGITAL TIMES (Mar. 21, 2018), <https://chinadigitaltimes.net/2018/03/media-film-and-publishing-put-under-direct-control-of-party/>; *China unveils three state administrations on film, press, television*, XINHUA (Apr. 16, 2018), [www.xinhuanet.com/english/2018-04/16/c\\_137115379.htm](http://www.xinhuanet.com/english/2018-04/16/c_137115379.htm) [hereinafter *China unveils three state administrations*] ("[R]estructuring showed the need to strengthen the Party's overall leadership in [film, press, and television], and was good for advancing the ideological governing system and the sector's prosperity") (citing Huang Kunming, a member of the Political Bureau of the Central Committee of the Communist Party of China). See also 中共中央印发《深化党和国家机构改革方案》 [*The Central Committee of the Communist Party of China issued the "Deepening Party and State Institutional Re-*

Prior to March 2018, the key national institutions consisted of the Publicity Department of the Communist Party of China (CCPPD), also called the Propaganda Department, and the State Administration for Press Publishing Radio Film & Television (SAPPRFT), regulatory body which was in charge of administering censorship policies for all media, housed under the State Council.<sup>269</sup>

The restructuring created three separate state administrations – the National Film Bureau (NFB), also called State Film Administration, the National Radio and Television Administration (NRAT), also called State Administration of Radio and Television, and the National Press and Publications Administration (NPPA), also called State Administration of Press and Publication—each specializing in functions previously consolidated under the SAPPRFT.<sup>270</sup> The government further moved two of these new administrations to the CCPPD: while the radio and television administration (NRAT) remains under the State Council, the film and press administrations (NFB and NPPA) are now under the CCPPD.<sup>271</sup>

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*form Plan*”], XINHUA (Mar. 21, 2018), [www.xinhuanet.com/politics/2018-03/21/c\\_1122570517.htm](http://www.xinhuanet.com/politics/2018-03/21/c_1122570517.htm) (full text of the official notice issued by the Central Committee of the Communist Party of China directing implementation of the reform). The restructuring of the national censorship bodies is in turn part of a larger effort by the Communist Party to reassert its control over China and the government. At the National People’s Congress in March 2018, where the restructuring was announced, the Chinese leader Xi Jinping also successfully abolished term limits for the presidency of China. Patrick Brzeski, *China to Abolish SAPPRFT, Bring Media Under Closer Government Control* (Mar. 13, 2018), <https://www.hollywoodreporter.com/news/china-abolish-sapprft-bring-media-under-closer-government-control-1094127>.

269. The State Administration for Press Publishing Radio Film & Television (SAPPRFT) was disbanded in March 2018, contemporaneously with the announcement of the restructuring. Pang-Chieh Ho, *Goodbye, SAPPRFT (But Not Chinese Censorship)*, SUPCHINA (Mar. 21, 2018), <https://supchina.com/2018/03/21/goodbye-sapprft-but-not-chinese-censorship/>. For further details on the SAPPRFT, see *infra* note 275.

270. *China unveils three state administrations*, *supra* note 268.

271. *Id.* The reorganization in effect formalizes the pre-existing state of affairs by which the Publicity Department of the Communist Party of China (CCPPD) worked closely with the SAPPRFT to administer censorship policies and campaigns over all types of media. See Zi Yang, *China’s state media is going global*, EAST ASIA FORUM (May 13, 2018), <http://www.eastasiaforum.org/2018/05/13/chinas-state-media-is-going-global/> (“Previously hidden behind state institutions, the [CCPPD] now publicly declares its control over all Chinese press and publications.”).

Censorship enforcement efforts typically take the form of “campaigns,” which constitute sporadic, ad-hoc, and harsh crackdowns on expressions targeted by the government.<sup>272</sup> The most public and longest running of such campaigns is the “clean up pornography and destroy illegal publications” or *Saohuang Dafei* campaign (*SHDF*).<sup>273</sup> Aiming to “sweep away pornography” (*saohuang*) and to “strike out against illegal publications” (*dafei*),<sup>274</sup> the National *SHDF* Working Group (*SHDF* Working Group), a government unit currently housed at the NPPA under the CCPPD, leads the *SHDF* campaigns.<sup>275</sup> The *SHDF* Working Group brings together representatives from twenty-eight national departments, including other censorship

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272. See McIntyre, *supra* note 212, at 124–26.

273. The *SHDF* campaign was launched under the leadership of propaganda czar Li Ruihuan in the aftermath of the Tiananmen Square protests of 1989. See *id.* at 126. The *SHDF* campaign institutionalizes the pre-Tiananmen censorship practices, particularly the infamous 1983 *Yan Da* (Strike Hard) campaign and the Striking Hard Against Illegal Publishing Activities campaign that was introduced in 1987. Thus, it has a clear censorship character. See Tianxiang He, *Control or Promote?: China’s Cultural Censorship System and Its Influence on Copyright Protection*, 7 *QUEEN MARY J. INTELL. PROP.* 74, 92–93 (2017). The campaign has been carried out on roughly an annual basis ever since. *Id.* at 93.

274. See He, *supra* note 273, at 93.

275. ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 142 (2018). Prior to the March 2018 restructuring, the *SHDF* Working Group was housed at the SAPPRT, predecessor organization to the National Press and Publication Administration (NPPA). MERTHA, *supra* note 226, at 142 (describing the National *SHDF* Working Group housed at the SAPPRT). The SAPPRT itself had been formed in March 2013, following the merger of two government regulatory watchdogs—the State Administration of Radio, Film, and Television (SARFT) and the General Administration of Press and Publication (GAPP). Rogier Creemers, *SARFT and GAPP to Merge*, *CHINA COPYRIGHT & MEDIA* (Mar. 10, 2013), <https://chinacopyrightandmedia.wordpress.com/2013/03/10/sarft-and-gapp-to-merge/>; 马凯: 组建国家新闻出版广播电影电视总局 [*Ma Kai: Forming the National Press, Publication, Radio, Film and Television Administration*], *PEOPLE’S NETWORK* (Mar. 10, 2013), [finance.people.com.cn/n/2013/0310/c1004-20738004.html](http://finance.people.com.cn/n/2013/0310/c1004-20738004.html) (full text of official statement of merger). Prior to the establishment of the SAPPRT, the *SHDF* Working Group was housed in the GAPP. See DIMITROV, *supra* note 157, at 229 (describing the National *SHDF* Working Group housed at the GAPP); *PRC State Council Websites Overseeing Media*, *OCS MEDIA AID* (Mar. 17, 2009), <https://fas.org/irp/dni/osc/prc-media-state.html> (describing how the GAPP coordinates the *SHDF* campaigns).

authorities such as the Ministry of Culture and the Ministry of Public Security.<sup>276</sup>

The copyright enforcement authority in China vests in the discrete national and local government agencies designated by the Copyright Law.<sup>277</sup> These underfunded and understaffed agencies, however, lack independent resources.<sup>278</sup> In practice, the copyright enforcement agencies instead rely on the enforcement resources of the censorship authorities. Significantly, the NCAC, the most important copyright entity in China,<sup>279</sup> rely on the enforcement resources of the national censorship agencies. In fact, as a part of the March 2018 restructuring, the government folded the NCAC into the NPPA.<sup>280</sup> Thus not only is the NCAC under the direct control

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276. See He, *supra* note 273, at 93. The SHDF Working Group includes the CCPD, incorporating twenty-eight member units, such as the Committee of Political and Legislative Affairs, State Commission Office of Public Sectors Reform, International Communication Office of the CPC Central Committee, General Office of the State Council, Supreme People's Court of China, Supreme People's Procuratorate of China, Ministry of Education, Ministry of Industry and Information Technology, Ministry of Public Security, Ministry of State Security, and Ministry of Transport. *Id.* at 93 n.175.

277. See *supra* Section V.B (Administrative Enforcement: China).

278. See McIntyre, *supra* note 212, at 124.

279. The National Copyright Administration of China is empowered to interpret the Copyright Law, handle copyright disputes, investigate cases of infringement, and even provide remedies and sanctions in copyright. Shuk Ki Ella Cheong, *Copyright Law and Regulation in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 47, 50, 52 (Mark A. Cohen et al. eds., 1999).

280. Thus the NCAC and the National Press and Publications Administration (NPPA) (also called State Administration of Press and Publication) are now one and the same – it is one agency with two different titles. See *China unveils three state administrations on film, press, television*, *supra* note 268 (“State Administration of Press and Publication . . . doubles as the National Copyright Administration”); Timothy P. Stratford et al., *More Officials Appointed to Lead Film and Media Authorities in China*, COVINGTON & BURLING LLP 2 (July 30, 2018), [https://www.cov.com/-/media/files/corporate/publications/2018/07/more\\_officials\\_appointed\\_to\\_lead\\_film\\_and\\_media\\_authorities\\_in\\_china.pdf](https://www.cov.com/-/media/files/corporate/publications/2018/07/more_officials_appointed_to_lead_film_and_media_authorities_in_china.pdf) (“[NPPA] also takes the title National Copyright Administration of China (NCAC)”); Yang, *supra* note 271 (observing that the CCPD uses the names SAPP or NCAC “[a]s a part of its deceptive tactics . . . when communicating with foreign counterparts”). Prior to the restructuring of March 2018, the NCAC formally existed as an entity separate from the censorship bodies. Nevertheless, even then, the NCAC effectively operated under the SAPPFT. See *2018 Two Sessions: The Future of China*, BRUNSWICK GROUP 9 (Mar. 2018), <https://www.brunswickgroup.com/media/4124/brunswick->

of the Propaganda Department (CCPPD) now, but its functions have become indistinguishable from those of the NPPA.

Meanwhile the aforementioned *SHDF* Working Group, housed in the NPPA, provides an important forum where copyright enforcement and censorship enforcement authorities can cooperate. Historically, NCAC directors have held positions of authority within the *SHDF* Working Group, working directly with directors of censorship agencies, including the CCPPD and the Ministry of Culture.<sup>281</sup>

Statements issued by directors of the NCAC and censorship agencies further illustrate the conflation of copyright and censorship enforcements in China. Yu Youxian, who served as both NCAC director and vice-director of the *SHDF* Working Group on different occasions, expressed that the *SHDF* “cleaned up the market and advanced intellectual property protection, creating very favorable conditions for audio-visual publishing.”<sup>282</sup> He also stated that the scope of the *SHDF* is extremely broad, and includes “acts of criminal copyright infringement in particular.”<sup>283</sup> Similarly, Yunshan Liu, the for-

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china-analysis-npc-2018-2018-03-22.pdf (“SAPPRFT . . . [was] responsible for managing the National Copyright Administration”); MERTHA, *supra* note 226, at 140 (observing that the NCAC and the GAPP, which later became the SAPPRFT, relied on the same enforcement personnel and that the personnel reported directly to the GAPP, but not to the copyright agencies); McIntyre, *supra* note 212, at 125 (explaining that the NCAC was accountable to the GAPP).

281. Post-restructuring, this distinction between the directors of NCAC and the censorship agencies is no longer meaningful. Zhuang Rongwen, who was appointed as the new head of the NPPA on May 24, 2018, is also the head of the NCAC, which now is effectively one and the same body as NPPA. Zhuang concurrently holds the Deputy Minister position in the CCPPD. Stratford et al., *supra* note 280.

282. Guanyu Yinfa Yu Youxian Tongzhi “Renzhen Guanche Zhongyang Jingshen, Duo Chu Youxiu Yinxiang Zhipin” Jianghua de Tongzhi (关于印发于友先同志《认真贯彻中央精神，多出优秀音像制品》讲话的通知) [Notice on the Distribution of Comrade Yu Youxian’s Speech on “Earnestly Implementing the Spirit of the Party Central Committee and Producing More Excellent Audiovisual Works”], RENMIN RIBAO [PEOPLE’S DAILY] (Jul. 23, 1997), <http://www.people.com.cn/electric/flfg/d2/970723.html>, translated in McIntyre, *supra* note 212, at 128 n.358.

283. Youxian Yu, *Jiaqiang Guanli Yifa Xingzheng Quanli Tuidong Fan Daoban Lianmeng Gongzuo Jiakuai Jianli You Zhongguo Tese de Zhuzuoquan Baohu Zhidu* (加强管理依法行政权力推动反盗版联盟工作加快建立有中国特色的著作权保护制度) [Strengthen Oversight; Administer According to the Law; Forcefully Advance the Anti-Piracy League’s Work; Quickly Establish a Copyright System with Chinese

mer Minister of the CCPPD, expressly identified “fighting piracy” as one of the priority works of the *SHDF* Working Group, alongside cracking down on illegal publications and tackling pornographic content.<sup>284</sup>

b. *Intertwining Enforcement Efforts*

In practice, much of China’s purported anti-piracy actions double as raids against pornographic, seditious, and otherwise prohibited literature. The nationwide anti-piracy campaign administered in 2009 is illustrative. Chinese officials and media proclaim that this campaign, through which authorities confiscated or shut down an exceptional number of newspapers, magazines, and other publications within a two month period,<sup>285</sup> provides evidence of China’s commitment to waging a “war of annihilation” against piracy.<sup>286</sup>

Despite such assertions, the campaign carried with it a palpable overtone of censorship. For one, the *SHDF* Working Group directed the campaign specifically in preparation for the 60th anniversary of the founding of the PRC, October 1, 2009.<sup>287</sup> Jiang Jianguo, the former deputy director of the

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*Characteristics*], 2010 ZHONGGUO CHU BAN [CHINA PUBLISHING J.], no. 4, at 5, 8, translated in McIntyre, *supra* note 212, at 128. This statement was made in 2000, when national-level *SHDF* authorities orchestrated another major crackdown.

284. In the 23rd National *Saohuang Dafei* Work Conference by Videophone in 2010. See He, *supra* note 273, at 93–94.

285. Millions of publications and hundreds of illegal newspapers and magazines between early August and October 1. See “*Saohuang Dafei*” *Di San Jieduan Guanbi Yinshua Qiye 182 Jia* [Third Phase of *SHDF* Closes 182 Printing Houses], RENMIN RIBAO [PEOPLE’S DAILY] (Sept. 14, 2009), <http://culture.people.com.cn/GB/87423/10048107.html> (reporting the seizure of 4.35 million “illegal” publications of which 3.52 million were allegedly “pirated”).

286. See, e.g., Mingfang Lai, *Chuban Zongshu Jiang Jianguo: Guangfan Fadong Qunzhong Yanli Daji Qinquan Daoban* (出版总署将建国：广泛发动群众严厉打击侵权盗版) [*Jiang Jianguo of the GAPP: Mobilize the Masses to Severely Fight Piracy*], RENMIN RIBAO [PEOPLE’S DAILY] (Aug. 10, 2009), <http://media.people.com.cn/GB/9818142.html>.

287. The National Day of the PRC (October 1) is a major political event in China providing an occasion for the government to affirm its authority and legitimacy. Through various publications and events that highlight the PRC’s achievements and goals, the PRC seeks to educate and unite the Chinese people. Other politically sensitive anniversaries include the anniversary of Tiananmen Square crackdown and anniversary of the Tibetan protests. See CHANG-TAI HUNG, MAO’S NEW WORLD: POLITICAL CULTURE IN THE EARLY PEO-

GAPP—the censorship authority now reconfigured as the NPPA—announced the start of the campaign. The campaign contained rhetoric typical of China’s censorship movements, particularly those preceding an important Party event. For instance, the announcement stressed the importance of “creat[ing] a good cultural environment and atmosphere of public opinion in which to celebrate” the PRC’s founding.<sup>288</sup> Furthermore, the *SHDF* enforcement authorities received a specific content-based criteria for their confiscation efforts.<sup>289</sup> Correspondingly, works that were ultimately confiscated consisted not of an indiscriminating pool of infringing works, but rather a pool of particular types of infringing works and “otherwise illegal media.”<sup>290</sup>

The annual “Eliminate Pornography and Illegal Publications—Cleanse the Internet” campaigns (Cleanse the Internet

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PLE’S REPUBLIC 93–94 (2011) (noting particularly the political significance of the state parades on these occasions). Censorship tends to increase before these major political events. See *China*, OPENNET INITIATIVE (Aug. 9, 2012), <http://access.opennet.net/wp-content/uploads/2011/12/accesscontested-china.pdf>; see also Liu, *supra* note 14, at 31 (pointing out that anti-piracy is not the priority of either the regular work of the *SHDF* Working Group or the anti-piracy crackdowns in which it has collaborated with the NCAC).

288. Mingfang Lai, *Woguo Qidong Jinnian “Saohuang Dafei” Di San Jieduan Jizhong Xingdong* (我国启动今年“扫黄打非”第三阶段集中行动) [*China Launches the Third Focused Phase of This Year’s Saohuang Dafei Campaign*], ZHONGGUO SAOHUANG DAFEI WANG [CHINA SAOHUANG DAFEI NET] (Aug. 27, 2009), translated in McIntyre, *supra* note 212, at 130 (citing an announcement made by Jiang Jianguo at a National *SHDF* Working Group meeting in early August of 2009).

289. See, e.g., Liming Fang, *Dazao Weichengnian Ren Jiankang Chengzhang de Shehui Wenhua Huanjing* (打造未成年人健康成长的社会文化环境) [*Creating a Social and Cultural Environment for the Healthy Growth of Young People*], RENMIN RIBAO [PEOPLE’S DAILY] (Sept. 14, 2009), <http://theory.people.com.cn/GB/10045625.html>, translated in McIntyre, *supra* note 212, at 131 (pornographic, violent, and otherwise “unhealthy” media); *Wenhua Bu Bushu Wenhua Shichang Jizhong Zhengzhi Xingdong* (文化部部署文化市场集中整治行动) [*Ministry of Culture Deploys Focused Campaign to Repair the Cultural Market*], RENMIN RIBAO [PEOPLE’S DAILY] (July 5, 2009), <http://news.66wz.com/system/2009/07/05/101306783.shtml>, translated in McIntyre, *supra* note 212, at 130 (reporting that earlier in the year, the Ministry of Culture had indicated that pre-October first *SHDF* activities would target goods “containing prohibited content”).

290. See Lai, *supra* note 288 (explaining that the *SHDF* campaign did not merely target infringing goods but to “comprehensively clean up the publications market through the large-scale collection and suppression of pirated and [otherwise] illegal” media).

Campaigns), another of the PRC's purported efforts for addressing piracy, also exhibit strong censorship overtones.<sup>291</sup> The SHDF Working Group and its enforcement personnel also lead these campaigns. The Group also administers the campaigns in ways that are much in line with promoting a key censorship goal: reducing public viewership of foreign content online. Markedly, the Cleanse the Internet Campaign crackdowns often occur shortly before or after the SHDF Working Group's other censorship actions,<sup>292</sup> and have resulted in the removal of many foreign films and TV shows that were in fact properly licensed, and thus were non-infringing content.<sup>293</sup>

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291. These Campaigns too have led to extensive confiscation and closure of infringing materials and websites. During the 2014 Cleanse the Internet Campaign, for instance, it is reported that government agencies confiscated some twelve million illegal copies of all kinds of cultural goods and shut down more than 750 infringing websites. See Nat'l "Saohuang Dafei" Working Grp. Office, *Quanguo Jizhong Xiaohui 1644 Wan Jian Qinquan Daoban ji Feifa Chubanyu* (全国集中销毁1644万件侵权盗版及非法出版物) [16.44 Million Copies of Infringing and Illegal Publications Nationwide Destroyed], ZHONGGUO SAOHUANG DAFEI WANG [CHINA SAOHUANG DAFEI NET] (Apr. 20, 2015), <http://www.shdf.gov.cn/shdf/contents/767/249181.html>. Shooter.cn and YYeTs.com, highly popular platforms providing crowd-sourced Chinese subtitles for American TV shows, were shut down during this period. As *China Cracks Down on Illegal Videos, Lovers of Foreign TV Mourn*, WALL ST. J. (Nov. 25, 2014), <https://blogs.wsj.com/chinarealtime/2014/11/25/as-china-cracks-down-on-illegal-videos-foreign-tv-lovers-mourn/>.

292. For instance, the SAPPRFT's take-down orders against YYeTs.com and Shooter.cn—both foreign-content-heavy file-sharing websites—for reasons of combating piracy were issued just three weeks after its announcement of a new set of censorship rules for the Internet, limiting foreign content online to 30% of domestically produced shows from the previous year and requiring all foreign shows streamed online to receive pre-approval by Chinese censors. See Matt Sheehan, *Hollywood, Chinese Censors Win in TV Anti-Piracy Campaign*, HUFFPOST (Dec. 1, 2014), [https://www.huffingtonpost.com/2014/12/01/hollywood-china-anti-piracy\\_n\\_6230074.html](https://www.huffingtonpost.com/2014/12/01/hollywood-china-anti-piracy_n_6230074.html) (noting that “[t]he crackdown on piracy . . . is largely motivated by, efforts to push super popular foreign TV shows into the Chinese pre-approval and censorship regime”).

293. For instance, in April 2014, four popular United States TV shows, including *The Big Bang Theory*, were abruptly removed from their official online streaming sites. *Id.*; see also Qin Qian, *Streaming Website Bilibili Breaks Silence Over Why It Took Films Offline*, CHINA FILM INSIDER (July 13, 2017), <http://chinafilmsinsider.com/streaming-website-bilibili-announces-that-it-took-films-offline-for-review/> (“Many commenters argued that it was probably just out of copyright concerns. However, in 2014, the government did something similar to big Chinese video streaming sites, including Sohu, iQIYI and Tencent, when it ordered these websites to take down many popular Ameri-

Thus, both the copyright administration's institutional connection to the censorship authorities and the pattern of the government's actual deployment of copyright resources in light of its censorship campaigns further illuminate the censorship priorities that drive the government's approach to copyright law.

### 3. Summary – China

In China, copyright law is primarily a vehicle for advancing the goals of the state's censorship regime. Such an understanding and approach to copyright law in China may explain why the country maintains a weak record in terms of criminal copyright enforcement. The classic rationales for criminalization and punishment relating to concepts of morality and economic harm do not have much force in the context of China's approach to copyright. China's ultimate concern with copyright law centers on the law's contribution to making *censorship* more efficient and large-scale, or perhaps more socially palatable, especially in light of the mounting criticisms against the country's censorship regime. In China, copyright law is therefore not necessarily about the moral wrongness or the economic harm caused by acts of copyright infringement.

Also, in light of its political purposes, copyright law is most valuable to China when it can be handled flexibly and conveniently by the censorship authorities. The fact that China has achieved this by setting up an interconnected administrative structure of the copyright and censorship agen-

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can TV shows, all of which had proper copyrights.”). Similarly, the Japanese TV drama *The Solitary Gourmet*, which was banished from Bilibili in July 2017, was content properly licensed by Bilibili. Laura He, *China's Ban on Foreign Content on Bilibili, AcFun Is Not About Piracy*, S. CHINA MORNING POST (July 17, 2017), <http://www.scmp.com/business/companies/article/2102948/chinas-ban-foreign-content-bilibili-acfun-not-about-piracy>. While much inquiries and complaints have been filed against the SAPPRFT regarding its take down decisions, the agency has refused to give a clear answer to this day. *Guangdian Zongju Renshi Huiying Meiju Xiajia: Bu Shi Suoyou Xinxi Ke Gongkai* (广电总局人士回应美剧下架：不是所有信息可公开) [*SAPPRFT Refused to Comment on the Take Down of the United States Shows, Claimed that Not All Information Could Go Public*], RENMIN RIBAO [PEOPLE'S DAILY] (May 13, 2014), <http://media.people.com.cn/n/2014/0513/c14677-25010185.html>; He, *supra* note 273, at 88 (“The reason why the government has chosen to pull popular United States television shows such as *The Big Bang Theory* from its official online streaming provider remains unknown . . .”).

cies—that is, without relying on the Procuratorate authorities—further explains China’s weak criminal copyright enforcement records.

### C. *Korea’s Approach to Copyright Law*

While the development of China’s relationship with copyright evolved around China’s censorship regime, Korea’s relationship with copyright evolved around the state’s economic policies. Korea, much like China, had a sparse history with respect to copyright. In the five centuries of the Joseon dynasty, ending in the early 1900s, the Korean government did not provide any formal protection of authors’ works.<sup>294</sup> The Japanese colonists formally introduced the notion of copyright laws during their rule of Korea between 1908 and 1945.<sup>295</sup> Although Korea enacted their preliminary copyright regime in 1957,<sup>296</sup> after it achieved independence from Japan, it did not actually implement or enforce the copyright laws.<sup>297</sup> Korea finally overhauled its copyright law in 1986, primarily due to pressures from the USTR.<sup>298</sup> Although Korea incorporated major changes to its copyright law and complied with contemporary international standards—it became a TRIPS signatory in 1994—it still did not enforce the copyright laws.<sup>299</sup>

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294. See Kyu Ho Youm, *Copyright Law in the Republic of Korea*, 17 PAC. BASIN L.J. 276, 278–81 (1999). The Joseon dynasty began in the closing years of the fourteenth century and lasted until 1910, when Korea became a Japanese protectorate. ANDREW C. NAHM, *KOREA: TRADITION & TRANSFORMATION: A HISTORY OF THE KOREAN PEOPLE* 517, 521 (1988).

295. See Youm, *supra* note 294, at 278–81.

296. Jeojakkwonbeob [Copyright Act], *supra* note 69; see Youm, *supra* note 294, at 281–82. Korea was divided into South Korea and North Korea following the World War II, which ended Japan’s rule over Korea in 1945. The Republic of Korea in South Korea was officially established in 1948 following a UN-supervised election held only for the U.S.-occupied South. “Korea” in this paper refers to South Korea, unless otherwise specified.

297. See Lee, *supra* note 6, at 1119–20 (“Korea did not enforce . . . [the 1957 Copyright Act] to any degree . . . Few authors sought to advance their statutory copyright protections, Korean courts paid little attention to copyright, and the subject was a nonissue for many years.”).

298. See *id.* at 1150–1151.

299. See, e.g., INT’L INTELLECTUAL PROP. ALL., 2001 SPECIAL 301 REPORT 218 (2001) (reporting that Korean law enforcement, prosecutors, and courts “often fail to take book piracy seriously as a commercial crime” and that neither the Ministry of Education, which oversees the nation’s universities,

This changed in the late 1990s in the midst of a turbulent time for the Korean economy. After a decade of rapid growth, the Korean economy plummeted during the 1996–1997 financial crisis. The manufacturing sector, the central pillar of the Korean economy, lost competitiveness as factories increasingly relocated to countries such as China, Vietnam, and Indonesia.<sup>300</sup> There was widespread urgency among Korean policymakers and the incoming ruling party to formulate a new policy direction for rejuvenating the economy.<sup>301</sup>

Among the numerous governmental initiatives pursued<sup>302</sup> was an initiative for expanding the country's cultural-content industry, which engaged in the production and distribution of on- and off-line media content.<sup>303</sup> Unlike other industries, Korea's cultural-content industry was growing at a remarkable rate, particularly with the rising global popularity of the Korean wave, Hallyu.<sup>304</sup> Thus, in what represented a radical

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nor the individual universities have done enough to discourage book piracy).

300. KOREA COPYRIGHT COMM'N, 178 JEJAKKWON MUNHWA [178 COPYRIGHT CULTURE] 4–5 (2009).

301. See Koo, *supra* note 56.

302. Most Korean government policies in general were subjected to neoliberal reforms in the wake of the 1996–1997 financial crisis. See generally Christopher M. Dent, *Transnational Capital, the State and Foreign Economic Policy: Singapore, Korea and Taiwan*, 10 REV. INT'L POL. ECON. 246, 246–77 (2003).

303. Munhwa sanbeop jinheung kibonbeob [Framework Act on the Promotion of Cultural Industries], Act No. 5927, Feb. 8, 1999, *amended by* Act No. 11845, May 28, 2013 (S. Kor.). “Cultural contents industry” is generally used in Korea as an umbrella term to refer to the overall contents industry and is also referred to as the “cultural industry,” “contents industry,” or media and entertainment industry. INVEST KOREA, INVESTMENT OPPORTUNITIES IN KOREA: CULTURAL CONTENTS 5, (Mar. 2015), [http://125.131.31.47/Solars7DMME/004/15Investment\\_Opportunities\\_in\\_Korea\\_Cultural\\_Content\\_March\\_2015.pdf](http://125.131.31.47/Solars7DMME/004/15Investment_Opportunities_in_Korea_Cultural_Content_March_2015.pdf).

304. By 2009, Hallyu exports had grown to total 2,155.8 billion won. The figure is particularly significant given that in the corresponding figure for mobile phones, Korea's key export, was 2.8 trillion won in the same period. KOREA COPYRIGHT COMM'N, *supra* note 300, at 4–5; see also Jiwon Sin, *Gugnae contents saneop seongjang jisok, choechoo suchulaek 60-eok dollars dolpa* [Continued Growth in the Cultural Contents Industry; Export Proceeds Exceeds KRW 6 Billion For the First Time], MINISTRY OF CULTURE, SPORTS AND TOURISM (June 1, 2018), [http://m.mcst.go.kr/m/s\\_notice/notice/noticeView.jsp?pTp=PpTpCD=0302000000&pSeq=16720](http://m.mcst.go.kr/m/s_notice/notice/noticeView.jsp?pTp=PpTpCD=0302000000&pSeq=16720) (reporting that Korea's cultural content industry's exports have grown by 6.8% on average between 2012 and 2016).

break from past policies, which only treated culture and art as subjects of control and censorship rather than growth and commerce,<sup>305</sup> the Korean government designated “the promotion of the cultural-content industry” as a national policy objective and began providing full support accordingly.<sup>306</sup>

The government expressed its commitment to the promotion of Korea’s cultural-content industry in many ways, starting in the Kim Dae-Jung administration (1998–2003). In his presidential inauguration speech, Kim Dae-Jung explicitly referred to the cultural-content industry as “one of the core industries of the twenty-first century.”<sup>307</sup> Thereafter, his administration produced numerous policy directives,<sup>308</sup> reorganized the MCST,<sup>309</sup> and spearheaded legislative changes which promoted culture and the arts, as well as the cultural-content industry.<sup>310</sup> Subsequent administrations<sup>311</sup> reinforced the Kim Dae-Jung administration’s policies, promoting the cultural-content industry within the broader theme of building an

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305. See Kyuchan Kim, *Hanguk munhuakhonthencheuskneob jinheungjeongchaegui naeyonggwa seonggwa* [*The Characteristics and Achievements of Korean Government’s Content Industry Policy*], 50 EONNONJEONGBO YEONGU [COMM. RES.] 276, 277–78 (2013).

306. *Id.* (translation by the author).

307. Kim Dae-Jung, Pres. of S. Korea, Inaugural Address (Feb. 25, 1998) (translation by the author).

308. Examples include the New Cultural Policy (Oct. 1998), the Promotion of Cultural Contents Industry 5 Year Plan (1999), the Vision for Cultural Contents Industry 21 (2000), and the Vision for Korea’s Contents 21 (2001). Haksoon Lim, *Munhwasaeob yeongyeokkwa yesulyeongyeoge tae han jeong chaek mokpyodeul yangripkaneungseong yeongu* [*Study on Compatibility of Policy Goals in the Cultural Contents Industry and the Artistic Industry*], 13 MUNHWA JEONGCHAEK NONCHONG [J. CULTURAL POL’Y] 279, 284 (2001).

309. The MCST was reorganized under the explicit mandate of promoting and maximizing the economic value of the cultural contents industry; previously, the MCST’s functions were confined to establishing cultural infrastructure, censorship, and standardization of national sentiment through broadcasting and media. Kim, *supra* note 305, at 278.

310. See, e.g., *Munhwa sanbeop jinheung kibonbeob* [Framework Act on the Promotion of Cultural Industries], Act No. 5927, Feb. 8, 1999, *amended by* Act No. 11845, May 28, 2013 (S. Kor.); *Munhwa yaesul jinheungbeob* [Culture and Arts Promotion Act] Act No. 15638, June 12, 2018 (S. Kor.).

311. Roh Moo-Hyun (2003–2008), Lee Myung-Bak (2008–2013), and Park Geun-Hye (2013–2017).

economy founded on creative industries where culture, business, and technology converge.<sup>312</sup>

In this context, strengthening domestic copyright law emerged as a key objective for the Korean government. Given that it was the new forms of media that is conducive to online distribution—films, TV shows, music, etc.—that was fueling the Korean cultural-content industry, it was essential for the government to stem online piracy activities arising both domestically and abroad. Domestically, piracy rates reached unprecedented heights, resulting in substantial losses to the industry.<sup>313</sup> The high piracy rates resulted from a confluence of factors, including the almost ubiquitous availability of internet within Korea,<sup>314</sup> the rise of new digital technologies such as peer-to-peer and web-disc services, and the public's unfamiliarity with the notion of copyright. Consequently, the government saw the need for a strong interventionist approach.<sup>315</sup>

A stronger domestic copyright regime was also necessary for reduction of the piracy of Korean contents overseas. The illegal streaming of Korean contents—particularly films, dramas, and music records—was prevalent in China and many Southeast Asian countries. This threatened the profitability of Korea's contents export.<sup>316</sup> By first providing adequate protec-

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312. Audrey Yue & Sun Jung, *Urban Screens and Transcultural Consumption Between South Korea and Australia*, in GLOBAL MEDIA CONVERGENCE AND CULTURAL TRANSFORMATION: EMERGING SOCIAL PATTERNS AND CHARACTERISTICS 15, 20 (Dal Yong Jin ed., 2010); see also Kim, *supra* note 305, at 278 (noting the dramatic and consistent increase in government budget allotted to the cultural-content industry since the Kim Dae-Jung administration). For President Moon Jae In (2017–Present)'s continued focus on promoting the cultural-content industry, see SPECIAL ADVISORY COMM. TO PRESIDENT MOON, MOON JAE IN JEONGBOO GOOKJUNG WOONYOUNG 5 GAENYUNG GAEHUEK [MOON JAE IN ADMINISTRATION FIVE-YEAR PLAN] 102 (2017).

313. See Yee-Fui Ng, *Global Soul, Local Seoul: The Ebb and Flow of Forces in Global Copyright*, 12 MEDIA & ARTS L.R. 477, 477, 483 (2007) ("Korea was ranked the country with the 15th largest piracy loses in the world in 2005."); Byungjun Kang et al., *Lee Myungbak jeongbu 5-dae eoenda (4) jeojakkwon gang-gugeul mandeulja* [Top 5 on the Lee Myungbak Government's Agenda (4) Building a Copyright Powerhouse], ETNEWS (Feb. 28, 2008), <http://www.etnews.com/200802270064>.

314. Over 95% of the Korean population has access to the internet. See Lee, *supra* note 204, at 379.

315. See generally KOREA COPYRIGHT COMM'N, *supra* note 300.

316. *Id.* at 4–5; MINISTRY OF CULTURE, SPORTS AND TOURISM, JEJAKKWON-SANUP BOHOREUL WIHAN BULBUB-JEJAKMUL GEUNJEOL DAECHAEK [ERADICATING

tion for foreign content within domestic borders, the Korean government planned to lay the grounds for requesting other countries to do the same for Korea's content in the long run.<sup>317</sup>

The government's concerns about the negative effects of online piracy set in motion a radical reshaping of the country's copyright regime. The executive branch clarified and reinforced the copyright-related authority delegated to the MCST.<sup>318</sup> It also issued numerous statements instructing the MCST to devise a comprehensive copyright-related plan for the national economy, develop the copyright regime in greater detail, and administer stricter enforcement.<sup>319</sup>

The MCST, bolstered by the executive branch's support, aggressively pursued various regulatory and legislative initiatives under a new organizational mandate to "exterminate online piracy" and to "expand owner-rights in the cultural-content industry."<sup>320</sup> The MCST's initiatives spanned both the substantive and enforcement aspects of the copyright law, which together over time circumscribed the acceptable parameters of user activity online and OSP freedom.

Major MCST initiatives tackling the substance of copyright included enlarging public transmission rights and OSP duties. In 1999, and again in 2004, the MCST initiated statutory amendments which ultimately granted the right of public transmission not only to content-owners, but also to perform-

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ILLEGAL REPRODUCTION] 6 (2007) [hereinafter MCST 2007 REPORT], [http://www.mcst.go.kr/web/s\\_notice/press/pressView.jsp?pSeq=8842](http://www.mcst.go.kr/web/s_notice/press/pressView.jsp?pSeq=8842).

317. KOREA COPYRIGHT COMM'N, *supra* note 300, at 7; see Ng, *supra* note 313, at 502–03 (describing Korea's transformation from almost entirely an importer of works during the 1970s and 1980s to a net exporter of works thereafter as pivotal to the Korean government's growing tendency to support stronger copyright law).

318. See MCST 2007 REPORT, *supra* note 316, at 6

319. *Id.*; Seung-Ho Kwon & Joseph Kim, *From Censorship to Active Support: The Korean State and Korea's Cultural Industries*, 24 ECON. & LAB. REL. REV. 517, 526 (2013).

320. Suhyeon Kyeong, *Bulbeob File Filtering Uimu Wiban [Violation of Duty to Filer Infringing Files Will Be Fined from September]*, YONHAP NEWS (Aug. 22, 2007), <http://www.mediawatch.kr/mobile/article.html?no=166339>. Many of these initiatives took place in the period that preceded the KORUS FTA negotiations, the first of which took place in June 2006 after a year of preparation.

ers and phonogram producers.<sup>321</sup> While the MCST reasoned its latter amendment in reference to the WIPO Performances and Phonograms Treaty (WPPT),<sup>322</sup> it received heavy criticism for broadening the scope of copyright law beyond that required by the WPPT.<sup>323</sup> Similarly, in 2006, the MCST successfully lobbied the imposition of technical protection obligations for special OSPs—i.e., P2P service providers.<sup>324</sup> By following up the enactment with an enforcement decree incorporating an expansive definition of “necessary measures” that OSPs must take to stop infringement, the MCST ensured that the new duty essentially requires the OSPs to maintain filtering mechanisms.<sup>325</sup> Scholars and practitioners agree that this requirement is an extremely demanding burden for

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321. See *Dijitheol jeojakkwonui kanghwaleul uihan jeojakkwonbeob kaejeong* [Amending Copyright Law to Strengthen Digital Copyright], JINBONET (May 18, 2010), <http://act.jinbo.net/wp/113/>; Sung-Ho Park, *Jeojagin jeopkwonjaegedo jeonshnggwon'eul puyeonhanda!?* [Granting ‘Transmission Right’ to Neighboring Right-Holder!?!], JINBONET (Mar. 4, 2004), <http://act.jinbo.net/wp/700/>.

322. WIPO Performances and Phonograms Treaty arts. 10, 14, Dec. 20, 1996, 2186 U.N.T.S. 203. Korea acceded to the treaty in December 2008. The MCST’s former proposal in 1999—granting transmission right to content-owners—which was enacted in 2000, referenced the WIPO Copyright Treaty (WCT) and MCST’s plans to prepare for accession to it, which occurred in 2004. See WIPO Copyright Treaty art. 8, Dec. 20, 1996, 2186 U.N.T.S. 121.

323. See, e.g., Park, *supra* note 321 (criticizing the MCST for catering to businesses in the content industry at the expense of users). As a result of the amendment, effectively all the major free music downloading or streaming services were either shut down or switched to a fee-charging basis. See Seon Ho, *Munhuabu Jeojakkwonbeob Gaejeongan Doip Chujin: soribada deung eumak service uichukduel ddeut* [Ministry of Culture, Sports and Tourism Pushes Ahead With Amendment Proposal for the Copyright Act: Music Services Expected to be Harmed], MEDIA TODAY (Jan. 7, 2004), <http://www.mediatoday.co.kr/?mod=news&act=articleView&idno=25161>.

324. Jeojakkwonbeob [Copyright Act], *supra* note 69, arts. 104(1), 142(1).

325. The statutory duty provides for OSPs “who aim[ ] principally at forwarding works, etc. by using computers between other persons” to take appropriate measures to cut off illegal forwarding of the relevant work upon request by the copyright holder. *Id.* In the corresponding enforcement decree, the MCST specified that “necessary measure(s)” means “technical measures to recognize copyrighted works, block them from being searched or transmitted illegally, and send copyright warnings to identified illegal transmitters.” Jeojakkwonbeob sihaengryung [Copyright Act Enforcement Decree], *supra* note 116, art. 46(1); see Nam, *supra* note 5, at 26 (explaining that this essentially establishes a duty for OSPs to maintain filtering mechanisms).

OSPs<sup>326</sup> and is found neither in the KORUS FTA, nor the United States copyright law,<sup>327</sup> nor any other copyright regime in the world.<sup>328</sup>

In addition to strengthening the substantive copyright law, the MCST also actively improved the enforcement of copyright law, particularly criminal enforcement. MCST's focus on criminal enforcement stemmed from a strongly held governmental belief that high piracy rate in Korea was caused by the public's lack of appreciation for the notion of copyright. The government perceived the public ignorance issue as deeply entrenched: some officials noted the effects of Confucius traditions<sup>329</sup> and others insisted that teenagers are inherently igno-

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326. See, e.g., Heesob Nam & Eunwoo Lee, *Ilbanjeok Gamsi Emuwa Jeojakgwonbob Jae101joeuh Munjaejom* [*The Ordinary Duty to Filter and The Problem of the Copyright Act Article 104*], KOREA ASSOC. INFO. L. (정보법학회) 10–13 (2012) (describing the burdensome requirements of the filtering duty of the special OSPs); ASSOCIATION FOR PROGRESSIVE (APC) COMMUNICATIONS, KOREAN PROGRESSIVE NETWORK JINBONET & OPENNET KOREA, JOINT SOCIETY SUBMISSION TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS FOR STATE COMPLIANCE WITH THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Pre-sessional Working Group of the CESCR for the 60th Session) 4–5 (asserting that this requirement on the OSPs “excessively protect[s] copyright beyond the international standard”).

327. United States copyright law prescribes no such duty on its online service providers and in fact, generally forbids conditioning service providers' eligibility for safe harbor provisions on the “service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i) . . . .” Copyright Act of 1976, 17 U.S.C. § 512(m)(1). See also *id.* § 512(i)(2) (definition for the term “standard technical measures”).

328. European Union copyright law, for instance, directly forbids any standard monitoring duty for OSPs altogether. The scheme is reflected in the FTA signed between the EU and South Korea, European Union-South Korea Free Trade Agreement (KOREU FTA). European Union-South Korea Free Trade Agreement, E.U.-S. Kor., art. 10.66, Oct. 6, 2010, 211/265/EU. There are concerns that Korea's filtering duty for special-type OSP law violates the KOREU FTA in this respect. See Nam, *supra* note 5, 18, 25–26.

329. See JUNG ET AL., *supra* note 17. In explaining why he thought piracy was high in Korea, Korea's ambassador to the United States once responded, “[h]istorically, Koreans have not viewed intellectual discoveries or scientific inventions as the private property of their discoverers or inventors. New ideas or technologies were public goods for everybody to share freely.” Kyung-Won Kim, *A High Cost to Developing Countries*, N.Y. TIMES (Oct. 5, 1986), <https://www.nytimes.com/1986/10/05/business/business-forum-a-high-cost-to-developing-countries.html>.

rant and unappreciative of copyright.<sup>330</sup> Strongly believing in the educational effects of strong criminal penalties, the MCST hoped to tackle the problem of piracy at its core.<sup>331</sup>

Accordingly, in the early 2000s the MCST led an effort to a drastically escalate criminal consequences for copyright infringement under the Korean Copyright Act.<sup>332</sup> The MCST-led changes focused on strengthening criminal penalties and prosecutorial powers.<sup>333</sup> The changes raised criminal penalties for all qualifying infringements from a maximum of three years of imprisonment or a fine of three million won to a maximum of five years of imprisonment or a fine of fifty million.<sup>334</sup>

The MCST also sought reduction of the scope of the Antragsdelikt rule underlying the Korean Copyright Act.<sup>335</sup> While completely eliminating it proved difficult, the MCST made some important progress. First, in 2003, the MCST succeeded in initiating the abolishment of Antragsdelikt for circumvention of technological protection measure<sup>336</sup> for his/her own business or for profit.<sup>337</sup> In 2005, the MCST proposed a similar amendment for copyright infringements—i.e., permitting initiation of legal action *ex officio* for infringements where the infringers commit the crime for their own business or profit. While this specific proposal faced opposition, the National Assembly ultimately passed an amended version of MCST's proposal, abolishing Antragsdelikt for infringements committed "habitually for profit-making"<sup>338</sup> purposes.

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330. See JUNG ET AL., *supra* note 17.

331. See *id.* (explaining that over-criminalization is a tendency in fact common in all field of Korean law).

332. See LEE, POLICE SCI. INSTITUTE, *supra* note 9, at 38 (tracking the escalation).

333. *Id.* The MCST focused on criminal penalties and prosecutorial power and not the scope of the criminal copyright provisions because the scope of these provisions was already quite broad, providing for criminal penalties for all types of infringement regardless of the volume of business or illegal gains. Korea had adopted these broad criminal copyright provisions when it first passed its copyright law in 1957 by largely mapping the Japanese copyright law administered during the preceding colonialist era. *Id.*

334. *Id.*

335. See *supra* Section IV.C.2.a (discussing the Antragsdelikt requirement).

336. For an explanation of technological protection measure, see Hinze, *supra* note 114.

337. See JUNG ET AL., *supra* note 17, at 14.

338. Jeojakkwonbeob [Copyright Act], *supra* note 69, art. 140(1) (the 'habitually' requirement reflected the compromise); see JUNG ET AL., *supra* note

In 2008, the MCST further strengthened prosecutorial power and efficiency, particularly with regards to online piracy, by forging a cooperative arrangement with the Ministry of Justice. The arrangement, which established the Copyright Special Judicial Police force,<sup>339</sup> was designed so that the MCST and the criminal enforcement authorities could coordinate investigative activities and reduce the investigative burden on prosecutors. Pursuant to this arrangement, the MCST specifically directed cooperation of the copyright administrative agencies under its jurisdiction with the Copyright Special Judicial Police and their efforts in investigating and relaying information to prosecutors.<sup>340</sup>

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17, at 13–15 (describing the legislative background to article 140(1) of the Korea Copyright Act). The justifications provided by the MCST for its legislative initiatives are indicative of MCST’s new take on copyright law as an important economic tool. In particular, the MCST subtly underplays the private/moral right or retribution-based rationales that underpinned Korea’s old approach to copyright, and in place emphasizes factors related to market loss and deterrence needs. For instance, regarding the old Copyright Act, the MCST has explained that the statute conditioned prosecutorial action for copyright infringement on the receipt of complaint because it was largely based on the view that copyright is a private right protecting authors’ moral rights and, relatedly, the view that some authors might be willing to allow free use of his or her work. Additionally, the MCST has explained that the Antragsdelikt requirement was instituted because most infringing activities in the past were one-off events by individuals for personal use.” See JUNG ET AL., *supra* note 17, at 14. Meanwhile, the MCST explained that the expansion of the prosecuting authorities’ ability to initiate legal action *ex officio*, as achieved by the 2006 amendment to the Korean Copyright Act, is warranted, because “in the current internet environment, infringing activities are large-scale and habitual, and cause serious loss to the industry”; because “authors lack resources to respond to each and every one of such threats”; and because “for-profit infringers” think it permissible to simply settle private complaints with a portion of their profits (from infringement) and continue on infringing. *Id.* at 15–17; *Gaejeong jeojakkwonbeob haeseol [Primer to the Amended Copyright Act]*, Ministry of Culture, Sports and Tourism, 8101 BEOBRYUL 52 (2007).

339. See *supra* note 169–171 and accompanying text.

340. See KOREA COPYRIGHT COMM’N, 2013 ANNUAL REPORT ON COPYRIGHT IN KOREA 12–19 (2013), <https://www.copyright.or.kr/eng/doc/activities/2013AR.pdf> (providing an institutional overview); Korea Copyright Comm’n, *Changjakja poho “jeongjakkwongyeongchal”-i apjangsyemnida [Protecting Authors with the ‘Copyright Special Judicial Police’]*, MINISTRY CULTURE, SPORTS & TOURISM (Sept. 19, 2008), [http://www.mcst.go.kr/web/s\\_notice/news/newsView.jsp?pSeq=514](http://www.mcst.go.kr/web/s_notice/news/newsView.jsp?pSeq=514).

## 1. *Summary – Korea*

In conclusion, Korea's strong criminal copyright enforcement tendencies stem from the Korean government's commitment to protecting the growth of its cultural-content industry.

Under the MCST's leadership, the landscape of the Korean copyright regime transformed considerably within a span of few years. In terms of substantive rights and duties, the MCST's early efforts included extending the right of transmission not only to content-owners, but also to performers and phonogram producers, and imposing on special-type OSPs a duty to filter. In terms of enforcement measures, the MCST dramatically strengthened the criminal justice system's hold over copyright infringements by expanding criminal penalties and prosecutorial power over copyright cases. Strengthening criminal enforcement was a particularly important goal for the MCST, because the government perceived Korea's online piracy problem as caused by the public's ignorance about copyright and believed criminal enforcement was the best means to educate the public.

## IX. CONCLUSION

This paper examined the criminal copyright enforcement regimes of China and Korea, comparing their diverging patterns of criminal copyright enforcement. The analysis identified important differences between the legal and institutional structures that undergird the criminal copyright enforcement mechanisms of China and Korea.

In China, the scope of criminal copyright provisions is relatively more limited than in Korea, most notably with respect to the list of qualifying infringing materials.<sup>341</sup> In addition, the administrative enforcement mechanisms for copyright are well-developed and resolve most infringement cases before administrative officials without transfer to criminal enforcement officials. Meanwhile, the public generally perceive criminal prosecution as uncalled for and lacking in assurance anyways. Copyright holders, whose aim in bringing a complaint is gen-

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341. For instance, transmission is not covered under Chinese law. *See supra* Section IV.B (discussing the scope of the Chinese copyright law); *supra* Section IV.A. (discussing the scope of the Korean copyright law); *supra* Section IV.C.1 (comparing the Chinese and Korean laws).

erally to instantly end an ongoing infringement, prefer administrative enforcement over civil enforcement because they generally perceive judicial enforcement mechanisms as lacking in terms of efficiency.

In Korea, by contrast, the scope of criminal copyright provisions is vast. It has neither a threshold for criminality nor a commercial purpose requirement, and criminal liability extends to most infringing acts proscribed under the copyright law. Administrative enforcement agencies do not have many remedial powers, so they operate by forging a strong cooperative nexus with the criminal enforcement authorities. Criminal enforcement authorities, meanwhile, receive a high volume of complaints from copyright holders who tend to perceive filing criminal complaints as an effective method for extracting large settlements.

The analysis also highlighted notable differences in the ways China and Korea perceived and approached copyright law and enforcement more generally. For China, copyright law serves primarily as a political tool for advancing the goals of the state's censorship regime. For Korea, copyright is an essential economic means for protecting the nation's profitable cultural-content industry.

As highlighted here, legal and institutional structures, as well as policy ideas, are important factors in explaining the criminal copyright enforcement trends in China and Korea and their marked divergence. This paper highlighted the limits of the conventional views that explain copyright enforcement patterns in China and Korea by relying primarily on culture or on external pressures from the international trading system. Rather, copyright enforcement patterns in China and Korea emerge partially due to the institutional particularities within each country and the distinct ideas and interests that shape them.

Overall, this paper shows that criminal copyright enforcements in China and Korea are multi-faceted phenomena, influenced by various domestic institutional mechanisms and ideological goals unique to each country. In this respect, this paper hopes to draw attention to the actual effectiveness of using international treaties, or other external pressures, as a means for inducing greater copyright enforcement commit-

ments elsewhere.<sup>342</sup> The diverging approaches to criminal copyright enforcement in China and Korea illustrate that top-down external pressures that fail to account for domestic particularities are likely to render only superficial results; while they may change the formal criminal copyright enforcement laws, they are unlikely to alter actual enforcement efforts.<sup>343</sup>

In hoping for more lively discussion on the topic of copyright enforcement, particularly with respect to China and Korea, this paper closes with recommendations for further research in two areas. First, the ideas raised in this paper regarding the influence of internal goals and institutional mechanisms on copyright enforcement, particularly with regard to China, should be further tested by examining whether enforcement of different forms of intellectual property show different patterns.<sup>344</sup> Second, examining the roles that domestic industrial structures and corresponding interest groups play in shaping copyright enforcement in China and Korea,

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342. See *supra* note 2 and accompanying text (developed countries' use of international for a to enforce IP commitments).

343. The experience of Korea, meanwhile, further raises the question of whether strong criminal copyright enforcement should always represent stronger copyright protection and a benefit for the society. Korea, notwithstanding its harsh criminal copyright enforcement regime, has thus far not only failed to curb piracy rates, but has also been burdened with new problems relating to the mass incrimination of minors and exploitative behavior by copyright holders and law firms looking to profit from settlement opportunities. See HANGUKEOJAKKWON BOHOWON [KOREA COPYRIGHT PROTECTION AGENCY], 2018 JEOKKWON BOHO YEONCHABOGOSEO [2018 ANNUAL REPORT ON COPYRIGHT PROTECTION] 157 (2018) (finding that losses across the music, film, broadcasting, publishing, and game industries from piracy amounted to approximately 2.6 trillion won in 2017). In particular, the case of Korea should serve as a cautionary precedent for China as well as the international community exerting pressure on China to enhance criminal copyright enforcement. Ensuring the existence of reasonable and accessible routes to obtaining copyrighted content may be an alternative focus for addressing high piracy rates. See, e.g., John Leitner, *A Legal and Cultural Comparison of File-Sharing Disputes in Japan and the Republic of Korea and Implications for Future Cyber-Regulation*, 22 COLUM. J. ASIAN L. 1, 30–31, 45–49, 54 (2008) (arguing that the continued high piracy rates in Korea relates to the Korean people's belief in the link between freedom of information in cyberspace and democracy, and suggesting that increasingly the availability of reasonably priced routes for obtaining copyrighted content may be a good way to address high piracy rates in the country).

344. See Liu, *Consequences of Legal Transplantation*, *supra* note 14, for an informative lead in this respect.

respectively, would also help develop a more diverse and overarching understanding of the different enforcement patterns in the two countries.

