On the Limitations of a "Dual System" Approach to IPRs: A Critical Evaluation of the Administrative Dominant Copyright Protection Regime in Contemporary China

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I.Introduction

What law is, can be, or ought to be is determined by the character of those processes that make, interpret, and enforce law.

—Neil Komesar[1]

Recently in many western countries, a number of academic commentators have identified several shortcomings with the conventional judicial protection model in the field of copyright.[2] As an alternative, the administrative process has been applauded as "a new arena for copyright decision-making" and "one institution that can play an important role in fine-tuning the scope of copyright".[3]

Arguments in favor of strengthening administrative authority have been unfolding on two main tracks. Firstly, there are arguments directed at making administrative agencies participate in the legislative process to fine-tune the scope of copyright.[4] Secondly, are those arguments that seek to deal with copyright law enforcement as well as dispute resolution through a more administrative-oriented approach.[5]

Recent developments in France provide an example of how these academic arguments are influencing policy makers. Besides conventional measures to expand the authority of existing administrative agencies to copyright enforcement, in 2007 France created the Regulatory Authority for Technical Measures (l'Autorité de Régulation des Mesures

[1] NEIL KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS, CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 3(2000).

[2] See e.g., Jane Ginsburg, *The Exclusive Right to Their Writings: Copyright and Control in the Digital Age*, 54 ME. L. REV. 195, 206-10 (2002); Antonina Engelbrekt, *Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation*, 4 REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES 65, 75(2007).

[3] See Engelbrekt, *Id*. at 85-86. In western countries, notably in the droit d'auteur traditional countries, government agencies are forbidden to intervene in the private copyright area, therefore, "there is typically no governmental agency, entrusted with enforcement or rule-making in the area". *Id*. at 86. Even in the countries of common law tradition which adopt a utilitarian view and regard copyright law makes rewards to the copyright holder a secondary consideration to the public interest (See United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)), the function of administrative agencies were primarily limited to registration and recordation. With the mandatory administration of compulsory licensing and collecting royalties, "the prerogatives of these public bodies have expanded, extending even to rule-making.…such offices are seen… as one institution that can play an important role in fine-tuning the scope of copyright." *Id*. at 86.

[4] To take one example, the U.S. Copyright Office provides expert assistance to Congress on copyright matters; advises Congress on anticipated changes in U.S. copyright law; analyzes and assists in drafting copyright legislation. see http://www.copyright.gov/circs/circ1a.html

[5] See Joseph Liu, *Regulatory Copyright*, 83 N. C. L. REV. 87 (2004).

Techniques or ARMT), an independent regulatory agency charged with promoting the interoperability of digital information distributed with embedded "technical protection measures" (TPM).[6] ARMT is recognized as "both a traditional independent regulatory agency and a novel attempt to develop a new governance structure at the national level to address global information economy challenges".[7]

In contrast, in China, administrative agencies have played an important role since the establishment of copyright regime, and together with the courts formed the so-called "dual system". The bipolar mechanism has played an important role in the process of establishing a legal regime in a very limited period and protecting copyright against rampant piracies, counterfeits and other infringements. However, on the negative side, administrative protection currently dominates the dualism and induces multiple problems.

In this article, I will comment on the current administrative dominant copyright protection regime in China. Part II of this paper describes the status quo of administrative dominant copyright "dual system". In part III, this paper illustrates the limitations of an administrative dominant copyright protection regime—principally, agency overlap and minoritarian bias from both normative and descriptive perspectives, which deserve the western countries to pay attention and keep vigilance. Finally, as a concluding observation, part IV will suggest that in spite of these limitations, China should persist with administrative protection and optimize the mechanism in order to realize a real dual system of copyright protection.

This paper does not intend to be offered as a cautionary tale for western or other Asian countries, which obviously have different situations from China. However, I do think that China hints or clues as to possible shortcomings of an uncritical embrace of an administrative protection approach. To this end, this paper will only focus on some limitations that are potentially relevant to an international audience.

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[6] See Nicolas Jondet, *DRM Watchdog Established in France (Décret n 2007-510 du 4 Avril 2007)*, French-law.net, Apr. 11, 2007, http://french-law.net/drm-watchdog-established-in-france-decret-2007-510-4-avril-2007.html.

[7] Jane Winn & Nicolas Jondet, *A New Deal For End Users? Lessons from A French Innovation in the Regulation of Interoperability*, 51 WILLIAM AND MARY LAW REVIEW 547, 550 (2009).

In this paper I attempt to analyse two particular limitations based on some concepts of an institutional approach to law, notably Neil Komesar's theory.[8] Pursuant to capture hypothesis, the administrative agencies are likely to become "captured" by the interest groups that they are charged with regulating.[9] And the concentrated high-stake interests often prevail over the dispersed small-stake interests in the decision-making process and generate minoritarian bias.[10] This exploratory article is an attempt to elaborate how these theories are embodied in the Chinese context — namely, the multi-headed copyright administration as well as agency interest in copyright legislative process. If this succeeds, then it will highlight the analytic value of these concepts in a very different political and legal system.

From a Chinese perspective, this paper serves as an example to illustrate the general limitations of the "dual system" approach to intellectual property rights (i.e. copyright, patent, trademark and others; hereafter "IPRs") in contemporary China. Moreover, this provides an empirical inquiry in the more fundamental sense about the roles of administrative agencies and other institutions in IPRs protection.

II.The Administrative Dominant "Dual System"

> *Institutional choice is contingent on a historical and institutional context that has been shaped through time, is often country-specific and is generally resistant to change.*
>
> —Antonina Engelbrekt[11]

Having introduced the main themes of the paper, in this section I will describes the current situation of the copyright dual protection system. Notably, at present administrative protection actually dominates the bipolar mechanism. I will describe this

[8] See e.g., NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY, CHICAGO AND LONDON: THE UNIVERSITY OF CHICAGO PRESS, 1994; KOMESAR, *supra* note 1.
[9] See Thomas Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997).
[10] See KOMESAR, *supra* note 8, at 76; see also Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?* 101 YALE L. J. 31 (1991).
[11] Engelbrekt, *supra* note 2, at 71.

characteristic in two tracks: powerful administrative protection and the correspondingly weak judicial protection.

A. Chinese Copyright "Dual System"

As Roscoe Pound demonstrates that the given geographical environment, customs and habits, economic and historical conditions demand the legal regulation and governance should adapt to the local conditions.[12] Therefore, it is of crucial importance in the first instance to scrutinize "how the past influences the present and the future".[13]Admittedly, the institutional choice of parallel dual copyright protection systems is determined by the distinct Chinese national conditions.

In the initial stages of establishing a copyright regime, given the exotic character of the copyright enterprise and starting from scratch, China adopted the so-called copyright "dual system". This was intended to exert the advantages of two parallel approaches — judicial process as well as administrative protection and establish the final ruling of justice. This was felt to be the best option given the insufficiency of a necessary transition period[14] as well as lack of necessary preconditions of effective implementation.[15]

Within the "dual system", administrative protection is the notable characteristic possessing significance.[16] It is reasonable and necessary for the public power to intervene into the copyright protection besides the private relief of right holder. This is pursuant to

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[12] [美]罗斯科•庞德：《法理学（第一卷）》，余履雪译，法律出版社 2007 年版，第 2 页 (ROSCOE POUND, JURISPRUDENCE, VOL.1, YU LVXUE TRANS., BEIJING: LAW PRESS CHINA, 2 (2007)).

[13] DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 3(1990).

[14] The globalization and trade integration deprived the necessary transitional process of copyright protection from low level into high level in China, for instance the transition period for China only lasted about 10 years, while normally this period would sustained from several decades to hundreds of years in the western countries.

[15] To achieve the policy target of copyright system reckons on a series of preconditions, including the substantial establishments in the area of economy, technology, culture and education, as well as the social environment and public policy scheme. Meanwhile, the court universally lacked of experience to deal with new type of IPRs cases which were dramatically distinctive from traditional civil, administrative and criminal cases, and at the same time lack of experienced professionals who were familiar with IPRs.

[16] All previous texts of three main IPRs legislations have regulated the judicial and administrative protection, especially in Patent Law and Trademark Law, which include abundant clauses regulating administrative protection in very detail. Comparatively, Copyright Law includes fewer clauses relating to administrative protection, i.e. Articles 7, 27, 47, 54 and 55.

the characteristic of copyright as an important private right which simultaneously involved public right characteristic and closely related to the economic and social development. [17] Moreover, through the concept of the public interest theory, administrative agencies would be "better able to act in the public interest".[18]

The "dual systems" has lasted more than 20 years, and played a significant role in the establishment and implementation of copyright regime. The former secretary general of the World Intellectual Property Organization (WIPO), Arpad Bogsch, praised China because, with regard to the protection of IPRs, it has traversed the path within 25 years for which the industrialized nations needed more than 100 years.[19] Dramatic achievement of protecting copyright and other IPRs has proved the rationality of "dual systems" which exerts the advantages and mutual complementation of the alternative protection arenas.

In contrast with judicial protection, administrative approach possesses distinct institutional advantages. Firstly, the centralized source of governmental authority which combines all governmental powers under one convenient roof, secures the coordinated solutions to IPRs disputes throughout its jurisdiction. Notably, the special, well-planned and focused actions, is accomplished in dealing with cases of repeated, organized IPRs infringements, and large-scale counterfeiting and piracies. While individual case based verdict, together with the non-recognition of precedent in China restrict the influence of justice decisions within a very limited scope.

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[17] See冯晓青，刘淑华："试论知识产权的私权属性及其公权化趋向"，《中国法学》2004 年第 1 期 (Fen Xiaoqing & Liu Shuhua, *On the Intellectual Property's Private Right Nature and Its Publicizing Trend*, 1 CHINESE LEGAL SCIENCE 61 (2004)); 李永明,吕益林："论知识产权之公权性质——对'知识产权属于私权'的补充"，《浙江大学学报》2004 年第 4 期 (Li Yongming & Lv Yilin, *Public Authority of Intellectual Property*, 4 JOURNAL OF ZHEJIANG UNIVERSITY (HUMANITIES & SOCIAL SCIENCES) 60 (2004)).

[18] Samuel Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 508-509 (1952); see also Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1272-1278 (1986).

[19] See 国家知识产权局：《1994 年中国知识产权保护状况》（白皮书） (STATE INTELLECTUAL PROPERTY OFFICE (SIPO), CHINESE IPRS PROTECTION STATUS IN 1994). However, on account of lacking necessary transition period and corresponding internalization conditions, the high level transplanted legislations do not operate and implement well in practice. According to the statistics by quantitative analysis, early in 1993 the protection level without consideration of implementation in China (score 3.190) had already exceeded part of developed countries; in 2001, the score up to 4.19 which had exceeded almost all developed countries and developing countries, and was only slightly inferior than US (score 4.52). When amend by the implementation index, however, the protection level score descended to 2.742. See韩玉雄、李怀祖："关于中国知识产权保护水平的定量分析"，《科学学研究》2005 年第 3 期 (Han Yuxiong & Li Huaizu, *Quantitative Analysis on Chinese IPRs Protection Level*, 3 STUDIES IN SCIENCE OF SCIENCE 377 (2005)).

Secondly, compared with formalized judicial process and high cost access to the court, administrative protection has the attraction of high efficiency and low cost which is in accordance with the general principle of TRIPs that protecting intellectual property should be achieved with minimized cost.[20]

Thirdly, in contrast with passive judicial protection following the principle of "no trail without complaint", administrative agencies can actively intervene in and solve the disputes before upgrading to lawsuits. Moreover, the staff of administrative agencies is expected to have specialized information and systematic knowledge - in other words, the expertise - to solve the complex problems that arise in this rapidly changing field.[21]

Lastly, given that the dual system establishes the final ruling of justice, administrative settlement does not exclude the chance of alternative judicial process,[22] but rather provides an extra protecting shield for right holders. If the parties refuse to accept the administrative decision, they can still go to the court as a last resort. In that way, administrative protection can be understood as a preceding procedure which could provide complementary support to judicial process and jointly maintain the order of copyright protection.

B. Powerful Administrative Protection

1. Copyright Competent Authority

At present, however, administrative domination is the primary characteristic of the copyright dual protection system. The Chinese administrative agencies have played the leading role in the copyright protection. According to the statistics, in all social realms including IPRs, about 80% of legislative regulations are implemented by

[20] See Article 41-61 of TRIPs.
[21] See Merrill, *supra* note 9, at 1049.
[22] Except for in some special circumstances the final ruling of administration.

administrations.[23] IPRs administrative agencies possess comprehensive and powerful authorities. Take an example of the competent authority in charge of copyright—the National Copyright Administration (NCAC). The following diagram 1 makes a comparison of the functions among U.S. Copyright Office,[24] Japan Copyright Office (JCO)[25] and NCAC.[26]

Diagram 1: Comparison of the Functions of Copyright Administrations

Administration	U.S. Copyright Office	JCO	NCAC
Registration	With Copyright Office; optional; but prerequisite to infringement action with respect to U.S. works only; registration pre-infringement requisite to statutory damages and attorneys' fees to all works	With JCO; optional; presumption of authorship, first publication, date of creation and being effective against any third party on the matters of transfer, alteration, expiry or the restriction on the disposal, of the right of pledge established on copyright	With CPCC; optional; *prima facie* evidence of copyright ownership
Administrating compulsory and statutory licenses	Administrating compulsory and statutory licenses	Administrating compulsory and statutory licenses, but scarcely implementing	Administrating statutory licenses
Legislation	Providing technical assistance to the Congress and to executive branch agencies; establishing administrative regulations	Planning of copyright legislations	Participating in the drafting of copyright law and regulations; Constituting copyright administrative regulations
Enforcement		Countermeasures against piracy from policy perspective	Investigating and punishing copyright infringement cases

[23] See应松年："依法行政论纲"，《中国法学》1997 年第 1 期，第 33 页 (Ying Songnian, *On the Administration by Law*, 1 CHINESE LEGAL SCIENCE 33 (1997)).
[24] http://www.copyright.gov/circs/circ1a.html
[25] Notably, most countries of civil law tradition basically do not have independent copyright administration. For example, in Germany Federal Ministry of Justice administrates the copyright affairs, while in France, Ministry of Culture and Francophone Affairs, Directorate of General Administration, Under-Directorate of Legal Affairs and Office of Literacy and Artistic Property take charge of the copyright issues. Similarly, JCO (著作權課) is not an independent government administration but belongs to the Agency for Cultural Affairs (文化庁ACA), which is a part of the Ministry of Education, Culture, Sports, Science and Technology (文部科学省MEXT). More details about JCO and ACA, see http://www.bunka.go.jp/chosakuken/index.html, and also http://www.cric.or.jp/cric_e/csj/csj.html
[26] More details about the functions of the Chinese National Copyright Administration, see http://www.ncac.gov.cn/GalaxyPortal/inner/bqj/include/detail.jsp?articleid=4618&boardpid=869&boardid=1150101011 1613

a. Registration

Since Article 5 (2) of Berne Convention confirmed the automatic vesting of copyright by forbidding the imposition of formalities prerequisite to enjoy, exercise of copyright or enforcement on foreign Berne member works. Most countries, including Japan[27] and China,[28] have also ceased to require copyright-constitutive formalities, mainly the notice of copyright, registration, deposit and recordation, to domestic authors as preconditions of copyright warranty and protection as well.

Although registration is voluntary and optional, given the significant effect to facilitate ascertaining the copyright status and ownership of works, domestic copyright laws customarily encourage registration. For instance, the Copyright Law of Japan definitely illustrates registration acts on the presumption of authorship (Article 75 (3)), first publication (Article 76), date of creation (Article 76 *bis*) and being effective against any third party on the matters of transfer, alteration, expiry or the restriction on the disposal, of the right of pledge established on copyright (Article 77).[29]

Similarly, although the Chinese Copyright Law does not explicitly stipulate the registration matters, various regulations recognize the effect of registration as the *prima facie* evidence of copyright ownership.[30] Registration is especially encouraged in the field of software copyright, software exclusive licensing contract and assignment contract.[31] Notably, as the undergoing of administrative agency reform, the original

[27] Article 17(2) of Copyright Law of Japan regulates: "The enjoyment of moral rights of authors and copyright shall not be subject to any formality."
[28] Article 2 of Proposed Measures of Works Voluntary Registration regulates: "The registration of works is voluntary. The enjoyment and the exercise of copyright shall not be subject to registration."
[29] The matters also shall not be effective against any third party without the registration of the right of publication. See Article 88 of Copyright Law of Japan.
[30] Article 1 of Proposed Measures of Works Voluntary Registration regulates: "The registration of works is beneficial to clarify the copyright ownership and provide primary evidence for the right holder in the case of infringement." See also *Interpretation of Applicable Law on Copyright Civil Disputes* by Supreme Court treats copyright registration certificate as primary proof; and *Measures for the Implementation of the Regulation on the Customs Protection of IPRs* by General Administration of Customs regards works registration certificate as the required document of IPRs customs protection recordation.
[31] Article 2 of *Registration of Computer Software Copyright Procedures* indicates that: "the copyright administrative department of the State encourages registration of software and gives priority protection to registered software." See also Article 3.

registration organ—NCAC has transferred the registration affairs to the Copyright Protection Center of China (CPCC).[32]

By contrast, the U.S. adopt a "two-tier" registration system,[33] namely only relaxes formalities requirement of foreign works in light of Berne Convention,[34] but retains registration as a prerequisite for an infringement action with respect to U.S. works.[35] In addition to pre-suit requirement, the U.S. Copyright Law encourages registration of all works regardless of origin through confirming registration as prima facie proof of validity of copyright[36] and the prerequisite of statutory damages and attorney's fees.[37]

b. Administration of compulsory license and statutory license

Compulsory license and statutory license are the limitation systems of copyright holder's exclusive rights. By contrast with fair use, although without seeking permission from, licensee should pay royalties to the copyright holder. Besides explicitly itemizing statutory circumstance without permission, copyright compulsory licenses are justified as a means of moderating the danger that exclusive licenses can be used to create market power in downstream markets.[38]

Copyright competent authority is responsible for the administration of compulsory license and statutory license in the light of the Copyright Law. The U.S. Copyright Law,

[32] CPCC is a social copyright management and social service organization under the direct leadership of the General Administration of Press and Publication of the PRC (PPA) and NCAC. It is responsible for the registration of copyright in computer software, registration of pledge contracts on copyright, registration of copyright in various published works, verification and registration of publishing contracts of imported audio-video products, and public information. See http://www.ccopyright.com.cn/cpcc/index_en.jsp

[33] See Jane Ginsburg, *The US Experience with Formalities: A Love/Hate Relationship*, For ALAI Congress, London, June 17, 2009, p.21, http://www.alai2009.org/Presentations/Jane%20Ginsburg%20US%20Experience%20with%20formalities%20(ALAI%202009)%20rev.doc

[34] Article 5 (3) of Berne Convention regulates, the "[p]rotection in the country of origin is governed by domestic law", which permits the U.S. to remain the reservation on the formalities with respect to U.S. works.

[35] See 17 U.S.C. §411 (a).

[36] See *id*. §410 (c).

[37] See *id*. §412.

[38] See Alan Fisch, *Compulsory Licensing of Blacked-Out Professional Team Sporting Event Telecasts (PTSETS): Using Copyright Law to Mitigate Monopolistic Behavior*, 32 HARV. J. ON LEGIS. 403, 417-28 (1995); Michael Meuer, *Vertical Restraints and Intellectual Property Law: Beyond Antitrust*, 87 MINN. L. REV. 1871, 1906 (2003).

in detail, stipulates the copyright statutory license[39] and compulsory license.[40] The broad application of involuntary license is commented representing a shift of copyright system from a property regime to a liability regime.[41] Analogously, the Copyright Law of Japan itemizes the applicable circumstance of copyright statutory license[42] and compulsory license.[43] However, in practice the compulsory license is criticized of being scarcely implemented.[44] By contrast, Chinese Copyright Law does not include the compulsory license, and restricts statutory license only in limited instances.[45]

c. Legislation

By contrast with the U.S. Copyright Office and JCO just providing suggestions to the legislators, NCAC can actively participate in the drafting of copyright law.

Arguably, the whole process of copyright legislation and revision mirrors the significant role of NCAC. In the wake of the founding of PRC, the NCAC established the drafting committee of Copyright Provisional Regulation and submitted the draft in November 1957, while the examination was ceased by the Cultural Revolution. After the 3rd Plenary Session of the 11th CPC Central Committee in December 1978, the copyright legislation again entered the schedule. This time the direct impetus was the China-US Trade Agreement which required China to protect copyright. In response, on April 21st 1979, NCAC submitted a report concerning the copyright issues in the China-US Trade Agreement to the State Council, suggesting immediately selecting personnel, constituting

[39] See *supra* note 35, §112, §114 and *President Signs into Law the Small Webcaster Settlement Act of 2002 (SWSA).*
[40] See *supra* note 35, §115.
[41] See Daniel Crane, *Intellectual Liability*, 88 TEX. L. REV. 253 (2009).
[42] See Articles 30 (2), 33, 33 *bis*, 34, 36 and 38 of the Copyright Law of Japan.
[43] See *Id.* Article 67-70. For overviews of the literature, see 中山信弘：*《著作権法》*，東京都：有斐閣 2007 年版，第 331-334 頁 (NOBUHIRO NAKAYAMA, COPYRIGHT LAW, TOKYO: YUHIKAKU, 331-334 (2007))；田村善之：*《著作権法概說》*（第二版），東京都：有斐閣 2006 年版，第 513-517 頁(YOSHIYUKI TAMURA, COPYRIGHT LAW 2ND. ED., TOKYO: YUHIKAKU, 513-517 (2006))；作花文雄：*《詳解著作権法》*（第三版），東京都：ぎょうせい 2006 年版，第 405-410 頁(FUMIO SAKKA, INTERPRETATION OF COPYRIGHT LAW, 3RD. ED., TOKYO: GYOSEI, 405-410 (2006)).
[44] Nakayama observes that now the compulsory license system is seldom used (“現在のところ、この裁定制度は余り利用されていない”), e.g., Article 67 “Exploitation of works in the case where the copyright owner thereof is unknown” is in fact hardly applied (“事実上この制度を利用できす”); Article 68 “Broadcasting of works” is only used in exceptional occasions (“利用された例はない”); and nowadays the existing significance of Article 69 “recording on commercial phonograms” is very slim (“現在では存在意味は小さい”), see NAKAYAMA, *Id*. at 331-334.
[45] See Articles 23, 32(2), 39(3), 42(2) and 43 of Chinese Copyright Law.

a special committee, collecting materials, engaging in investigation and training personnel, and assistance to draft copyright law.

The same story repeated during the modification of the Copyright Law in the coming of new millennium. In January 1998, NCAC put forward the basic revision principles and submitted an explanation concerning the modification of the Copyright Law to the State Council. The NCAC not only drafts the Copyright Law and its Modification Proposal, but also constitutes the implementing regulations of Copyright Law[46]as well as various copyright administrative regulations.

Whereas, besides provide technical assistance to the legislator,[47] U.S. copyright office also can establish administrative regulations.[48] However, JCO does not have the authority to institute administrative regulations.

d. Enforcement

U.S. Copyright Office and JCO principally do not have the authority of copyright enforcement. Although JCO manages countermeasures against piracy, it is mainly from a policy perspective.[49]

By contrast, NCAC has the authority to investigate and punish copyright infringement cases. Article 47 of the Chinese Copyright Act authorizes the Copyright Administration to take charge of the copyright infringement cases where also damage the public interests as well. The enforcement measures of Copyright Administration principally include ceasing the infringing act, confiscation of unlawful income from the act and administrative penalties.

[46] Article 54 of 1991 Copyright Law: "The implementing regulations of this Law shall be drawn up by the copyright administration department under the State Council and shall enter into force after approval by the State Council."
[47] See *supra* note 35, §701 (b) (1), (2).
[48] See *id.* §702.
[49] See "海賊版対策について"(*Countermeasures against Piracy*), http://www.bunka.go.jp/chosakuken/kaizokuban/gaiyou.html

In a word, notwithstanding the authority of NCAC in respect of registration and involuntary licenses are comparatively weaker, the mandatory mission in drafting of copyright law and enforcement are apparently distinct. Buried beneath the powerful influence in the legislative process as well as enforcement, the legislature is exposed to be risk of being "captured" by the administrative agencies and the danger of policy stagnation or minoritarian bias potentially increases.

2. Special Offices

Besides the independent administrative agencies, special offices, notably the National Office of Rectification and standardization of Market Economic Order[50] and the National Anti-Pornography and Anti-Illegal Publications Office,[51] are established to organize and harmonize the combined enforcement of various administrative agencies.

To take one example, the leadership and influence of the National Anti-Pornography and Anti-Illegal Publications Office in mobilizing and uniting dispersed administrative forces can hardly be reached by any separate administration. Diagram 2 illustrates the main functions of the Office and the member units which cover various ministries in culture, education, finance, commercial, transport, judicial as well as police areas. Besides the headquarters in Beijing, there are branched in 31 provinces and cities which cooperate with the local administrative agencies.[52]

Diagram 2: Functions and Member Units of the National Anti-Pornography and Anti-Illegal Publications Office

Function[53]	Participating in the rule-making of publication market and the policy of Anti-Pornography and Anti-Illegal Publications
	Administrating the publication process and market
	Investigating illegitimate publishing behaviors and sequestrating illegal publications.

[50] More details of the National Office of Rectification and standardization of Market Economic Order see http://law.baidu.com/pages/chinalawinfo/4/77/469222793f404a524ca28e63184010e4_0.html
[51] 中国扫黄打非网（the website of China Anti-Pornography and Anti-Illegal），http://www.shdf.gov.cn/portal/index.html
[52] The address and telephone number of the branches see http://www.shdf.gov.cn/portal/org_developement.html
[53] More details about the functions of The National Anti-Pornography and Anti-Illegal Publications Office, see http://www.shdf.gov.cn/portal/org_function.html

	Organizing, coordinating and instructing collective action or special governance of "Anti-Pornography and Anti-Illegal Publications" among various administrations
	Supervising and urging important cases
Member Units[54]	Publicity Department of the CPC Central Committee Commission of politics and law of the CPC Central Committee General Office of the State Council National Copyright Administration The Supreme People's Court The Supreme People's Procuratorate Ministry of Culture Ministry of Education Ministry of Industry and Information Technology Ministry of Public Security Ministry of Supervision Ministry of Civil Affairs Ministry of Finance Ministry of Transport State Administration for Industry & Commerce State Administration of Radio Film and Television State Post Bureau General Administration of Customs General Administration of Press and Publication Civil Aviation Administration The Publicity Department of People's Liberation Army The Political Department of People's Armed Police Forces …

Though combined enforcement and special action, Chinese administrations obtained great achievement in copyright protection. For instance, in 2008 China had captured 83,837,000 illegal publications, banned 46,000 shops and 8 illegal CD product lines, ceased 1420 printeries and 14,000 illegal websites, deleted detrimental network information 490,000, investigated and dealt with 25,056 administrative punishment cases and 328 criminal cases. The statistics number of captured illegal publications which descended for the first time in recent years revealed that various illegal publishing activities were effectively stifled.[55]

Notably in the anti-piracy field, in 2008 China had investigated and dealt with 12,490 piracy cases and captured 76,055,000 pirate publications, among which 56,795,000 were pirate audiovisual products, 13,094,000 were pirate books, 3,351,000 were pirate teaching materials, 2,815,000 were pirate softwares and electronic publications. On April

[54] See http://www.shdf.gov.cn/portal/org_member.html

[55] "2008年 '扫黄打非' 工作取得显著成绩" (*In 2008 the task of "Anti-Pornography and Anti-Illegal Publications" obtained great achievements*)，http://www.gapp.gov.cn/cms/html/47/711/200902/462578.html

26th 2008, World Intellectual Property Day, the National Anti-Pornography and Anti-Illegal Publications Office deployed 31 provinces and cities at the same time to hold concentrated destroying altogether 47,180,000 piracy and other illegal publications.[56]

It would not be an exaggeration to say, that the administrative protection plays a dominant role in the copyright protection, notably in the copyright infringement enforcement. The protection of copyright and other IPRs is not only the responsibility of the competent authorities, but also an important task of all Chinese government agencies.[57]

C. Weak Judicial Protection

The original purpose of the "dual system" was to overcome the disadvantage of single approach and obtain mutual complementation. Article 7 (2) of *Administrative Punishment Law* states explicitly the relationship between administrative enforcement and criminal justice that: "[w]here offences against the law constitute crime, investigation shall be conducted to determine criminal responsibility; administrative punishments are not to replace criminal punishments".

However, in practice the administrative protection dominants the copyright "dual system" and impairs the judicial protection. Considerable infringement cases which are supposed to be delivered to the court and charged criminal liability are now being substituted by administrative penalty. This is on account of lacking efficient connection and information sharing platforms, due process requirement[58] as well as necessary supervision to the administrative behaviors.

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[56] "2008 年‘扫黄打非’工作取得新的突破"(*In 2008 the task of "Anti-Pornography and Anti-Illegal Publications" obtained new breakthrough*)，http://www.gapp.gov.cn/cms/html/47/711/200902/462577.html

[57] In recent years, all of the annual Reports on the Work of the Government refer to the protection of intellectual property.

[58] The administrative agencies in China conventionally highlight the substantive justice but overlook the procedural justice. The attitude that reckons administrative process would restrict the efficiency of administrative protection is actually inefficient. "The nature of process is to prevent corruption, arbitrariness and exorbitance in the administration and decision." See季卫东：《法制秩序的重建》，中国政法大学出版社 1999 年版，第 57 页 (JI WEIDONG, ON THE RECONSTRUCTION OF LEGAL ORDER, BEIJING: CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW PRESS, 57 (1999))

To take one example, in 2006 Shanghai Administration for Industry & Commerce investigated 5189 counterfeit and piracy cases with the total value involved in the cases 830,000,000 RMB, among which 78 cases were major cases valued more than 1,000,000 RMB, while only 21 cases were handed over to the judiciary; Shanghai Bureau of Quality and Technical Supervision inquired 1685 infringement cases, while only 15 cases were delivered to the court; Shanghai Administration of Customs examined 2148 smuggling cases, captured 132 suspects and the total value involved was 113,400,000,000RMB, while only 41 cases and 81 suspects were received decisions on the court.[59]

One utilitarian reason underlying the phenomenon is that the administrative penalty supplements the financial resources of the administration beyond the national financial allocation, and is closely related to the welfare of personnel.[60]The scope of enforcement authority distinguishes the gravy department and non-gravy department in the perspective of office conditions, personnel income, labor insurance and welfare.

The weakness of copyright judicial protection is the important underpinning of the existence of administrative dominance. By contrast with powerful copyright administrative protection, the judicial protection in China is rather weak. Although undergoing decades of construction, the IPRs judicial protection has been improved and obtained remarkable achievements,[61]yet in the present stage, the judicial protection is still too feeble to bear the task of IPRs protection alone. Concretely speaking, the following aspects impair the effect of judicial protection.

[59] See 柴俊勇:“亟待建立行政执法与刑事司法衔接机制”,《检察日报》2007 年 09 月 20 日(Cai Junyong, *The Junction System between Administrative Enforcement and Criminal Justice Is Urgent to Establish*, PROCURATORIAL DAILY, 2009-9-20), http://www.jcrb.com/n1/jcrb1423/ca638707.htm

[60] For instance, aiming at few administrative agencies hook enforcement with economical interests of personnel, and treat administrative penalty as the way to earn extra revenue, Legislative Committee of Sichuan People's Congress suggested: government of all levels should not dispose administrative penalty index or hook the penalty with welfare and allowance of enforcement personnel. See http://news.sina.com.cn/c/2002-01-18/448589.html

[61] According to statistics, in 2005 the local courts all together dealt with 3567 IPRs infringement cases, a year-on-year growth of 28.36%; 3529 cases were made verdicts, year-on-year rise of 28.28%. Among which 524 were IPRs criminal cases, year-on-year growth of 35.40%; 505 cases were ended, 741 suspects were charged criminal liability, which indicated criminal judicial protection of IPRs being strengthened. See最高人民法院知识产权庭:“2005 年中国知识产权司法保护概况”,《法律适用》2006 年第 4 期 (Intellectual Property Tribunal of Supreme Court, *Survey on 2005 Chinese IP Judicial Protection*, 4 JOURNAL OF LAW APPLICATION 2006).

In the first instance, there are no unified special judicial organs to deal with copyright cases. The copyright civil, administrative and criminal cases are dispersed into different tribunals. Moreover, the diverse operations that copyright first instance civil cases are dealt with mainly by intermediate courts while copyright first instance administrative and criminal cases are still dealt with by primary courts, induce the conflict of verdicts. In practice, there were several cases that the criminal tribunal of primary courts initially sentenced guilty verdict, whereas the civil tribunal of intermediate courts found no infringement.[62]In this circumstance, the latter courts got into a dilemma: if made verdicts of no infringement, they would conflict with effective criminal judgments; whereas if maintained the criminal verdicts, two misjudged cases would be engendered.[63]

Besides, the implementation standard is not unified. On account of imbalance of economic and social development among different districts, the quality and quantity of copyright cases diverse dramatically. In general, most copyright cases are dealt with by the courts in developed eastern coastal regions while few are heard by the Midwest. The IPRs cases in some primary courts of developed districts even equal or exceed the total cases in all courts of certain undeveloped provinces. The lack of cases in undeveloped areas baffles the training of judges and accumulation of experience to handle specific IPRs cases, especially new types of infringements. The distinction of the judge's quality induces the discrimination of verdicts towards similar cases in different courts and influences the uniform implementation of copyright law.

Admittedly, heavy reliance on administrative agencies may be a rational choice in the initial stages of establishing copyright regime. This is particularly so when adapting copyright to an unsound legal system, limited judicial resources as well as dim defense consciousness of copyright holders. Since 1978 adopting the "reform and opening up" policy, China is in the process of large scale commercial and social construction and innovation. The multiple governance resources in China, involving custom, stipulation,

[62] 陈惠珍，徐俊："论我国知识产权立体审判模式的构建"，《法律适用》2006 年第 4 期，第 12-13 页 (Chen Huizhen & Xu Jun, *On the Construction of Chinese IP Solid Trial*, 4 JOURNAL OF LAW APPLICATION 12, 13 (2006)).
[63] 最高人民法院民三庭：《知识产权审判指导与参考》（第 7 卷），法律出版社 2004 年版，第 138 页 (THE THIRD CIVIL TRIBUNAL OF SUPREME COURT, IP TRIAL GUIDANCE AND REFERENCE, VOL.7, BEIJING: LAW PRESS CHINA, 138 (2004)).

clan rules and other "local resources",[64] along with the powerful governance by the Party and administrations, bear the weight of social governance together with the law.[65] During this specific period, the domination of government power has dramatic comparative institutional advantage of unifying planning, centralizing forces and mobilizing all possible social resources. It would not be an exaggeration to say, that the significant achievement of establishing copyright regime within 25 years, and providing some degree of protection for copyright holders' interest has, to a great extent, depended on the administrative dominant approach.

In contrast, pursuant to the public interest theory, the other institutions might bear some critical comment. Principally, the legislature typically lacks specialized information and expertise; courts are regarded a decentralized and lack expertise; and markets are deemed decentralized and uncontrolled. Thus, administrative agencies are more likely to achieve the objective of bringing complex phenomena under the control than are any of these rival institutions.[66]

In this Part, I have dwelt on the administrative dominant copyright protection regime. I now want to turn to an analysis of its main limitations, utilizing some concepts of institutionalism.

[64] See苏力：《法治及其本土资源》，中国政法大学出版社 1996 年版，第 3-22 页 (SU LI, THE NATIVE RESOURCE OF RULE OF LAW, BEIJING: CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW PRESS, 3-22(1996)).

[65] These governance resources, however, on the other hand limit the operation of law, and make it difficult to completely achieve the principle of "supremacy of law" in the current stage. See顾培东："也论中国法学向何处去"，《中国法学》2009 年第 1 期，第 14 页 (Gu Peidong, *Where China's Legal Science Will Go?* 147 CHINA LEGAL SCIENCE 5, 14 (2009)).

[66] See Merrill, *supra* note 9, at 1049.

III.Limitations of an Administrative Dominant Copyright Protection Regime

Laws grind the poor, and rich men rule the law.
—Oliver Goldsmith[67]

Notwithstanding the fact that reliance on an administrative approach was a realistic and rational choice in the initial stages, overtime the "public interest" focus of the administrative agencies has given way to a "capture pathology". In China, the decentralized model of IPRs administration induces agency overlap and policies often conflict. The competition among multi-headed administrative agencies either runs into stagnation and generates policy inconsistency, or represents "minoritarian bias" when one agency captures the legislature.

According to Richard Stewart, agencies are often accused of subverting public interests in favor of the private interests of regulated and client firms.[68]The capture hypothesis suggests that once administrative agencies are given substantial authority to make and enforce policy decisions, they are likely to be subjected to extensive pressure from groups that have a particularly strong interest in the consequences of their policy determinations. The focus of this pressure would invariably be an attempt to promote the private interest of the regulated group at the expense of some broader interest of the public.[69]

In this section, I will not cover all flaws of the administrative dominant copyright protection regime, but only pick up two particular limitations that are potentially relevant to an international audience. I will explore how these concepts of institutionalism, notably Komesar' theory, are illuminated in a distinct Chinese context.

[67] OLIVER GOLDSMITH, THE TRAVELER, LINE 386 (1764).
[68] See Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1682-83 (1975).
[69] See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1565-70 (1992).

A. Agency Overlap: Multi-headed Copyright Administration

Overlapping organizations and functions and conflicting policies from different departments are a long-standing and well-documented problems within administrative systems in China. Ever since 1978 the start of the "reform and opening up", China has already undergone five administrative reforms.[70] At present, the sixth administrative reform is undergoing in the light of building a service-oriented government indicated by the Report to the Seventeenth National Congress of the Communist Party of China (CPC) on October 15, 2007.[71]It focuses on the streamlining government organs, downsizing various organs for deliberation and coordination, cutting down levels of administration, minimizing costs, and establishing greater departments with integrated functions.

In the IPRs field, the problems of agency overlap and policy conflict also exist, and are lively compared to "multi-headed" administration.[72] By contrast with most other countries in the world adopt centralized IPRs administration, China chooses the decentralized model.[73]The current IPRs administration framework is mainly based on the separation of authority to classify the IPRs protection into 10 departments.[74] Although

[70] The focuses of these five administrative reforms are: in 1982 the abolishment of life tenure in leading posts; in 1988 "transfer of government function"; in 1993 "adapting to the requirements of establishing socialism market economy system"; in 1998 cancellation of industrial economy special departments to overcome the fusion of government and corporation; in 2003 administrative system renovation. See新华网，"解读改革开放以来五次重要的政府机构改革"(Xinhua, *Interpretation on the Five Governmental Institution Reforms Since Reform and Opening Up*)，http://news.xinhuanet.com/politics/2008-01/28/content_7509409.htm; more details about Chinese administrative reforms see Xinhua News Special "深化行政管理体制和机构改革"(*Deepen Administrative System and Institution Reform)*，http://www.xinhuanet.com/politics/xzgltzgg/

[71] The sixth administrative reform will establish several new ministries including areas of industry and information, transportation, human resources and social security, environment protection as well as housing and urban-rural development. This administrative reform has not referred to the IPRs administrations.

[72] See e.g., 李驰："行政管理过程中多头执法的解决路径探析"，《法制与社会》2009 年第 7 期 (Li Chi, *On the Solution of Multi-headed Enforcement in Administrative Process*, 7 LEGAL SYSTEM AND SOCIETY 198 (2009)); 方军："当前行政管理中多头执法、多层执法问题的思考与对策"，北大法律信息网(Fang Jun, *On the Countermeasures of Multi-headed Administration*, THE WEBSITE OF LAW INFORMATION CHINA), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=37444

[73] At present, among 196 countries and areas which implement the IP regime, there are 180 adopting centralized IP office, however, only less than 10 choosing the decentralized administration. See罗国轩主编：《知识产权管理概论》，知识产权出版社 2007 年版，第 35 页 (LUO GUOXUAN ED., INTELLECTUAL PROPERTY MANAGEMENT CONSPECTUS, BEIJING: INTELLECTUAL PROPERTY PRESS 35 (2007)).

[74] State Intellectual Property Office takes charge of Patent & Layout-Designs of Integrated Circuits; National Copyright Administration is responsible for copyright issue; Trademark Office of State Administration for Industry & Commerce deals with trademark issue; Antimonopoly and Anti-unfair Competition Enforcement Bureau of State Administration for Industry & Commerce presides over Antimonopoly & Anti-unfair competition affairs; General Administration of Quality Supervision, Inspection and Quarantine deals with Geographical Indications; Ministry of Agriculture and State Forestry Administration separately handle New Varieties of Agricultural Plants and Forestry Plants; Ministry of

the Patent Office renamed into the State Intellectual Property Office (SIPO) in 1998, it did not change the decentralized arrangement of IPRs administration. SIPO inherited former patent administrative affairs and only added the function of overall planning and coordination.

As regarding copyright affairs, the National Copyright Administration (NCAC) is the competent authority in charge of copyright, along with the Ministry of Culture, the State Administration for Industry & Commerce (SAIC), the Ministry of Commerce and the General Administration of Customs. Arguably, the enormous institutions and elaborate division of administrative authority have not promoted more efficient administration and effective protection, but conversely induced overlap, inefficiency and inconsistency among agencies.

1. Overlap and Inefficiency

A copyright administrative protection system with diffused and overlapping lines of authority and responsibility cannot efficiently accomplish its mission and meet new protection challenges. The decentralized arrangement of copyright administration seems on the surface to reach every aspect, however, in reality each administrative agency is always trying to expand the jurisdictional lines which generate the authority scramble in profitable areas whilst striving to shrink accountability and result in "buck-passing" in nonprofit areas. Agencies are, consequently, criticized as unthinking "bureaucracies" more concerned with expanding their budgets than with attending to the needs of the beneficiaries of regulation.[75]

Perhaps one notable shortcoming in the current copyright administrative system is its arbitrary jurisdictional lines. These lines cause agency overlap and administrative inefficiency. The copyright administration and protection are regulated by more than one

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Commerce tackles IPRs affairs in International Trade; The Ministry of Science and Technology takes charge of IPRs Relevant to Science and Technology; and General Administration of Customs handles IPRs Relevant to Inward and Outward Goods.

[75] See WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT, CHICAGO: ALDINE, ATHERTON, 81 (1971).

agency, in which case multiple government representatives, each with varying guidelines, and have to undertake multiple inspections of the same object.

Notwithstanding the NCAC is the competent authority, given the characteristics of copyright works relate to the literature, culture and art, other multiple agencies also have jurisdiction to intervene. For instance, copyright works belong to the field of culture and arts, and it is the authority of the Ministry of Culture to stipulate principles and policies for the development of culture and arts in China, to draft laws and regulations on culture and arts, to administer literary and artistic undertakings, and guide artistic creation and production;[76] When the copyrighted works enter the market and are threaten by the pirate, monopoly and unfair competition, or other illegal acts which damage market order and the legitimate rights and interests of right holders and consumers, they belong to the mandate commission of SAIC;[77]When related to the copyright domestic and foreign trade as well as international cooperation, these issues are under the supervision of the Ministry of Commerce;[78] When involving inward and outward copyright goods, it involves the monitor of the General Administration of Customs.[79]

The copyright administrative jurisdiction is split among several largely uncoordinated agencies, increasing the risk of duplicative efforts and administrative inefficiency. The multiple administrative departments each have its own organization system, office space and personnel, and devote a lot of resources to deal with the similar missions which greatly waste the public resources.[80] Additionally, as a result of agency overlap, one or more departments tend to neglect their responsibilities in reliance on other agencies.[81]

[76] More details about the function of Ministry of Culture, see http://www.ccnt.gov.cn/English/Introduction/200904/t20090428_62706.html
[77] More details about the function of SAIC, see http://www.saic.gov.cn/english/aboutus/Mission/
[78] More details about the mandate of the Ministry of Commerce, see http://english.mofcom.gov.cn/mission.shtml
[79] More information about the mission of the General Administration of Customs, see http://english.customs.gov.cn/publish/portal191/
[80]朱雪忠、黄静：“试论我国知识产权行政管理机构的一体化设置”，《科技与法律》2004 年第 8 期，第 82 页 (Zhu Xuezhong & Huang Jing, *On the Unified IP Administrative Agency in China*, 8 SCIENCE TECHNOLOGY AND LAW 82 (2004)).
[81]汪应明：“市场经济应注重对知识产权的行政保护”，《行政与法》2008 年第 11 期，第 80 页 (Wang Yingming, *Market Economy Should Emphasize More Administrative Protection to IPRs*, 11 PUBLIC ADMINISTRATION & LAW 78,80 (2008)).

Administrative inefficiency also happens between copyright and other IPRs protection. In recent years, the IPRs cases tend to be more complicated. Yet the separation of jurisdiction lines blocks the cooperation of settlements among different categories of IPRs. For example, if the suspected copyright case which the NCAC is investigating also involves the trademark or patent infringement, NCAC can only deal with the copyright issue and the whole case can not be completely solved until the Trademark Office of SAIC and SIPO participate. The dispersed jurisdiction delays the dispute investigation, increases the protection cost and depresses the settlement efficiency. On account of this, during the IPRs bulletin in Shanghai towards 24 consulates, the most concerned issue of the foreign parties was in case IPRs disputes happened, which one agency rather than several should be referred to.[82]

Notwithstanding the combined enforcements of various administrative agencies have been undertaken in the national and local scales,[83] the legitimate basis of combined enforcement itself is questionable. If various agencies possess the same authority, it is undoubtedly the repeated setting and resource waste; if these agencies lack of relevant authority or only part of agencies have jurisdiction, then whether the unauthorized organs can be empowered for the sake of reasonable purpose in combined enforcement? If that is the case, does it breach the fundamental principle of "statutory authority"? Even taking no account of the legitimacy of power origin, and only evaluating on the effect of combined enforcement, it still does not fully meet the expectation. Usually after the "movement", illegal actions repeatedly revive.[84] As the IPRs infringements becoming more and more complicated, it is imperative to streamline agencies and explore ways to establish greater departments with integrated functions.

[82] See *supra* note 80, at 83.
[83] For instance the 2006 "Blue Exhibition Action"(蓝天会展行动) and "Anti-piracy Every Day Action"(反盗版天天行动)； in 2008 "Thunder Storm"(雷雨) and "Skynet"(天网) Movements as well as long-term combined enforcements to protect Olympic marks.
[84] 刘文静：《WTO规则国内实施的行政法问题》，北京大学出版社 2004 年版，第 73 页(LIU WENJING, ADMINISTRATIVE LAW ISSUES OF WTO REGULATIONS IMPLEMENTATION, BEIJING: PEKING UNIVERSITY PRESS, 73 (2004)).

2. Policy Inconsistency Among Agencies

The decentralized and dispersed administration leads to diverse protection standards and conflicting policies among rival departments when the competition plunges into stagnation and failure to reach a compromise.

This has been the story of charging copyright royalty fees on Karaoke. Since 2003 the ubiquitous Karaoke service has increasingly triggered disputes between copyright holders and bar operators for copyright infringement in China,[85] up to now the private disputes have upgraded into a conflict of department interests. In the same year—2006, two Chinese administrative agencies had come up with separate plans to charge karaoke bars copyright royalty fees, causing a turf war. On July 18, the Ministry of Culture said it would create the "National Karaoke Management and Service System" which provides karaoke bars voluntarily being connected to the system without expense, but charge for each song downloaded. The purpose of the Ministry of Culture to create the unified karaoke system is to block public access to "unhealthy songs" and stop the infringement of copyright. The system contains a list of songs that are copyright approved and it can record how many times a song is ordered, indicating how much copyright-holders should be paid.[86]

Later, on July 20 NCAC announced its own karaoke copyright royalty fees system and on November 9, NCAC unveiled a pilot scheme that required karaoke bars in Beijing, Shanghai and Guangzhou to pay 12 yuan (1.5 U.S. dollars) a day for each private room (less in underdeveloped regions). Two national associations—the Music Copyright Society of China (MCSC) and the China Audio-Video Collective Administration (CAVCA)—were entrusted with the fee collection.[87]

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[85] Fifteen domestic and foreign recording companies, including Warner Music, Global Music and Sony BMG, launched a campaign in 2003 to charge the royalties from Chinese karaoke operators, who had lost a succession of lawsuits and been fined thousands of yuan. See Xinhua, *Two Chinese Gov't Bodies Jockey for position in Karaoke Market*, http://news.xinhuanet.com/english/2006-08/04/content_4918539.htm

[86] See Xinhua, *China to Unify KTV System to Protect IPR*, http://news.xinhuanet.com/english/2006-07/19/content_4855063.htm

[87] See Xinhua, *China's Karaoke Bar Royalty Scheme Reaches Impasse*, http://news.xinhuanet.com/english/2006-11/29/content_5408694.htm

The two administrative agencies had not conferred with each other about the fees, as yet no moves seem to have been made to unify the charge system. NCAC spokesman Wang Ziqiang told a press conference that the Ministry of Culture was not entitled to charge karaoke operators because copyright supervision and fee collection was the responsibility of the NCAC. While Liang Gang, an official of the Ministry of Culture, said to the China Newsweek magazine that the Ministry had established a platform for the trade between the copyright holders and bar operators, and it had the authority for collective pricing and supervision of song content.[88] Although the two administrative agencies' moves are both said to be aimed at protecting copyright holder's rights, the copyright holders were excluded from the royalty pricing process.

In fact, the separate proposals with distinct charge mechanisms actually reflect a tussle of interests between the NCAC and the Ministry of Culture. Collecting copyright royalty fees for the use of musical and video products is said to be a potentially lucrative business. According to the estimate, China has an estimated 100,000 karaoke establishments—each with an average of 10 private rooms—generating almost 1 billion yuan in turnover annually.[89] *The Collective Management of Copyright Regulations* that came into effect on March 1, 2005, allows copyright collective management bodies to take a certain percentage from the royalties.[90] Wang Huapeng, deputy director of the CAVCA, said that the association would receive a cut - less than 20 percent - of the collected royalties to cover its cost of management. According to Wang's calculation, MCSC, with 4,234 members, collected 64 million yuan (8 million U.S. dollars) in royalties in 2005, would net the association more than 12 million yuan (1.5 million U.S. dollars).[91]To some extent, the two government agencies are competing for the power to collect those sums.

"We should pay the royalty charges but the problem is to whom and how we should pay," Huang Shiqiu, head of the Guangzhou Cultural and Entertainment Industry Association,

[88] See *supra* note 85.
[89] See Xinhua, *China Closes First Karaoke Bar over Copyright Infringement*, http://www.chinadaily.com.cn/bizchina/2009-12/24/content_9225932.htm
[90] See Article 28 (1) of the *Collective Management of Copyright Regulations.*
[91] See *supra* note 87.

which represents the city's largest karaoke bars, said to Xinhua.[92] The unified karaoke system of the Ministry of Culture seems more humane, but it is voluntary; whereas in the NCAC scheme, those who refuse to pay will be deemed illegal. Yet, the per-room charge system of NCAC suffered opposition from karaoke bars arguing that the two entrusted associations with fee collection actually did not have the legal authorities to do so and the charges were unreasonably high. Wang Xudong, a copyright lawyer in Nanjing, said that "The two associations can only collect royalties for copyright owners who have entrusted them to do so. In fact, the copyright of most songs played in karaoke bars has not been entrusted to these associations."[93] He added that since copyright is a private right, royalty charges should be negotiated by the copyright owners and the bar operators rather than established by the administrative agencies.[94] Meanwhile, karaoke consumers are worried that even if operators accept the fee charging out of administrative pressure, in the end they would transfer the fees to consumers.[95]

In this part, I have explored the pathology of agency overlap. The multi-headed copyright administration induces overlap and inefficiency. When the conflicting measures among rival agencies plunge into stagnation, policy inconsistency generates. However, when one agency captures the legislature, another different pathology – minoritarian bias appears.

B. Minoritarian Bias: Agency Interest in Copyright Legislative Process

Komesar has presented a two-force model of malfunctions in political process, which he has labeled, majoritarian bias and minoritarian bias.[96] In the case of the majoritarian malfunction — a tyrannical majority can victimize a discrete and insular minority,[97] the second form of malfunction, minoritarian bias, indicates that the concentrated high-stake interests often prevail over the dispersed small-stake interests in the legislative process as

[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] 梁兴国："卡拉OK版权收费之争与知识产权中的公权问题"，《上海财经大学学报》2008 年第 1 期，第 52 页 (Liang Xingguo, *On Public Right of Intellectual Proper through the Charging Disputes of KTV*, 1 JOURNAL OF SHANGHAI UNIVERSITY OF FINANCE AND ECONOMIC, 46, 52 (2008)).
[96] See KOMESAR, *supra* note 8, at 53-8, 213-21.
[97] See United States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938).

well as in public agency decision-making.[98] "From the standpoint of resource allocation efficiency, minoritarian bias occurs when a concentrated high per capita minority prevails over the dormant low per capita majority even though the total social costs imposed on the losing majority are greater than the total social benefits gained by the successful minority."[99]

In the western context, minoritarian bias has been utilized in myriad contexts in the literature on rent-seeking and interest group politics,[100] yet in China it is embodied through department interest in legislation. In contrast with the conventional agency capture theory that different interest groups fight to capture one dominant agency to influence legislation, in China the battle is among multi-headed administrative agencies to capture the legislature.

Department protection is an unusual phenomenon in the Chinese legislative process, which arises along with the participation and intervention of administrations into the legislation. A tradition has formed that whenever the National People's Congress (NPC) and its Standing Committee exercise the legislative power of the State to constitute or revise any law, other corresponding administrations are invited to discuss and solve the main problems or key issues, while incidentally giving birth to the notion of department protection. The department protection has been unfolding on two main tracks, the first one directed at expanding the authority of department, and the second one, seeking to obtain various interests, notably the economic benefits through maintaining or enlarging the department authority.[101]

This has been the story of copyright law, to give the most representative example, that the long time consuming, reiteration and tortuous process of legislation would hardly been exceeded by other laws. It took 11 years for repeating consultation and modification, and submitting to the Standing Committee of NPC 4 times for deliberation before the draft

[98] See Engelbrekt, *supra* note 2, at 68.
[99] See KOMESAR, *supra* note 8, at 76.
[100] See James E. & Ruth B. Doyle-Bascom, *Book Review: A Comment on Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public*, 83 CALIF. L. REV. 941, 946 (1995).
[101] See刘松山："国家立法三十年的回顾与展望"，《中国法学》2009 年第 1 期，第 40 页 (Liu Songshan, *A Retrospect and Prospect of China's Legislations*, 147 CHINA LEGAL SCIENCE 31, 40 (2009)).

being finally passed in 1990. 11 years later, the Copyright Law was revised in order to meet the requirement of entering WTO and adapt to the new situations. This time it also took 3 years for reiterative amendments and 3 times deliberations by the Standing Committee of NPC contrasting to the normal dual examinations. No wonder some scholars commented that the similar instance was scarcely encountered in the legislation history before.[102]

One significant reason underling the extraordinary troublesome constitution and revision of the Copyright Law was the involved multiple department interests which were difficult to harmonize and balance. To take one representative example, former Article 43[103]was regarded by many legislators as the most difficult obstacle in the copyright legislation and modification,[104] because it touched off the conflicting interests between the copyright holders and the business organizations—namely, radio station and television station.

In fact, in the earlier 1989 the copyright draft submitted by NCAC regulated the use of radio station and television station as statutory license. Although without seeking permission from, stations should pay remunerations to the copyright holders. NCAC's statutory license suggestion was obviously in favor of the copyright holder's interest. However, when the draft was deliberated to the Standing Committee of NPC, notwithstanding supported by the musicians and record industries, the approach of "statutory license" encountered fiercely opposition the State Administration of Radio Film and Television (SARFT). The primary reason of SARFT was that the radio and television stations in China were state owned and noncommercial organizations which bore an important socialist propaganda mission to promote public welfare. The operation funds were appropriated by the government. If the legislation regulated to pay the remunerations, Ministry of Finance should pay the bill.[105] The objection of SARFT finally "captured" the legislature and the former Article 43 was passed.

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[102] "著作权法在争辩中前行，修改问题再次被提起" (*The Disputes on the Revision of Copyright Law*), http://www.sipo.gov.cn/sipo2008/mtjj/2009/200909/t20090902_474289.html

[103] Article 43 of 1990 Copyright Law: A radio station or television station may broadcast, for noncommercial purposes, a published sound recording without seeking permission from, or paying remuneration to, the copyright owner, performer and producer of the sound recording.

[104] See the comment by one legislator—Song Muwen, *supra* note 102.

[105] See *Id*.

The triumph of SARFT, on the one hand, owed much to the big picture of planned economy mechanism that the policy customarily leaned to the state-owned organizations. On the other hand, the case illuminated, borrowing the terminology of Komesar—a minoritarian bias in the legislative process. Interest group theory argues that agencies are likely to become "captured" by the groups that they are charged with regulating. The disproportionate influence of groups wields over administrative agency to influence legislature.[106] Institutions seek to maximize their own self-interested ends in the way they respond to these interest groups.[107] This seems to be an accurate description of what has also happened in China in the Article 43 case.

Pursuant to a capture assumption, the concentrated high-stake interests of stations were likely to prevail over the dispersed small-stake interests of copyright holders in the decision-making process. As the competent authority in charge of broadcasting and television, SARFT intended to maximize its department interest in the way of representing parochial interests of regulated community at odds with the public purposes reflected in the copyright statutory scheme. Thus, former Article 43 was fiercely criticized of as a method of subsidizing department interests at the expense of the numerous copyright holders.

The apparently unfair Article 43 existed for more than 10 years until it was ultimately modified in 2001. During the decade, the economic and social environment changed dramatically. The most distinct alteration unfolded in two aspects. On the one hand, the implementation of international treaties generated super national treatment on foreign copyright holders. Since 1992 joining Berne Convention and World Copyright Treaty, China applied international regulations which adopting statutory license on the broadcasting of foreign works,[108] whereas still applied former Article 43's fair use

[106] See William Landers & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 JOURNAL OF LAW & ECONOMICS 875, 877 (1975); Merrill, *supra* note 9, at 1043; Seidenfeld, *supra* note 69.
[107] See JERRY MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW, NEW HAVEN, CONN.: YALE UNIVERSITY PRESS, 6-25 (1997).
[108] See Article 11 *bis* (2) of Berne Convention, compulsory licenses of broadcasting rights should not be prejudicial to copyright holder's right to obtain equitable remuneration.

approach towards domestic works. The discriminating treatment generated unfair situation that the protection level of foreign copyright holders was much higher than the domestic ones, which went against the domestic cultural creation and innovation.

On the other hand, the Chinese economic system shifted from a planned economy to a market economy. The radio and television stations were no longer absolute noncommercial public organizations and their abundant advertisement income could be sufficient to pay for the copyright remuneration.

During the intense contest on retaining or abolishing former Article 43, the legislator—Education, Science, Culture and Public Health Committee of NPC explicitly indicated that the department interest should be subject to the national interests in order to foster a good environment for the IPRs protection in the whole society and supported NCAC to modify former Article 43.[109] Notwithstanding the victory in the battle on legislation, the remuneration to the copyright holders by the radio and television stations had remained a fictitious bill for 8 years,[110] until a compromise between NCAC and SARFT was finally reached in 2009.[111]

Arguably, the phenomenon of department interest has been noticed and criticized in both theoretical and practical fields for a long time, but there is still a long way to go before it can be solved systematically. Several complicated factors constitute the underpinning of department interest represented in legislative process. Firstly, the administrative agencies are actually undertaking the drafting of law. Although the constitution and other laws

[109] See郑成思："我国的著作权法修正浅议"，《著作权》2001 年第 6 期，第 42 页 (Zheng Chengsi, *Comment on the Revising of Chinese Copyright Law*, 6 COPYRIGHT 35, 42 (2001)).

[110] Article 43 of 2001 Copyright Law: "A radio station or television station that broadcasts a published sound recording does not need to obtain permission from, but shall pay remuneration to the copyright owner, unless the parties concerned have agreed otherwise. The specific measures shall be provided by the State Council." However, up to now the State Council has not promulgated any corresponded measures. In practice, corresponding stations hereby refuse to pay any remuneration to copyright holders. Zhou Lin criticizes the behavior as copyright infringement. See周林："著作权不仅仅是'作者之权'"，中国法学网(Zhou Lin, *Copyright Right Is not Merely the "Author's Right"*, CHINA LEGAL SCIENCE WEBSITE), http://www.iolaw.org.cn/showNews.asp?id=643

[111] *Provisional Measures on the Copyright Remuneration Payment of Broadcasting Sound Recordings by Radio Stations and Television Stations* (《广播电台电视台播放录音制品支付报酬暂行办法》) was enacted on Nov. 10, 2009 and implemented from Jan. 1, 2010. Subsequently, the directors of Legislative Affairs Office of the State Council, NCAC and SARFT together attended the press conference to answer questions on the Provisional Measures, see http://www.gov.cn/zwhd/2009-11/17/content_1466745.htm

stipulate wide proposers, most proposals of law and regulations are provided by governmental agencies. Administrative agencies dominate the link of drafting and proposing which to a great extent influence the legislative process, and inevitably induce the department interest filtering into the legislation.

Secondly, in despite of having no authority to consider or vote on the draft, in fact administrative agencies can still exert an important influence on the legislature's behavior. On the one hand, the political statuses of administrative agencies in state organ system compel legislature have to sufficiently emphasize and consider their opinions. Besides, legislature "typically lacks specialized information and expertise,"[112] thus is easily influenced by the administrative "expertise". On the other hand, given that the implementation task of legislation will ultimately depend on interrelated administrative departments, if a certain draft is opposed by the administrative agencies, the legislature would inevitably worry about the implementation after being enacted.

Thirdly, given the assumption that the high per capita minority often prevails over the dormant low per capital majority in the legislative process,[113] thus the participation of public in the legislative process customarily fails to compete with the administrative departments. Many approaches are adopted by the National People's Congress and its Standing Committee to hear the voices besides the departments, especially to solicit opinions from the ground for some important draft. However, the influence of social forces and counterparts could hardly contend with the powerful departments to avoid the unfair phenomenon that dominant agencies expanding department power and reducing department liability while aggravating the obligation and weakening the right of counterparts in the legislative process.[114] The existence of aforementioned factors increases the difficulty of legislature to overcome the department protection when constituting a law.

[112] See Merrill, *supra* note 9, at 1049.
[113] See KOMESAR, *supra* note 8.
[114] See Liu, *supra* note 101, at 40-41.

IV.Conclusion

Two obstacles are better than one.
—Einer Elhauge[115]

This paper critically evaluates the administrative dominant copyright protection regime and analyses two particular limitations based on some concepts of an institutional approach to law, notably Komesar's theory. Hopefully, in a provisional way this suggests the analytic value of these concepts in a very different political and legal context.

Embeded in the specific national conditions and justified by public interest assumption, Chinese administrative agencies have taken charge of copyright protection since the establishment of copyright regime. Overtime, the faith in the "public interest" focus of the administrative agencies gives way to capture pathology. Rival power of multi-headed administrative agencies either runs into stagnation and generates policy inconsistency, or represents "minoritarian bias" when one agency captures the legislature.

Pursuant to the naive capture theory assumption that agency capture and other pathologies only infect administrative agencies, thus these flaws of administrative agencies could be rectified by rival institutions, namely the legislature and the courts. For instance, one solution might be for the legislature to enact more detailed statutes in order to constrain the discretion of agencies.[116] Alternative measure would be "a general shift in authority over regulatory policy from agencies to courts",[117] principally, to strengthen the judicial review and improve the procedural rules that govern agency decision-making in order to counteract the distortion of administrative process influenced by interest group capture.[118]

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[115] EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION, CAMBRIDGE: HARVARD UNIVERSITY PRESS, 289 (2008).
[116] See MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? ATHENS: THE UNIVERSITY OF GEORGIA PRESS: 78-87 (1988); Sidney Shapiro & Robert Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 821-845(1988).
[117] Merrill, *supra* note 9, at 1040. Similarly, in China some advocators have suggested abolishing the IPRs "dual system" and adopting the single judicial protection. E.g. during the National People's Congress and CPPCC National Committee Session in 2007, some deputies of the People's Congress advanced the proposal to abandon the "dual system". See "人大代表建议取消知识产权保护双轨制"(*Representatives of the People's Congress Advocate to Abandon the "Dual System")*，http://news.sina.com.cn/c/2007-03-12/042212490253.shtml
[118] Merrill, *supra* note 9, at 1052.

However, the presumption that reckoning agencies were the only flawed institutions subject to capture suspect is now substituted by the pessimism of public choice theory that all institutions—agencies, legislatures and even the "insulated" courts have all, to some degree, fallen under the cloud of disrepute.[119] Given the "pox on all houses" attitude of the public choice concept of all government institutions, thus, rather than debating on the shift in authority over copyright protection from administrative agencies to courts or from courts to agencies, the proper inquiry should be a comparative analysis to search for the least imperfect alternative.[120]Therefore, in spite of the aforementioned limitations, China should persist with administrative protection and optimize the dual mechanism.

Admittedly, the Chinese experience is not offered as a cautionary tale for international commentators contemplating an expanded role for administrative agencies in the field of copyright. However, I do believe that China might provide some hints as to possible drawbacks of an uncritical adoption of an administrative protection approach. Arguably, one could glean from a study of the capture pathology of Chinese administrative dominant copyright protection regime, which might make them less enthusiastic and more cautious about utilizing administrative approach to cover the judiciary flaws. At the same time, public choice pessimism might help us to be less fanatical on the shift in power over copyright protection between agencies and courts, and less despairing about government institutions because of the lower expectations it seems to advocate. Neither agencies nor courts are perfect alternatives. Thus, the least imperfect approach is likely to involve adopting a more interactive view of government institutions,[121] principally, to exert various institutions' advantages, counteract their limitations and realize a real "dual system" of copyright protection.

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[119] See David Skeel, *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 659-660 (1997); Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 397 (1974). More details about public choice theory, see generally DANIEL FARBER & PHILIP FRICKEY, LAW AND PUBLIC CHOICE, CHICAGO AND LONDON: THE UNIVERSITY OF CHICAGO PRESS, (1991); Elhauge, *supra* note 10; Jerry Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV.123 (1989); MAXWELL STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY, CINCINNATI: ANDERSON PUBLISHING CO., (1997).

[120] See KOMESAR, *supra* note 8, at 3-13.

[121] See Daniel Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L. REV. 1, 138-49 (1994).