



# Looking Backward, Moving Forward: Copyright Administrative Enforcement in China

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**Abstract** The dual-track system of judicial and administrative protection has always been a distinct feature of copyright protection in China over the past three decades. A detailed historical retrospective shows the predominant role of administrative enforcement for safeguarding copyright and the significant role of path dependence in the creation of the Chinese copyright administrative enforcement system. TRIPS, domestic copyright legislation and various policy documents laid the legal basis for copyright administrative enforcement in China. This paper reveals that there is a notable lack of focus on the infrequent use of administrative dispute resolution procedures for copyright disputes and extra-judicial enforcement measures carried out by copyright administrations, namely regulatory talks (*yuetan*) and campaigns, to address copyright infringements on online platforms. In particular, extra-judicial regulatory approaches are often accompanied by fundamental flaws such as the lack of proportionality, legal certainty, and due procedures, undermining the expected predictability and stability of copyright regulations. This paper argues that open and transparent rules and procedures should be implemented to halt such aggressive expansion of administrative intervention; a platform-oriented co-regulatory framework would reconcile the collaboration between state intervention and industry expertise, thereby shifting the governance paradigm from centralized dispute resolution to diverse alternative mechanisms; the focus of copyright administration should shift from law enforcement to the development of serviced-oriented copyright administrative protection. Although this paper focuses primarily on the Chinese perspective, the Chinese experience with copyright governance could offer some lessons to inform the global policy debate.

**Keywords** Chinese copyright law · Administrative enforcement · Online piracy · Path dependence · Rule of law

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## 1 Introduction

Administrative enforcement has assumed a pivotal role in the remedying intellectual property right (IPR) infringements, especially copyright, as is evident in China's legal practice and has long been controversial as an approach with Chinese characteristics.<sup>1</sup> In particular, the administrative enforcement of copyright refers to a series of administrative measures addressing copyright infringements<sup>2</sup> for which there is no obvious parallel in other jurisdictions.<sup>3</sup> In instances where copyright infringements harm the public interest, copyright administrations proactively safeguard the legitimate rights and interests of the rights holder, maintain market order and foster the incentive to innovate.<sup>4</sup> This protective stance involves a range of administrative measures including administrative penalties, mediation and adjudication.<sup>5</sup> Meanwhile, special extra-judicial administrative actions, namely regulatory talks (*yuetao*) and campaigns, are also employed to address copyright infringements and maintain market stability.<sup>6</sup>

Intellectual property and administrative intervention enjoy a long-standing but ambiguous relationship.<sup>7</sup> China is not unique in broadening the scope of administrative intervention within the field of copyright. Due to the remarkable difficulties that the governance of online intermediaries faces in a digital environment, numerous jurisdictions have opted for the involvement of the public administration in copyright enforcement.<sup>8</sup> EU countries like Spain, Italy and Greece have opted for the administrative enforcement of copyright, empowering administrative, non-judicial bodies to take measures intended to combat online copyright infringement.<sup>9</sup> In a broader sense, the expansion of administrative intervention can also be found in the DMA, which expands the range of social goals

<sup>1</sup> Tang (2010), p. 408 (Administrative authorities enforcing the law reflect the lengthy past and deep cultural roots from ancient China); Shan (2014).

<sup>2</sup> In general, the administrative aspect of copyright encompasses three main facets: (1) implementation of copyright law, which includes copyright registration management, administration of collective copyright organizations, oversight of statutory licensing, and regulation of statutorily prescribed remunerations; (2) administration of international copyright treaties and copyright matters relating to foreign affairs; (3) administrative enforcement of copyright, specifically addressing copyright infringements through administrative measures. In this paper, only the third facet will be explored and analyzed in detail.

<sup>3</sup> Kur et al. (2019) (In the EU, only customs offices are responsible for the administrative enforcement of copyright).

<sup>4</sup> Tang (2010).

<sup>5</sup> Xiong and Zhu (2020); See general Part 4.2.

<sup>6</sup> See generally Part 4.3.

<sup>7</sup> Manderieux (2021); Smith (2017) (intellectual property rights which are “more public and administrative than classic areas of private law”); Menell (2013); Menell (2016) (In nascent copyright regimes, strong state intervention through administrative actions swiftly stabilizes the transactional order in the copyright market, thereby safeguarding the incentives for investment); Besen et al. (1992); Yoo (2020) p. 224; Saich (2008), p. 6. Lemley (2004), pp. 1072–1074 (proper state intervention in the free market might not only prevent market failures in the IP sector, but also bolster innovation and benefit the public more extensively).

<sup>8</sup> Cogo and Ricolfi (2020), p. 587; Frosio (2018), p. 16.

<sup>9</sup> Cogo and Ricolfi (2020) (the legal provisions setting up the administrative enforcement of copyright have been very “shaky”).

that can be legitimately pursued by administrative action.<sup>10</sup> Across the Atlantic in the US, the Copyright Alternative in Small-Claims Enforcement Act (CASE Act) introduced an administrative tribunal, namely the Copyright Claims Board (CCB), to adjudicate copyright infringement claims. Located within the United States Copyright Office, the CCB provides a procedurally streamlined and cost-effective forum for copyright owners to seek damages under USD 30,000 for copyright violations.<sup>11</sup> As a further example, the Korean Copyright Act grants the Ministry of Culture, Sports and Tourism (MCST) authority to take administrative measures to enforce copyright policy and handle online copyright infringements.<sup>12</sup>

## 2 Looking Backward: The Rise of Copyright Administrative Enforcement in China

### 2.1 1910–1949: Administrative Enforcement Under the Shadow of Formal Legal Institutions

Scholars are inclined to view Chinese copyright law as law at gunpoint,<sup>13</sup> i.e., a product of Chinese-western legal interaction during the late imperial period. There were sporadic cases that indicated the public authorities' efforts at prohibiting piracy in ancient China which cannot be regarded as copyright administrative enforcement since there was no established consensus or ideology regarding the protection of copyright.<sup>14</sup>

Although the first copyright law in China, *Da Qing Zhu Zuo Quan Lv*,<sup>15</sup> was officially promulgated in 1910,<sup>16</sup> it only applied in practice for less than a year due to the collapse of the Qing Dynasty. Subsequently both the Beiyang Government (1909–1912) and the Kuomintang Government (1912–1949) promulgated copyright laws based on the *Da Qing Zhu Zuo Quan Lv*.<sup>17</sup> Notably, all these regulations required copyright infringements to be resolved through judicial means, with no mention of the role of administrative authorities in handling such infringements.<sup>18</sup>

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<sup>10</sup> Petit (2021).

<sup>11</sup> Copyright Alternative in Small – Claims Enforcement Act of 2020 (CASE Act of 2020); Samuelson and Hashimoto (2018).

<sup>12</sup> Cho (2019).

<sup>13</sup> Alford (1995); Li (2006); Li (2013).

<sup>14</sup> Alford (1995) (See Generally Chapter Two; Alford believes that scattered decrees and official proclamations depict the landscape of copyright protection in imperial China, mainly serving as a symbolic display of rights and a tool to control speech).

<sup>15</sup> Li and Ng (2008).

<sup>16</sup> Alford (1995); Burkitt (2001).

<sup>17</sup> Zhou and Li (1999), pp. 133–134.

<sup>18</sup> Li and Ng (2008).

However, successive years of wars, devastating famines and a turbulent political environment rendered copyright law insignificant.<sup>19</sup>

Meanwhile, it was not uncommon to see copyright infringements being resolved through administrative measures. For example, when foreign individuals or entities were involved, administrative agencies would, to varying degrees, proactively engage in the enforcement of infringements.<sup>20</sup> Nevertheless, authors and publishers not only proactively made use of customary regulation and private antipiracy policing,<sup>21</sup> but also sought more administrative interventions to secure the interests generated from works under the shadow of formal legal institutions.<sup>22</sup>

## 2.2 1949–1976: Administrative Enforcement Overtook Judicial Protection

Statistics indicate that, in the early stages of the PRC, the “public” forces in the publishing industry accounted for only about one-fourth of the national publishing industry, while the remaining three-fourths were controlled by “private” entities.<sup>23</sup> The timely reprinting of policy texts was a major source of income for most publishing houses, but the public’s high demand for information about policy trends clashed with the low production capacity of state-owned printing presses, creating opportunities for private publishing houses.<sup>24</sup> Thus, private publishing houses dominated the market, severely impacting the profits of state-owned entities. Moreover, such publications contained many unofficial comments on current politics which the authorities found difficult to control.<sup>25</sup> Consequently, administrative measures were taken to monopolize certain publications and ensure the implementation of publishing policies through state control at that specific period.<sup>26</sup>

During the Anti-Rightist Movement, the Ministry of Culture formulated the “*Interim Provisions on the Protection of Copyright in Publications (Draft)*” to dilute the “bourgeoisness” of copyright.<sup>27</sup> It explicitly stipulated that copyright infringements could be handled by the administrative authority responsible for cultural publishing or brought to court through litigation, thus breeding the prototype of a

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<sup>19</sup> All laws enacted in Republican times, copyright law included, were abolished after the foundation of People’s Republic of China. See Yang (2004).

<sup>20</sup> In the first Sino-American copyright infringement lawsuit filed in China, the American textbook publisher Ginn and Co., Evans not only accused the Chinese textbook tycoon Commercial Press Ltd. of copyright infringement in court, but also urged the Chinese government to take administrative measures to counter piracy, backed up by American political pressure. See Wang (2019), pp. 1024–1025.

<sup>21</sup> Wang (2020), p. 20.

<sup>22</sup> Li et al. (2020), pp. 17–18. (“in fact, literature shows that citizens at that time were not concerned with the means to be used to combat copyright infringement. In the face of serious infringements, people were more concerned with how to stop them quickly and efficiently, and naturally administrative enforcement and judicial protection should co-exist”.)

<sup>23</sup> Zhang (2016).

<sup>24</sup> Li et al. (2020), pp. 17–18.

<sup>25</sup> Zhu (2008).

<sup>26</sup> Li and Chang (2007).

<sup>27</sup> Wang (2022), p. 279.

dual-track approach to copyright enforcement in a planned economy.<sup>28</sup> However, according to the explanations provided in the interim provisions, the administrative authorities were empowered to handle most copyright disputes, with judicial means being applicable only to “serious” criminal offenses.<sup>29</sup> Evidently, although a pseudo dual-track approach was laid down in the regulations, administrative measures still constituted the primary method to combat piracy in practice.<sup>30</sup>

### 2.3 1976–1990: Official Introduction of the Dual-Track Approach

Before the enactment of the 1990 Chinese Copyright Law (CCL), administrative departments had performed concrete work in drafting and enforcing provisional regulations to provide protection for certain types of works.<sup>31</sup> In 1984, the Ministry of Culture issued “*Trial Regulations on the Protection of Copyright in Books and Periodicals*”,<sup>32</sup> granting provincial-level publishing authorities the administrative power to directly determine copyright disputes. In the same year, China established the National Copyright Administration of China (NCAC) and embarked on the journey of administrative protection of copyright.<sup>33</sup> Meanwhile, policy makers also emphasized the role of judicial protection for copyright. The 1985 “*Implementing rules of the Trial Regulations on Books and Periodicals Copyright Protection*” incorporated judicial protection into the provisions for infringement remedies, thus creating both administrative and judicial protection for copyright holders.<sup>34</sup> Additionally, the 1986 *General Principle of Civil Law* explicitly protected copyright as a private right for the first time, offering judicial protection for the rights of authorship, disclosure, publication and remuneration for right holders.<sup>35</sup>

In the formulation of the 1990 CCL, lawmakers advocated the incorporation of administrative enforcement for copyright, influenced by a confluence of practical imperatives and diplomatic considerations. Initially, the courts contended that judges were overloaded, and that competent copyright administrative authorities

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<sup>28</sup> Yang (1992). (As a result of the Rectification and Anti-Rightist Movement, the fledgling copyright legislation came to a halt amidst vocal objections to “private ownership of knowledge” and “the remnants of bourgeois legal power”).

<sup>29</sup> Li (2006); Li and Chang (2007). (The explanations provide that “due to the absence of formal legislation, copyright infringements can only be temporarily dealt with by administrative intervention. Serious cases can be prosecuted in court and subject to criminal penalties”).

<sup>30</sup> Wu (2009).

<sup>31</sup> Li (2006).

<sup>32</sup> Trial Regulations on Copyright Protection of Books and Periodicals (5 June 1984) <https://chinacopyrightandmedia.wordpress.com/1984/06/05/trial-regulations-on-copyright-protection-of-books-and-periodicals/> accessed 22 August 2023.

<sup>33</sup> NCAC, (20 April 2017) Overview of China’s Copyright Undertaking, <https://en.ncac.gov.cn/copyright/contents/10359/329069.shtml> accessed 22 August 2023.

<sup>34</sup> Implementing rules of the Trial Regulations on Books and Periodicals Copyright Protection (1 January 1985), <https://chinacopyrightandmedia.wordpress.com/1985/01/01/implementing-rules-of-the-trial-regulations-on-books-and-periodicals-copyright-protection/> accessed 22 August 2023. See also Heath (2021), p. 297.

<sup>35</sup> Article 94 of 1986 General Principle of Civil Law.

could assist them in handling copyright disputes.<sup>36</sup> Administrative agencies outperformed courts in countering piracy because they “deal with copyright disputes more conveniently with experienced professionals”.<sup>37</sup> In particular, the judicial mechanism came with inherent constraints, including prolonged legal proceedings, modest damage awards, intricate evidentiary requirements, and a scarcity of experienced judges.<sup>38</sup> Moreover, given that copyright is not an “indigenous lexicon”<sup>39</sup> to Chinese legal system, the legal framework for copyright protection was integrated through a government-led, top-down approach.<sup>40</sup> Concurrently, the populace has substantial trust in and acceptance of the administrative mechanisms, recognizing that administrative intervention may serve as an ancillary mechanism where judicial protection remains inefficient or lacks the requisite expertise.<sup>41</sup> Furthermore, in response to the US government’s demand for a substantive overhaul of Chinese IPR enforcement mechanisms to achieve a high level of IPR protection, the administrative approach emerged as an optimal option.<sup>42</sup>

Amidst prolonged Sino-American IP negotiations, the 1990 Copyright Law emerged from over two decades of deliberations, encapsulating an integrated dual-track approach that comprised both administrative and judicial protection operating in parallel, offering comprehensive protection for creative expressions in China.<sup>43</sup> Article 46 of the 1990 CCL provided that “[a]nyone who commits any of the following acts of infringement ... *may*, in addition, be subjected by a copyright administration department to such administrative penalties as confiscation of unlawful income from the act or imposition of a fine”.<sup>44</sup> Notably, this provision granted copyright administrations the power to impose penalties on copyright-infringing activities, serving as the legal ground for “dual-track” copyright protection.<sup>45</sup> However, it did not articulate any prerequisite for copyright administrative protection, which not only led to an excessive expansion of copyright administrative protection in practice but also blurred the distinction

<sup>36</sup> Li (2015), p. 21.

<sup>37</sup> Li et al. (2020), p. 21.

<sup>38</sup> Li (2003).

<sup>39</sup> Alford (1995), p. 7. (Alford describes it as “western subject in an eastern context”).

<sup>40</sup> Shao (2005).

<sup>41</sup> Li et al. (2020), pp. 21–22.

<sup>42</sup> Yu (2010) (“During the 1990s, the US repeatedly threatened China with a series of economic sanctions, trade wars, non-renewal of Most Favored Nation status, and opposition to entry into the World Trade Organization”).

<sup>43</sup> Li et al. (2020), p. 22; Li (2006).

<sup>44</sup> Article 46 para. (1) of 1990 CCL provides that “[a]nyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making a public apology or paying compensation for damages, depending on the circumstances, and may, in addition, be subjected by a copyright administration department to such administrative penalties as confiscation of unlawful income from the act or imposition of a fine ...” English translation from PKULaw.com [CLI Code] CLI.1.4812(EN) (emphasis added).

<sup>45</sup> Li (2018).

between civil liability and administrative responsibility for copyright infringements.<sup>46</sup>

#### 2.4 1990–2020: Fierce Debates on Copyright Administrative Enforcement

After China's accession to the World Trade Organisation (WTO) in 2001, compliance with the multilateral IP system became the priority for China.<sup>47</sup> Article 47 of the 2001 CCL reaffirmed the dual-track approach but limited the scope of administrative intervention by restricting the copyright administrative authorities' power to impose penalties where public interests are harmed in the disputed cases.<sup>48</sup> Nevertheless, as legal uncertainties surrounding the ambiguous terminology of "public interests" remained unanswered, the copyright-related administrations were subject to a strong and long-lasting path dependence on administrative intervention.<sup>49</sup> As shown in Fig. 1, despite a drastic decline in the number of cases handled by copyright administrations (on the right side), administrative enforcement served as the dominant means of enforcing copyright in that period.<sup>50</sup>

Moreover, in the 2010s, the radical paradigm shift in the Chinese digital services landscape not only fundamentally changed the supply chain ecosystem but opened the door to the unprecedented massive spread of online piracy.<sup>51</sup> Against this background, copyright administrative enforcement, as a proactive *ex ante* administrative action, can respond and resolve massive and repeated copyright infringements swiftly, efficiently, and at a lower cost.<sup>52</sup> After the implementation of TRIPS, Art. 48 of the 2010 CCL adopted the verbatim provision of the 2001 CCL, maintaining the dual-track protection of copyright.<sup>53</sup> As shown in Fig. 1, due to positive moves towards greater use of judicial machinery and increased administrative enforcement efforts, the number of cases tried by courts soared dramatically, while cases handled by copyright administrations decreased sharply.

The third draft of the third Amendment to the CCL has fueled fierce controversy as it expunged the stipulation pertaining to "[infringements that] harm the public interest", thereby liberating the administrative intervention in copyright infringements from the constraints of the "public interest test".<sup>54</sup> Against the fierce debates

<sup>46</sup> Li et al. (2020).

<sup>47</sup> Cheng (2019), p. 147.

<sup>48</sup> Article 47 of the 2001 CCL provides that "where he damages public interests at the same time, the copyright administration may order the infringer to discontinue the infringement, confiscate his unlawful gains, confiscate and destroy the reproductions of infringement, and impose a fine on him; if the case is serious, the copyright administration department may also confiscate the materials, instruments and equipment, etc. mainly used to make the reproductions of infringement". English translation from PKULaw.com [CLI Code] CLI1.37087(EN).

<sup>49</sup> Wu (2013).

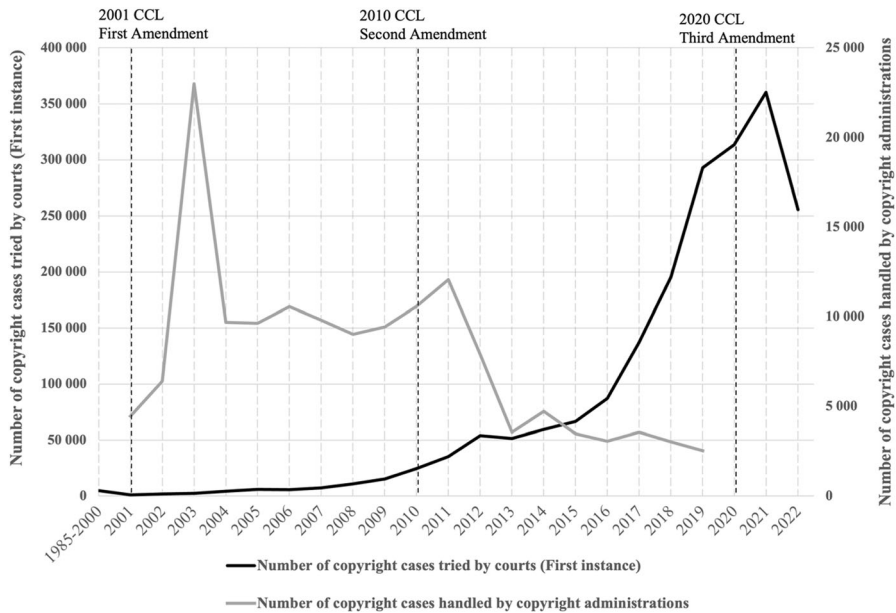
<sup>50</sup> Thomas (2007); Tang (2010), p. 407.

<sup>51</sup> Priest (2006); Mertha (2009).

<sup>52</sup> Tang (2019); *See also* Duncan et al. (2008), p. 543; Dong (2022).

<sup>53</sup> Article 48 of 2010 CCL.

<sup>54</sup> Article 77 of Third Draft of Third Amendment to CCL, [https://www.gov.cn/xinwen/2014-06/10/content\\_2697701.htm](https://www.gov.cn/xinwen/2014-06/10/content_2697701.htm) accessed 22 August 2023.



**Fig. 1** Number of copyright cases tried by courts and handled by copyright administrations from 1985 to 2022 (Data and statistics are retrieved from NCAC and CNIPA official annual report. Available at: <https://www.ncac.gov.cn/chinacopyright/channels/12567.shtml>; accessed 22 August 2023.)

on the administrative intervention of copyright,<sup>55</sup> the third amendment to the CCL in 2020 maintained the “public interest test” while further enhancing the power of copyright administrations<sup>56</sup> to take more administrative measures to deal with copyright infringements, including issuing orders to cease infringement and warnings, confiscating unlawful gains and tools, and investigating suspected copyright infringement.<sup>57</sup> Although commentators have voiced concerns about the potential over-enforcement of copyright,<sup>58</sup> copyright owners and governments

<sup>55</sup> Yu (2022).

<sup>56</sup> Xie and Chen (2022).

<sup>57</sup> Article 53 provides that “where a tort concurrently damages public interests, the copyright authority shall order the violator to cease the tort, give a warning, confiscate the illegal gains, confiscate and harmlessly destroy and dispose of the infringing copies, as well as the materials, tools, and equipment, among others, that are mainly used to make the infringing copies, and where the illegal business amount exceeds 50,000 yuan, a fine of one to five times the illegal business amount may be imposed; where there is no illegal business amount, or the illegal business amount is difficult to be calculated or is less than 50,000 yuan, a fine of not more than 250,000 yuan may be imposed ...” (emphasis added). English translation from PKULaw.com [CLI Code] CLI.1.347867(EN).

<sup>58</sup> Jiang Y (20 Nov. 2020) Copyright Law Revision from the Perspective of Administrative Enforcement (从行政执法视角看著作权法修改). (China IPR) [http://www.iprchn.com/cipnews/news\\_content.aspx?newsId=126029](http://www.iprchn.com/cipnews/news_content.aspx?newsId=126029) accessed 22 August 2023; Yu (2022); Before the enactment of the 2020 CCL, scholars shared concern about potential over-enforcement regarding the proposed amendment. See Lee, Bruun and Li (2016), p. 86. (“Many experts have criticized the fact that a government agency can go to a company in order to investigate a suspected patent infringement and even pursue coercive measures contained in the amendment as being detrimental to businesses in China”).

swiftly embraced the enhanced enforcement powers.<sup>59</sup> Compared to the protracted and costly judicial process, copyright administrative enforcement provides a more efficient avenue with streamlined procedures, swift investigations, and reduced evidentiary requirements, making it preferable for rights holders seeking the immediate cessation of infringements.<sup>60</sup>

## 2.5 An Interim Conclusion

Throughout different historical periods, copyright administrative enforcement consistently emerged as the predominant mechanism for safeguarding copyright. Considering the limited judicial resources and deeply rooted top-down strategy of social governance in the 1990s, China passively presented as a “norm taker” of international standards<sup>61</sup> and adopted a substantial administrative apparatus in domestic copyright law to achieve “strategic cooperation” and “tactful resistance” with foreign copyright policies.<sup>62</sup> Nowadays, with the growth of internal demand, China endeavours to proactively promote the international copyright rulemaking and expand copyright administrative enforcement to achieve a high level of copyright protection.<sup>63</sup>

Besides the internal push and outward pressure, path dependence plays a significant role in the creation of the unique copyright administrative enforcement system.<sup>64</sup> According to North, “path dependence is not ‘inertia’, rather it is the constraints on the choice set in the present that are derived from historical experiences of the past”.<sup>65</sup> That said, once an increasing return mechanism is established, positive feedback may result in a single equilibrium that will in turn be resistant to change, rendering the today’s choices “locked in” by historical patterns.<sup>66</sup> In the same vein, the “heritage” of administrative intervention has become ingrained in the making of the Chinese copyright legal system through self-reinforcing mechanisms, influencing the manner in which copyright infringement is addressed at present and even in the future.<sup>67</sup>

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<sup>59</sup> In the 2021 Special 301 Report, the United States Trade Representative recognized the progress made by the recent amendments to intellectual property laws but noted that “it remains to be seen whether these measures sufficiently address existing challenges to right holders”. Office of the U.S. Trade Representative, 2021 Special 301 Report, pp. 41–42 (2021).

<sup>60</sup> Li et al. (2020).

<sup>61</sup> Yu (2019).

<sup>62</sup> Tian and Chao (2011) (describing how China applied strategic cooperation and tactful resistance in the enactment and implementation of copyright laws to balance between the protection of copyright and the promotion of innovation. Particularly, Chinese Government has applied strategic cooperation by establishing the copyright regime in China to gain a ticket to accede to WTO and attract more direct foreign investments, while employed “selectively cooperative and tactically resistant” to deal with the USA-China copyright disputes.); Beebe (2013).

<sup>63</sup> He (2020).

<sup>64</sup> Prado and Trebilcock (2009); Husa (2018).

<sup>65</sup> North (2005), p. 52.

<sup>66</sup> Liebowitz and Margolis (1995); Page (2006), pp. 87–88.

<sup>67</sup> Xiong (2018).

### 3 Status Quo: Legal Framework for Copyright Administrative Enforcement

With the ongoing development and maturation of China's IP legal framework, there has been a systematic evolution and enhancement of the IP judicial system.<sup>68</sup> In particular, China has engaged in several judicial reforms to enhance the judicial enforcement of IPRs, including improving the professionalism and efficiency of the judicial process and increasing the adequacy of remedies.<sup>69</sup> Following the National IP Strategy's call for "the leading role of judicial protection of IPRs",<sup>70</sup> some scholars suggest that the copyright administrative enforcement should be abandoned because TRIPS recognizes that IPRs are private rights<sup>71</sup> and neither prescribes nor mandates the implementation of an administrative protection system by its members.<sup>72</sup> However, such argumentation seems untenable from many perspectives. Against this background, it is appropriate to turn now to the legal context in which the administrative enforcement of copyright is rooted.

#### 3.1 Administrative Enforcement in TRIPS

TRIPS includes more than 20 provisions affirming the administrative protection of IPRs<sup>73</sup> alongside some provisions aimed at restricting its drawbacks.<sup>74</sup> In general, the latitude granted to members to formulate administrative protection for IPRs is mainly encapsulated within TRIPS.<sup>75</sup> While these provisions do not explicitly mandate administrative protection, they do, nevertheless, afford member states the flexibility to tailor administrative protection in alignment with their domestic legal frameworks and prevailing national circumstances.<sup>76</sup> Notably, TRIPS only mandates WTO members to afford minimum standards of protection,<sup>77</sup> leaving them the full autonomy to adopt enforcement measures, including civil and

<sup>68</sup> Tang (2019); Huang (2017).

<sup>69</sup> Guo (2021); Shen and Wen (2016); Lee and Zhang (2017); Jia (2021); Feng and Ma (2019).

<sup>70</sup> State Council (10 Jun 2008) National IP Strategy 2008, [https://www.gov.cn/zwqk/2008-06/10/content\\_1012269.htm](https://www.gov.cn/zwqk/2008-06/10/content_1012269.htm) accessed 22 August 2023. Supreme People's Court (23 Mar. 2009) Opinions of the Supreme People's Court on Several Issues Regarding the Implementation of the National Intellectual Property Strategy, [https://www.gov.cn/govweb/jrzg/2009-03/30/content\\_1271884.htm](https://www.gov.cn/govweb/jrzg/2009-03/30/content_1271884.htm) accessed 22 August 2023.

<sup>71</sup> Xuan and Correa (2009), p. 210 (noting that the demands for strengthened intellectual property enforcement "seem to overlook the crucial fact that IPRs are private rights and, hence, the burden and cost of their enforcement is to be borne by the right-holder, not the public at large"); Yu (2019), pp. 747–54 (discussing the importance of the TRIPS minimum standards and the Agreement's recognition that "intellectual property rights are private rights").

<sup>72</sup> Paragraph 1 of TRIPS; Li (2018); Wu and Suo (2013).

<sup>73</sup> Paragraph 1, 2(c) of the Preamble, Art. 1(1), Art. 2(2), Art. 7, Art. 22 (3) and (4), Art. 23 (1) and (2), Art. 24 (3), Art. 41 (1) and (2), Art. 49, Art. 50 (8), Arts. 51–60, Art. 62(1), (2), (4) and (5), and Art. 65(5) of TRIPS.

<sup>74</sup> Article 4, Art. 31(i) and (j), Art. 41(3) and (4), Art. 48(2), Art. 49, Art. 58(c), and Art. 63(1), (3) and (4) of TRIPS.

<sup>75</sup> Specifically, within paras. 1 and 2(c) of the Preamble, as well as Arts. 1(1), 7, 41(1), and 62.

<sup>76</sup> Malbon et al. (2014), p. 613.

<sup>77</sup> Van den Bossche and Zdouc (2017).

administrative procedures<sup>78</sup>, border measures,<sup>79</sup> and criminal procedures,<sup>80</sup> to ensure that the implementation of TRIPS meets the overarching requirements and fundamental obligations imposed.<sup>81</sup>

In addition, the requirement of “cost effectiveness” in law enforcement is chiefly reflected in numerous articles of TRIPS.<sup>82</sup> Particularly, the general obligations regarding IPR enforcement set out in Art. 41 provide that procedures “shall not be unnecessarily complicated or costly”, nor “entail unreasonable time-limits or unwarranted delays”, requiring member states to enhance the efficiency of law enforcement.<sup>83</sup> Therefore, compared to the judicial approach, the administrative protection of IPRs perfectly meets the requirement of “cost effectiveness” as it ensures timely and effective remedies for rights holders at low cost.

Furthermore, according to TRIPS, after their accession to the WTO, members must not diminish the pre-existing level of protection for IP due to the weakening of administrative protection.<sup>84</sup> Before signing TRIPS, the administrative enforcement of copyright existed in the 1990 Chinese Copyright Law (CCL) and functioned as the primary enforcement tool.<sup>85</sup> In such a scenario, the existing level of IP protection in China would inevitably fall if copyright administrative enforcement were abolished, thus failing to meet the requirements of TRIPS.

Overall, although TRIPS does not mandate members to adopt an administrative protection system of IPRs, its fundamental stance towards administrative intervention can, however, be characterized as affirmative.

### 3.2 Administrative Enforcement in Domestic Legislative Provisions

When a copyright infringement harms the public interest, a copyright administration shall enforce its power by issuing an order to cease infringement and warnings, confiscating unlawful gains and tools. Moreover, copyright administrations are granted the power to impose a fine of one to five times unlawful gains exceeding

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<sup>78</sup> Articles 42–50 of TRIPS.

<sup>79</sup> Articles 51–60 of TRIPS.

<sup>80</sup> Article 61 of TRIPS.

<sup>81</sup> Gervais (2021), p. 68; Marsoof (2021), pp. 223–24.

<sup>82</sup> See paras. 1 and 2(c) and (d) of the Preamble, Art. 39(1) Art. 41(2), Art. 46, Art. 50, Art. 63, Art. 64(3) of TRIPS.

<sup>83</sup> Article 41 of TRIPS.

<sup>84</sup> Article 2(2) explicitly lays down that “[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other ...”. Article 65(5) further adds that “[a] Member availing itself of a transitional period under paras. 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement”.

<sup>85</sup> Wu (2013); Alford (1995).

RMB 50,000, and up to RMB 250,000 in cases where there is no unlawful gain or an unlawful gain that is difficult to calculate or less than RMB 50,000.<sup>86</sup> Interestingly, Art. 53 of the 2020 CCL deleted the modal auxiliary verb “*may*”, which indicates that all infringements detrimental to the public interest *must* be subject to administrative intervention, thereby further intensifying copyright administrative enforcement.<sup>87</sup> Furthermore, Art. 55 entrusts the copyright administrations with the power to investigate suspected copyright infringement, such as questioning the relevant parties, investigating circumstances related to suspected unlawful acts, conducting on-the-spot inspections, checking and reproducing contracts, invoices, account books, and other materials, and sealing or seizing the premises and articles of suspected unlawful acts.<sup>88</sup>

Additionally, Art. 84 of the 2018 *E-commerce Law* sets out administrative liability for E-commerce business operators that fail to promptly perform a “notice and take down” obligation and take necessary measures against an IPR infringement on their services.<sup>89</sup> The competent IP administrations shall order the disputed operators to make corrections within a time limit, impose a fine of more than RMB 50,000 but less than RMB 500,000, and a fine of more than RMB 500,000 but less than RMB 2 million under serious circumstances.<sup>90</sup> Therefore, copyright administrations may order rectifications and impose fines against e-commerce business operators for copyright violation on their services under certain circumstances.

However, the 2020 CCL further enhances the power of copyright administrations, while no further elaboration of the highly abstract term “public interest” is provided in related regulations.<sup>91</sup> In other words, the question of how far

<sup>86</sup> Article 53 provides that “where a tort concurrently damages public interests, the copyright authority shall order the violator to cease the tort, give a warning, confiscate the illegal gains, confiscate and harmlessly destroy and dispose of the infringing copies, as well as the materials, tools, and equipment, among others, that are mainly used to make the infringing copies, and where the illegal business amount exceeds 50,000 yuan, a fine of one to five times the illegal business amount may be imposed; where there is no illegal business amount, or the illegal business amount is difficult to be calculated or is less than 50,000 yuan, a fine of not more than 250,000 yuan may be imposed ...”.

<sup>87</sup> *Ibid*, emphasis added.

<sup>88</sup> Article 55 provides that “[w]hen investigating and handling suspected infringement upon copyright and copyright-related rights, the copyright authority may inquire about the relevant parties and investigate the situation concerning the suspected illegal act; carry out on-site inspections of the parties’ premises and articles suspected of illegal acts; consult and copy contracts, invoices, account books and other relevant materials concerning the suspected illegal acts; and may seal up or seize the premises and articles suspected of illegal acts. When the copyright authority exercises the functions and powers prescribed in the preceding paragraph in accordance with the law, the parties shall provide assistance and cooperation, and shall not reject or obstruct the exercising of such functions and powers.”.

<sup>89</sup> Feng et al. (2019); Huang and Li (2019).

<sup>90</sup> Article 84 of 2019 E-commerce Law provides that “If an e-commerce platform business operator, in violation of the provisions of articles 42 and 45 of this Law, fails to take necessary measures in accordance with the law against the infringement of on-platform business operators upon intellectual property rights, he or she shall be ordered by the relevant intellectual property administrative authorities to make corrections within a time limit; if he or she fails to make corrections within a time limit, the e-commerce platform business operator shall be fined more than RMB 50,000 but less than RMB 500,000; under severe circumstances, he or she shall be fined more than 500,000 yuan but less than RMB 2 million”.

<sup>91</sup> Article 53 of the 2020 CCL.

administrative intervention should extend remained unanswered. Moreover, the regulations do not keep pace with the 2020 CCL, and the relevant rules have remained unchanged for more than ten years.<sup>92</sup> Concurrently, a plethora of administrative regulations and departmental rules derived from the 2020 CCL and Administrative Penalty Law provides scattered stipulations on substantive issues pertaining to copyright administrative enforcement.<sup>93</sup>

### 3.3 Policy Documents

Contrary to academia's call for the reduction of copyright administrative enforcement, the central government has issued a multitude of policy documents pertaining to IPRs to delineate the vast discretionary powers of the competent administrative authorities.<sup>94</sup> These policy documents, typically standardized in an authoritative form, delineate the objectives to be achieved within a specific period of time, the guiding principles to be followed, the explicit tasks to be completed, the methods of implementation, and the general steps and specific measures to be taken, thereby playing a crucial role in enhancing the administrative protection of IPRs at national level. Marking the promulgation of the 2008 *Outline of the National Intellectual Property Strategy*<sup>95</sup> as a significant watershed, one can observe that the state has continuously released numerous IP policy documents specifying the responsibility of administrative authorities. This trend became even more prevalent when the state formally proposed the "National Intellectual Property Strategy (2014–2020)"<sup>96</sup> which specified the responsibilities of over 20 national administrative authorities to strengthen IP law enforcement. Subsequently, the "Opinions" issued by the State Council have called for stronger administrative protection of IPRs at all levels.<sup>97</sup>

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<sup>92</sup> Li (2022); CNIPA (2 Nov. 2022) In-depth implementation of the Advancement Plan for the Opinions on Strengthening Intellectual Property Protection, [https://www.gov.cn/xinwen/2022-11/02/content\\_5723778.htm](https://www.gov.cn/xinwen/2022-11/02/content_5723778.htm) accessed 22 August 2023.

<sup>93</sup> 2013 Regulations on the Implementation of the Copyright Law; 2013 Regulations on Collective Copyright Management; 2009 Measures for the Implementation of Administrative Penalties for Copyright; 2005 Measures for the Administrative Protection of Internet Copyright; and the 2009 Regulations on Customs Protection of Intellectual Property Rights.

<sup>94</sup> Li (2014).

<sup>95</sup> State Council (5 June 2008) Outline of the National Intellectual Property Strategy, [https://www.gov.cn/zwqk/2008-06/10/content\\_1012269.htm](https://www.gov.cn/zwqk/2008-06/10/content_1012269.htm) accessed 22 August 2023; An English version is available at WIPO Lex, <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf> accessed 22 August 2023.

<sup>96</sup> State Council (10 Dec. 2014) Action Plan for the In-depth Implementation of the National Intellectual Property Strategy (2014–2020), [https://www.gov.cn/gongbao/content/2015/content\\_2806004.htm](https://www.gov.cn/gongbao/content/2015/content_2806004.htm) accessed 22 August 2023.

<sup>97</sup> State Council (22 Dec 2015) Opinions of the State Council on Accelerating the Building of a Strong Intellectual Property Country under New Circumstances, [https://www.gov.cn/zhengce/content/2015-12/22/content\\_10468.htm](https://www.gov.cn/zhengce/content/2015-12/22/content_10468.htm) accessed 22 August 2023.

A similar emphasis on enhancing the administrative enforcement of IPRs was also presented in other forms of policy documents, such as the 2019 Opinions on Strengthening Intellectual Property Protection,<sup>98</sup> the 2020 Promotion Plan for In-depth Implementation of the National Intellectual Property Strategy and Accelerating the Building of a Powerful Nation in Intellectual Property Rights<sup>99</sup> and the Outline to Boost China's Competitiveness in the Area of Intellectual Property (2021–2035).<sup>100</sup> Upon examining these promotion plans, opinions, and outlines, it becomes evident that these policy documents grant administrative authorities the power to implement flexible administrative measures, aiming to ensure the holistic protection of IPRs.<sup>101</sup>

#### 4 Copyright Administrative Enforcement in Practice: Judicial and Extra-Judicial Approaches

Based on the intensity of administrative intervention, administrative enforcement in the copyright domain can be roughly categorized into five groups: administrative penalty, administrative adjudication, administrative mediation, regulatory talks, and campaigns. Much has been written, and much is understood, about how copyright administrations investigate and deter copyright infringements through administrative penalties in the offline world. Far less has been written and is understood about how other administrative dispute resolutions, namely administrative mediation and administrative adjudication are used to resolve copyright disputes. In addition, there is a notable lack of focus on extra-judicial enforcement measures carried out by copyright administrations, namely regulatory talks and campaigns, to address copyright infringements on the various online platforms.

##### 4.1 Administrative Penalty

When conflicts arise between parties, copyright administrations at all levels often opt to intervene in disputes through an administrative penalty.<sup>102</sup> They are subject to piecemeal rules scattered in two areas of legislation, namely copyright law and administrative law. Among them, *Measures for the Implementation of Copyright Administrative Penalty* (2009) set out detailed procedures for copyright administrations to follow when dealing with copyright infringements.<sup>103</sup>

<sup>98</sup> State Council (24 Nov. 2019) Opinions on Strengthening Intellectual Property Protection, [https://www.gov.cn/zhengce/2019-11/24/content\\_5455070.htm](https://www.gov.cn/zhengce/2019-11/24/content_5455070.htm) accessed 22 August 2023.

<sup>99</sup> CNIPA (18 May 2020) Promotion Plan for In-depth Implementation of the National Intellectual Property Strategy and Accelerating the Building of a Powerful Nation in Intellectual Property Rights, [https://www.cnipa.gov.cn/art/2020/5/18/art\\_499\\_151069.html](https://www.cnipa.gov.cn/art/2020/5/18/art_499_151069.html) accessed 22 August 2023.

<sup>100</sup> CNIPA (9 Sep. 2022) Outline to Boost China's Competitiveness in the Area of Intellectual Property (2021–2035), [https://english.cnipa.gov.cn/art/2022/9/9/art\\_3038\\_178653.html](https://english.cnipa.gov.cn/art/2022/9/9/art_3038_178653.html) accessed 22 August 2023.

<sup>101</sup> Li et al. (2020); Dong (2022).

<sup>102</sup> Articles 53 and 55 of the 2020 CCL.

<sup>103</sup> Measures for the Implementation of Copyright Administrative Penalty (2009). See also Tang (2010).

When copyright infringements harm the public interest, copyright administrations shall issue order to cease infringement and warnings, confiscate unlawful gains and tools, and impose fines.<sup>104</sup> Distinct from the inherent prudence and reactivity of the judiciary, copyright administrations are more proactive in penalizing unlawful activities and have the discretion to initiate investigations and proceedings based on their own initiative.<sup>105</sup> In particular, self-initiated copyright administrative enforcement reduces the intricacies and associated expenses of investigations, empowering law enforcement against unspecified infringing parties and applying effective measures for massive infringements and repeated violations within certain regions and timeframes.

Certain procedural safeguards are provided to prevent the abuse of the power of administrative penalties. To request administrative protection, the interested party shall submit a written application stating the names and addresses of the parties concerned and the facts and reasons on which the application depends, proof of copyright ownership, the infringed work and other evidence.<sup>106</sup> Upon receiving all materials, the copyright administration shall, within 15 days, decide whether to accept or reject the application and notify the applicant about its decision, providing a written explanation if declined.<sup>107</sup> A case investigation report shall be submitted after the investigation, stating whether the involved act is illegal, offering an opinion on handling, and setting out the relevant facts, reasons and basis, with all evidential materials enclosed.<sup>108</sup> When issuing the decision of an administrative penalty, an advance notice of the penalty should be delivered to inform the party of the basis for the decision and its lawful rights.<sup>109</sup> The relevant party, upon notification or within 30 days after the public announcement, is granted a seven-day window to present its statements or arguments.<sup>110</sup> Prior to imposing an administrative penalty that mandates a hearing as stipulated by relevant laws or administrative regulations, the copyright administration is obligated to notify the concerned party of their entitlement to such a hearing.<sup>111</sup> If aggrieved by an administrative penalty levied by the copyright administration, the affected party has the right to seek an administrative reconsideration.<sup>112</sup> Administrative penalties issued by copyright administrations are subject to judicial review. Should the party

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<sup>104</sup> Article 53 of 2020 CCL.

<sup>105</sup> Article 11 of Measures for the Implementation of Copyright Administrative Penalty (2009) (The copyright administrations are granted the power to file for investigation and penalty based on their own initiative, the case materials transferred by the relevant department, or a complaint or report made by the right holder, an interested party or any other informant).

<sup>106</sup> *Ibid.*, Art. 13.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*, Art. 25.

<sup>109</sup> *Ibid.*, Art. 26.

<sup>110</sup> *Ibid.*, Art 27.

<sup>111</sup> *Ibid.*, Art 33.

<sup>112</sup> *Ibid.*, Art. 37.

be dissatisfied with the administrative penalty or the outcome of the administrative reconsideration, they are entitled to initiate an administrative lawsuit.<sup>113</sup>

Corporations, particularly foreign companies, prefer to enforce their rights through raids because of the publicity and the quick and inexpensive results.<sup>114</sup> Such cost-effective outcomes send a misleading signal to both domestic and foreign right holders, leading them to bypass conventional judicial remedies in copyright disputes and instead seek redress from copyright administrations. However, copyright disputes traditionally subject to the principle of private autonomy and judicial adjudication have been subsumed under the jurisdiction of administrative powers, preventing market entities from choosing the dispute resolution methods that best align with their interests.<sup>115</sup>

## 4.2 Alternative Dispute Resolutions

### 4.2.1 Copyright Administrative Adjudication

Administrative adjudication is “an act by the administrative authority, upon the application of the parties involved, and authorized by laws and regulations, to adjudicate civil disputes that are closely related to administrative management activities”.<sup>116</sup> It represents an atypical administrative action, in which administrative agencies exercise their power to resolve civil disputes. Compared to civil litigation, administrative adjudication presents distinct advantages, especially its specialization, flexibility and cost-effectiveness in copyright disputes. While judges typically require specific knowledge and experience when dealing with copyright infringements, administrative bodies, due to their specialized experience within their jurisdictional purview, are well-suited to address the highly specialized demands of copyright infringements.

Notwithstanding, administrative bodies often exhibit hesitancy in undertaking adjudication, occasionally circumventing such responsibilities through subtle tactics.<sup>117</sup> Given that administrative adjudications lack binding force, an aggrieved party from a decision rendered by the copyright administration retains the prerogative to pursue civil litigation. Scholars argue that there is the possibility that the judiciary and the copyright administration will arrive at incongruent determinations on an identical copyright infringement, thereby augmenting judicial expenditure and squandering administrative resources.<sup>118</sup> Consequently, copyright administrations appear to intentionally sidestep the administrative adjudication mechanism, displaying a proclivity for mediation over formal decisions, which

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<sup>113</sup> *Ibid.*

<sup>114</sup> Hurtado (2018).

<sup>115</sup> Xiong and Zhu (2020).

<sup>116</sup> State Council (2 Jun 2019) Opinions on Improving the Administrative Adjudication System and Strengthening the Work of Administrative Adjudication, [https://www.gov.cn/zhengce/2019-06/02/content\\_5396932.htm](https://www.gov.cn/zhengce/2019-06/02/content_5396932.htm) accessed 22 August 2023.

<sup>117</sup> Zhang (2015).

<sup>118</sup> Xiong and Zhu (2020).

jeopardizes the prospective efficacy of the administrative adjudication framework.<sup>119</sup> Moreover, whether administrative bodies can consistently maintain a neutral adjudicatory stance, ensuring the impartiality of dispute resolution, remains a profound question worthy of contemplation.<sup>120</sup>

#### 4.2.2 Copyright Administrative Mediation

Mediation is not an uncommon alternative resolution method for copyright disputes.<sup>121</sup> Following the principle of private autonomy, administrative mediation for copyright disputes is conducted under the guidance of copyright administrations, with minimal intrusion into the copyright marketplace.<sup>122</sup> In handling copyright disputes, administrative agencies underscore their service-oriented role, prioritizing consensual agreements over imposing coercive decisions or manifesting bias towards any party.<sup>123</sup> Arising from administrative mediation, the mediation agreement does not affect the legitimate rights and obligations of the parties concerned, due to the lack of inherent binding nature.<sup>124</sup> Nonetheless, existing copyright statutes remain silent on the delineation of explicit rules governing the procedures and ambit of administrative mediation concerning copyright disputes.<sup>125</sup>

Due to constraints imposed by “top-down” enforcement paradigms, the function of copyright administrative mediation has not been effectively developed and nurtured.<sup>126</sup> First, grounded in the principle of voluntariness, the commencement of administrative mediation is prevented if any party objects. Besides, the enforceability of the mediation agreement emanating from the administrative mediation necessitates judicial confirmation to secure binding effect.<sup>127</sup> Moreover, the task of mediating copyright disputes primarily resides with copyright administrations that also impose administrative penalties on copyright infringements that harm the public interest, and thus invariably leads to an ambiguity in the delineation of the roles of copyright administrations as mediation entities.<sup>128</sup> Furthermore, the proactive administrative authorities at times infiltrate the mediation process, compromising the impartiality of mediators.<sup>129</sup> In practice, copyright administrations mischaracterize the role of administrative mediation, equating the mediation

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<sup>119</sup> Zhang (2015).

<sup>120</sup> *Ibid.*

<sup>121</sup> WIPO Mediation Rules (Effective from 1 Jul. 2021), <https://www.wipo.int/amc/en/mediation/rules/index.html#10a>, accessed 22 August 2023; Art. 84 of the third draft of the third amendment to the CCL provides that “parties involved in disputes concerning copyright and related rights may alternatively opt for mediation”.

<sup>122</sup> Xiong and Zhu (2020).

<sup>123</sup> Deng (2017).

<sup>124</sup> Li et al. (2020).

<sup>125</sup> Deng (2017).

<sup>126</sup> Xiong and Zhu (2020).

<sup>127</sup> Wang and Yi (2017).

<sup>128</sup> He (2014).

<sup>129</sup> Xiong and Zhu (2020).

process with that of administrative penalty procedures, thereby rendering administrative mediation an empty shell.<sup>130</sup>

### 4.3 Extra-Judicial Regulatory Response against Online Piracy

#### 4.3.1 Regulatory Talks (*Yuetan*)

Regulatory talks, or “*yuetan*” are often regarded as a pragmatic administrative regulatory measure in the face of lax or weak regulations, particularly when addressing regulatory challenges in economic and social sectors.<sup>131</sup> By engaging in scheduled talks with relevant stakeholders, be they citizens, legal entities, or other organizations, administrative organs order self-inspection and rectification to foster legal compliance.<sup>132</sup> This proactive approach seeks to guide the parties concerned towards voluntary actions or inaction, and mitigate potential legal infractions, thereby safeguarding the overarching public interest.<sup>133</sup>

In recent years, regulatory talks have been frequently employed in the regulation of online platforms and the burgeoning sharing economy.<sup>134</sup> Regulatory talks have proven highly efficient in rectifying copyright infringements on platforms, offering timely oversight and producing immediately discernible results.<sup>135</sup> The NCAC has initiated several regulatory talks to assert its regulatory stance, urging platforms to moderate copyright-infringing content,<sup>136</sup> maintain the order of the copyright

<sup>130</sup> He (2014).

<sup>131</sup> Regarding platform economy, see Calhoun (8 Nov. 2020) Why China Stepped On The Ant Group (Part 1): To Stop A Bubble. (Forbes) <https://www.forbes.com/sites/georgecalhoun/2020/11/08/why-china-stepped-on-the-ant-group-part-1-a-bubble-looming/?sh=1facb1642054>; educational training, see XinhuaNet (10 May 2018) The Ministry of Education interviewed some heads of off-campus training organizations, [http://www.xinhuanet.com/politics/2018-05/10/c\\_129869234.htm](http://www.xinhuanet.com/politics/2018-05/10/c_129869234.htm), national security, see CAC (31 July 2022): CAC had regulatory talks with 3491 platforms in the first half of 2022 regarding information security, [http://www.news.cn/2022-07/31/c\\_1128878986.htm](http://www.news.cn/2022-07/31/c_1128878986.htm); online games, see People.cn (9 Sep. 2021) The Central Propaganda Department and the State Press and Publication Administration interviewed Tencent, NetEase and other game companies and platforms, <http://politics.people.com.cn/n1/2021/09/09/c1001-32221841.html> accessed 22 August 2023.

<sup>132</sup> Qiang X (2019).

<sup>133</sup> Meng (2015); Wang (2018).

<sup>134</sup> McMorrow and Sender (2 Nov. 2020): Beijing summons Jack Ma over \$37bn Ant IPO. (Financial Times) <https://www.ft.com/content/ea298d72-aa5d-4c4b-b74d-e255f579ab98> accessed 22 August 2023.

<sup>135</sup> Shen and Jiang (2021).

<sup>136</sup> CAC (15 Sep. 2018): The NCAC had regulatory talks with 15 short video platform companies, [http://www.cac.gov.cn/2018-09/15/c\\_1123432727.htm](http://www.cac.gov.cn/2018-09/15/c_1123432727.htm) accessed 22 August 2023 (The National Copyright Administration has urged short video platforms to enhance copyright protection awareness and fully implement corporate responsibilities. Platforms must manage content copyright by ensuring authorization before dissemination and preventing misuse of the “safe harbor” rule. They should improve rights protection by refining the copyright complaint mechanism, fulfilling “notice-and-takedown” obligations, and managing infringement by penalizing users with repeated complaints. Additionally, platforms should cooperate with authorities, report serious infringers, and comply with investigations, while retaining and providing user registration information when needed.)

industry,<sup>137</sup> fight against online piracy,<sup>138</sup> and so forth.<sup>139</sup> In 2018, in a specific manifestation of administrative governance, the NCAC collectively initiated regulatory talks with 15 short video platforms, demanding that they investigate and rectify outstanding copyright issues that existed on their platforms. As a result of these interviews, the platforms have banned or downgraded 140,000 infringing accounts, dealt with more than 470,000 infringing works, and taken down 570,000 infringing short videos.<sup>140</sup> Simultaneously, under the auspices of the NCAC, over 30 mainstream financial media outlets established the “China Financial Media Copyright Protection Alliance”, and online marketplaces entered into cooperative agreements regarding copyright protection for books with prominent publishing presses.<sup>141</sup>

### 4.3.2 Campaigns

Unlike *yuetao*, which often take the form of scheduled talks and guide the parties concerned towards voluntary actions or inaction, campaigns in China are short-term, intensive sets of collaborative administrative actions routinely deployed to “address perceived crises arising out of shortcomings in the legal regulatory regime and to deal with problems that regular enforcement strategies have failed to address adequately”.<sup>142</sup> As Zhou pointed out, in order to regulate the extent of coupling between central and local governments, the top-down campaign-style mobilization was activated from time to time in the practice of China’s governance in different fields, from political rectification to economic development.<sup>143</sup>

As shown in Table 1, campaigns are characterized by a centralized approach of a “planned” nature: with clear goals for a set time window, campaigns are launched through large-scale organizational mobilization which involves interagency bureaucratic mobilisation at multiple levels of government,<sup>144</sup> specifying strict and

<sup>137</sup> NCAC (6 Jan. 2022): The NCAC had regulatory talks with digital music-related enterprises, promoting the construction of a good digital music copyright ecology, <https://www.ncac.gov.cn/chinacopyright/contents/12227/355756.shtml> accessed 22 August 2023; NCAC (29 Sep. 2019): The NCAC had regulatory talks with 13 Online Service Providers to regulate online reprinting, [https://www.gov.cn/xinwen/2018-09/29/content\\_5326839.htm](https://www.gov.cn/xinwen/2018-09/29/content_5326839.htm) accessed 22 August 2023.

<sup>138</sup> *Supra* note 137; Caxin (30 Sep. 2018): NCAC had regulatory talks with 13 online service providers and prohibited the content spinning, distortion and alteration of headlines, <https://companies.caixin.com/2018-09-30/101331460.html> accessed 22 August 2023.

<sup>139</sup> China Daily (14 Sep. 2017): NCAC had regulatory talks with major online music service providers, asking for full authorization to widely disseminate musical works, [http://cn.chinadaily.com.cn/2017-09/14/content\\_31981732.htm](http://cn.chinadaily.com.cn/2017-09/14/content_31981732.htm) accessed 22 August 2023.

<sup>140</sup> NCAC (27 Feb 2019) Reports on the Results of the Special Action Sword Net 2018, <https://www.ncac.gov.cn/chinacopyright/contents/12384/350238.shtml> accessed 22 August 2023.

<sup>141</sup> Lai (19 March 2019) NCAC Releases Ten Major Events in China’s Copyright in 2018. (People.cn) <http://ip.people.com.cn/n1/2019/0319/c179663-30983268.html> accessed 22 August 2023.

<sup>142</sup> The environmental protection regulation, the organizational response to public health crises such as COVID-19, anti-corruption campaigns, Internet financial governance, and the poverty alleviation campaigns are best examples. See Zhou (2022); Biddulph et al. (2012); Xu et al. (2019).

<sup>143</sup> Zhou (2008), pp. 5, 20; Heilmann and Perry (2011), p. 14.

<sup>144</sup> Biddulph et al. (2012).

**Table 1** Action plan for “sword net campaign 2016”

Timeframe	Actions
1 Jul – 15 Jul Plan Deployment	<ol style="list-style-type: none"> <li>1. NCAC together with MIIT, PBS, and CAC (four central departments) hold a press conference to fully launch the special action.</li> <li>2. Local departments report their work plans and implementation programs.</li> <li>3. Local departments formulate publicity programs to publicize the special action.</li> </ol>
16 Jul – 31 Jul Clearance and Inspection	<ol style="list-style-type: none"> <li>1. Organize and guide key Internet enterprises to carry out self-inspection and self-correction to identify copyright infringements.</li> <li>2. Organize and mobilize domestic and foreign rights-holders’ organizations and the general public to actively file complaints and reports, and collect evidence related to infringements.</li> <li>3. Carry out law enforcement training and organize training for law enforcement personnel from all relevant departments.</li> </ol>
1 Aug – 31 Oct Intensified Enforcement	Local departments carry out law enforcement actions, increase administrative penalties and criminal crackdowns in accordance with the law, and focus on investigating and handling a number of major cases.
1 Nov – 30 Nov Supervision and Summary	<ol style="list-style-type: none"> <li>1. The four central departments supervise and inspect key areas and enterprises to ensure that the special action is put in place.</li> <li>2. Local departments report the summary of their work.</li> <li>3. The four departments jointly hold a press briefing to announce the achievements of this special action.</li> <li>4. Units and individuals who have achieved an outstanding performance in the special action will be included in the scope of the 2016 annual reward.</li> </ol>

NCAC (12 Jul 2016) Notification on the Special Action against Online Copyright Infringement and Piracy Sword Net Campaign 2016, <https://www.ncac.gov.cn/chinacopyright/contents/12548/351268.shtml> Accessed 22 August 2023.

detailed accountability mechanisms and evaluation of required performance.<sup>145</sup> Notably, their multi-departmental participation and cross-domain joint enforcement, backed by the state’s centralized authority, confer the advantages of a broad coverage and potent effectiveness in addressing local government’s laxity in law enforcement,<sup>146</sup> as well as alleviating the information asymmetry problem.<sup>147</sup>

<sup>145</sup> Liu et al. (2015); Zhou (2022).

<sup>146</sup> Liu et al. (2015); See also Jia (2024).

<sup>147</sup> Wang et al. (2018); Zhou (2022), pp. 21–22. (These joint campaign-style enforcements essentially represent a temporary departure from the routine mechanisms, mobilizing resources and concentrating efforts in a top-down approach to achieve effects of “activating the officials’ attention, shaking up bureaucratic inertia, and swiftly transmitting top-down intentions and signals to different levels of the bureaucracy”).

Optimally, the short-term achievements and lessons learned from campaigns may pave the way for future legislative initiatives for long-term governance.<sup>148</sup>

Statistically, the top-down “campaign-style” copyright administrative enforcement measures, represented by the intensified and focused annual “Sword Net Campaign”, have played a significant role in combating and deterring online copyright infringement since 2005.<sup>149</sup> In cooperation with the other three departments, the NCAC launched the 18th round of Sword Net Campaign against online piracy from September to November 2022.<sup>150</sup> Through this special operation, the NCAC investigated and handled 1,180 cases of online copyright infringement, removed 840,000 infringing links, shut down 1,692 infringing websites and applications, and disposed of 15,400 infringing accounts.<sup>151</sup> Such joint copyright enforcement initiatives with multi-departmental participation achieved notably positive outcomes in curbing online piracy, reflecting China’s intensified efforts in law enforcement and its resolute stance on cracking down on copyright infringements.

#### 4.3.3 Legal Challenges of Extra-Judicial Enforcement

The NCAC, along with other central administrative bodies, leverages potent “soft” regulatory instruments, such as regulatory talks and campaigns, to address a substantial volume of online copyright violations.<sup>152</sup> However, these extra-judicial tools often involve fundamental flaws such as a lack of proportionality, legal certainty, and due procedures, undermining the expected predictability and stability of copyright regulations.<sup>153</sup>

Admittedly, such extra-judicial administrative actions lack long-term impacts due to their responsive nature.<sup>154</sup> Under this top-down mechanism, many regulatory

<sup>148</sup> Xu et al. (2009), p. 7.

<sup>149</sup> Chen (2021).

<sup>150</sup> In this campaign, the NCAC assumes a primary role in directing specialized governance initiatives, eradicating online copyright infringements, directing case lead aggregation, and transitioning potential criminal cases. Furthermore, they intensify proactive oversight and champion specialized governance publicity and incentivization efforts. Public Security entities are mandated to escalate their collection of digital copyright infringement leads, instigate requisite inquiries, proactive investigative undertakings and the seamless transfer of prosecutable cases. MIIT and CAC are tasked with augmenting supervision over predominantly local internet entities. They facilitate industry associations in the internet domain to usher self-regulation endeavors and extend assistance in accessing implicated website registrations. NCAC (9 Sep 2022) NCAC and four other departments to launch the “Sword Net 2022” special campaign, [https://www.gov.cn/xinwen/2022-09/09/content\\_5709237.htm](https://www.gov.cn/xinwen/2022-09/09/content_5709237.htm) accessed 22 August 2023.

<sup>151</sup> State Council (26 Apr. 2023) Press Office of the State Council Holds Conference on Annual Report on China’s Efforts to Combat Infringement and Counterfeiting (2022), [https://www.gov.cn/lianbo/2023-04/26/content\\_5753432.htm](https://www.gov.cn/lianbo/2023-04/26/content_5753432.htm) accessed 22 August 2023.

<sup>152</sup> Zhang (2022), p. 500 (Other “soft” regulatory tools such as administrative guidance and propaganda are also employed by administrative agencies during the law enforcement process).

<sup>153</sup> Biddulph, Cooney and Zhu (2012) (arguing that campaigns undermine respect for the law); Zhou (2022), p. 20. (regulatory authorities need to adhere to central policy initiatives, and administrative power is subject to few institutional constraints).

<sup>154</sup> Van Rooij (2018); Van Rooij et al. (2018); Dimitrov (2009) (describing campaign-like copyright enforcement as “high quantity, though not necessarily high quality, enforcement”)

problems do not receive adequate attention from the top leadership until they begin to spiral out of control.<sup>155</sup> This policy control mechanism fluctuates from a previously lax to a strict and harsh enforcement, resulting in a transient effect.<sup>156</sup> Although the effects of the “Sword Net Campaign” in 2018 were evidently positive, another report still indicated the emergence of 7.54 million new infringing short video links in 2019 from video-sharing platforms operated by Baidu, Tencent and ByteDance.<sup>157</sup> After a pattern of intensified and focused selective enforcement against the most significant illegal activities, the market descended back into chaos with massive copyright infringements “bouncing back”.<sup>158</sup>

Moreover, such extra-judicial administrative enforcement is in conflict with China’s commitment to the rule of law. When a crisis looms, the top leadership quickly mobilizes all administrative resources and propaganda to initiate actions against specific entities, regardless of administrative procedural constraints,<sup>159</sup> although both copyright law and administrative law fail to explicitly define whether those administrative actions fall within the ambit and procedure of administrative power.<sup>160</sup> Given the undefined “public interest”, courts have confirmed that “the determination of whether a copyright infringement concurrently harms the public interest should be made by the copyright administration”.<sup>161</sup> Thus, administrations breach the above constraint by either broadly interpreting public interest<sup>162</sup> or relying on general premises such as upholding a “good market order” and promoting the “healthy development of the industry”.<sup>163</sup> As a result, those being regulated struggle to anticipate the objectives and extent of such administrative actions.<sup>164</sup> Zhang succinctly observes that, due to the absence of a transparent enforcement process subject to strong judicial oversight, aggressive agency interventions and

<sup>155</sup> Zhang (2022), pp. 465, 471.

<sup>156</sup> Hurtado (2018) (while campaigns are marked by a high volume of enforcement, in the long-term they are ineffective for combating intellectual property rights infringement).

<sup>157</sup> In 2019, the Copyright Monitoring Center monitored more than 6.28 million pieces of various types of copyrighted works, focusing on short videos, games and images, and monitored more than 18.03 million suspected piracy links. See Dou (21 Apr 2020) Online Copyright Monitoring Report: Piracy Socialization and Mobilization Trend is Obvious. (IPRCHN) [http://www.iprchn.com/cipnews/news\\_content.aspx?newsId=122123](http://www.iprchn.com/cipnews/news_content.aspx?newsId=122123) accessed 22 August 2023.

<sup>158</sup> Hurtado (2018); Xu et al. (2019).

<sup>159</sup> Zhang (2016), p. 495.

<sup>160</sup> Articles 53 and 55 of 2020 CCL, 2017 Administrative Procedure Law and 2021 Administrative Penalty Law.

<sup>161</sup> See [2016]粤行终492号 (2016) Yue Xing Zhong No. 492.

<sup>162</sup> By interpreting the “public interest” as the “legal, economic, and social order”, any infringement stipulated in Art. 53 can be deemed detrimental to the public interest. See Dong (2022) (“any infringement of IPRs should not be viewed merely as an infringement of the individual rights of the right owner, but as an infringement of the public will of the State behind IP law to protect the interests of innovators as a whole”).

<sup>163</sup> NCAC (9 Sep. 2022) NCAC, MIIT, PBS and Launch the Special Action Sword Net 2022, [https://www.gov.cn/xinwen/2022-09/09/content\\_5709237.htm](https://www.gov.cn/xinwen/2022-09/09/content_5709237.htm) accessed 22 August 2023; Xinhua News Agency (27 Apr. 2022) Central Propaganda Department Announces that China Will Further Strengthen Copyright Supervision in Key Areas of the Internet This Year, [https://www.gov.cn/xinwen/2022-04/27/content\\_5687429.htm](https://www.gov.cn/xinwen/2022-04/27/content_5687429.htm) accessed 22 August 2023.

<sup>164</sup> Xiong and Zhu (2019).

heavy-handed approaches create the risk of over-enforcement and administrative power abuse.<sup>165</sup> Deeply ingrained in its authoritarian governance system, an extra-judicial approach that is coloured by the interests of political leaders in achieving their political goals and by the bureaucratic inertia of the regulators, may reinforce the lack of a rule-of-law tradition.<sup>166</sup>

Furthermore, the strong administrative intervention in the copyright market contravenes the National IP Strategy's call for "the leading role of judicial protection of IPRs". The escalating intensity of administrative interventions, exemplified by the serial regulatory talks and "Sword Net Campaign", has garnered increased societal resonance, fostering a climate where copyright owners are more accustomed to administrative enforcement over judicial protection.<sup>167</sup> The excessive reliance on massive administrative interventions, epitomized by regulatory talks and campaigns, has culminated in conflicts between administrative and judicial powers and at the same time has marginalized judicial protection to a certain extent.<sup>168</sup> This has, to a degree, decelerated the transition toward making judicial protection the predominant method of copyright protection in China.

Finally, considering the conflicts between the centralized policy-making process and fragmented power within the Chinese bureaucracy,<sup>169</sup> such extra-judicial administrative enforcement generates unintended consequences and poses significant risks. Possible negative impacts on administrative capacity-building and policy-making quality, such as rent-seeking, corruption and local protectionism, may stem from the biased priority setting and undue administrative discretion in extra-judicial administrative enforcement.<sup>170</sup> Administrative agencies have an incentive to over-enforce in order to 'broaden their turf' and expand their influence,<sup>171</sup> while targeted platforms rarely challenge such administrative interventions due to the omnipresent power imbalance between government and business.<sup>172</sup> As a result, excessive campaigns maintain social stability and amass popular support on the one hand, but undermine the central government's goal of fostering economic growth and innovation on the other hand.<sup>173</sup>

## 5 Moving Forward: From Enhanced Enforcement to Effective Governance

Strong administrative intervention not only brings a transient effect but obfuscates the flexible and rapid transmission of information in the copyright market.<sup>174</sup>

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<sup>165</sup> Zhang (2016).

<sup>166</sup> Liu et al. (2015).

<sup>167</sup> Tang (2010), p. 414.

<sup>168</sup> Xiong (2018).

<sup>169</sup> Mertha (2009), p. 996.

<sup>170</sup> Heilmann and Perry (2011), p. 494; Tang (2019); Li (2003).

<sup>171</sup> Zheng (1999).

<sup>172</sup> Zhang (2022), p. 68.

<sup>173</sup> Zhang (2022); *See also* Zhang (2022), pp. 8–9.

<sup>174</sup> Zhang (2016).

Therefore, to achieve a long-term effect, copyright administrations should introduce clear and transparent rules and procedures, employ diverse alternative dispute resolutions, and endeavor to develop a co-regulatory framework by collaboration between state intervention and industry expertise. Moreover, copyright administrations may delegate their enforcement responsibility to specialized law enforcement entities and focus on the development of service-oriented copyright administrative protection.

### 5.1 Transparency and Due Process

Any administrative interference within the copyright market ought to be undertaken with meticulous prudence in the context of the rule-of-law principle. Specifically, a transparent copyright administrative enforcement process under strong judicial oversight and a clear standard for a “public interest test” should be introduced to avoid arbitrariness and abuse of administrative power. Currently, the procedural regulation of copyright administrative enforcement remains fragmented and outdated, with relevant provisions scattered across disparate legal instruments addressing administrative investigations, penalties, and adjudications. Hence, the China National Intellectual Property Administration (CNIPA) should draw on previous experience and consider formulating a comprehensive and unified national legislation addressing the due procedure for copyright administrative enforcement. The CNIPA provided detailed implementation rules for patent administrative enforcement in 2015, aiming to streamline and increase the transparency of patent administrative proceedings.<sup>175</sup> A similar approach could be employed to establish transparent regulations for copyright administrative enforcement nationwide.

In addition, a more transparent system for disclosing enforcement information should be introduced under the guidance of the CNIPA to guarantee stakeholders’ right to information. Equal and sustained access to government information is essential for efficient and transparent copyright enforcement in today’s information-driven society.<sup>176</sup> Government entities, given their unique position, are better suited as the primary processors and providers of such information.<sup>177</sup> By releasing official information on a regular basis, authorities can provide guidance to assist individuals in making informed decisions and to significantly reduce the cost for information acquisition. A responsive and high-quality information disclosure system would not only optimize the public oversight of state administration, but also positively impact administrative authorities’ performance in law enforcement.<sup>178</sup>

Moreover, to minimize potential inconsistency, one primary approach involves introducing national unified guidelines that predefine the elements to be considered,

<sup>175</sup> CNIPA (9 Jan. 2015) Guidelines for the Administrative Enforcement of Patents, [https://www.cnipa.gov.cn/art/2015/1/9/art\\_99\\_28271.html](https://www.cnipa.gov.cn/art/2015/1/9/art_99_28271.html) accessed 22 August 2023. This guideline addressed basic principles, patent infringement proceedings, patent counterfeiting proceedings, mediation of patent disputes, cooperation across different administrative regions and governmental departments, and mechanisms for handling infringement disputes arising from e-commerce.

<sup>176</sup> Jaeger and Bertot (2010); Cuillier and Piotrowski (2009).

<sup>177</sup> Li and Shang (2020); Xu et al. (2009).

<sup>178</sup> Chen et al. (2023); Wang (2017).

such as the reasons, circumstances, nature, and consequences when imposing a discretionary administrative penalty. Developed regions like Beijing and Guangdong have promulgated regulations for the administrative enforcement of IPRs,<sup>179</sup> detailing standards for the exercise of discretionary administrative penalties. However, inconsistencies and disparities in different provincial regulations evidently hinder the standardization of law enforcement nationwide. Therefore, a prompt harmonization and standardization of the guidelines pertaining to discretionary administrative penalties on a national level is imperative.

Furthermore, the “public interest test” should stand as an indispensable condition preceding any administrative involvement in the private sphere, thereby acting as a safeguard against unwarranted administrative interventions.<sup>180</sup> Thus, this paper suggests that an illustrative clarification of the determination of “public interest” should be provided in the form of guiding cases.<sup>181</sup> In particular, following designated standards and procedures, the administrative enforcement guiding cases system requires specific administrative bodies to gather, compile, and disseminate typical cases that subsequently enjoy binding authority for future administrative enforcement actions. Grounded in both empirical rationality and professional authority, such a system of guiding cases would form a regulatory framework within the administrative domain that would embody the essence of case law and customary practices, synergizing with the judicial guiding cases system.<sup>182</sup> The CNIPA released two batches of Guiding Cases for administrative enforcement of IPRs in 2020 and 2022 respectively to facilitate local IP administrations in the correct understanding and application of IP administrative protection in similar future cases.<sup>183</sup> Consequently, typical cases related to the “public interest test” may be adopted as guiding cases to provide enhanced legal certainty in practice.

## 5.2 Platform-Oriented Co-Regulatory Framework

A heavy-handed “top-down” approach not only results in potential over-enforcement on emerging platforms, but also stifles alternative regulatory dynamics within and between digital actors, particularly the private institutions.<sup>184</sup> Meanwhile, self-regulation might entail flaws, such as a lack of accountability and transparency, and

<sup>179</sup> Beijing Municipal Regulations on the Protection of Intellectual Property Rights (effective on 1 Jul. 2022) <http://zscqj.beijing.gov.cn/zscqj/zwgk/zcfg/flfg/325742129/index.html> accessed 22 August 2023; Guangdong Provincial Regulations on the Protection of Intellectual Property Rights (effective on 1 May 2022) [http://amr.gd.gov.cn/zwgk/zcfg/fggz/content/post\\_41724249.html](http://amr.gd.gov.cn/zwgk/zcfg/fggz/content/post_41724249.html) accessed 22 August 2023.

<sup>180</sup> Tang (2011).

<sup>181</sup> CNIPA, “Notification of the National Intellectual Property Administration on Conducting Case Guidance on Intellectual Property Administrative Law Enforcement” 24 April 2019 [https://www.gov.cn/zhengce/zhengceku/2019-10/22/content\\_5443508.htm](https://www.gov.cn/zhengce/zhengceku/2019-10/22/content_5443508.htm) accessed 22 August 2023.

<sup>182</sup> Jia (2016); Finder (2016).

<sup>183</sup> CNIPA (16 Dec. 2020) Notification of CNIPA on the Release of the First Batch of Intellectual Property Administrative Enforcement Guiding Cases, [https://www.gov.cn/zhengce/zhengceku/2020-12/16/content\\_5569961.htm](https://www.gov.cn/zhengce/zhengceku/2020-12/16/content_5569961.htm) accessed 22 August 2023; CNIPA (4 Jul. 2022) Understanding and Application of the Second Batch of Intellectual Property Administrative Enforcement Guiding Cases (Nos. 6–8), [https://www.cnipa.gov.cn/art/2022/7/4/art\\_2432\\_176365.html](https://www.cnipa.gov.cn/art/2022/7/4/art_2432_176365.html) accessed 22 August 2023.

<sup>184</sup> Lessig (2006); Marsden (2011); Van Dijk, Poell and De Waal (2018).

arbitrariness in decision-making, which might lead to a potential under-enforcement of rights.<sup>185</sup> Nevertheless, the co-regulatory approach, distinguished by its greater flexibility to context and less intervention of state, offers a balanced solution. This pragmatic solution reconciles the collaboration between state intervention and industry expertise, thereby shifting the governance paradigm from centralized dispute resolution to diverse alternative mechanisms.<sup>186</sup>

In China, a market-oriented paradigm of the state-market relationship was adopted to promote a better combination of “efficient markets” and “responsive government”.<sup>187</sup> To break down local protectionism and market segmentation, the Chinese government opines that “it’s imperative to allow the market to play a decisive role in resource allocation”, and concurrently calls for strengthened governmental oversight, emphasizing “the necessity of refining macro-policy interventions to foster a structured progression of capital”.<sup>188</sup> A co-regulatory framework resonates with the call for a combination of an “efficient market” and “responsive government” by respecting the laws of the market and industrial practices while retaining macro-policy interventions to maintain effectiveness in rapidly evolving markets.

On the one hand, the diverse forms of copyright administrative enforcement in China have their respective functions and characteristics, serving as supportive measures to judicial protection. However, in practice copyright administrations predominantly resort to “intensified” administrative penalties and extra-judicial approaches to address copyright disputes, often sidelining other “milder” administrative measures such as administrative mediation and administrative adjudication. Admittedly, such “milder” measures may be viewed as a more expeditious and less costly alternative for right holders to address copyright infringements under the guidance of copyright administrations.<sup>189</sup> For example, during administrative mediation, copyright administrations endeavor to harmonize the ostensibly conflicting interests of copyright proprietors and purported infringers, thereby maintaining a benign collaborative and competitive equilibrium.<sup>190</sup> In addition, regarding copyright disputes, particularly those of a less intricate nature, administrative mediation not only enhances the expediency of dispute resolution but also mitigates the soaring caseloads in the judicial system, culminating in a prudent allocation of legal resources.<sup>191</sup>

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<sup>185</sup> Krokida (2022), pp. 36–37.

<sup>186</sup> You (2020), p. 12.

<sup>187</sup> Central Committee of the CPC and the State Council (10 Apr. 2022) *Opinions on Accelerating the Construction of a Unified Domestic Market*, [https://www.gov.cn/zhengce/2022-04/10/content\\_5684385.htm](https://www.gov.cn/zhengce/2022-04/10/content_5684385.htm) accessed 22 August 2023.

<sup>188</sup> Huld A (14 April 2022) China’s “National Unified Market”: Standardizing the Domestic Market to Spur Internal Circulation. (China Briefing) <https://www.china-briefing.com/news/chinas-national-unified-market-standardizing-the-domestic-market-to-spur-internal-circulation/> accessed 22 August 2023.

<sup>189</sup> Marsoof (2021), p. 230.

<sup>190</sup> Li et al. (2020).

<sup>191</sup> He and Deng (2023).

On the other hand, platforms are encouraged to explore diverse approaches to address copyright violation through private ordering.<sup>192</sup> Platforms, equipped with quasi-legislative, quasi-administrative, and quasi-judicial powers through voluntary and non-binding informal governance initiatives, play a pivotal role in online copyright governance.<sup>193</sup> Significantly, these platforms play a dualistic role as they are not only subjects of the regulatory oversight of copyright administrations but also emerge as contenders in the arena of regulatory governance.<sup>194</sup> Prominent e-commerce platforms, including Tencent and JD.com, offer professional services for IPR complaints and redress mechanisms.<sup>195</sup> Certain specialized platforms have also commenced offering online evidence collection and notarization services for IPR disputes.<sup>196</sup> Moreover, diversified enforcement measures are deployed by platforms, including restrictions on the availability, visibility and accessibility of disputed content.<sup>197</sup> Under the guidance of administrative authorities, platforms have introduced algorithms backed up by powerful AI to proactively identify infringing goods and activities. In turn, the implementation of algorithmic governance provides copyright administrations with indications of suspected infringing activities and facilitates the collection of electronic evidence, forming a collaborative effort in online copyright governance.<sup>198</sup> Hence, within a co-regulatory framework, while enforcement bodies can leverage the platform's control over online information for efficient copyright enforcement, the platforms' exercise of power remains under the vigilant oversight and guidance of the administrative agencies.<sup>199</sup>

### 5.3 Service-Oriented Copyright Administrative Protection

In practice, the primary bodies responsible for copyright enforcement are the copyright administrations at all levels, who also engage in copyright administration such as registration and authorization.<sup>200</sup> Within a rule-of-law framework, copyright administrative enforcement mandates qualified legally authorized entities devoid of

<sup>192</sup> Belli and Venturini (2016). Quintais et al. (2023).

<sup>193</sup> Quintais et al. (2023).

<sup>194</sup> *Ibid.*

<sup>195</sup> JD.com Intellectual Property Rights Protection Guidelines, <https://help.jd.com/user/issue/343-1066.html> accessed 22 August 2023; Tencent Intellectual Property Rights Protection Guidelines, <https://ipr.tencent.com/complain> accessed 22 August 2023.

<sup>196</sup> China IP Notarization Service Platform, <https://www.ipnotary.com/> accessed 22 August 2023.

<sup>197</sup> Ulbricht and Yeung (2022); Gillespie (2020).

<sup>198</sup> In 2014, the State Administration for Industry and Commerce released the “White Paper on Administrative Guidance on Alibaba Group”, which called for “full use of information network technology for internal management”. Subsequently, the Alibaba Group integrated the “Aliprotect” and “Taoprotect” platforms, establishing the Alibaba Intellectual Property Platform (IPP) and developing the “IP Protection Tech Brain” algorithm system to proactively intercept infringing goods. People.cn (28 Jan. 2015) SAIC disclosed Alibaba's administrative guidance white paper and pointed out Taobao's 5 major problems, <http://finance.people.com.cn/n/2015/0128/c1004-26463776.html> accessed 22 August 2023.

<sup>199</sup> However, a co-regulatory approach risks becoming a top-down collateral censorship mechanism. Klonick (2017); Balkin (2013), pp. 2309–2310.

<sup>200</sup> Articles 12, 30, 53 and 55 of 2020 CCL.

vested interests to ensure due process and strengthen public trust.<sup>201</sup> Hence, from a long-term perspective, the onus of bolstering copyright administrative enforcement should primarily lie with dedicated professional enforcement agencies like the Public Security Bureau and Customs Office, under judicial oversight to minimize potential administrative local protectionism.<sup>202</sup> Notably, copyright administrations may implement more flexible administrative measures, which primarily manifest themselves as service-oriented administrative activities, such as administrative guidance, administrative rewards, administrative subsidies, and information disclosure to the public.<sup>203</sup>

In fact, the development of service-oriented copyright protection aligns with the primary objective to provide high-quality IP public services conveyed in policy documents.<sup>204</sup> On the one hand, the CNIPA fully supports the construction of municipal-level comprehensive IP public service institutions covering various services including information search and retrieval, business consultation, and promotional training.<sup>205</sup> For example, the NCAC has spearheaded the establishment of an increasing number of Intellectual Property Rights Assistance Centers to help rights holders to safeguard their legitimate rights and interests.<sup>206</sup> Through the establishment of these IP-related public service platforms, the copyright administrations have contributed to a nationwide framework for copyright protection by initiating various mechanisms for copyright adjudication consultations, swift administrative mediation, copyright violation reports and complaints. On the other hand, it also involves the construction of an innovative infrastructure for IPRs to further enhance IP public services. The integration of big data and blockchain technology enhances copyright administrations' capability in both law enforcement and public services, exemplified by the China Copyright Chain launched by the NCAC.<sup>207</sup> Such blockchain-based platforms aim to document proof of digital assets, monitor infringement activities, collect evidence online, issue notices to remove piracy products and help courts and copyright administrations settle copyright-related disputes.<sup>208</sup>

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<sup>201</sup> Li (2015).

<sup>202</sup> Hurtado (2018).

<sup>203</sup> CNIPA (30 May 2022) Notification of CNIPA on Accelerating the Implementation of Intellectual Property Policies to Increase Efficiency and Promote the Stable and Healthy Development of the Economy, [https://www.gov.cn/zhengce/zhengceku/2022-06/12/content\\_5695335.htm](https://www.gov.cn/zhengce/zhengceku/2022-06/12/content_5695335.htm) accessed 22 August 2023.

<sup>204</sup> *Supra* notes 98, 99 and 100.

<sup>205</sup> CNIPA (31 Dec. 2021) Notification of CNIPA on the Issuance of the Fourteenth Five-Year Plan for Intellectual Property Public Services, [https://www.gov.cn/zhengce/zhengceku/2022-01/09/content\\_5667251.htm](https://www.gov.cn/zhengce/zhengceku/2022-01/09/content_5667251.htm) accessed 22 August 2023.

<sup>206</sup> China Intellectual Property Rights Aid Network, <http://www.ipwq.cn/> accessed 22 August 2023.

<sup>207</sup> China Copyright Blockchain, <https://www.zbl.org.cn/officialHome> accessed 22 August 2023.

<sup>208</sup> Pan D (4 Jun. 2021) China Launches Copyright Protection Blockchain. (CoinDesk) <https://www.coindesk.com/policy/2021/06/04/china-launches-copyright-protection-blockchain/> accessed 22 August 2023.

## 6 Conclusion

The inception of the Chinese copyright system took place amidst a prevailing planned economic strategy, reflecting the interventionist ideology in the economic transition.<sup>209</sup> Looking backward, the predominant emphasis on administrative protection for copyright was a pragmatic strategy, given the shortage of experienced IP professionals and the underdeveloped judicial mechanism. As of late, the internal need to innovate a copyright-based economy, combined with external pressure from the international trading system, necessitates a further strengthening and broadening of the administrative protection of copyright. However, as the context has changed with the further enhancement of IP professional competence and ongoing judicial reform, administrative enforcement should not overshadow judicial enforcement but rather complement it by promoting transparency, efficiency, and collaboration with judicial processes. Moving forward, copyright administrations should incorporate transparency in enforcement rules and procedures, employ diverse alternative dispute resolution mechanisms, and strive for a co-regulatory framework through collaboration between state intervention and industry expertise.

In fact, after decades of consistent effort, China has established four Specialized IP Courts and three Specialized Internet Courts, promoting the concentration of IP judicial expertise on the one side, and minimizing potential administrative intervention and local protectionism on the other.<sup>210</sup> Moreover, the judges presiding over IP cases possess robust professional competence, challenging the notion that administrative bodies are inherently superior in addressing infringement disputes. Though acknowledging the high efficiency of copyright administrative enforcement, the short-lived outcomes are at the cost of a failure to develop regular enforcement that follows legal procedures. In addition, its aggressive expansion inevitably undermines regular legal procedure and contravenes the principle of the rule of law. In light of the prevailing context, eschewing copyright administrative enforcement in China appears untenable; instead, integrating heightened transparency and adherence to due process within the enforcement mechanism emerges as a pragmatic and optimal approach to enhance regular enforcement capacity.

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<sup>209</sup> Nolan (2005).

<sup>210</sup> The 4 Specialized IP Courts are located in Beijing, Guangzhou, Shanghai, and Hainan Free Trade Port, and 3 Internet Courts are located in Beijing, Guangzhou and Hangzhou. See CNIPA (30 Jun 2023) Report on Intellectual Property Protection in China, [https://www.cnipa.gov.cn/art/2023/6/30/art\\_91\\_186011.html](https://www.cnipa.gov.cn/art/2023/6/30/art_91_186011.html) accessed 22 August 2023.

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