Preserving Originality in Cyberspace - What China can Learn from the United States and the European Union about Database Protection

Jiarui Liu, Stanford University
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Jiarui LIU*

I. INTRODUCTION

Although China has long been criticized for her half-hearted efforts in copyright enforcement, she is actually one of the few countries that, under international pressures and obligations, has established a basic, modern, copyright system in an extremely short period of time. It is undeniable that response to international pressures has increasingly become one of the primary motives behind domestic copyright legislation efforts. Yet Chinese copyright law, as well as those of most modern countries is also proposed for furthering the other two equally, if not more, important ends. That is:

- to recognize and encourage intellectual creations of authors;* and

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* Ph.D. Candidate, the Intellectual Property Center, China Academy of Social Sciences, Beijing, People's Republic of China; LL.M., University of Washington Law School, Washington.

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1 See, e.g., Gregory S. Feder, Enforcement of Intellectual Property Rights in China: You can lead a Horse to Water, but you can't make it Drink, 37 Va. J. Int'l L. 223, 1996: discussing the insufficiency of China's efforts to enforce her domestic intellectual property laws and to discharge her international obligations.


3 "[Chinese copyright laws] cover in a little more than a dozen years, a distance which took other developed countries scores of years, even a hundred years, establishing a relatively comprehensive legal system for the protection of intellectual property rights.": Rafael A. Declerq Jr., Protecting American Intellectual Property in China: The Persistent Problem of Software Piracy, 10 N.Y. Int'l L. Rev. 57, 1997, 60.

4 Notable, among a long list of countries that recently revised their copyright laws in compliance with international standards, was the United States. See Peter Jaszi, Caught in the Net of Copyright, 75 Or. L. Rev. 259, 1996, 306-307: “Often in recent years, as I've suggested, we are told that we must enact this or that piece of domestic copyright legislation, even at the cost of curtailing public access, in order to 'keep up' with developing international norms.”

5 For the policy underpinnings of Chinese copyright law, see the Copyright Law of the People's Republic of China 2001, Article 1: “This Law is enacted, in accordance with the Constitution for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and rights and interests related to copyright, of encouraging the creation and dissemination of works which would contribute to the building of an advanced socialist culture and ideology and to socialist material development, and of promoting the development and flourishing socialist culture and sciences.”

to promote public interest in the progress and dissemination of science and knowledge.  

The awareness of these dual purposes of copyright law is particularly crucial in cyberspace, where the international community has not yet achieved a final consensus on the appropriate level of copyright protection.

Taking electronic database protection as a case study, this article discusses whether China should start to build a more balanced copyright system in cyberspace to tame new technologies into maximizing the welfare not only of individual authors but also of the society as a whole.

Database protection may not be classified as an entirely novel issue in cyberspace. Literally speaking, any collection of information is a “data-base”—for example, yellow pages and encyclopedias which have long been existing in the printed form. Nonetheless, digital technology has dramatically reactivated and exaggerated the database concern in at least two aspects. On the one hand, the use of computers makes it economically feasible to create highly comprehensive but still user-friendly databases, collecting, storing and processing a huge amount of data. On the other hand, it is also not hard to imagine that electronic databases are particularly vulnerable to piracy. Once they become available on the Internet, several clicks on the mouse may turn an end-user into a potential competitor. Nonetheless, what brings database protection to the front of the digital copyright agenda worldwide is not only the bright economic

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7 This approach, labelled “utilitarianism”, is well accepted as the foundation of Anglo-American copyright laws. For example, the admitted first copyright statute in history, the “Statute of Ann” in the early 1700s, is titled with a clear utilitarian bias: “An Act, for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein mentioned”. The U.S. Constitution, Article I, Section 8, Clause 8, stipulates that: “The Congress shall have power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” (emphases added). As indicated in the legislative history of the U.S. Copyright Act: “The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted...” (H. Rep. No. 2222, 60th Cong. 2d Sess.). See also the U.S. Supreme Court’s interpretations of copyright justification: Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984): holding that copyright privilege is a means to achieve a public purpose instead of private benefits; Mazer v. Stein, 347 U.S. 201 (1954): holding that the copyright law makes reward to authors a secondary consideration to the public welfare.


11 In 1996, WIPO made a Basic Proposal for the Substantive Provision of the Treaty on Intellectual Property in Respect of Databases to be considered by the Diplomatic Conference, WIPO Doc. CRNR/DC/6, 30 August 1996. The Conference did not adopt the proposal, but it decided to continue the work on the issue of database protection according to the Recommendation Concerning Databases, WIPO Doc. CRNR/DC/100, 25 December 1996.
prospects and exacerbated vulnerability of database industries in cyberspace, but also the potential effects of expansive database protection on the public interest in the free flow of information.

Section II will briefly survey the database protection regimes in the United States and the European Union, which lays the ground for a further comparative analysis of their Chinese counterpart. Section III will trace the history of database protection in China, with particular emphasis on the recent trend of applying unfair competition law to protect uncopyrightable databases. Based on the successful experiences of the United States and the European Union, Section IV will articulate constitutional and economic implications of originality and propose how China might preserve originality in cyberspace to strike the delicate balance between providing incentives to intellectual creation and safeguarding the public domain. Section V will conclude the main points of the article and try to invoke some further policy considerations. Although these are beyond the scope of this article, they require even more serious attention from the Chinese copyright profession.

II. A COMPARATIVE STUDY OF DATABASE PROTECTION: THE UNITED STATES AND THE EUROPEAN UNION

A. DATABASE PROTECTION IN THE UNITED STATES

In the United States, copyright law is the traditional mechanism for database protection. The Copyright Act of 1976 provided that copyright only covers "original works of authorship fixed in any tangible medium of expression." (emphasis added). Most databases may be protected as compilations, which were defined as "a work formed by the collection and assembling of pre-existing materials or of data that are selected, co-ordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." (emphasis added). Accordingly, the originality requirement becomes crucial in limiting the scope of copyright protection available to databases.

Surprisingly, such a key term as "originality" was left undefined in the U.S. copyright law. The most authoritative interpretation of originality arose from the Supreme Court in the Feist case. In Feist, the plaintiff, a local telephone company, annually published a telephone directory as requested by state law. All the information in the telephone directory was collected by the plaintiff directly from all the subscribers of its telephone services and listed in the alphabetical order of the names and addresses, etc. The defendant initially applied to the plaintiff for the licence to use the plaintiff's telephone directory. After being rejected, the defendant, without authorization, copied a substantial

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13 See ibid., § 101.
15 Ibid., at 344.
The Supreme Court held that the contents of the plaintiff's telephone directory were uncopyrightable, despite its substantial labour and investment in the creation of the directory. The Court reasoned that, as a constitutional prerequisite for copyright protection, an original work must constitute "independent creation" and bear a "modicum of creativity". Accordingly, in order to render a database original enough for copyright protection, its selection and arrangement must be made independently and involve a minimum degree of creativity. Applying such an originality requirement, the Court held that, because all the information in the plaintiff's telephone directory was selected and arranged in a very "obvious" and actually "inevitable" way, there was lack of originality and thus did not qualify for copyright protection.

To sum up, the dominant view in the United States is that copyright law only protects an original database whose selection and arrangement reflect its author's minimum creativity, regardless of the labour or investment involved.

Although copyright protection was not available to unoriginal databases, they used to have some protection in the early twentieth century under unfair-competition principles. In the landmark INS case, the U.S. Supreme Court announced a quasi-property right in the dissemination of uncopyrightable news reports by creating a new branch of unfair-competition law—misappropriation. In INS, the defendant, a news agency competing with the plaintiff, literally copied and retransmitted the plaintiff's news reports without the consent of the latter. The Court held that, although news reports lacked the originality necessary for copyright protection, the defendant's actions constituted unfair competition by appropriating the plaintiff's labour and investment in collecting news.

However, this quasi-property right in unoriginal databases appears to be no longer acceptable to modern courts. First of all, the broad holding of misappropriation law in INS was severely narrowed to its unique facts, and has been sparingly applied by subsequent courts over the years. In most recent cases, courts squarely held that broad misappropriation claims were "pre-empted" by federal copyright law. The so-called "pre-emption" means that all legal or equitable rights that are equivalent to any of the

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16 Ibid., at 345.
17 Ibid., at 346-348.
18 Ibid., at 347.
19 Ibid., at 362-363.
21 See Restatement (Third) of Unfair Competition Section 38, Comment C.: discussing the negative treatments of subsequent courts towards the INS case and why the Restatement did not incorporate the INS misappropriation doctrine as common-law unfair competition.
22 See, e.g., National Basketball Association v. Motorola Inc. (NBA), 105 F. 3d 841 (2d Cir. 1997); holding that federal copyright law pre-empted the plaintiff's state misappropriation claim over the defendant's provision of real-time information about professional basketball games; and Financial Information Service, Inc. v. Moody's Investors Service, Inc. (Financial Information), 808 F. 2d 204 (2d Cir. 1986); holding that the financial report publisher's state misappropriation claim was pre-empted by federal copyright law.
exclusive rights within the general scope of copyright in works of authorship will be exclusively governed by the copyright regime.\textsuperscript{23} Therefore, copyright law largely pre-empts any equivalent common-law claims, including those under unfair-competition principles. For instance, in the well-known case of NBA \textit{v.} Motorola, the Court held that when the instant information about a basketball game could not be copyrightable as an original work, its misappropriation claim under unfair-competition principles could not prevail either because of the copyright pre-emption.\textsuperscript{24}

Moreover, Restatement (Third) of Unfair Competition also expressly rejected misappropriation as a separate common-law unfair-competition cause of action.\textsuperscript{25} It stated that the INS decision "had little enduring effect" and "no general rule of law prohibit[ed] the appropriation of a competitor's ideas, innovation, or other intangible assets once they become publicly known."\textsuperscript{26} This position further indicated that the majority of American courts would leave unoriginal databases basically unprotectable in any legal regime and therefore preserve them for the general public.

B. DATABASE PROTECTION IN THE EUROPEAN UNION: COPYRIGHT AND \textit{SUI GENERIS} PROTECTION

The most important legal source of database protection in the European Union is the 1996 Directive on the Legal Protection of Databases.\textsuperscript{27} The EU Database Directive provides two separate legal mechanisms for database protection: first, original databases will enjoy conventional copyright protection; second, the unoriginal databases may enjoy \textit{sui generis} protection, which is subject to stricter limitations and shorter duration than copyright protection.

In accordance with the Directive, databases that, by reason of the selection or arrangement of their contents, constitute the author's own "intellectual creation" shall be protected as such by copyright.\textsuperscript{28} In another paragraph, the Directive provides a plain explanation for the term "intellectual creation": "no criterion other than \textit{originality} in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;" (emphasis added).\textsuperscript{29} Accordingly, in order to qualify for copyright protection, a database must satisfy the originality requirement as the threshold for "intellectual creation".

\begin{footnotes}
\item[23] See 17 U.S.C. § 301.
\item[24] See the \textit{NBA} case, supra, footnote 22.
\item[25] See Restatement (Third), supra, footnote 21, Section 38, Comment B.
\item[26] Id.
\item[28] See ibid., Article 3.
\item[29] See ibid., Preamble, Paragraph 16.
\end{footnotes}
Under copyright protection, the author of a database will enjoy the exclusive right to carry out or authorize:

- temporary or permanent reproduction by any means and in any form;
- translation, adaptation, arrangement and any other alterations;
- any form of distribution to the public of the database or of copies thereof; and
- any communication, display or performance to the public.30

These exclusive rights in copyrighted databases will basically last the whole life of the author plus seventy years.31

The most significant characteristic of the EU Database Directive is that it provides a unique type of *sui generis* protection for unoriginal databases. While *sui generis* protection requires no originality or creativity in databases, it is available to database owners who make substantial investment in “the obtaining, verification or presentation of the contents ... of that database.”32 In other words, “substantial investment”, instead of originality, is the trigger of *sui generis* protection.

In contrast with the four exclusive rights under the copyright law, a rightholder under the *sui generis* protection enjoys only two exclusive rights:

- extraction right—the right to prevent the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form; and
- re-utilization right—the right to prevent any form of making available to the public all or a substantial part of the contents of a database by distribution of copies, by renting, or by on-line or other forms of transmission.33

These two rights will only last for fifteen years upon the completion of the database.34

III. THE EBB AND FLOW OF ORIGINALITY: DATABASE PROTECTION IN CHINA

Database protection in China has an interesting history of continuous expansion. China had previously made a U-turn in her copyright law, from merely protecting compilations of pre-existing works to the covering of almost all databases having original selection or arrangement. Most remarkably, there is a recent trend in Chinese judiciary that general principles of unfair competition law—such as “honesty” and “fairness”—might be used to protect even unoriginal and uncopyrightable databases.
A. TRADITIONAL COPYRIGHT PROTECTION

Under the Chinese Copyright Law of 1990, only a limited number of databases were eligible for copyright protection as “compilation”. “Compilation” was defined as the “creation of a work by assembling a number of selected pre-existing works, in whole or in parts, according to an arrangement designed for a specific purpose.” (emphasis added). By definition, databases such as directories and catalogues, which only comprised uncopyrightable data and raw facts, fell outside the scope of compilation, no matter how creative the collection or arrangement of such databases could be. This narrow protection seemed to be a faithful following of the Berne Convention, but directly at odds with the U.S. position, and arguably those of most of the World Trade Organization (WTO) Member countries. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) explicitly rebutted the Berne Convention on the copyrightable scope of compilation by stipulating that:

“Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such...”

However, China’s position on compilation was slackened long before China revised her intellectual property laws into compliance with TRIPS as part of her effort for entry into the WTO. When China enacted a new regulation to implement a bilateral treaty between China and the United States on intellectual property protection in 1992, she endowed foreign—and only foreign—authors with TRIPS standard protection covering compilations both of individually copyrightable works and of uncopyrightable data and facts. To put it another way, foreign authors could enjoy certain super-national treatment in China with respect to copyright under “compilation”. In 2001, China finally put an end to such embarrassment by extending full compilation protection to both national and international authors.

35 See the Chinese Copyright Law of 1990, Article 14: “Copyright in compilation is enjoyed by the compiler, provided that the exercise of such copyright shall not prejudice the copyright of the pre-existing works included in the compilation.”
36 See the Chinese Copyright Regulation of 1991, Article 5.
37 See the Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971), Article 2:5: “Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.”
38 See supra, text at footnote 13.
39 See TRIPS, Article 10:2.
41 See the Implementing Regulations of International Copyright Treaties of 1992, Article 8: “Foreign works that are a compilation of unprotected material but that are original in the terms of the selection or arrangement of the material shall be protected under Article 14 of the Copyright Law.”
42 See the Chinese Copyright Law of 2001, Article 14: “Works that are created by assembling a number of works, in whole or in parts, or data or other materials not constituting works and that are original in terms of selection and arrangement are compilation in which the compiler enjoys copyright, provided that the exercise of such copyright shall not prejudice the copyright of the pre-existing works included in the compilation.”
Even so, it is still a half-truth to say that all databases enjoy copyright protection in China. Like the United States\textsuperscript{43} and the European Union,\textsuperscript{44} China imposes an originality requirement on the copyrightability of databases.\textsuperscript{45} Although originality seems to be the essence of copyright, this term remains undefined in Chinese copyright laws. Literally interpreted, originality must mean that the work owes its origin to the author and is not a copy from another. Then, the immediate question is whether Chinese laws impute any creativity requirement into originality as the U.S. Supreme Court did in \textit{Feist}.\textsuperscript{46} If so, a significant number of valuable and costly databases, such as yellow pages, shopping lists and financial statistics, will be deprived of copyright protection, since they are basically selected and arranged by some standardized or routine means.

Absent any direct guideline, many parts of Chinese copyright laws nevertheless imply such a creativity requirement. For example, the Implementing Regulations of the Copyright Law defined “creation” as intellectual activities directly resulting from the works, and ruled out labours merely comprising co-ordination, general consultation or material support from the scope of “creation”.\textsuperscript{47} This position could be interpreted as a direct rejection of the “sweat-of-the-brow” doctrine.\textsuperscript{48} Moreover, Chinese copyright laws explicitly exclude current events and news from their coverage.\textsuperscript{49} This might be another indicator that pure facts are not protectable in the Chinese copyright regime.

Most Chinese courts appear to also endorse that original works of authorship dictate a modicum of creativity. In a classic originality case, the plaintiff was the author of a well-known children's song entitled “Wahaha”, which was created in the 1950s and immediately became one of the Chinese people's all-time favourites. The defendant, without the plaintiff's authorization, registered and used the phrase “Wahaha” as its trademark for food and beverage products. Hence, the defendant was accused of infringing the plaintiff's copyright in the title “Wahaha”. Despite the famousness of the disputed song, the Court finally held the phrase “Wahaha” \textit{per se} uncopyrightable and acquitted the defendant of any copyright infringement. It reasoned that such a short phrase was too trivial and banal to bear any characteristic of the author's own mind\textsuperscript{50} and therefore was not recognizable as the author's own intellectual creation. This case

\textsuperscript{43} 17 U.S.C. § 102: “Copyright protection subsists ... in original works of authorship ...”.
\textsuperscript{44} See the EU Database Directive, Preamble, Paragraph 16; see text supra, footnote 29.
\textsuperscript{45} See the Implementing Regulations of the Copyright Law, Article 2: “The term ‘works’ used in the Copyright Law refers to original intellectual creations in the literary, artistic and scientific domain ...”
\textsuperscript{46} See \textit{Feist}, supra, footnote 14: holding that alphabetized telephone directory white pages lack originality and are not eligible for copyright protection.
\textsuperscript{47} See the Implementing Regulations Of The Copyright Law, Article 3: “The term ‘creation’ mentioned in the Copyright Law refers to intellectual activities from which literary, artistic and scientific works result. The making of arrangement and the provision of consultation, material means or supportive service, done for others in the creating activities, shall not be deemed as acts of creating.”
\textsuperscript{48} The “sweat-of-the-brow” doctrine refers to the argument that mere labour or investment can give rise to copyrighted works. For a thorough criticism of the doctrine see \textit{Feist}, supra, footnote 14, at 345.
\textsuperscript{49} See the Chinese Copyright Law of 2001, Article 5.
may remind us of a vast number of U.S. decisions in which copyright was denied for lack of originality to fragmentary words and slogans.51

B. THE TREND OF UNFAIR-COMPETITION PROTECTION IN CYBERSPACE

However, a highly controversial case concerning a dispute over television guides subtly unsettled the originality issue, and later on proved to be the trigger of change in the landscape of electronic database protection in cyberspace.52 In this case, the plaintiff obtained licenses from several national and local television stations to print their television guides in exchange for a certain sum for license fees.53 The defendant, without authorization from the plaintiff, copied and reprinted these guides from the plaintiff’s newspaper.54 On the one hand, the Court admitted that television guides lacked the necessary originality for copyright protection.55 On the other, the Court opined that, since television stations devoted a substantial amount of labour and investment in creating television guides, they deserved certain rights in the fruits of their labour.56 The plaintiff, by the means of licences from television stations, became the successor to television stations’ rights in television guides.57 Finally, the Court bypassed copyright law and applied directly some general principles of civil law to hold the defendant liable for infringing the plaintiff’s rights in television guides.58 This case immediately attracted a storm of academic criticism, focusing on the fact that it unduly stepped outside the boundary of originality without squarely defining what new rights it created under unfair-competition principles.59

Nevertheless, two subsequent courts dealing with electronic databases concurrently followed the above television guide case and furthered the trend of expansive protection of unoriginal databases, probably out of special appreciation and sympathy for high-technology industries. In the first case, the plaintiff was licensed by more than a dozen stock and commodity exchanges to collect and retransmit their real-time financial information.60 These collected segments of information would be sorted and formatted by a special data-analysing software designed by the plaintiff and finally would be

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51 See, e.g., Alberto-Culver Co. v. Andrea Dumon, Inc., 466 F. 2d 705 (7th Cir. 1972); holding that the phrase “most personal sort of deodorant” is not copyrightable; Magic Marketing v. Mailing Services of Pittsburgh, 634 F. Supp. 769 (W.D.Pa. 1986); holding that short phrases “Telegram”, “Gift Check” and “Priority Message” do not exhibit a sufficient degree of creativity to be copyrightable.


53 Id.

54 Id.

55 Id.

56 Id.

57 Id.

58 Id. The main applicable law of this case is the General Principles of Civil Law of the People’s Republic of China, Article 4: “In civil activities, the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed.”


transmitted to the plaintiff's clients via a satellite broadcasting system as an information service called "SIC Simultaneous Finance". The plaintiff and the defendant entered into a contract that permitted the defendant to use the "SIC Simultaneous Finance" formatting software for the purpose of developing a new data-analysing software, but prohibited him from using the software for any other purpose, in particular for decoding and retransmitting the plaintiff's "SIC Simultaneous Finance". Before long, the plaintiff discovered that the defendant engaged in unauthorized retransmissions of "SIC Simultaneous Finance", so brought it into an action. This could have been a rather straightforward breach-of-contract case. But, for some unknown reason, the plaintiff elected copyright infringement and general tort as causes of action. In the first place, the Court rejected the copyright claim by pointing out that, although "SIC Simultaneous Finance" could be deemed as an electronic database of financial information, its selection or arrangement was too mechanical to meet the threshold of originality for copyright protection.

The Court then made an extraordinary endeavour to work on the plaintiff's general tort claim. The Court recognized that the plaintiff undertook certain investment risks by devoting sizeable financial resources to create the electronic database; meanwhile, the plaintiff realized its investment return by the means of selling this time-sensitive information to the public. As a result, the plaintiff should enjoy legal protection of its legitimate investment and interest in the electronic database. The defendant, without the authorization of the plaintiff, retransmitted "SIC Simultaneous Finance" for commercial purposes. This activity went against the principles of honesty and credibility and business ethics in the marketplace, and therefore constituted unfair competition actionable under Chinese Anti-Unfair Competition Law.

In the second case concerning electronic databases, the Court went even a step further by holding that merely hyper-linking, instead of copying, another's uncopyrightable electronic database constituted an act of unfair competition. The disputed subject-matter of this case was a foreign exchange fluctuation Chart (posted on the plaintiff's Website to which the public had free access. The plaintiff alleged that the defendant should be liable for its Website providing a direct link to the Chart, bypassing the plaintiff's home page. The defendant argued that the Chart did not exhibit sufficient originality for copyright protection as it was automatically generated by a specially designed software processing real-time foreign exchange.

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61 Id.
62 Id.
63 Id.
64 Id.
65 Id.
66 See Anti-Unfair Competition Law of the People's Republic of China, Article 2: "An operator shall, in transactions in the market, follow the principle of voluntariness, equality, fairness, honesty and credibility, and observe generally recognized business ethics."
information from the China Construction Bank. The Court stated that, despite the fact that the defendant was correct on the originality of the Chart, the denial of copyright protection had no bearing on this case’s favourable outcome to the plaintiff. It started the reasoning with characterizing “Internet economy” as a type of “eyeball-catching economy”, in which a dotcom company’s success by and large depended on the eye traffic to its Website. Hyper-linking, especially deep-linking, would divert the eye traffic from the original Website, and therefore cause it economic losses. In addition, commercial Website operators must invest substantial money and labour to survive in the highly competitive market among dotcom companies. Unlimited hyper-linking of another’s Websites was not only unfair to original Website operators and against business ethics, but also detrimental to the development of the Internet industry as a whole. Consequently, the defendant’s unauthorized hyper-linking constituted an unfair-competition act actionable under the Chinese Anti-Unfair Competition Law.

IV. PROPOSALS FOR DATABASE PROTECTION IN CYBERSPACE

Based on the comparative study of the above three jurisdictions, this article proposes that China should:

A. insist on the originality requirement for copyright protection of databases in cyberspace; and

B. reverse the recent trend of manipulating general unfair competition principles to protect unoriginal databases, rather than creating well-defined sui generis rights in legislation.

The following discussions will further explore these two points.

A. THE SIGNIFICANCE OF ORIGINALITY

A considerable part of the Chinese legal literature applauded the above database cases that directly applied general legal principles such as honesty, fairness and business ethics. It was argued that, although Chinese copyright laws did not explicitly include television guides or electronic databases as eligible subject-matter, this should not render courts impotent; instead, courts should creatively interpret and apply catch-all

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68 Id.
69 Id.
70 Id.
71 Id.
provisions in the Chinese Anti-Unfair Competition Law to resolve these flaws in Chinese copyright laws.

The assumption of the above academic argument and, probably, of the three cases discussed above, is that failure to cover certain subject-matters is an inherent flaw in Chinese copyright laws. However, a second thought on this issue may lead to an entirely different conclusion: that such a “failure” is not negligence but a deliberation of legislators. In other words, television guides or electronic databases falling outside the scope of copyright law is not because legislators had no conception about these subject-matters at the time of legislation, but because they intentionally left certain kinds of works unprotected and freely accessible to the public. Such a legislative intent could be easily inferred from the explicit imposition of the originality requirement to all copyrightable works.

One may argue that the originality requirement per se may be a slip-up of the legislators of the Copyright Law. Why should we need such a cumbersome requirement to block enormously valuable and costly databases from legal protection? It appears extremely unjust to allow the appropriating of the fruits of another’s labour. Likewise, the courts in the three cases seemingly shared the sentiment that one should be entitled to the full return of one’s labour and investment. As mentioned above, a similar impulse of restitution had also been strongly felt by the U.S. Supreme Court, which in the INS case attempted to protect uncopyrightable news reports under unfair-competition principles. However, it turned out that subsequent courts and the Restatement (Third) of Unfair Competition never literally followed this approach.

The underlying concern of the originality requirement is substantive rather than procedural. Although the argument that one should not “reap where another has sown” sounds entirely valid, it is by no means a universal truth, at least in a legal sense. For example, a small shop may freely benefit from the traffic attracted by a huge department store in the neighbourhood, and a newspaper may gain better sales by reporting popular athletic events. Such a “reap/sown” theory could be even more fallacious in the arena

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73 See the Chinese Anti-Unfair Competition Law, Article 2.
74 See Liang Huixing, supra, footnote 72.
75 Id.
76 See Feist, supra, footnote 14, stating that the originality requirement is mandated by the U.S. Constitution to “promote the Progress of Science and useful Arts”.
77 See William W. Fisher, III, Reconstructing the Fair-Use Doctrine, 101 Harv. L. Rev. 1659, 1988, 1688-1689: “authors and inventors deserve a reward for their labour and should be given it regardless of whether they would continue their work in the absence of such compensation.”
78 See Gordon, supra, footnote 21, Section 38, Comment B.
of intellectual property. Taking patents as an example, patent law protects only inventions with novelty, non-obviousness and utility.\(^8^3\) Therefore, inventions that are only repetition or obvious variations of prior arts, once published, will be freely accessible to the public, no matter how much time or money was expended.\(^8^4\) The economic underpinning of patent as well as other intellectual property rights is that information, in contrast to tangible property, has more characteristics of public goods—usually described as "non-excludable" and "inexhaustible".\(^8^5\) It is non-excludable in that, once information is published, it will physically be difficult to exclude others from using it. It is inexhaustible in that one person's use of information will not naturally diminish another's use of the same. Accordingly, without certain legal protection, inventors and authors would tend to under-produce, because "non-excludable" free-riders would mean that they would be unable to recoup their expenditures on research and development and authorship; with too much legal protection, the general public would, however, have very limited access to valuable information, which otherwise might have fully realized its potential of "inexhaustible" accessibility. As a legal mechanism to rescue this production/access dilemma, intellectual property law is designed to strike the delicate balance between rewarding the hard work of creators and preserving the public domain in which the public can freely draw knowledge and information.\(^8^6\)

As many commentators indicate, the public domain is of vital significance in both constitutional and economic dimensions. First of all, the public domain is essential for free speech.\(^8^7\) Citizens in a democratic society should be well informed of facts and ideas to participate in social dialogue and political discourse.\(^8^8\) Establishing excessive property rights in information and ideas is tantamount to establishing a private censorship over speech.\(^8^9\) Second, the public domain is an indispensable element in the Chinese current

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\(^8^4\) One twist here is that, if the information is not published, it may enjoy some protection as trade secret: see Restatement (Third), supra, footnote 21, Sections 39-45.


\(^8^6\) Some authors regard the public domain as an aggregation of individual user rights that are at least as important as authors' exclusive rights. See generally L. Ray Patterson and Stanley W. Lindberg, The Nature of Copyright: A Law of Users' Rights, University of Georgia Press, Athens, 1991.


\(^8^8\) See, e.g., Neil W. Netanel, Copyright and a Democratic Civil Society, 106 Yale L.J. 283, 1996; justifying the copyright system as a legal institution to enhance the democratic nature of a civil society. See Niva Elkin-Koren, Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace, 14 Cardozo Arts & Ent. L.J. 215, 1996; arguing that copyright law should fully realize the Internet's potential to decentralize social dialogue.

education system. As Professor Kaplan has indicated: “Education, after all, proceeds from a kind of mimicry, and ‘progress’, if it is not entirely an illusion, depends on generous indulgence of copying.” Allowing private enclosure of information and ideas previously in the public domain will unduly increase education costs and severely upset the financial sustainability of the education system.\textsuperscript{92}

From an economic perspective, over-protection of information may even serve as a disincentive to intellectual creation, contrary to the original intentions of “unfair-competition” proponents. A romantic notion of authorship characterizes intellectual creation as “craft[ing] out of thin air”\textsuperscript{93} authors create something from nothing and works exclusively owe their origins to their respective authors. However, such a charming notion is largely illusory in reality, because all processes of authorship are more or less incremental and cumulative, and may be properly described as transformative uses of pre-existing knowledge and materials.\textsuperscript{94} Ideas and facts are basic building blocks from which all generations of authors can draw to produce diverse works. If an overly expanded property regime removes these raw materials from the public domain, second-comers would be forced to repetitively conduct the basic research and collect the factual data all from scratch.\textsuperscript{95} This would not only be a huge waste of scarce material and intellectual recourses, but also generate anti-competitive effects in the marketplace.\textsuperscript{96} The anti-competitive danger of over-protection may be even more imminent in database industries, which are notorious for sole-source problems.\textsuperscript{97} Many data sources, such as television stations and stock exchanges, hold \textit{de facto} dominant positions on the generation of certain information products. Expanded protection on facts and information may reinforce their natural monopolies by vesting them with further legal vetoes to any second-comer in the marketplace.\textsuperscript{98} As a very interesting illustration here, in a European case\textsuperscript{99} with almost identical fact-patterns to those of the Chinese

\textsuperscript{90} See the Constitution of the People's Republic of China, Article 46: "Citizens of the People's Republic of China have the duty as well as the right to receive education.”


\textsuperscript{92} See Reichman and Samuelson, \textit{supra}, footnote 10, at 131: discussing that a \textit{sui generis} database protection may have a great impact on scientific research, education and public interest organizations, etc.

\textsuperscript{93} See Paul Goldstein, \textit{Copyright}, 55-SPG Law and Contemp. Probs. 79, 1992, 80: elaborating on traditional notions and modern implications of copyright and authorship.

\textsuperscript{94} See Jessica Litman, \textit{The Public Domain}, 39 Emory L.J. 965, 1990, 966: characterizing the public domain as “the essence of authorship”.

\textsuperscript{95} Some commentators detect a tendency of systematic inter-generational bias among legislators, which might cause them to enact overly protected database rights only in favour of the current generation of authors. See Yochai Benkler, \textit{Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information}, 15 Berkeley Tech. L.J. 535, 2000, 570–573.

\textsuperscript{96} See Reichman and Samuelson, \textit{supra}, footnote 10, at 90–94: discussing that strong property rights in information may establish legal barriers to market entry.

\textsuperscript{97} “Sole source” refers to the market phenomena that some information products are supplied by only one or a very limited number of producers. See ibid., at 70, quoting the report by the National Research Council, which “suggests that the market for commercially distributed databases is almost universally characterized by a distinct absence of competition.”

\textsuperscript{98} See Reichman and Uhlir, \textit{supra}, footnote 10, at 808–809.

television guide case,\textsuperscript{100} the European Court of Justice held that television stations that refused to license their television guides to other competitors constituted abuse of their dominant market positions.\textsuperscript{101}

In short, originality is not "some unforeseen by-product of a statutory scheme", but "the essence of copyright",\textsuperscript{102} and the means by which copyright law promotes the progress of science and useful arts. The originality requirement secures exclusive rights being only recognized for adding to the wealth of public knowledge, not for "removing existent knowledge from the public domain" (emphasis added).\textsuperscript{103} Harshly expanding general principles of unfair-competition law to cover unoriginal facts and ideas will swallow the notion of public domain and frustrate the delicate production/access balance achieved by copyright law. Instead of being a complement, it could be a disaster to copyright law.

\subsection*{B. Rejecting Unfair-Competition Principles in Database Protection}

One may argue that digital technology upsets the production/access balance in database industries and generates underproduction problems,\textsuperscript{104} which entails the need for new incentives to create. Assuming this argument is valid, the Chinese Anti-Unfair Competition Law is thus in no sense the proper legal institution to redress the balance. The legal principles in the Chinese Anti-Unfair Competition Law speak merely of "honesty", "fairness" and other "business ethics".\textsuperscript{105} On the contrary, the issue here is "not about ethics; it is about the protection of property rights in ... information so that the information will be made available to the public by profit-seeking entrepreneurs,"\textsuperscript{106}—an economic solution to an economic dilemma. Furthermore, "the general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—became, after voluntary communication to others, free as the air to common use."\textsuperscript{107} In other words, it is not preserving the public domain, but encompassing the public domain with property rights that need

\begin{footnotes}
\footnote{See supra, footnote 52.}
\footnote{Even more ironically, the applicable law of this European case (supra, footnote 99) were the copyright laws of the United Kingdom and Ireland, both of which recognize copyright in non-creative works. See Ulrika Bath, \textit{Access to Information v. Intellectual Property Rights}, E.I.P.R. 24(3), 2002, 138–146: discussing the interaction between the European Union Competition Law and Intellectual Property Law.}
\footnote{See Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, at 589, dissenting opinion.}
\footnote{See Graham v. John Deere Co. at Kansas City, 383 U.S. 1 (1966), at 6.}
\footnote{See supra, footnotes 2–30 and the accompanying text.}
\footnote{See the Chinese Anti-Unfair Competition Law, Article 2.}
\footnote{See Nita, supra, footnote 22.}
\footnote{See Ins, supra, footnote 20, at 250, dissenting opinion. See also Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 1989, 146: \text{"Imitation and refinement through imitation are both necessary to ... the very lifeblood of a competitive economy.";} Financial Information, supra, footnote 22, at 208: \text{"Whether or not reproduction of another's work is 'immoral' depends on whether such use of the work is wrongful. If, for example, the work is in the public domain, then its use would not be wrongful."}; Restatement Third, supra, footnote 21, Section 38, Comment B.: \text{"The law has long recognized the right of a competitor to copy the successful products and business methods of others absent protection under patent, copyright, or trademark law."}}
compelling economic justifications to be exceptions to the general rule. Taking copyright as an example, on the one hand it clearly defines its boundary with the originality requirement and with the duration of copyright, and on the other hand it carves out several affirmative defences such as fair-use and cover licence. Even the EU Database Directive, which has been subject to persistent controversy, contains some safety-valves such as duration and exceptions. In contrast, the Chinese Anti-Unfair Competition Law—equipped with nothing more than bare words such as "honesty" and "fairness"—has the potential to grow into a monstrous amoeba that generates eternal and absolute property rights in information and swallows-up the entire public domain. This potential, even though not yet fully realized, will have a chilling effect on the free flow of information, and render traditional intellectual property institutions largely superfluous. In a nutshell, the Chinese Anti-Unfair Competition Law is both ill-oriented and ill-defined to cope with production/access problems.

The remaining question is whether the Chinese courts are able to creatively supplement the Anti-Unfair Competition Law and turn it into a quasi-property regime. As the Restatement of Unfair Competition pointed out, because of inherent intricacy and subtlety in intellectual property law, it would be better if rule-making in this area were deferred to legislation. For instance, any rule-making initiative should begin with an investigation into whether the current legal regime had already caused an underproduction of information. Next, one must ascertain whether any alternatives exist, such as contracts or encryption, which producers may themselves use to cure the problem. The above investigations might be so time-consuming and expensive that the courts could hardly afford to conduct them during the relatively short periods of individual actions. Also, creating new property rights in information may affect a wide variety of interest groups including education, libraries, research institutes and even governmental bodies. Therefore, in order to accommodate all the competing

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108 See Yochai Benkler, supra, footnote 95, at 587–589: arguing that for database legislation to pass the muster of first amendment, it must "further an important or substantial governmental interest".
109 See INS, supra, footnote 20, at 263, dissenting opinion.
110 See Restatement Third, supra, footnote 21, Section 38, Comment B: stating that copyright law "contains elaborate mechanisms intended to balance the interests in protection and access."
111 See the EU Database Directive, Article 10.
112 Ibid., Article 9.
113 This point owes its inspiration to Professor Mike Townsend of University of Washington Law School.
114 See Restatement Third, supra, footnote 21, Section 38, Comment B.
115 Interestingly, it was reported that the commercial private database industry was healthy, robust and hardly affected by the Feist case. See Yochai Benkler, supra, footnote 95, at 592.
117 See INS, supra, footnote 20, at 263, dissenting opinion: stating that "Courts are ill-equipped to make the investigations which should precede a determination of ... any property rights in news."
118 See Reichman and Samuelson, supra, footnote 10, at 131.
interests to the greatest extent, rule-makers should establish a forum for wide social discourse. Because disputes are usually narrowed to parties in the courtroom, the courts have a systematic tendency to overlook outside interests and the potential costs to society as a whole. Above all, Chinese courts—as are all courts following the civil-law tradition—are never designed or equipped to undertake any rule-making task apart from the extremely narrow power of judicial interpretation of existing laws. Self-empowered rule-makings will only end up adding to uncertainty in the law and jeopardizing the integrity of the legal system.

V. CONCLUSION

The baseline of this article is that copyright law must strike a delicate balance between providing incentives to intellectual creation and securing the public interest in the free flow of information. To further these dual purposes copyright law, on the one hand, grants authors a bundle of exclusive rights in copyrighted works, and on the other hand, has devised the originality requirement to safeguard the public’s privileges in liberally utilizing the ideas and information conveyed by works. Therefore, when copyright law is expanding its coverage on new subject-matters in cyberspace, it must also pay proportionate attention to such traditional doctrines as originality in order to avoid depriving the public of the welfare brought by new information technology. This is especially important for China where copyright statutes seemingly have failed to give detailed and practical guidelines about originality even before the advent of digital technology. This article argues, therefore, that substantial legislative effects must be dedicated to this aspect as an indispensable part of China’s digital copyright agenda.

Furthermore, the urgent need for legislative progress in Chinese copyright law may also lie in some deeper policy considerations that could be inferred from the above discussions but which go far beyond the coverage of this article. With the increasing complexity of society, public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Accordingly, the law continues to decline as an “autonomous discipline”, and legal doctrines become increasingly entangled with theories from other disciplines, such as economics,

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119 Notably, some commentators argue that even legislations often result from expedient compromises between lobbying groups regardless of social costs as a whole. See Jessica Litman, Copyright, Compromise and Legislative History, 72 Cornell L. Rev. 857, 1987, 869–879: stating that the U.S. Copyright Act of 1976 was a negotiated settlement among specific stakeholders.


121 For more discussions of copyright objectives, see supra, footnotes 5–7 and the accompanying text.


123 See Ray Patterson and Lindberg, supra, footnote 86, 120–122.

124 See INS, supra, footnote 20, at 262–263; dissenting opinion.
sociology and anthropology. This is especially true in the area of copyright law, in which even tiny revisions will profoundly affect various interests of the information producers and which concern such fundamental policies as culture, education and competition. Therefore, courts are no more able, if they ever were, to handle intricate challenges from new technologies equipped merely with such bare words as "honesty" and "fairness". It is a sound policy that copyright expansion, with technological innovation, be consistently deferred to the systematic treatment of legislation rather than the individual talents of judiciary.

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126 See Sony Corp., supra, footnote 7, at 430: "The judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme."