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**CHINA'S COPYRIGHT PUBLIC DOMAIN: A
COMPARISON WITH AUSTRALIA**

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China's copyright public domain: A comparison with Australia

Yahong Li and Graham Greenleaf*

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1. Introduction

Texts on intellectual property law do not often recognise the public domain as a basic concept of copyright law, and if they do only give it passing mention when discussing the expiry of the copyright term or the idea/expression dichotomy. The focus of most books and articles on copyright law is the rights of the owners of creative works – both the creators of such works and others with commercial interests in them. The organizing principle of such studies is the exclusive rights of the copyright owner.

This article takes a different approach, putting the user of copyright works (and, in aggregate, 'the public') at the centre of the study of copyright law, by making the core question 'what can users do with works, without obtaining the permission of a copyright owner?'

The justification for this theoretical approach to copyright has been argued previously, in relation to Australia and the UK,¹ resulting in a definition of the public domain, and an analysis of it as being comprised by fifteen distinct categories of 'public rights', necessary and sufficient to describe the copyright public domains in those two related legal systems. However, this raises the question of to what extent this definition, and its categories, are universal.

In this article the copyright public domain of a very different social and legal system is the focus, that of the People's Republic of China ('China'). Comparison of the copyright public domain in a country with such a different legal background (Confucian, civil law and socialist) is one step (but only one) toward testing the above question of universality. This article does something different from previous copyright scholarship: it is a comparative analysis of copyright regimes in Australia and China from the point of view of the public domain. It also tests whether the analysis of Chinese copyright provides new insights into the previous theoretical approach to the public domain. The relationship between the constraints imposed on the public domains of China and Australia by international copyright agreements, and the extent to which each country has utilised such flexibility as those agreements offer, is also considered.

1.1. A new approach to copyright public domains

Greenleaf and Bond have argued for a more expansive meaning for the copyright public domain (and the 'public rights' which comprise it), and illustrated their argument by an analysis of Australian law (and to a lesser extent that of the UK). The brief definition of the copyright public domain they give is that it is the public's ability to use works without seeking prior permission, and on equal terms. Other authors have taken a similar starting point but have not developed a full definition.²

The full definition used by Greenleaf and Bond is that the public domain, in relation to copyright, is the ability of members of the public (including a significant class of the public, not chosen by the copyright owner) to use works without obtaining a licence the terms of which are set (or changeable) by a copyright owner. Any licences must pre-exist, with terms set by a neutral party. Use must be on the same terms (including costs, if any) for all users (public/class). Each category of 'public rights' must satisfy this definition to be regarded as part of the public domain. This approach therefore provides an overall definition of the copyright public domain, and a set of more easily understood categories (public rights) of which it is comprised. The expression 'public rights' is used, but it has much the same meaning as 'user rights' in the sense in which that term is used in Canada.³

¹ Greenleaf, Graham and Bond, Catherine, 'Public Rights' in Copyright: What Makes Up Australia's Public Domain? (January 23, 2013). *Australian Intellectual Property Journal*, (2013) 23 AIPJ 111-138 <<http://ssrn.com/abstract=2212127>>

² These authors include Professors Deazley, Litman, Lessig, Boyle and others: see Greenleaf and Bond pp. 115-111.

³ See Greenleaf and Bond pp. 113-114.

The fifteen categories of public rights that Greenleaf and Bond identify under Australian copyright law and practice are:

1. Works failing minimum requirements
2. Works impliedly excluded
3. Works expressly excluded
4. Constitutional and treaty exclusions
5. Term limits: Copyright has expired
6. Public domain dedications (relinquishment)
7. Public policy refusals to enforce (for types of works)
8. Public interest defences
9. Insubstantial parts
10. Mere facts, ideas etc
11. Uses outside exclusive rights
12. Statutory free-use exceptions
13. Neutral compulsory licensing
14. Neutral voluntary licensing
15. De facto public domain of benign uses

In this article, we apply this definition and these fifteen categories to the copyright public domain in China (under the current *Copyright Law* (PRC) and its proposed revision) to examine whether under Chinese law there are any different or additional categories of public works and whether the fifteen categories are regarded as being of similar importance.

1.2. Public domain elements in Chinese copyright history

Before introducing public domain elements in Chinese copyright history, a brief overview of China's copyright law history is necessary for the readers who are not familiar with it.⁴ Following the establishment of the People's Republic of China (PRC) in 1949, China's 1928 Copyright Law was abolished, along with all other laws enacted by the predecessor Republic. No substantial copyright laws were enacted until a Trial Copyright Regulation was issued in 1984,⁵ which was later replaced by a formal Copyright Law in 1990,⁶ which was amended in 2001⁷ and 2010.⁸ Since 1992 China has become a party to copyright treaties.⁹ Further amendments, under consideration by the State Council will be referred to as the '2014 Draft Amendments'.¹⁰ The current Act and

⁴ We do not provide a similar background to Australia's Copyright Act 1968 because we assume that the audience for this journal has certain familiarity with the history of Australian copyright law.

⁵ The Trial Regulations on Copyright Protection for Books and Periodicals, issued by the Ministry of Culture on June 15, 1984, and effective from January 1, 1985.

⁶ *Copyright Law of the People's Republic of China*, adopted at the 15th Session of the Standing Committee of the 7th National People's Congress on 7 September 1990, promulgated by Presidential Decree No 31 of 7 September 1990, effective 1 June 1991 (*Copyright Law*).

⁷ National Peoples Congress Standing Committee (NPCSC) *Decision on Revision of the Copyright Law* (Oct. 27, 2001). This revision aimed to bring China's copyright law in line with the TRIPs Agreement so that China could gain entry into the WTO.

⁸ *Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China*, adopted at the 13th Meeting of the Standing Committee of the 11th National People's Congress on 26 February 2010, promulgated by Presidential Decree No 26 of 26 February 2010, effective 1 April 2010.

⁹ China became a member of the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention) in 1992, the *Universal Copyright Convention* in 1992, the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement) in 2001, and the World Intellectual Property Organization "Internet" Treaties in 2007.

¹⁰ The English version quoted in this article is the unofficial translation 'PRC Copyright Law (Revision draft for solicitation of Comments)' provided by [China Law Translate](http://chinalawtranslate.com/prc-copyright-law-revision-draft-for-solicitation-of-comments/?lang=en) 6 July 2014, available at <<http://chinalawtranslate.com/prc-copyright-law-revision-draft-for-solicitation-of-comments/?lang=en>>, cited herein as '2014 Draft Revision (China)'

proposed Amendments are the subject of detailed study by one of the authors, to which reference will be made throughout.¹¹ The Copyright Law authorizes the State Council to issue regulations concerning copyright.¹²

The National Copyright Administration of China ('NCAC') was established in 1985 to administer copyright-related matters. China has a 'two track' approach to enforcement of copyright law, providing for both civil actions before the Courts, and for administrative enforcement (under Art. 48) including fines and other civil remedies. Since the Chinese legal system follows the civil law tradition, case law is of limited effect.¹³

Various interpretations of the history of Chinese civilisation have stressed the importance of a culture of sharing knowledge, including through republication, and the support for this found in Confucianism.¹⁴ Faithful replication of ancient works was seen as the greatest form of flattery, favored and encouraged,¹⁵ though some interpretations take this to extremes.¹⁶ Ken Shao argues:¹⁷

Sharing knowledge was deemed to be so vital to learning and creativity that hoarding knowledge exclusively to broaden one's own vision was widely condemned. ... As the seventeenth-century bibliophile Cao Ron put it, to hinder the sharing of ancient or rare works was to disrespect the forefathers of their literary heritage.

It is arguable that aspects of the development of publishing in China, and the strong role played by government printing houses, may have paved the way for the growth of a culture disposed toward free sharing in Imperial China. Publishing and distribution of literary works were, however, largely censored and controlled by imperial authorities.¹⁸ Official government printing houses were established in major ancient Chinese cities.¹⁹ However, at least parts of Imperial China had thriving

¹¹ Yahong Li 'China' Chapter in L. Bently *International Copyright Law and Practice* (LexisNexis, 2016) (hereinafter "Li 'China'"); see para. 1[2][b] for an overview of the amendments and proposed amendments.

¹² For details see Li 'China' para. 1[2][c]; Some of the regulations relevant to public domain issues are: *Implementing Regulations (China)* (2002, am. 2013); *Software regulations* (2001, am. 2002, 2013); *Internet regulations* (2006, am. 2013); *Regulations on collective management* (2004); *Remuneration* (various dates); *Registration* (various dates).

¹³ Court decisions do not have binding effect on later courts. However, the Supreme People's Court ('SPC') has published a series of *Guiding Cases* since 2010, including copyright cases, for the reference of all lower court, according to the Provisions of the SPC's *Work on Guiding Cases* (26 November 2011). (See, e.g., SPC, 4th Set of Guiding Cases, Feb. 6, 2013; SPC, Top Ten Innovative Intellectual Property Cases Tried by Chinese Courts in 2013, April 22, 2014).. These guiding cases are not directly cited by the courts in their decisions and have no binding effect, but have strong influence on lower courts in their decisions. In addition, the SPC is authorized by the National People's Congress ('NPC') to issue judicial interpretations to guide lower courts on how to apply laws in deciding specific cases (See The Decision of the Standing Committee of People's Congress on Strengthening the Work of Interpreting Laws (June 10, 1981), Art. 2)..

¹⁴ Confucius said in the *Lun-Yii*, or *Analects*, 'I transmit rather than create; I believe in and love the Ancients': *The Analects of Confucius*, bk 7, ch 1 I Another translation is 'my function is to transmit rather than to originate; and I treat antiquity with trust and affection'. Confucianism also emphasizes the value of harmony, which requires obedience to authority and respect to the 'social order'. Spreading and sharing intellectual works was therefore seen as a tool to achieve and maintain social harmony.

¹⁵ Guan H Tang *Copyright and the Public Interest in China* (Edward Elgar, 2011), p. 22.

¹⁶ Chinese civilization seen as lacking 'the notion of human ownership of ideas or their expressions': Carla Hesse, 'The rise of intellectual property, 700 B.C. – A.D. 2000: an idea in the balance', *Daedalus* Spring 2002, p. 27; Chinese characters were thought to be the products of nature, not able to be possessed by any human being, as were the expressions in a book: W Alford 'To Steal a Book is an Elegant Offence: Intellectual Property Law in Chinese Civilization', Stanford University Press, 1995, pp. 25-29.

¹⁷ Ken Shao 'The promotion of learning in Chinese history: Discovering the lost soul of modern copyright', p. 84.

¹⁸ For example, the ordinance under the Emperor Wen-tsing, in 835, prohibited the private publication of almanacs. Censorship and restrictions were extended to astrological charts, prognostications, dynastic histories, and civil service examination literature, etc., in the Song dynasty (960-1179). By the 18th century, more comprehensive system of pre-publication censorship was in place throughout Imperial China. See Chan Hok-Lam, *Control of publishing in China: Past and Present* (Canberra: Australian National University, 1983), 2-24.

¹⁹ Chan Hok-Lam 'Control of publishing in China'.

private publishing industries for hundreds of years.²⁰ Private printing houses could register their particular works with the Imperial Officials and receive exclusive privileges to print and sell books.²¹ Given the late development of the notion of copyright property rights in Europe and everywhere, when compared with millennia of Chinese history, comparisons which over-emphasise China's 'sharing culture' should be treated with caution.

Perhaps there was some element of the value placed on sharing in Imperial Chinese culture that laid a foundation for a new form of sharing in socialist China, but that is beyond the scope of this article. Post-1949, the new regime of the Chinese Communist Party (CCP) valued social and public interest over individual welfare, to the extent that, individuals were obliged to share their creations with their community.²² It can be argued that this philosophy has been evident in some aspects of Chinese copyright law since 1949. In the 1950s, when there was no formal copyright law, no comprehensive copyright was recognized for authors. Only a few administrative regulations were enacted to deal with the issues such as the payment of *gaofei*, a very modest remuneration based on number of words, and to prevent unauthorized alteration of authors' works.²³

The *Copyright Trial Regulations* (CTR) of 1984 contained some 'socialist' elements. For example, only the works created by Chinese citizens and published by state publishing houses were protected.²⁴ Under this repealed CTR, the Ministry of Culture, as required by state interests, could purchase the copyright of certain works and lengthen the period of protection for these works by subsuming them under state copyrights.²⁵ Prior to 1 June 1997, foreign works were also subject to free appropriation.²⁶

The 1990 *Copyright Law* did away with most of these 'socialist' elements (including those above), but preserved the legislative objective to 'encourage the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and of promoting the development and prosperity of socialist culture and science'.²⁷ To achieve this objective, the law provided that works banned from publication or dissemination are not protected by the *Copyright Law*, and the use of copyright shall not violate the Constitution and laws or contravene the public interest,²⁸ the result of which is discussed in [2.6] and [2.7] below. Judicial practice also shows that, whenever there is a conflict, the Chinese courts tend to favour public interest over individual rights in their decisions,²⁹ a point we will also discuss later.

²⁰ Lucille Chia provided a long list of books printed from the Song to the Ming dynasties, including the classics, dictionaries, histories, geographies, school primers, medical texts, encyclopaedias, poetry anthologies, plays, ballads and much more, which were freely printed with multiple editions. Lucille Chia, 'Printing for profit: the commercial publisher of Jianyang, Fujian (11th-17th centuries) 154-55 (2002), at Appendix A.

²¹ Chan Hok-Lam.

²² Guan Hong Tang, pp. 102-103.

²³ For example, in September 1950, the National Conference of Publishers issued the Resolution for Improving and Developing Publication Work. In 1953, the General Administration of Publication issued the Rules for Rectifying the Wanton Reproduction of Books. In July 1985, the Ministry of Culture issued the Interim Regulations Concerning the Remuneration for Works of Literature and Social Science. See Yahong Li, "Transplantation and Transformation: 30-Year Development of China's IP System" in G. Yu (ed.), *The Development of the Chinese Legal System: Change and Challenges* (Routledge, London and New York, 2010), p. 141.

²⁴ CTR Art. 2. Yahong Li, id. p. 145.

²⁵ CTR Art. 14. Id.

²⁶ Guan Hong Tang, p. 78.

²⁷ Copyright Law (China), Art. 1.

²⁸ Copyright Law (China) 1990, Art. 4.

²⁹ Guang Hong Tang, p. 91, and ???

Throughout the history of publishing in China, there have therefore been cultural objectives (Confucianism, socialism, and censorship among them) which, whatever their motivation, tended to expand China's copyright public domain in the sense used in this article, of allowing use of works without permission of copyright owners. The purpose of this article is not to examine this contested history, but rather to examine whether the current public domain in China is significantly different from that of Australia, a country with a very different cultural history.

2. Comparison of the copyright public domains of China and Australia

We will now describe the fifteen categories above, with reference to how each fits the proposed public domain definition. For each category, we then compare the relevant provisions of Chinese law with (in less detail), Australian law.

In this comparison, we use 'works' (simpliciter) in a non-technical sense to encompass all examples of human expression, and therefore distinguish between 'works' (which may or may not be protected by copyright) and 'copyright works'.

2.1. Works failing minimum requirements

Works that fail to meet the standard of originality (required by statute, but determined by the courts), or fail *de minimis* requirements such as titles or headlines, will not have any copyright protection. In Australia the standard of originality required is minimal, requiring little more than that the work originates from an identified human author who makes a minimum authorial contribution.³⁰ However, compilations that lack that minimum authorial elements, such as a telephone directory, remain excluded. Works that have not been reduced to a material form ('fixation') are also not protected, although the definition of 'material form' is very liberal. However, works that are spontaneous oral performances, or are dramatic works in the form of 'a choreographic show or other dumb show',³¹ must be fixed in some material form such as film in order to be protected. These requirements therefore do not cause major expansions of Australia's public domain, but the requirement of fixation may, when compared with China result in a broader public domain in some cases (as discussed below and in [2.2]).

In China, the standard of 'originality'³² required is also minimal. Originality means that the work is independently created from the author's own intellectual activities and has not been copied from others.³³ Works that cannot be copied in a tangible medium (2010 Copyright Law) are not protected. The law is ambiguous on whether a work must be *actually* embodied in a tangible medium to be protected. Article 2 of the Implementing Regulations to the 2010 Copyright Law provides that works are only protected if they *are capable of* reproduction in a tangible form. The law protects oral works, defined broadly as 'works created via spoken words, such as impromptu speeches, lectures and court debates'³⁴ that have not been fixed in a tangible form,³⁵ and may continue to do so.³⁶ This means that an oral work capable of being fixed but not yet fixed (*e.g.*, a

³⁰ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458.

³¹ Copyright Act 1968 (Aust.), s. 10(1) definition 'dramatic work'.

³² Implementing Regulations (China), Art. 2.

³³ Implementing Regulations (China), Art. 3, para. 1: 'The term "creation" in this law means intellectual activities from which literary, artistic and scientific works are directly derived.'

³⁴ Implementing Regulations (China), Art. 4(2).

³⁵ See Li 'China' § 2[2][b] *infra*.

³⁶ 2014 Draft Revision (China), Art. 5(2) includes 'oral works, meaning impromptu speeches, lessons and other works expressed in orally spoken form'.

lecture) is protected. However, this is not the case for a computer program. To be protected, a computer program must be fixed in a tangible medium.³⁷ In future, however, under the 2014 Draft Amendments, works that cannot be 'fixed in some form' may be excluded.³⁸

Registration is not mandatory for copyright protection in either Australia or China, and cannot be, under the Berne Convention. In China the NCAC provides procedures for voluntary registration, and has issued special rules dealing with the registration of computer software. No voluntary registration system exists in Australia.

Therefore, in both countries, neither the requirement of originality, nor the material form requirements, significantly expand the public domain. Australia does not protect oral works or physical performance works that have not (yet) been reduced to a material form. China, however, does protect works which are capable of being so reduced. Thus in that respect Australia has a broader public domain.

2.2. Works impliedly excluded from copyright

The Berne Convention provides a very broad inclusive definition of 'literary and artistic works'³⁹ as the basis for protection by State parties, and provides that '[t]he works mentioned in this Article shall enjoy protection in all countries of the Union'.⁴⁰ However, the practice of states varies, with the laws of some such as France and Germany, containing a broad statement of the categories protected, followed by a non-exhaustive list of examples.⁴¹

Where national statutory definitions are not broad enough to include particular types of works (in the broad sense described above), we can describe such works as part of the public domain, impliedly excluded from copyright. We refer to these as 'implied' statutory exclusions for want of a better term. It is fundamental that copyright never has protected, and still does not protect, all forms of original creative expressions reduced to material form. Therefore there are at least in theory, forms of expression, or categories of works (in the above non-technical usage) which are not protected by copyright at all, and so form part of the public domain, free for others to copy and use.

In the Australian legislation there is no over-arching definition of the subject-matter that will be protected, only an exclusive list of eight categories.⁴² The Act defines some of the categories of subject matter, by either inclusive or exclusive definitions, and the courts continue the task of definition.⁴³ As a result, there is always the likelihood of gaps, where some forms of expression do not fit into any of the defined protected categories. For example, the smell of a perfume, protected

³⁷ See Li 'China', § 2[4][d] and 5[3] *infra*.

³⁸ 2014 Draft Revision, Art. 5 provides, 'The works in this Law means the intellectual expressions in literary, artistic and scientific fields, which have originality and can be fixed in some form'.

³⁹ Berne Convention, Article 2(1) 'The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.'

⁴⁰ Berne Convention, Article 2(6).

⁴¹ Trevor Cooke (Ed.), *Sterling on World Copyright Law* (Sweet & Maxwell, 4th ed, 2015) [6.02].

⁴² Namely, literary, dramatic, musical and artistic works, plus sound recordings, cinematograph films, television and sound broadcasts, and published editions of work.

⁴³ See *Copyright Act 1968* (Aust.) s 32(1) (subsistence of copyright in original literary, dramatic, musical and artistic works); s 89 (subsistence of copyright in sound recordings); s 90 (subsistence of copyright in cinematograph films); s 91 (subsistence of copyright in sound and television broadcasts); s 92 (subsistence of copyright in published editions).

under some national copyright laws, can be said to be impliedly excluded from Australian copyright protection.

In China a copyright work is first defined generally as an 'intellectual creation in literary, artistic and scientific domain'.⁴⁴ Copyright Law Article 3 then provides, by way of inclusion, general categories of works including 'works of literature, art, natural science, social science, engineering technology,' and lists nine specific categories of copyrightable 'works'⁴⁵ which are correspondingly explained by Article 4 of the Implementing Regulations. This is a non-exhaustive list of defined categories, a potentially open-ended list of categories. The 2014 Draft Amendments take a similar inclusive approach.⁴⁶

Among the nine named categories under Chinese law, a number would not fit easily into any of the defined subject-matter categories of Australian copyright law. For example the Chinese law protects oral works (works created via spoken words, such as impromptu speeches, lectures and court debates). It also contains a category⁴⁷ *Qǔyì* (曲艺) which includes a variety of performance works;⁴⁸ and works of acrobatic artists, magicians and circus performers which can be expressed through body movements and artistry. Some of these might not fit within the Australian category of 'dramatic work,' even though it includes 'a choreographic show or other dumb show,' although it is difficult to be certain.⁴⁹ There is also in China the catch-all category of 'Other Works as provided for in Laws and Regulations'. In the 2014 Draft Amendments the new category 'works of applied art'⁵⁰ is added. Performers of oral works and *Qǔyì* may also be protected by performer's rights in China, classified under the Chinese law as 'neighbouring rights'.⁵¹

Both because of its open-ended general categories, and because of its extensive list of named categories, there seems to be less likelihood in China than in Australia of types of works being impliedly excluded from copyright protection, and thus part of the copyright public domain. Because it is more difficult for types of works to 'fall between the cracks', in China, this category of the public domain is therefore potentially smaller than in Australia. As discussed in [2.1], this position is reinforced because of the more liberal Chinese approach to fixation.

⁴⁴ Implementing Regulations (China), Art. 3, para. 1

⁴⁵ Written works; oral works; Musical, Dramatic, *qǔyì*, Choreographic and Acrobatic Works; Works of Fine Art and Architectural Works; Photographic Works; Cinematographic Works; Works of Drawing of Engineering Designs, Product Designs, Maps and Illustrations, and Works of Models; Computer Software; and Other Works as Provided for in Laws and Regulations.

⁴⁶ 2014 Draft Revision (China), Art. 5: 'Works as named in this law refers to intellectual expressions in the literary, artistic and scientific spheres, having originality, which can be fixed in some form'.

⁴⁷ Implementing Regulations (China), Art. 4(2).

⁴⁸ *Qǔyì* is defined generally as the various narrative and singing performances in China, developed and evolved from indigenous folklores. It is estimated that there are about 400 kind of *quyi* existing in China, including the works such as *xiàngshēng* (相声) (cross talk), *kùishū* (快书) (clapper talk), *dàgǔ* (大鼓) (ballad singing with drum accompaniment) and *píngshū* (评书) (story-telling based on classical novels), which are performed through the form of recitation, singing, or a combination of both. Baike Baidu, <http://baike.baidu.com/subview/107686/5125119.htm>

⁴⁹ Copyright Act 1968 (Aust.), s 10(1).

⁵⁰ Defined as 'toys, furniture, accessories and other two dimensional or three dimensional artistic works that possess both practical function and artistic merit'.

⁵¹ See Li 'China' § 9[1][a].

2.3. Works expressly excluded from copyright

Berne allows its Parties to decide whether to protect ‘official texts of a legislative, administrative and legal nature, and official translations of such texts’.⁵² Despite Berne allowing such exclusions, in Australia the current Copyright Act does not exclude from copyright protection any categories of works⁵³, including legislation or case law,⁵⁴ or other government-owned works. Nor does Australia explicitly exclude ‘news of the day’ from protection, leaving this to the interpretation of the idea/expression dichotomy by the courts and the fair dealing exception for reporting news. Nevertheless, some Australian governments, including the Federal government, have adopted policies that government documents should, in default, be published under Creative Commons licences, therefore placing them in the public domain (see [2.14]). Also legislation and case law from all Australian jurisdictions are available for free access from both government and non-government sources, placing them in the *de facto* public domain (see [3.15]).

In China copyright is excluded for certain Governmental documents (‘laws and regulations, resolutions, decisions and orders of State organs, other documents of a legislative, administrative or judicial nature and their official translations’),⁵⁵ news or current affairs, calendars, numerical tables, forms of general use and formulas. Case law has not yet clarified which data on government websites (for example) comes within this exception.⁵⁶

This category of China’s public domain is therefore broader, in theory, than is Australia’s. In practice, however, there may not be so much difference. As discussed in [2.14], Australia has a stronger public domain than China in relation to adoption of Creative Commons licences by the government.

2.4. Constitutional and treaty exclusions

Constitutions can have both expansive and contracting effects on the copyright public domain. Robust free speech protections can mean that some types of expressions cannot be subjected to copyright law. On the other hand rights to compensation for appropriation of property may effectively prevent the existing scope of copyright from being narrowed.

In Australia, the only significant constitutional limitations on copyright are likely to be those arising from the very limited implied right of free speech in relation to political matters and section 51(xxxi) of the Constitution. This, and some other limited constitutional possibilities, have not been fully tested in relation to copyright law.⁵⁷ Australia does not adopt a monist approach to treaties, so there are no treaty obligations (such as in human rights treaties) which may impose limits on copyright without further legislation.

The Chinese Constitution calls for the dissemination of knowledge of science and technology,⁵⁸ and protects citizens’ rights to freedom of speech and press,⁵⁹ and ‘encourages and assists creative

⁵² Berne Art. 2 (4) ‘It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts’.

⁵³ Its treatment of therapeutic goods may approach an exclusion, but is limited to certain uses.

⁵⁴ Part VII Division 1 of the Copyright Act 1968 (Aust.) expressly provides for the subsistence of copyright in works and other subject matter produced by the Crown, although such creations may also be protected under the general copyright provisions, or alternatively the Crown prerogative: see Copyright Act 1968 (Aust.) s 8A.

⁵⁵ Art. 5 of the Copyright Law (China) provides that copyright does not protect the following: laws; regulations; resolutions, decisions or orders of State organs; other documents of a legislative, administrative, or judicial nature; and official translations of such works.

⁵⁶ See for example the very unclear case concerning the Huarong County Government website discussed by G H Tang, pp. 114-115.

⁵⁷ See C Bond, ‘Constitutional aspects of Australia’s public domain’ (2009) 27 *Copyright Reporter* 4 – 11.

⁵⁸ See Constitution Law of People’s Republic of China, Art. 20.

endeavours conducive to the interests of people that are made by citizens engaged in education, science, technology, literature, art and other cultural work'.⁶⁰ Although China's Constitution may provide some guarantees for the protection of copyright, there is no judicial remedy for violations of these provisions, because in practice the Chinese Constitution is not directly enforceable.⁶¹ There is therefore little difference between the constitutional positions in China and Australia, except in relation to free speech on political matters.

2.5. Copyright has expired

The Berne Convention provides that the base rule of the Convention for the minimum duration of copyright 'shall be the life of the author and fifty years after his death',⁶² and then both allows (films, photos) and requires (anonymous and pseudonymous works) various exceptions.⁶³

Australia has adopted the same approach as the European Union and the United States, as a result of the *Australia-United States Free Trade Agreement 2004*, with a base rule of 'life of the author plus 70 years' applying to all published works protected by copyright at the time it came into effect, and all works to be created in future.⁶⁴ However, in contrast to the European Union copyright term extensions, the Australian legislation does not provide that this rule applies retrospectively to works where copyright had otherwise expired before the term extension provision ('life of the author plus 70 years') came into effect.

A significant factor diminishing Australia's public domain is that copyright in unpublished works will never cease by effluxion of time.⁶⁵ Unpublished works will therefore not enter the Australian public domain at any time before publication. This also applies to government works.⁶⁶ The proposed 2016 Amendment Bill provided that copyright in unpublished works will cease 70 years after the death of the author, or if the author is unknown, 70 years after the work was made. There were similar provisions for expiry of copyright 70 years after they were made public, for orphan works with unknown authors that have been published, broadcast or performed in public,.

- (i) In China the general term is 'life of the author plus 50 years' for individual works, but only '50 years after first publication or creation' for works-for-hire. Moral right protection is perpetual.⁶⁷ There are various Chinese exceptions to the 'life of the author plus 50 years' rule (with relevant Australian provisions noted, subject to a differing base rule):

⁵⁹ See Constitution Law of People's Republic of China, Art. 35

⁶⁰ See Constitution Law of People's Republic of China, Art. 47.

⁶¹ The most significant case concerning the justiciability of constitutional rights, *Qi Yuling v Chen Xiaoqi* (2001), a case concerning identity theft. In that case, the Constitution had not been raised in the lower courts, but the SPC had itself raised 'the right to receive education stated in Art. 46 of the Constitution, and based its decision upon it. The decision had in effect suggested for the first time that rights stated in the Constitution could be justiciable and the basis of civil liability. However, in 2008 the SPC officially withdrew its reply to the lower court, stating only that it was no longer in use (or application), but without giving reasons. This is taken to confirm that it is not possible for individuals to raise constitutional rights in China's courts in civil disputes. See Greenleaf *Asian Data Privacy Laws*, OUP, 2014, 196-7.

⁶² Berne Art. 7 (1).

⁶³ Berne Art. 7 (2)-(8)

⁶⁴ See Copyright Act 1968 (Aust.) s 33. Shorter, non-post mortem periods apply for the protection of sound recordings, television and sound broadcasts, cinematograph films and published editions. See Copyright Act 1968 (Aust.) ss 93, 94, 95, 96.

⁶⁵ Copyright Act 1968 (Aust.) s 33(3).

⁶⁶ For a detailed discussion and recommendations for change in relation to public sector information, see G Greenleaf and C Bond 'Reuse rights and Australia's unfinished PSI revolution' *Informatica e diritto- Rivista internazionale*, Vol. 1, No. 2, pp. 341-69, 2011 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951625>

⁶⁷ See Copyright Law (China), Art. 39, para. 1. Also see Li 'China', § 3[2][d].

- (ii) Unpublished works are only protected for the life of the author plus 50 years (currently of indefinite duration in Australia), and this is retained in the 2014 draft Amendments.⁶⁸ Australia's 2016 Draft Amendments take an approach similar to China.
- (iii) Works made in the course of employment, where the copyright is held by a legal entity or organisation, are protected for 50 years of first publication, but protection will cease to be available if the work is not published within 50 years of when the work is made. These provisions utilise the Berne and TRIPs provisions setting a minimum term of 50 years from when a work is made, when the life of the author is not used to set the term.⁶⁹
- (iv) Photographic and cinematographic works are protected for 50 years from the year of first publication (Australia's approach is similar for films⁷⁰), but protection will cease to be available if the works are not made public within 50 years of when the work is made, as allowed by the Berne Convention Article 7(2) and (4).⁷¹
- (v) For computer software works-made-for-hire, the term is 50 years from the year the software is first published, but, this term will lapse 50 years after the year of creation if such software is not published, as allowed under TRIPS Article 12.
- (vi) 'Works of applied art' are currently protected for the normal base rule of life plus 50 years (Australia takes the same approach to artistic works, but with the base rule of life plus 70 years⁷²). In the 2014 Draft Amendments protection is reduced to only 25 years, utilising an exception permitted by Berne.⁷³
- (vii) The right in a published edition ('typographical design') lasts for only ten years from publication,⁷⁴ compared with 25 years in Australia.⁷⁵ Protection of typefaces is not required by either Berne or TRIPs, and a proposed Convention setting a minimum 15 year term is not in force,⁷⁶ so countries are therefore entitled to set whatever term they wish.
- (viii) The protection for performances, recordings, or broadcasts last for 50 years from the year in which, respectively, the performance, initial fixation of the recording, or broadcast took place,⁷⁷ pursuant to TRIPS Article 14(5).⁷⁸ The Australian rule for broadcasts is the same, but for recordings it is 70 years from publication.
- (ix) Anonymous works are protected for 50 years from the first publication of the work. If, however, the author of the work is identified prior to the expiration of this period, the

⁶⁸ Draft Art. 29: 'the property rights in copyright is the life of the author and fifty years after his death'

⁶⁹ TRIPs Agreement, Art. 12.

⁷⁰ Copyright Act 1968 (Aust.), s. 94).

⁷¹ Copyright Law (China), Art. 21, para. 3.

⁷² Copyright Act 1968 (Aust.), s. 33(2).

⁷³ Berne Art. 2 (7).

⁷⁴ See Copyright Law (China), Art. 36 (2).

⁷⁵ Copyright Act 1968 (Aust.), s. 96.

⁷⁶ Art. 9, *Vienna Agreement for the Protection of Type Faces and their International Deposit*. Adopted at Vienna on June 12, 1973. (Treaty not yet in force) <www.wipo.int/treaties/en/documents/other_treaties/vtf-parties.pdf>; see Ricketson and Ginsburg [19.81].

⁷⁷ See Copyright Law (China), Arts. 39, 42, 45.

⁷⁸ See Copyright Law (China), Arts. 39, 42, 45.

general term of the author's life plus 50 years applies.⁷⁹ Australian provisions are similar.⁸⁰

These differences between the Chinese and Australian public domains in relation to the expiry of copyright, mean China's public domain is significantly broader in four respects:

- (i) the base rule in China is 'life plus 50' so works generally enter the public domain more rapidly than under Australia's base rule of 'life plus 70';
- (ii) China provides less protection than its base rule of 'life plus 50' in some cases, including less protection than the equivalent Australian provisions concerning software works-made-for-hire, and works made in the course of employment
- (iii) less protection is also proposed in relation to 'works of applied art';
- (iv) unpublished works are only protected for 'life plus 50', not indefinitely as currently in Australia (but a change to a similar position as in China was proposed by Australia's 2016 Draft Amendment);
- (v) a shorter term has been chosen for published editions.

It is not clear from the Copyright Law whether the 'Rule of Comparison', also known as the 'Rule of Shorter Term',⁸¹ applies in China,⁸² but it should be bound as a party to the Berne Convention. In practice, it has been suggested that, if the protection term of a work originating from another Berne member is longer than the protection term provided in China, the shorter term of protection prescribed under Chinese Copyright Law should apply in China,⁸³ as Berne allows where the protecting country's law so provides. China has not signed any other treaties concerning the term of copyright protection.

2.6. 'Public domain dedications' (relinquishment)

Some countries such as India have statutory provisions allowing copyright to be relinquished, effectively putting the work completely into the public domain. There is no statutory procedure for the relinquishing of copyright in Australia, where the position is uncertain at common law, and further complicated by moral rights provisions.⁸⁴ In China there is no statutory procedure allowing relinquishment either, but it appears that it can occur in effect. G H Tang notes that the author of the song 'Ode to the Motherland', famous within China, 'assigned his copyright over that song to the people of China'.⁸⁵

The Creative Commons system of voluntary licensing provides on its international website a licence called 'CC0' (cc-zero) or 'Public Domain Dedication'⁸⁶ which it sums up as 'no rights reserved',

⁷⁹ See Implementing Rules of Copyright Law (China), Art. 18. Also see Li 'China' § 3[1][d].

⁸⁰ *Copyright Act 1968* (Aust.), s. 34.

⁸¹ Berne Convention, Art. 7(8) provides, 'In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation otherwise provides, the term shall not exceed the term fixed in the country of origin of the work'.

⁸² On the application of the rule of shorter term in China, see 'Introduction', Li 'China' § 5[2].

⁸³ 'Five major copyright issues in translating foreign works', China Writer Net, <<http://www.chinawriter.com.cn/zjqy/2011/2011-07-15/100036.html>>

⁸⁴ The three moral rights provided by the Copyright Act 1968 (Aust.) in Australia – the right of attribution, the right against false attribution, and the right of integrity – cannot be waived by the author, although a breach of moral rights can be consented to in limited circumstances. See Copyright Act 1968 (Aust.) s 195AW.

⁸⁵ G H Tang, p. 167, citing 'Copyright for the "Ode to the Motherland" Belongs to People – An Interview with Professor Wang Xin' *The People's Daily*, 13 August 1999.

⁸⁶ Creative Commons international website, 'Public Domain Dedication' <<https://creativecommons.org/publicdomain/zero/1.0/>>.

and describes as ‘CC0 enables scientists, educators, artists and other creators and owners of copyright- or database-protected content to waive those interests in their works and thereby place them as completely as possible in the public domain ...’.⁸⁷ They claim that ‘CC0 is a universal instrument that is not adapted to the laws of any particular legal jurisdiction, similar to many open source software licences’, and that ‘it provides the best and most complete alternative for contributing a work to the public domain given the many complex and diverse copyright and database systems around the world.’ The legal text of the licence⁸⁸ is summarised in its ‘human readable’ version as:

*The person who associated a work with this deed has **dedicated** the work to the public domain by waiving all of his or her rights to the work worldwide under copyright law, including all related and neighboring rights, to the extent allowed by law.*

Creative Commons Australia believes that CC0 licences are likely to be effective in Australia, although there is no definitive judicial interpretation to support that view. China’s Creative Commons project (‘CC China’) has not yet introduced the CC0 licence on its official website because the Chinese translation is not yet complete.⁸⁹ Only a few websites of Chinese research institutes have provided a link to the CC0 licence that is provided on the global Creative Commons website.⁹⁰

2.7. Public policy refusals to enforce copyright

There is a long history of common law courts taking the view that the content of a work could be so objectionable that it was against public policy to allow copyright to be enforced,⁹¹ which in effect negated the existence of copyright in the work because it would prevent any attempts at enforcement against any infringers. In the most important modern UK authority, *Hyde Park Residence Ltd v Yelland*⁹² the Court of Appeal held that a court could be entitled to refuse to enforce copyright where a work is: ‘(i) immoral, scandalous or contrary to family life; (ii) injurious to public life, public health and safety or the administration of justice; (iii) incites or encourages others to act in a way referred to in (ii)’.⁹³ It further found UK statutory support for this approach.⁹⁴ It therefore appears that rather than denying subsistence of copyright, in such cases the English courts apply their inherent jurisdiction to refuse to enforce the copyright.

There are no modern authorities supporting this as part of Australian law, and (unlike the UK) no statutory provisions supporting such refusal. Contemporary Australian courts have indicated that there will be no blanket refusals of protection on these grounds,⁹⁵ and in the most significant recent

⁸⁷ Creative Commons international website, ‘Public domain – CC0’ <<https://creativecommons.org/share-your-work/public-domain/cc0/>>.

⁸⁸ Creative Commons – CC0 1.0 Universal <<https://creativecommons.org/publicdomain/zero/1.0/legalcode>>.

⁸⁹ CC China has provided a link to the older “public domain dedication” site, but instructed the users not to adopt this licence because it has been withdrawn by Creative Commons internationally: <<https://creativecommons.org/licenses/publicdomain/deed.zh>>.

⁹⁰ See, for example, Knowledge repository of China Academy of Science, <<http://ir.las.ac.cn/guiter?id=5>>, which is included in the websites of other institutions: <<http://ir.bjmu.edu.cn/guiter?id=5>>; <<http://dspace.imech.ac.cn/guiter?id=5>>.

⁹¹ *Glyn v Weston Feature Film Co* [1916] 1 Ch 261 at 269-270, concerning a ‘grossly immoral’ work.

⁹² [2001] Ch 143.

⁹³ [2001] Ch 143, 168.

⁹⁴ *Copyright, Designs and Patents Act 1988* (UK) s 171(3), which provides ‘Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise’

⁹⁵ *Rodney Keft & Kemalda Pty Ltd v Commissioner of Police* [1985] AIPC 90-236;

case the Full Federal Court held that there was no statutory basis under Australian law for a finding that copyright does not subsist in material that offends against community standards and, furthermore, while such considerations might be taken into account in awarding discretionary remedies, the discretion was ‘narrow’.⁹⁶

In China, the 1990 Copyright Law previously provided in Article 4 that ‘Works the publication or distribution of which is prohibited by law shall not be protected by this Law’. This required courts to refuse to enforce copyright of works ‘prohibited by law’. Therefore, many works considered anti-government or against social morality were refused copyright protection and thus enforcement, and portions refused copyright were deleted or altered as part of ‘content review’ requirements. Such works effectively became part of the public domain, and could be freely reproduced without judicial remedy under copyright law. Ironically this might have helped promote their reputation and circulation. Of course such reproduction may have breached other Chinese laws.

In 2007, Article 4 was subject to a complaint by the United States to the WTO, alleging that it was inconsistent with Articles 5(1) and 5(2) of Berne, as incorporated by reference by Article 9.1 of the TRIPs Agreement. Articles 5(1) and 5(2) of Berne impose minimum obligations to protect foreign works without formalities. In 2009, the WTO Panel ruled that, as Article 4 of the Copyright Law denied copyright protection to works or portions of works failing content review, it was inconsistent with Article 5(1) of Berne.⁹⁷ In addition, the Panel concluded that the denial of protection deprived judicial authorities of the enforcement remedies required under Article 41.1 of TRIPs.⁹⁸ China argued that such works are copyrighted, but not protected, but the US argued that if works are copyrighted then they must be protected by copyright law.

In relation to Article 17 of Berne, referred to above, which gives Berne members the power to limit rights to maintain public order, the Panel ruled that, while this conferred power to limit the circulation, presentation or exhibition of works, this does not extend to the complete denial of copyright protection.⁹⁹ Given these findings, the Panel refrained from ruling on whether or not the requirement for content review was inconsistent with the rule against formalities in Article 5(2) of Berne. The practical result of the Panel ruling is that China remains able to maintain a censorship regime.¹⁰⁰

In 2010 China amended Article 4 of the Copyright Law by deleting its first sentence so that it now reads, ‘(c)opyright holders shall not violate the Constitution or laws or jeopardize public interests when exercising their copyright. The State shall supervise and administer the publication and dissemination of works in accordance with the law.’¹⁰¹ This removed the previous denial of copyright, and means that such works of an unlawful nature are no longer part of the public domain.

⁹⁶ *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd* (2006) 70 IPR 517, [84].

⁹⁷ WTO Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS-362/R (26 January 2009), [7.117] – [7.119].

⁹⁸ WTO Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS-362/R (26 January 2009), [7.179].

⁹⁹ WTO Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS-362/R (26 January 2009), [7.132].

¹⁰⁰ See Daniel Gervais, ‘China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights’ (2009) 103(3) *American Journal of International Law* 549; Peter K Yu, ‘The US – China Dispute Over TRIPs Enforcement’ in Christoph Antons (ed) *The Enforcement of Intellectual Property Rights: Comparative Perspectives from the Asia-Pacific Region* (Kluwer Law International, Alphen aan den Rijn, 2011) 239.

¹⁰¹ See Order of the President of the People’s Republic of China No. 26, 26 February 2010; Decision of the Standing Committee of the National People’s Congress on Amending the Copyright Law of the People’s Republic of China (adopted at the 13th Meeting of the Standing Committee of the Eleventh National People’s Congress on February 26th 2010).

Given the WTO Panel's decision, the requirement that copyright holders 'shall not violate the Constitution or laws . . . when exercising their copyright' cannot be interpreted to mean that copyright can be refused because a work breaches some other Chinese law. The new wording implies that works that are unconstitutional, illegal or against the public interest are still regarded as copyright works. However, Article 4 now asserts that the State may determine that copyright may only be 'exercised' subject to the continuing operation of censorship ('content review') or other grounds for restricting publication and dissemination, provided these are supported by other laws, or 'public interests' (the meaning of which is discussed in [2.8]). For many purposes, there will be little practical difference between 'content review' restrictions and non-enforcement of copyright, but there is a difference in principle, recognised by Berne. Legislation enforcing content review or other restrictions on publication would also be likely to restrain third party dissemination.

Australian courts, it seems, will not prevent the enforcement of copyright on public policy grounds, and appear unlikely to refuse or reduce discretionary remedies but there are other laws restricting publication of copyright works. 'Content review' is likely to be much broader in China (a matter outside the scope of this article), but there are no obvious major differences concerning this category between the copyright public domains in the two countries.

2.8. Public interest defences to copyright enforcement

If a public interest defence is recognised by courts or other copyright enforcement bodies it will prevent enforcement of copyright in particular cases, rather than operating as a blanket prevention of enforcement, distinguishing it from the situation in [2.7] above.

In Australia the judicial support for a public interest defence against copyright enforcement is very slight, with one decision in support in relation to government documents, but strong criticism in later cases.¹⁰² In contrast, in the UK such a defence obtains some support as a result of the Human Rights Act 1998 (UK),¹⁰³ and any such defence is preserved by the current legislation.¹⁰⁴

However, in China the position is different from Australia, with public interests mentioned explicitly in both Articles 4 and 48 of the Copyright Law. The meaning of 'public interest' may also be affected by the fact that China's copyright law has an explicit stated purpose. Article 1 of the 2010 Copyright Law states that the law is enacted 'for the purpose of protecting the copyright of authors in their literary, artistic and scientific works and the rights and interests related to copyright, encouraging the creation and dissemination of works conducive to the building of a socialist society that is advanced ethically and materially, and promoting the progress and flourishing of socialist culture and sciences.' The second and third of these indicate that the purposes of the law are broader than the protection of the rights of existing authors. Australia's Copyright Act 1968 does not have an explicitly stated purpose.

G H Tang argues, on the basis of Article 1, that the public interest plays a key role in Chinese copyright law:

The public interest, in the Chinese copyright regime, is not only a fundamental principle emphasised by the law and a recognised legal defence for copyright exemption, but is also a

¹⁰² In particular, in *Collier Constructions Pty Ltd v Foskett Pty Ltd* (1990) 19 IPR 44, Gummow J, in *obiter*, cast serious doubt on the existence of a public interest defence under Australian law. See further: DFC Thomas, 'A Public Interest Defence to Copyright Infringement?' (2003) 14 *Australian Intellectual Property Journal* 225. However, the acceptance of the availability of the defence in relation to government material by Mason J in *Commonwealth v John Fairfax & Sons Ltd* (1980) 32 ALR 485, has not been overruled.

¹⁰³ See Greenleaf and Bond, p.130 for more details on the Australian and UK positions.

¹⁰⁴ *Copyright, Designs and Patents Act 1988* (UK) s 171(3), which provides 'Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest ...'

justification in its own right that regulates works free from copyright. Furthermore, it provides the legal basis for administrative copyright enforcement in China ...¹⁰⁵

First, the public interest is specifically mentioned in Article 48 of the 2010 Copyright Act,¹⁰⁶ which allows for administrative enforcement of copyright law to take place, where specified infringing acts take place, and 'where public rights and interests are impaired'. The National Copyright Administration of China (NCAC), local Copyright Bureaus and other agencies, are involved in administrative enforcement. The implementing regulations do not define what the public interest means in this context.¹⁰⁷ Cases have held that administrative enforcement can occur in relation to normal commercial disputes between businesses,¹⁰⁸ which can be regarded as based on the inclusion of an 'authorship public interest' as part of the general concept of public interest,¹⁰⁹ but there is little if any clarification as yet of how the other aspects of the public interest may influence the operation of Article 48. In 2013, the NCAC issued an Administrative Penalty Order imposing administrative penalties of cessation of the infringing act, and fining the defendant, Baidu, RMB250,000 for linking to infringing films.¹¹⁰ NCAC applied Article 48 and specifically pointed out that the administrative penalty was imposed because Baidu's act was not only done knowingly, but was also continuous and with harmful effect on the public interest.¹¹¹ Some scholars argued that the original purpose of the lawmakers in adding 'public interest' in Article 48 was to limit the administrative authorities in exercising their power to cases involving large scale infringement with harmful social impact. However, in practice it seems that this clause is allowing administrative authorities to interpret the term 'public interest' broadly and to impose stricter penalties.¹¹² In any event, while Article 48 is significant for the administration of China's copyright law, it does not make any difference to the content of China's copyright public domain.

Second, and more important in the context of the public domain, is the apparent Article 4 'defence'. The second sentence of Copyright Law Article 4 reads in part 'Copyright holders shall not . . . jeopardize public interests when exercising their copyright'. This provision only refers to the exercise of existing copyrights. It does not require the courts to apply a blanket refusal to enforce, but only a refusal which depends on the particular circumstances of the case. Article 4 could be read as creating something like an exception, though one of limited and unpredictable scope, where copyright enforcement in a particular situation would 'jeopardize public interests'. G H Tang argues that some cases suggest that Courts award lower penalties for infringements where there is some element of public interest in the (infringing) acts of the defendant. We question whether these decisions can support this interpretation, because of their lack of explicit references to 'public interest', and because alternative explanations of the decisions are possible.¹¹³ Also, if Article 4

¹⁰⁵ G H Tang p. 2.

¹⁰⁶ Previously Art. 47, before the 2010 amendment which inserted a new Article (Art. 26).

¹⁰⁷ NCAC *Implementing Measures for Administrative Penalties on Copyright Infringement*, 2000.

¹⁰⁸ *Xiqiao Henhui Printing Factory and Guang Dong Copyright Bureau*, 2002. See G H Tang, p. 107, for discussion.

¹⁰⁹ G H Tang, p. 117.

¹¹⁰ NCAC Order (2013), No. 16. Cited from Cui Guobing, *Copyright Law Cases and Materials* (Peking University Press, 20114), at pp. 879-880.

¹¹¹ *Id.*

¹¹² *Id.*, at 881.

¹¹³ In a case where a coaching company republished the plaintiff's TOEFL past exam questions, which were not otherwise available to Chinese students, the appeal court reduced the amount of damages. However, the court could not determine the actual damages suffered by the plaintiff, and it is arguable that the court therefore decided the amount of damages on the basis of profit made, which was less than the plaintiff's claim (*ETS v New Oriental* (2003) Beijing High People's Court Final Judgment Number (2003), 1393; discussed by T H Tang, pp. 147-151). Tang also refers to other cases concerning 'digital libraries' which had made available online the works of authors without permission, where the plaintiffs did not receive as much economic compensation as might be expected

does establish an exception, its validity under Berne and TRIPs may be open to question if an appropriate case arises.¹¹⁴

Tang concludes that 'how to define the public interest within the copyright regime is a fundamental question for all', even if its meaning will depend on the context in which it is raised, because it is 'impossible to give it an exhaustive definition'.¹¹⁵ To suggest that the public interest, as reflected through Article 4, is a 'fundamental' aspect of Chinese copyright law, is a large claim, for which there is not yet enough evidence. It is possible that 'public interest' may play a significant role in China's copyright law, because of the references to it in both Articles 4 and 48, but the shortage of reported decisions, SPC interpretation, or WTO Panel decisions, means that what role it will actually play remains enigmatic. Another hypothesis is that these references to 'public interest', instead of expanding the public domain in some way that benefits the public, are more likely to serve government interests in controlling publication and dissemination of content. Again, evidence is needed. However, while the meaning of 'public interest' in Article 4 is unclear, it is not meaningless. It may mean that, in this category, China's public domain is broader than that of Australia.

2.9. Insubstantial parts

The Berne Convention does not provide any guidance on the threshold for determining whether or not a use is an infringing use, including on matters such as whether the standard is qualitative or quantitative.¹¹⁶ This remains a matter for regional and national laws.

In Australia, a 'substantial part' of a work must be used before there is infringement. Case law has provided a low threshold (although often a contested one), for what is a 'substantial part'¹¹⁷ and the uncertainty of the boundary may deter some use of insubstantial parts. As it was put in a leading Australian decision 'The area of substantial similarity is at the heart of copyright law, yet it remains one of its most elusive aspects. The general rule is that substantiality depends on quality not quantity...'.¹¹⁸ This category therefore provides little scope for public rights in Australia.

In China, there is no clear legislative requirement for a 'substantial part' of a work to be used before there is infringement. Although in practice some judicial interpretations do require this and (for example) find that copying of 100 words had taken the heart of the copyright work,¹¹⁹ other cases do not seem consistent.¹²⁰ At present, there is no clear difference between Australia and China on this point, but that is in part because Chinese law is unclear.

because, on one reading of the cases, the Courts have decided that digital libraries that benefit the public should be supported in the public interest. However, these cases do not involve explicit reliance on 'public interest'. (T H Tang, p204-7, considering *Super-Star Digital Library v Rui* (2007) Beijing Haidian District People's Court Judgment Number (2007) 7610, and *Shusheng Digital Library v Apabi Digital Library* (2008) Beijing Haidian District People's Court Judgment Number (2008) 11424.)

¹¹⁴ Could such an exception withstand a challenge that it is not compliant with the 'three step test' established under Berne Art. 9(2) and TRIPs Article 13? The TRIPs panel 'homestyle' decision does not give any clear indication. A public interest exception will not come within any of the other permissible Berne exceptions.

¹¹⁵ G H Tang, p. 122.

¹¹⁶ Ricketson and Ginsburg, [11.26].

¹¹⁷ See *Ice TV Pty Ltd v Nine Network Australia Pty Ltd*, [2009] HCA 14, [157].

¹¹⁸ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* (2005) 216 ALR 631, 634, per Finkelstein J.

¹¹⁹ *Yuan Ke v. China Friendship Publishing*, Beijing Chaoyang District Court (2003), No. 18302. See He Huaiwen, *The Chinese Copyright Law: Case Studies and Normative Analysis* (Peking University Press, 2016), p. 640.

¹²⁰ *Chen Bing v. China Friendship Publishing*, Beijing Chaoyang District Court (2003), No. 18305. See He Huaiwen, pp. 639-640.

2.10. Mere facts or ideas

Uses of mere facts, information or ideas derived from a work are outside the scope of the exclusive rights of the copyright owner, and therefore remain part of the public domain, but there is a contested boundary in the extent to which compilations of works are protected. In Australia, there is a low level of protection for compilations and directories, the High Court having rejected the rationale underlying the ‘sweat of the brow’ doctrine, that copyright should be used to protect the mere labour and expense in producing an informational work from misappropriation. The court commented that ‘Some compilations are no more than a selection or arrangement of facts or information already in the public domain’ when refusing protection.¹²¹ Australia has no separate database right.

In China there is also no separate database right, and a low level of protection is given to compilations of works. The law explicitly excludes calendars, numerical tables, forms of general use, and formulae.¹²² In practice, a catalogue of TV programs,¹²³ a blank answer sheet,¹²⁴ and a numerical table¹²⁵ have been denied copyright protection by courts.¹²⁶ It does not seem that there is any significant difference between the public domains of China and Australia in relation to this category.

2.11. Uses outside exclusive rights

Anyone can make use of a work in ways that do not fall within the statutorily defined exclusive rights of the copyright owner. This is in part another question of ‘gaps’; the identification of uses of works that do not quite fit within any of the exclusive rights, though we might expect they would. But it also covers other uses of works which we do not expect copyright should prohibit, such as the right to read a work without any conditions (eg disclosure of identity of the reader), the right to lend our copy of a work to a friend, or the right to sell our copy of a work on the second-hand market once we are finished with it. The copyright owner has traditionally not been able to use copyright law to restrict works being read or viewed, at least in relation to non-public uses of legitimate copies. Copyright law has not traditionally prevented these uses.

The extent of this part of the public domain therefore depends on the definitions of the exclusive rights of the copyright owner in each country.

The Australian exclusive rights are: reproduction, publication, performance, adaptation and communication, in relation to works; renting out a computer program, or a work embodied in a sound recording; reproduction, performance or communication to the public, in relation to audio-visual works; rental of recordings; and making facsimiles of published editions.¹²⁷ There is no catch-all additional proviso allowing other rights to be added by the courts. An Australian example of a significant public domain element is the ‘public’ limitation on the performance and

¹²¹ *IceTV Pty Ltd v Nine Network Australia Pty Ltd*, (2009) 239 CLR 458 at [31], per French CJ, Crennan and Kiefel JJ.

¹²² Copyright Law (China), Art. 5(3).

¹²³ *Guangxi Radio and TV v. Guangxi Coal Mine Workers’ Newspaper*, Guangxi Liuzhou District Intermediate Court (1994). But the court decided that the defendant is liable for violating plaintiff’s other civil rights under the General Principle of Civil Law.

¹²⁴ For example, in *Chen Jian v. Wanpu Company*, Supreme People’s Court, Aug. 30, 2011, the court, in dismissing the appeal, found that copying 100 words out of 1900 words was too small to be considered as infringement.

¹²⁵ *Ma Qi v. Leshan Municipality Cultural Board and Film News and Publishing Bureau*, Supreme People’s Court (2015), Case No. 1665.

¹²⁶ See Li, ‘China’, at pp. 20-21.

¹²⁷ Copyright Act 1968 (Aust.), s. 31(1) (works) and ss. 85-88 (other subject matter).

communication rights, which leave private performances and communications as acts beyond the exclusive rights of the copyright owner.

In China Article 10 of the Copyright Law enumerates twelve specific economic rights: reproduction; distribution; rental (audiovisual works and software); public performance 'by any means'; public display (works of fine art or photography); presentation; public broadcasts; public communications through information networks; adaptation; translation; adaptation by cinematography; and compilation.

In addition, Article 10 includes a catch-all phrase stating that it includes 'other rights to be enjoyed by copyright owners', indicating that the list is not exhaustive, and that copyright includes such other rights as may emerge with new forms of exploitation.¹²⁸ Examples of these 'other rights' recognised in decisions include a prohibition on producing and selling the work with a counterfeited name¹²⁹ but court's decisions on whether this right is an economic right or a moral right have not been consistent.¹³⁰ Other rights recognised by the courts that cannot be clearly ascertainable under other provisions include the right to receive remuneration for the work to be used by others in situations such as statutory licensing; the rights to an unpublished manuscript that is lost or damaged by a publisher;¹³¹ and economic compensation for using source materials (or stories).¹³²

The 2014 draft Amendments, Article 13, differs from Article 10 in that three of the rights in the 2010 Act are deleted: presentation, adaptations by cinematography, and compilation.¹³³ However, the first two are probably included in the rights of publication and adaptation. The right of compilation only concerns the selection of compilations of an author's own works.¹³⁴ The catch-all protection of 'other rights that copyright holders should enjoy' is retained in the 2014 draft Amendments.

There are therefore two substantive differences between the exclusive rights under the Chinese and Australian laws. First, the Australian rental rights only apply to sound recordings or computer programs, whereas in China they apply to films or computer programs (and in other countries such as the UK they apply to both). Second, and much more significant, the exclusive right of 'other rights to be enjoyed by copyright owners' is open-ended, but as yet its scope or significance is not

¹²⁸ For discussion of neighbouring rights, see § 9[1][a] *infra*. In addition, Arts. 47 and 48 of the Copyright Law (China), Art. 8 of the Software Regulations, and Arts. 217, 218, and 220 of the Criminal Law further specify acts falling into these categories that call for copyright remedies and sanctions. For details, see § 8[4] *infra*.

¹²⁹ Copyright Law (China), Art. 48(8), 'producing or selling a work the authorship of which is counterfeited' shall bear civil liability. In jurisdictions such as Australia, this would be dealt with by the law of passing off, but in China is it considered as 'other rights' under copyright.

¹³⁰ For example, *Hongmo v. Qingdao Press*, Beijing Haidian District Court (2011), Case No. 11875, held that the defendant infringed the author's moral right; but *Zhou Guoping v. Yezhou, et. al*, Beijing Haidian District Court (2005), Case No. 17913, held that the defendant infringed the author's economic right. For discussion of these cases, see He Huaiwen, at p. 413.

¹³¹ Supreme People's Court *Interpretation on the Application of Law in Handling Copyright Dispute Cases* (2002) Art. 23 provides that 'publisher that loses or damages the unpublished manuscript submitted by a copyright owner shall bear civil liability according to Copyright Law Art. 53, General Principle of Civil Law Art. 117 and Contract Law Art. 22. For example, in a case involving the loss of the plaintiff's unpublished manuscript by the defendant publisher, the court held that the defendant had committed another act of infringing the plaintiff's copyright and the right related to copyright under Copyright Law Art. 47 (11). See *Li Jiancheng v. Chen Ming*, Chongqing Intermediate Court (1992), Case No. 273, cited from He Huaiwen, *id.*, at p. 417.

¹³² When there is no copyright infringement is found in cases involving stealing ideas or plots, the courts may nevertheless award some damages based on the principle of equity under the Torts Law Art. 24. See *Huang Zixiu v. Nanning Art Theater*, Guangxi Autonomous Region High Court (2008), Case No. 15, and *Shan Yueying v. Ma Liqing*, Beijing Haidian District Court (2006), case No. 15467. See He Huaiwen, at pp. 419-420

¹³³ The wording of some other rights is altered without changes in their substance.

¹³⁴ This is different from the question of whether the act of compilation can provide the originality required by a work.

very clear from decided cases or SPC interpretations. As a result of this open-ended exclusive right, this aspect of China's public domain is theoretically narrower than is Australia's, but how much so in practice is uncertain.

2.12. Statutory 'free use' exceptions

Australian and Chinese law both include various statutory exceptions to copyright that give members of the public (or limited classes thereof) the right to use works in different ways that would otherwise be part of the exclusive rights of the copyright owner. The Australian free use exceptions are numerous (and scattered throughout the Act), including narrowly-defined 'fair dealing' exceptions (similar to and derived from the UK) and numerous other precisely defined exceptions that continue to expand (such as recent exceptions for audio-visual 'format shifting' and 'time shifting'),¹³⁵ as well as 'a plethora of other exceptions scattered throughout the legislation that apply to particular types of works or use, without reference to the notion of fair dealing'.¹³⁶ This is the public rights category that is likely to differ most in its content between jurisdictions, and often to be a source of expansion of the public domain. A few of these are closed commons, meaning that only defined categories of persons can utilise the exception, sometimes as intermediaries for others.

In China, Article 22 of the Copyright Law lists 12 exceptions to copyright protection. Articles 6 and 7 of the Internet Regulations, and Articles 16 and 17 of the Computer Software Regulations, have adapted most of these exceptions to the network environment.¹³⁷

The exceptions in Article 22 appear to be exhaustive and similar to the 'list of exceptions' approach taken in many civil law jurisdictions. It is neither an open-ended 'fair use' system, nor a 'fair dealing' system where specified exceptions also have to satisfy a test of fairness. Only one of the twelve exceptions uses a concept similar to fairness, namely the requirement that only an 'appropriate' quotation for specified purposes may be made from published works.¹³⁸ Cases on this exception have considered 'fairness' factors including the purpose of the use, amount of use, and effect of use on the market.¹³⁹

Some authors argue that the Chinese courts may also exempt some uses outside of the Article 22 fixed list of exceptions, utilising concepts similar to 'fair use'. This argument assumes that a more flexible approach is permissible when the public interest is considered to be at stake. As S H Song puts it, the 'vague language' of Article 22 'still requires courts to exercise discretion when determining whether a particular use falls within the enumerated list.'¹⁴⁰ Song argues that Chinese courts are willing to go beyond the Article 22 list based on a 'fair use' approach, but only provides

¹³⁵ See Copyright Act 1968 (Aust.) ss 40 (fair dealing for the purpose of research or study), 41 (fair dealing for the purpose of criticism or review), 41A (fair dealing for the purpose of parody or satire), 42 (fair dealing for the reporting of news), 43C (format shifting of works to another format for private and domestic use), 103A (fair dealing for the purpose of criticism or review), 103AA (fair dealing for the purpose of parody or satire), 103B (fair dealing for the purpose of the reporting of news), 103C (fair dealing for the purpose of research or study), 109A (format shifting of music), 111 (recording of television broadcast for replaying at a more convenient time).

¹³⁶ A Stewart, P Griffith, J Bannister and A Liberman (5th Ed.) *Intellectual Property in Australia*, LexisNexis 2014 [hereinafter SGB&L] [8.38].

¹³⁷ See Li 'China' § 8[1][c][iii][B], and the Table below.

¹³⁸ Copyright Law (China), Art. 22(1).

¹³⁹ *Yang Luo-Shu v. China Pictures Press* LU MIN ZHONG ZI DI, at p. 94 (Shandong High Court 2007) (China), discussed by Seagull Haiyan Song, *Reevaluating Fair Use in China—A Comparative Copyright Analysis of Chinese Fair Use Legislation, the US Fair Use Doctrine, and the European Fair Dealing Model*, 51 IDEA: THE IP LAW REVIEW 453, 478-479 (2011), at pp. 481-2.

¹⁴⁰ S H Song, at p. 481.

one example of a court explicitly using such language, and that in a case where it ultimately rejected the defendant’s argument and found it liable for infringement.¹⁴¹

Another example of a court considering ‘fair use’ was in relation to a Chinese Internet search engine which provided to the public some contents of a copyrighted work including the table of contents, foreword, and 10 pages of the main text. The court held this was to be treated as a fair use, even though it is not within the Article 22 list of exceptions, because it serves the objective of copyright law to promote the creation and dissemination of excellent works.¹⁴² However, a similar case involving Google, was subsequently decided differently. The court held that Google failed to prove that scanning the copyrighted work to create snippets constituted an exceptional circumstance warranting a fair use outside of the list under Article 22.¹⁴³ Though more examples are needed, these two cases may indicate that Chinese courts will interpret ‘public interest’ differently depending on whether the parties are domestic or foreign. The cases also show that the list of exceptions in Article 22 is not in practice closed.

The 2014 draft Revision to China’s law appears to have adopted a slightly more ‘open-ended’ approach to copyright exceptions, moving closer to a ‘fair use’ approach. After listing 12 exceptions, draft Article 43(13) adds ‘other circumstances’,¹⁴⁴ but such exceptions are subject to criteria similar to the three-step test.¹⁴⁵ How open-ended this actually is will only be seen in practice, but in theory it is a move in the direction of a broader public domain.

The following Table compares the twelve ‘free use’ exceptions in Article 22 of current Chinese law with Australian provisions. The Table also notes relevant provisions in Berne and other international agreements, but is not meant to suggest that those provisions necessarily justify the exceptions in each country. Comments on the Chinese provisions are in parentheses.

<i>International agreements</i>	<i>China – Free use exceptions in Art. 22</i>	<i>Australia – Equivalents (if any)</i>
Berne Art. 9(2) (‘three step test’ optional exception) and Rome Art. 15(2) Rome Art. 15(1)(a)	Private use of a published work for the user’s own private study, research, or personal entertainment. ¹⁴⁶ (‘Entertainment’ in China goes beyond the scope of fair dealing in Australia.)	Fair dealing for the purpose of research or study (ss 40, 103C). See also ‘private and domestic use’ exceptions – format and time shifting exemptions (ss 43C, 109A, 111).
Berne Art. 10(1) (mandatory exception)	Appropriate quotation from a published work, in one’s own work for the purpose of introducing or commenting on the	Fair dealing for the purpose of criticism or review (ss 41, 103A).

¹⁴¹ *SARFT Movie Channel Prod. Center v. China Educ. TV Station*, HAI MIN CHU ZI NO. 8877, at 2 (Beijing Haidian District Court 2006) (China), cited by S H Song, pp. 483-4.

¹⁴² *Wurui v. Beijing Century Duxiu Tech. Co., Ltd.* Beijing No. 1 Intermediate Court (2008), civil case No. 6512.

¹⁴³ *Wangzi v. Beijing Guxiang Information Technology Ltd. and Google Inc.*, Beijing High Court (2014), published by Supreme Court, Top Ten Innovative Intellectual Property Cases in 2013, April 22, 2014.

¹⁴⁴ 2014 Draft Revision (China), Art. 43(13).

¹⁴⁵ 2014 Draft Revision (China), Article 43 provides, following paragraph (13) ‘When using works in ways provided by the previous Paragraph, it is prohibited to influence the regular use of the work, and it is prohibited to unreasonably harm the lawful rights and interests of the copyright holder.’

¹⁴⁶ Copyright Law (China), Art. 22(1).

	quoted work in question or for illustrating a point. ¹⁴⁷	
Berne Article 10(2) (optional exception)	Translation or limited reproduction of a published work for use in classroom teaching or scientific research (not published and distributed to the public). ¹⁴⁸	Many educational minor uses. ¹⁴⁹
Berne Art. 9(2) ('three step test' optional exception)	A State organ is allowed to use a published work to the extent necessary to fulfill its official duties. ¹⁵⁰	Crown uses of copyright material are not free uses. They come within a statutory licence for a fee (see section 3.13).
Berne Art. 9(2) ('three step test' optional exception)	Translation of a published work from the Han Chinese language into languages of ethnic minority (or into braille) for publication and distribution within China. ¹⁵¹ (China does not utilise Berne Paris Act Annexure; exception may only affect Chinese citizens)	No equivalents.
Berne Art. 9(2) ('three step test' optional exception) and Rome Art. 15(2)	Institutions such as libraries, archives, memorial halls, museums, art galleries can reproduce a published work in its collection for the purpose of display or preservation. Under the Internet Regulations, such an institution may allow users on its premises to access a work in its collections, or one reproduced in digital form, for the purposes of display or preservation, subject to further conditions of availability. ¹⁵²	Libraries and archives can utilise numerous Pt III Div 5 exceptions, now extended to some digitisation exceptions ¹⁵³ 'Special cases' (2006 Amendments) – based on 3-step test; for libraries, archives, educational institutions, and those for persons with disabilities.

¹⁴⁷ Copyright Law (China), Art. 22(2) and Internet Regulations, Art. 6(1). See Li, 'China' § 8[1][c][iii][B]. See, e.g., *Zhuang Changjiang v. Chen Ruitong and Tide Photographic Art Press*, Fujian High Court (2007), noted in Legal Daily, Dec. 18, 2007 (holding that a quotation which amounted to 10% of the content of a book was not appropriate).

¹⁴⁸ Copyright Law (China), Art. 22(6). See also, e.g., *American ETS and GAMC v. Beijing Haidian New Oriental School*, Beijing High Court (2004), noted in People's Court Daily, Feb. 3, 2005 (holding that the defendant's teaching of the plaintiff's work in the classroom was an exceptional use permitted by Art. 22 of the Copyright Law, provided that the defendant did not use unauthorized copies of the work).

¹⁴⁹ See SGB&L [8.44] for details.

¹⁵⁰ Copyright Law (China), Art. 22(7), and Internet Regulations, Art. 6(4). See Li, 'China' § 8[1][c][iii][B].

¹⁵¹ Copyright Law (China), Art. 22(11), and Internet Regulations, Art. 6(5). See Li, 'China' § 8[1][c][iii][B].

¹⁵² Internet Regulations (China), Arts. 7, 10. See Li, 'China' § 8[1][c][iii][B]. For the work to be thus accessed in reproduced digital form under the exemption, the work has to satisfy one of the following conditions: be stored in an obsolete format, be no longer reasonably available on the commercial marketplace, have been damaged or destroyed, or be at risk of being damaged, destroyed, lost, or stolen. The institution, to assert the exemption, may not have, directly or indirectly, any economic interest in making the work accessible and must take technical measures to prevent any impermissible copying or other use, notably any that would substantially prejudice the interest of the copyright owner.

¹⁵³ See SGB&L [8.45] for details.

Berne Art. 2(8) (mandatory limitation for news of the day). Berne Art. 10bis(1) (optional exception)	Unavoidable reproduction or use of published works by mass media, when reporting current events. ¹⁵⁴	Fair dealing for the reporting of news (ss 42, 103B).
Berne Art. 2bis(2) ¹⁵⁵ (optional limitation) China utilises this Berne limitation, but Australia does not.	Mass media communication of speeches delivered at public gatherings (or already published by such media) on current economic, political, or religious topics, subject to such reservations of rights as the authors may make by express notice on the articles. ¹⁵⁶ (Such rights to ‘opt-out’ of an exception are not found in Australia.)	No exception for public speeches in their entirety, nor subject to conditions. Other exceptions will apply, possibly including the limited constitutional right of political free speech (see 3.4).
Berne Art. 9(2) (‘three step test’ optional exception) and Rome Art. 15(2)	Gratuitous public performances of published works, when no fees are charged to the audience and no remuneration is paid to the performers. ¹⁵⁷	Public recitations and performances (s 45); and very broad exceptions for where persons ‘reside or sleep’ (ss 46, 119)
Berne Art. 9(2) (‘three step test’ optional exception)	Copying, drawing, photographing, or video recording of an artistic work located, or displayed, in an outdoor public place, including for reasonable commercial use. ¹⁵⁸	Artistic works have many specific exceptions. ¹⁵⁹
Berne Art. 9(2) (‘three step test’ optional exception)	Making copies of software for use and backup, subject to many conditions (Software Regulations).	Computer programs have various exceptions for interoperability etc. ¹⁶⁰
Berne Art. 9(2) (‘three step test’ optional exception) and Rome Art. 15(2)	No equivalent.	Fair dealing for the purpose of parody or satire (ss 41A, 103AA)
Berne Art. 9(2) (‘three step test’ optional exception) and Rome Art. 15(2)	No equivalent.	Fair dealing for professional advice and judicial proceedings (s 43).
Berne Art. 11bis(3) (optional)	No equivalent.	Temporary or incidental reproductions exception covers many situations, but

¹⁵⁴ Copyright Law (China), Art. 22(3), and Internet Regulations, Art. 6(2). See Li, ‘China’ § 8[1][c][iii][B]. See also Supreme Court Copyright-Dispute Guidelines (2002) (discussed in Li, ‘China’ § 1[1][e]) (although mere facts or happenings conveyed by the mass media are not protected, as clarified by Article 5 of the Copyright Law, any communication of news of current affairs collected and compiled by someone other than the news agency is required to indicate the source of the news).

¹⁵⁵ Berne Art. 2bis (2) ‘It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in [Article 11bis\(1\)](#) of this Convention, when such use is justified by the informatory purpose.’

¹⁵⁶ Copyright Law (China), Art. 22(4); Internet Regulations, Art. 6(7), (8). See Li, ‘China’ § 8[1][c][iii][B].

¹⁵⁷ Copyright Law (China), Art. 22(9).

¹⁵⁸ Copyright Law (China), Art. 22(10); Supreme Court Copyright-Dispute Guidelines (2002).

¹⁵⁹ See SGB&L [8.49] for details.

¹⁶⁰ See SGB&L [8.52] for details.

limitation)		probably not proxy caching. ¹⁶¹
Berne Art. 9(2) (‘three step test’ optional exception) and Rome Art. 15(2)	No equivalent.	Copyright in films expires 70 yrs after publication (s 94), long before copyright in underlying works may expire. Exception allows public exhibition of old films without breach of underlying works; even broader for old news films. ¹⁶²
Berne Art. 9(2) (‘three step test’ optional exception) and Rome Art. 15(2)	Appropriate specified types of works, for the purpose of eradicating poverty, can be made accessible for free to the public in rural areas via any information network. ¹⁶³ Copyright owner may opt out within 30 days of notice.	No equivalent.

It is possible that the scope of some of the Chinese exceptions might be challenged as not complying with the ‘three-step test.’

The free use exceptions in the laws of both China and Australia are so complex and extensive that it is difficult to conclude overall which is the most extensive. However, the Chinese free use exceptions for eradication of rural poverty, translations into minority languages, uses by government agencies and ‘private entertainment’ are clearly more extensive than Australian exceptions.

2.13. Neutral compulsory licensing

Compulsory licences are the only part of the public domain where the uses allowed by statute are intended to result in revenue flowing to the copyright owner. To come within the public domain, on our approach, such licences must have licence conditions and fees set by a neutral body¹⁶⁴ on public interest grounds, and uniform for all users. They must not be set, or revocable, by the copyright owner or its collecting society. Usually, only a class of beneficiaries can directly benefit from such collective licences (often called a closed commons), but that is no impediment, as this is also the case for many free use statutory exceptions. Large classes of the general public benefit indirectly from such licences (eg gym users, students, library users). The ‘neutral licensing’ will usually ensure that there is a public benefit resulting from such licences.

In Australia, collective licences include both compulsory statutory licences specified in the Copyright Act and voluntary ‘blanket’ licences declared to apply by the Copyright Tribunal (see details in Table 2).¹⁶⁵ On our analysis, these blanket licences administered by collecting societies are on the margins of the copyright public domain, but not part of it.

In China the law allows specified uses of certain works without the prior consent of the authors or owners of rights, but subject to the obligation to pay remuneration.¹⁶⁶ However, in some cases, the

¹⁶¹ See SGB&L [8.53] for details.

¹⁶² See SGB&L [8.51] for details

¹⁶³ Internet Regulations (China), Art. 9.

¹⁶⁴ Parliament, the Copyright Tribunal, the Minister and the ACCC all have significant roles in setting the terms under which particular licences operate.

¹⁶⁵ Copyright Act 1968 (Aust.), ss.154-9.

¹⁶⁶ On setting rates of remuneration, see Li, ‘China’ §§ 4[3][a] and 5[2][c]. In accordance with Article 22 of the Implementing Regulations (China), the NCAC is to establish interim regulations, and eventually more permanent standards, concerning remuneration for statutory licences.

Copyright Law allows copyright owners to 'opt out' of statutory licences by giving appropriate notices. China has at present five approved¹⁶⁷ copyright collecting societies (CCS), also called 'collective management organizations' or (*jítǐ guǎnlǐ zǔzhī*), established to represent and collectively manage the interests of copyright holders. They are regarded as 'non-profit' social organizations,¹⁶⁸ but their establishments and operation are subject to the approval and management of the NCAC,¹⁶⁹ and unauthorized CCSs are prohibited.¹⁷⁰ CCSs are empowered to collect licence fees from the right users, and to distribute licence fees to the right-holders.¹⁷¹ Their fee schedules are subject to the approval of the NCAC.¹⁷² Except for the fees of statutory licences under the Copyright Law, the collecting society and the users may determine the specific sums of payment within the fee schedules through an agreement.¹⁷³ There are other rules enacted to provide bases for negotiating actual rates of remuneration.¹⁷⁴

It is common for China's compulsory licences to include provision for copyright owners to 'opt out' of the licence by notice, a variation which is unknown in Australia, but which is consistent with those exceptions allowed by the Berne Convention which allow members of Berne to set the conditions under which various types of works can be made available, and may be consistent with other compulsory licences which meet the Article 9(2) '3-step test' requirements. This does not stop these licences coming within the definition that makes them part of the public domain, because the copyright owner is not able to choose which users are able to use the work (subject to a fee), but only to choose which of the owner's works will come within the compulsory licence.

Current compulsory licences

The main compulsory licences in use under the current Chinese Copyright Law 2010 are:

- Reprinting or abstracting of works published in newspapers or periodicals, by other newspapers or periodicals (unless author has opted-out).¹⁷⁵
- Re-recording and other exploitation of musical works that have been published as sound recordings (with opt-out).¹⁷⁶
- Radio or TV stations may broadcast published sound recordings (no opt-out).¹⁷⁷
- For nine-year compulsory education (and national education planning), 'passages' of published works or short literary texts, musical works, or single works of fine art or

¹⁶⁷ Music Copyright Society of China (MCSC); China Copyright Society of Written Works (CCSWW); Audio-Visual Copyright Association (AVCA); China Film Copyright Association (CFCA); and China Photographic Association (CPA)

¹⁶⁸ Copyright Law (China), Art. 8(2).

¹⁶⁹ Regulations on Collective Management of Copyright (China) (enacted on Dec. 18, 2004, effective as of March 1, 2005, and revised on August 1, 2011), Arts. 3 and 5. See also §§ 5[2][c] and 5[2][f] supra. See also Reply of the NCAC to the Inquiry from Hainan Provincial Copyright Administration Regarding the Issues of Copyright Licenses (China), No. 22, June 4, 2003, at: <http://www.ncac.gov.cn> (clarifying that the establishment of foreign copyright agencies and provision of foreign-related copyright agency services are subject to the approval of the NCAC and registration with the SAIC).

¹⁷⁰ Regulations on Collective Management of Copyright (China), Arts. 6, 41, 44; Implementing Regulations on the Copyright Administrative Punishment (China), Art. 3(4).

¹⁷¹ Regulations on Collective Management of Copyright (China), Art. 2(2) and (3).

¹⁷² Regulations on Collective Management of Copyright (China), Arts. 7(4), 9.

¹⁷³ Regulations on Collective Management of Copyright (China), Art. 25.

¹⁷⁴ See, e.g., Rules on Radio Stations and Television Stations' Remuneration for the Broadcast of Sound Recordings (2010) (China).

¹⁷⁵ Copyright Law (China), Art. 33(2); Implementing Regulations (China), Arts. 30, 32.

¹⁷⁶ Copyright Law (China), Art. 40(3); Implementing Regulations (China), Art. 31.

¹⁷⁷ Copyright Law (China), Art. 44.

photography may be copied, compiled, and published in textbooks (opt-out by express notice on publication).¹⁷⁸

- This approach is extended to a compulsory licence for the use of information networks by 'distance education institutions.'¹⁷⁹
- The same provisions, that is, the provision on nine-year compulsory education above, apply 'to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations,' meaning that these rights are subject to the compulsory licence for the purpose of nine-year compulsory education.¹⁸⁰
- A very unusual compulsory licence allows free access publication 'to the public in rural areas through information network, for the purpose of aiding poverty-stricken areas', by publication of works relating to poverty reduction, but also 'which satisfies the basic needs for culture'.¹⁸¹ Authors are to be notified in advance of publication, including with details of fees payable, and have thirty days in which to opt-out. The licence applies only to 'a published work of a Chinese citizen', which avoids problems of international agreements.¹⁸²
- A statutory licence for State-commissioned software.¹⁸³
- A licence allowing continuing use of infringing software under some circumstances, on payment of a licence fee.¹⁸⁴

In China, uses by government organs necessary for their work are a free use exception. So are other matters that might elsewhere be the subject of compulsory licences, namely the translation of works by Chinese citizens in the Han language into minority nationality languages,¹⁸⁵ and transliterations of (any) published works into braille.¹⁸⁶

Proposed reforms to existing licences

The 2014 draft Revisions of the Copyright Law published by the State Council,¹⁸⁷ with an explanatory document,¹⁸⁸ propose significant changes to existing aspects of China's compulsory licensing, as well as the introduction of significant new types of compulsory licences for orphan works, and an extended collective licence (ECL) in relation to karaoke establishments. There does

¹⁷⁸ Copyright Law (China), Art. 23

¹⁷⁹ *Regulations on Protection of the Right of Communication through Information Network*, State Council (China), 2006 (hereinafter 'Internet Regulations (China)') <<http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn064en.pdf>>, Art. 8, 10, 11.

¹⁸⁰ Copyright Law (China), Art. 23, para. 2.

¹⁸¹ Internet Regulations (China), Art. 9.

¹⁸² Wan Yong 'Copyright limitation for the benefit of poverty alleviation: Is Chinese copyright provision to be a model for developing countries?' (2015) Vol 3 *China Legal Science* p. 129.

¹⁸³ See Law for Advancement of Science and Technology 2007 (China), Art. 20 (allowing a computer program developed in a project funded by State funds to be used, free of charge, for national security, national interests, or public interests by the State or by a party licensed by the State).

¹⁸⁴ Under the Software Regulations (China), software end-users are strictly liable for infringement for using pirated software. However, they can continue to use the pirated copy after paying a fee to the copyright owner if they can prove that ceasing to use it would cause them serious harm.

¹⁸⁵ Copyright Law (China), Art. 22(11).

¹⁸⁶ Copyright Law (China), Art. 22(12).

¹⁸⁷ PRC Copyright Law (Revision draft for solicitation of Comments), 7 June 2014, on China Law Translate (unofficial translation, original by Rogier Creemers, China Copyright and Media), referred to hereinafter as '2014 Draft Copyright Law' <<http://www.chinalawtranslate.com/prc-copyright-law-revision-draft-for-solicitation-of-comments/?lang=en>>

¹⁸⁸ Explanatory document concerning the 2014 Draft Copyright Law, issued by State Council, 18 June 2014 (unofficial translation by Rogier Creemers), hereinafter '2014 State Council explanation' <<https://chinacopyrightandmedia.wordpress.com/2014/06/18/state-council-publishes-new-copyright-law-revision-draft/>>

not appear to have been progress on the modification or enactment of the proposed new Copyright Law since the State Council publication of the draft in mid-2014. Among the State Council's reasons for wanting to reform the Copyright Law are that 'it insufficiently stimulates the vigour of creators; copyright licensing mechanisms and trading rules are not smooth, it is difficult to guarantee that users are able to gain authorization lawfully, conveniently and effectively, and to disseminate and use works'.¹⁸⁹

Insofar as existing licences are concerned:

- The provisions for reproduction or abstracting of literary works already published in newspapers or periodicals by other newspapers or periodicals are retained.¹⁹⁰ However, a newspaper or periodical can opt-out from such republication 'where they have made an indication that they prohibit reprinting or republishing in a clear position in newspapers or periodicals they publish.'¹⁹¹ It seems that the opt-out must be placed in the text of a newspaper or periodical, it will not be sufficient for it to be indicated by some technological measure such as a robot exclusion clause in the metadata of a website of a newspaper or periodical.¹⁹²
- The statutory licensing framework for textbooks compiled for national compulsory education is retained.¹⁹³
- The compulsory licence is continued for radio or television broadcasting of published works (including sound recordings), whether by Chinese or foreign authors. However, audiovisual works (continuous images, with or without soundtrack, such as in a cinematograph film¹⁹⁴) are no longer subject to a compulsory licence.

A consistent set of administrative provisions are proposed to apply to all of these licences, requiring conformity to three conditions:

- (i) filing details with the corresponding CS before the first time of use;
- (ii) indicating details of the author, the work, and its source (if possible);
- (iii) paying use fees, within one month of using a work, either directly to the rights holder, or to the CS on their behalf, according to remuneration standards formulated by the State Council. Such details filed and fees paid must be made searchable by the CS.

The licence to continue innocent infringing use of software is discontinued, although such users will still not be liable to pay compensation for past uses.¹⁹⁵ This provision was strongly opposed by the software industry, and the final Draft proposes that the user get a licence from, not just pay a fee to,

¹⁸⁹ 2014 State Council explanation (China): 'Concerning the necessity of the revision'.

¹⁹⁰ 2014 Draft Copyright Law (China), Art. 48.

¹⁹¹ 2014 Draft Copyright Law (China), Art. 48, para 2.

¹⁹² This was left unresolved by the Supreme Peoples' Court *Explanations of Application of Law in Trials of Computer Network Copyright Disputes*, November 2000, particularly Art. 3: see Xue Hong and Zheng Chengsi *Chinese Intellectual Property Law in the 21st Century*, Sweet & Maxwell Asia, 2002, pp. 69-71.

¹⁹³ 2014 Draft Copyright Law (China), Art. 47.

¹⁹⁴ 2014 Draft Copyright Law (China), Art. 5(12).

¹⁹⁵ 2014 Draft Copyright Law (China), Art. 75.

the copyright holder in order to continue to use the software.¹⁹⁶ Some licences for performances have been modified.¹⁹⁷

Proposed orphan works and ECL additions

The proposed ‘orphan works’ provision¹⁹⁸ will apply where users have ‘tried their best ... without result’ to find the rights holders of works in which copyright has not yet expired, and either (i) ‘the identity of the copyright holder is unclear’; or (ii) ‘it is impossible to establish contact’. A user will then be permitted to use the work ‘in digital form’ (but not otherwise) after applying to a body appointed by the State Council administrative copyright management department (and subject to its administrative regulations), and ‘posting a use fee’ (licence fee). The proposal says nothing about what is to occur if the copyright holder subsequently appears (including compensation payable from use fees). No CS (‘collecting society’ or collective-rights management body) is involved, only a State Council agency. The State Council explains that this change is ‘in order to resolve the reality that under specific circumstances, searching for copyright holders is fruitless but works still need to be used’.¹⁹⁹

Karaoke establishments (‘self-service song-selection systems as well as other methods’) are to be subject to collective-rights management by a CS. Where the CS ‘obtain(s) approval from the rights holder and are able to represent the rights and interests in a nationwide scope, they may represent the whole body of rights holders’.²⁰⁰ Rights holders who are non-members of the CS would be required to receive equal treatment to CS members.²⁰¹ In other words, this is a proposal for an extended collective licence (ECL), over all repertoire (including non-members of the CS, and foreign authors), provided the licence is initiated by a Chinese CS of national scope, and providing equal treatment. These conditions may keep the ECL within Berne requirements of Article 9(2) and the 3-step test.

The proposals also set out detailed rules on CS,²⁰² applicable to both voluntary and compulsory licensing.²⁰³ A State Council agency is given extensive powers to set licence fees and to arbitrate in licensing disputes.

Comparison of Chinese and Australian compulsory licences

The following Table sets out the remuneration-based compulsory licences in both countries, and notes the provisions of international agreements that may be relevant (but do not necessarily justify the licence).

<i>International agreements</i>	<i>Chinese collective licences</i>	<i>Australian equivalents</i>
Berne Art 10bis(1) (optional exception)	Specific uses of works published in newspapers or periodicals, by other	No equivalent.

¹⁹⁶ 2014 Draft Copyright Law (China), Art. 75.

¹⁹⁷ The Copyright Law (China), as revised in 2001 and 2010, does not include prior statutory licences for performing works already made public. On the exception for gratuitous public performance, set out in Art. 22(9) of the Copyright Law, see Li, ‘China’ § 8[2][c].

¹⁹⁸ 2014 Draft Copyright Law (China), Art. 51.

¹⁹⁹ 2014 State Council explanation (China): ‘Concerning the limitation of rights’, para. 4.

²⁰⁰ See 2014 Draft Copyright Law (China), Art. 63.

²⁰¹ 2014 Draft Copyright Law (China), Art. 63, second para.4

²⁰² 2014 Draft Copyright Law (China), Arts. 61- 67.

²⁰³ 2014 Draft Copyright Law (China), Art. 61.

	newspapers or periodicals (with opt-out). ²⁰⁴	
Berne Art. 13(1) (optional remunerated exception)	Re-recording and other exploitation of musical works that have been published as sound recordings (with opt-out). ²⁰⁵	Recording of ‘cover versions’ of musical work (by anyone) (ss 54-64); see also licences determined by the Copyright Tribunal.
Berne Art 11bis(2) (optional exception)	Radio or TV stations may broadcast published sound recordings (no opt-out). ²⁰⁶	Broadcasting / causing to be heard in public sound recordings (ss 108-9).
Berne Art. 9(2) (‘three step test’ optional exception) and Rome Art. 15(2)	For compulsory education, parts of published works or short literary texts, musical works, or single works of fine art or photography may be copied, compiled, and published in textbooks. ²⁰⁷ Copyright owners may opt out of the licence by express notice upon publication.	No compulsory licence for textbooks. For works and other material – copying or communication by educational institutions or by institutions assisting those with intellectual disabilities (Pt VB) For broadcasts (free to air or subscription), copying/communication statutory licence for educational institutions or by institutions assisting those with intellectual disabilities (Pt VA).
Berne Art. 9(2) (‘three step test’ optional exception) and Rome Art. 15(2)	Compulsory licence for distance education. ²⁰⁸	No direct equivalent for distance education.
	Statutory licence for State-commissioned software. ²⁰⁹	No equivalent.
	Uses by government organs necessary for their work are a free use exception (see [2.12]).	Statutory licence for government use, ‘for the services of the Crown’ (including by contractors), subject to fees either negotiated or set by Copyright Tribunal (182B-183E). ²¹⁰
Berne Art. 9(2) (‘three step test’ optional exception) and Rome Art. 15(2).	No Chinese equivalents for all, but see licence above for ‘other exploitation of musical works’.	Licences determined by the Copyright Tribunal for use of sound recordings in nightclubs and at dance parties; to commercial television broadcasters to broadcast certain sound recordings; to digital music services for providing downloading of recordings; for use of sound recordings in fitness classes; for use of sound recordings in radio simulcasts;

²⁰⁴ Article 33(2) of the Copyright Law (China); Implementing Regulations, Art. 32 and Art. 30.

²⁰⁵ Article 40(3) of the Copyright Law (China); Implementing Regulations, Art. 31.

²⁰⁶ Copyright Law (China), Arts. 43(2), 46; Copyright Law, Art. 44.

²⁰⁷ Copyright Law (China), Art. 23

²⁰⁸ Internet Regulations (China), Arts. 11, 10.

²⁰⁹ See Law for Advancement of Science and Technology (enacted on Dec. 29, 2007, effective July 1, 2008), Art. 20 (allowing a computer program developed in a project funded by State funds to be used, free of charge, for national security, national interests, or public interests by the State or by a party licensed by the State). See also Li, ‘China’ § 4[1][b][iii] (on commissioned works).

²¹⁰ SGB&L [7.25-6].

		and for use of sound recordings by subscription television broadcasters. ²¹¹
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Conclusions

Both China and Australia make relatively extensive use of collective licensing, and their uses are often similar. China makes somewhat greater use for ‘public welfare’ purposes such as distance education and production of textbooks. In addition, some uses that would be remunerated in Australia are free use exceptions in China. The ‘blanket’ licences in Australia are used more to facilitate some commercial services.

If China does enact reforms which resemble those in its 2014 State Council draft then it will have both strengthened existing provisions and, through the addition of both ECL and orphan works provisions, made compulsory licensing an ever more important part of China’s copyright system.

2.14. Neutral voluntary licensing

Possibly the most important expansion of public rights in copyright in the last two decades has been because of voluntary licensing of copyright works by copyright owners, using pre-designed licences not written by the copyright owner. These voluntary licences are at no cost to licensees, and are usually to the public at large, but they are subject to compliance with certain conditions set out in each particular licence. This category includes software licences (both open source software licences and the GNU General Public Licence), open content licences, such as the Creative Commons suites of licences, and many other licences. In China, such licences are called ‘public licences’.

Applying this approach, the boundary of the public domain does not depend on the simple factor of whether use of an exclusive right depends on *permission* from the copyright owner. There are other factors that distinguish Creative Commons licences and some categories of open source licences from voluntary licences negotiated between individual parties or their representatives. The factors that bring these licences within our definition while excluding some other ‘copyleft’ licences, are:

- (i) the grant of the licence pre-exists the licensee’s wish to use the work in accordance with it;
- (ii) the conditions of the licence have been determined by a body which is independent of individual copyright owners and can reasonably be considered to be acting in the public interest in determining the licence terms,²¹² for which reason we call them ‘neutral’ licences in this and previous articles, to distinguish them from other voluntary licences.
- (iii) the conditions of the licence do not permit any variation by the copyright owners who simply decide whether it will apply it to a work they own;
- (iv) the licence cannot be revoked or changed in relation to any licensee already using the work under the licence, but can be revoked or changed in relation to future licensees (but if changed by the copyright owner will put it outside the public domain).

In Australia such voluntary licensing has been used extensively in relation to software, with Australian authors making significant contributions to global FOSS (free and open source

²¹¹ Copyright Tribunal decisions respectively: *PPCA under s.154(1)* [2007] ACopyT 1; *PPCA under s.154(1)* [2008] ACopyT 1; *APRA and AMCOS* [2009] ACopyT 2; *PPCA under s.154(1)* [2010] ACopyT 1; *PPCA under s.154(1)* [2015] ACopyT 3; *PPCA under s.154(1)* [2016] ACopyT 3.

²¹² There could be some need to consider here the position of long-standing licences originally developed by a copyright owner which has subsequently been adopted by very large numbers of licensors and licensees. But this is the exception, not the rule.

software). Creative Commons Australia²¹³ has been active for over a decade. Its most significant success has been the adoption of the Australian Governments Open Access and Licensing Framework (AusGOAL)²¹⁴ through which all Australian governments advocate the adoption for government materials of a licence suite that includes the Creative Commons Version 4.0 licences, the AusGOAL Restrictive Licence Template (for where CC licences are not appropriate, such as for personal data), and the BSD 3-Clause software licence. Creative Commons and open source software have as a result come close to being the default standard for public sector information in Australia.

In China, there has been substantial use of such neutral voluntary licensing. In relation to software the most extensive use has been of the General Public Licence (GPL), partly because most software are based on Linux operating system. For example, mobile phone company 'xiaomi' uses Android software and has adopted GPLv2. It is, however, recently being challenged for violation of GPLv2.

Chinese Internet users started to adopt Creative Commons (CC) as early as 2003. On March 29, 2006, the Chinese version of the CC licence was officially released, under the Chinese name 知识共享 (zhishi gongxiang), literally meaning, 'knowledge sharing'.²¹⁵ Since its inception, Creative Commons China Mainland (CCCM) has organized some promotional activities.²¹⁶ However, the effect is not clear, and there seems to be only modest take-up of CCCM licences. Several problems associated with CCCM have been identified. For example, CCCM was not widely known among Internet users;²¹⁷ and CCCM licences are mainly used in blogs where the content is usually trivial.²¹⁸ It has been suggested that CCCM should expand its use to wider areas such as government open information, cloud computing, MOOC (Massive Open Online Courses), digital learning centres of open university, university think tanks, player-generated content in online games, user generated content in microblogs, remixing activities, and fan fiction. G H Tang notes that 'the free sharing aspect of Creative Commons' harmonises the traditional Chinese culture and the socialist principle, but is not yet flourishing in China. She speculates that the reasons are not only lack of public recognition, but lack of government approval, and that CC's 'bottom-up approach' 'in this power-centralised nation would never work as effectively as a top-down approach'.²¹⁹

However, other types of voluntary licences have been more successful in China. Baidu Encyclopedia, *Baidu Baike* in Chinese, is the equivalent of Wikipedia, providing a free and open online encyclopedia created and edited by volunteers. However, Baidu does not require its

²¹³ Creative Commons Australia <<http://creativecommons.org.au/>>.

²¹⁴ AusGOAL website <<http://www.ausgoal.gov.au/>>.

²¹⁵ In January 2003, CNBlog.org began to recommend and adopt CC licence. In August 2003, a Chinese website qiji.cn which aims to open access to the scientific literature, accepted the CC licence and began to translate the COMMON DEED of CC licence to Chinese. In November 2003, with the cooperation of iCommons, CNBlog.org launched the project 'Creative Commons China'. The project team translated the CC licence version 1.0 and named 'Creative Commons' as '创作共用'. In January 2005, Professor Wang Chunyan (王春燕) was nominated as the director for Creative Commons China, which changed its name to 'Creative Commons China Mainland'. See <http://creativecommons.net.cn/about/history/>

²¹⁶ *id.*; these activities include CC salon, CC birthday party, CC symposium and CC photography competition.

²¹⁷ According to a survey by CCCM, 27.0% of participants didn't know of CC at all; 41.8% knew a little; 23.8% knew relatively more and 7.4% knew very well. The survey also showed that 32.8% and 34.4% of the participants already adopted or intended to adopt CC licence, and 86.8% of participants wished to know more about CC and CCCM. Among those participants who already adopted or intended to adopt CC licence, 71.2% were using or preparing to use the Chinese version of CC licence. See Yang Man & He Huagang, "The Initial Exploration of the Application of Creative Commons in China", 52 *Book Information Work* 37, 39 (2008).

²¹⁸ *Id.*, pp. 39-40.

²¹⁹ GH Tang, pp 36-37.

contributors to make their contributions under an open content licence, but instead requires contributors to license all content to Baidu.²²⁰ By April 2016, it has provided 13 million articles, with the participation of 5.8 million volunteers,²²¹ and is the world’s largest user-generated Chinese-language encyclopedia. Since it is operated by China’s largest search engine company, it therefore has the endorsement of a very powerful non-government Chinese organization.

Since this involves licensing encyclopedia content and other content to the platform operator, and not under some form of open content licence, then this content is not (on our definition) part of the public domain as a form of neutral voluntary licensing. It may, however, be part of the *de facto* public domain (see 3.15 following).

Through this and other means, Baidu and other Internet social media²²² have promoted their version of a free sharing culture in China. User-generated content (UGC) including various digital remixes are abundant, but few copyright lawsuits have been filed against providers of UGC.

In sum, both Australia and China have adopted neutral voluntary licenses, such as Creative Commons licences, but Australia has been more successful in promoting their use in society, particularly in opening up government works, whereas in China neither the government nor social media operators have embraced such licences.

2.15. De facto public domain of benign uses

For inclusion in the public domain it is not sufficient that some significant *de facto* uses of copyright works go undetected or that copyright owners do not think that enforcement action is worthwhile. This is sometimes called ‘tolerated use’. We do, however, include one type of tolerated use in the public domain. We define the *de facto* public domain as those situations where the public, or a class of intermediaries, can make significant particular uses of works, which uses may arguably fall within the owner’s exclusive rights, but which as a matter of practice or custom, go unchallenged because copyright owners recognise that it is in their interests to let the practice go unchallenged. In some cases such owners are unlikely to be aware of the uses despite their being overt, and supported by the availability of opt-out facilities. This complex definition can be summed up as ‘Non-objection to benign uses of works coupled with opt-outs’.

The most important example of this *de facto* public domain in most countries is the operation of Internet search engines (at least in those countries without broad ‘fair use’ exceptions which explicitly make such search engine practices legal), and the reproduction for private uses of works made available via the Internet for free access. In Australia, as in other countries where there is relatively low government interference with the operation of the Internet, search engines such as Google operate largely unhindered by copyright lawsuits aimed at their basic functions of copying content for indexing, creating concordances (indexes), ‘snippets’ or caching, even though the legal status of some of this derived content may be unclear.

The international predominance of Google in Internet searching has made this *de facto* aspect of the public domain substantially global, but the situation which exists in China, and may exist in other countries where there is substantial blocking of Internet access (eg Iran, Ethiopia, North Korea), means that the unqualified use of ‘global’ is inaccurate. Access to Google is blocked in China, and it no longer officially operates there. The Chinese search engine giants such as Baidu and Sohu

²²⁰ Baidu Agreement of Use, Article 5.2, <https://passport.baidu.com/protocol.html>

²²¹ <http://baike.baidu.com/view/1.htm>

²²² Social media such as ku6.com, heyi.com (formerly youku.com and todou.com), and weibo.com.

dominate the Chinese market, offer a wide range of services beyond search,²²³ and have been very influential beyond China’s borders.²²⁴

In relation to these search engines operating within China, neither the Copyright Law, nor the Regulations on the Protection of the Right of Communication over the Internet, explicitly say whether the law allows search engines to copy websites in order to create indexes for searching or caching content. A Supreme People’s Court’s Interpretation²²⁵ does provide that creating snippets, or caching, constitutes copyright infringement if it substitutes for the other ISP’s normal service of providing Internet content. However, the Interpretation effectively provides that it is a ‘fair use’ if the snippet or caching does not substitute for the other services. As in other parts of the world, the general operation of search engines, in reproducing works found on the Internet for search purposes, has gone unchallenged in China, despite a lack of legal clarity, and we can therefore conclude that there is a *de facto* public domain operating in China as there is elsewhere.

Another example of a *de facto* aspect of the public domain is fan fiction, in which fans of a work or author use their characters, and other aspects of their works to create new ‘fan’ works. Copyright owners often tolerate, and often welcome, fan fiction, because they consider it is to their commercial and reputational advantage to do so, even though some of these uses might possibly breach copyright. Fan fiction and other kind of remixes are widely tolerated in China and few cases have commenced against such practices. However, a famous Hong Kong writer, Jin Yong, did sue a fan fiction writer in China who used the names of the characters from one of Jin’s many popular martial art novels,²²⁶ and the result will be instructive for similar cases in the future. There are as yet no Australian decisions on fan fiction. The Australian Copyright Council, while listing various ways in which fan fiction might breach Australian copyright law, but involve issues which are not straight-forward,²²⁷ states that in its opinion ‘[i]n practice, copyright owners and authors are unlikely to take legal action against fan fiction that is not done for profit’.²²⁸

On the basis of these examples there are therefore no obvious differences between the *de facto* public domains in China and Australia.

3. New definition or categories derived from China’s public rights?

The fifteen public domain categories used in this article are based on what was previously found necessary to explain the copyright public domain of Australia and the UK.²²⁹ Are there any examples of rights to use works in China which require us to modify this definition of the public

²²³ In addition to its core web search product, and popular vertical search-based products, such as Maps, Image Search, Video Search, News Search, Baidu also offers community-based products such as Baidu PostBar, “the world’s first and largest Chinese-language query-based searchable online community platform; Baidu Knows, the world’s largest Chinese-language interactive knowledge-sharing platform; and Baidu Encyclopedia, the world’s largest user-generated Chinese-language encyclopedia.”; see Id.

²²⁴ Take Baidu as an example, it has 260 million active users in December 2015 alone, many of them from Brazil, Indonesia, Japan and Thailand ; see <<http://ir.baidu.com/phoenix.zhtml?c=188488&p=irol-homeprofile>>.

²²⁵ Supreme People’s Court *Interpretations on Several Issues about Adjudicating the Civil Disputes concerning Infringing the Right of Communication over Internet* (2012), Art. 5.

²²⁶ The case was filed in October 2016 in Guangzhou Tianhe District Court, and is scheduled to be heard on February 16, 2017.

²²⁷ Issues would include whether the fan fiction was an adaptation of the original work, whether it copied a ‘substantial part’ of the work, and whether any exceptions (eg for satire) might apply.

²²⁸ Australian Copyright Council *Fanfiction and Copyright*, Information Sheet, August 2016 <http://www.copyright.org.au/acc_prod/ACC/Information_Sheets/Fanfiction_Copyright_G137v01.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef>

²²⁹ Greenleaf and Bond, 2013.

domain, or which fit within the existing definition but do not fit within any of the 15 categories which we have used to organise this comparison? A 'yes' to either question would mean that our theory of the public domain requires modification in light of China's public domain.

In this respect, China's opt-out provisions require careful consideration. Some researchers in China suggest that orphan works and folklore, as well as examination questions, the background and style of works, and computer fonts, should be considered as potentially in the public domain.²³⁰ Among these, orphan work and folklore deserve separate consideration here.²³¹

3.1. Opting out from the public domain

An unusual aspect of Chinese copyright law is the ability of authors to opt-out (by express notice) from both the free-access exception for mass media communication of public speeches, and from the collective licences allowing re-publication of newspaper articles by other periodicals, and the collective licences allowing re-recording of musical works already published as sound recordings. The author cannot choose to opt-out in relation to particular categories of users, but must opt-out in relation to all. Nor are the conditions of free access, or the terms of the collective licence, changeable by the author. These factors mean that the opt-out is still consistent with the basic purpose of the public domain, to allow use of works without first obtaining a licence from the copyright owner. Such opt-outs are also consistent with a number of Berne Convention provisions allowing countries to set the conditions under which exceptions will exist.

However, the provision of the opt-out makes such exceptions and collective licences contingent upon the author not exercising the opt-out. This requires modification of the sentence in the full definition of the public domain proposed by Greenleaf and Bond which states 'Any licences must pre-exist, with terms set by a neutral party', by addition of the sentence, 'If the author is permitted, by the terms set, to opt-out of the operation of the exception or compulsory licence in relation to a work, such an opt-out must not have occurred.' We consider that this is a better solution than to create a completely new category of public rights, one distinguished by the contingent nature of the right (depending on the exercise of an opt-out).

3.2. Orphan works

Neither Australian nor Chinese copyright law yet have any explicit provisions on orphan works, although some other exceptions might apply in limited circumstances (eg museum preservation activities). Explicit orphan works provisions can share elements of free access statutory exceptions, neutral collective licences, or changes to the copyright term, depending on how they are designed.

Australia's 2016 draft copyright amendment Bill²³² (which did not proceed) only deals with the duration of copyright in orphan works, and therefore does not provide an explicit ability to use such works while the copyright term runs.²³³ The Australian Law Reform Commission had previously proposed that the issue of orphan works should be addressed by limiting available remedies where a reasonably diligent search (subject to statutory guidelines) has not found a rights holder (but

²³⁰ Chen Xiaoling, "Research on Public Domain in Copyright Law," MPhil Dissertation <<http://www.docin.com/p-1311680621.html>> accessed on 31 October 2016. Also see Liu Xingxing (劉行星) Li Xilong (李希龍), "Copyright Law Amendment should Solve the Problem of Public Domain," *China Social Science*, July 22, 2015, <http://www.cssn.cn/zx/201507/t20150722_2088525_1.shtml> accessed on 31 October 2016.

²³¹ Chen Xiaoling, "Research on Public Domian in Copyright Law".

²³² *Copyright Amendment (Disability Access and Other Measures) Bill 2016* Exposure Draft (Aust.).

²³³ Other exceptions are however relevant to use of orphan works by public institutions (libraries, museums etc).

reasonable attribution has been made in any uses),²³⁴ but governments have not yet taken up this recommendation.

China is proposing a more thorough approach. Current Chinese law indicates that an orphan work is always owned by someone (an individual, organization, or the state), and not in the public domain in any situation.²³⁵ However, the 2014 Draft Revision has a set of separate rules to regulate their use. Under Article 51,²³⁶ for orphan works whose authors are unknown or known but cannot be found, such works may be used in digital form after an application has been made to a relevant authority and upon payment of certain fees.²³⁷ The draft proposes that specific rules will be issued to regulate the use of works whose authors either are unidentifiable or cannot be contacted despite the user's diligent search for the authors. This will be a significant addition to China's public domain.

China's proposed practice poses another interesting variation for public domain theory. The proposed licensing fee for orphan works may be contingent upon an owner subsequently coming forward, and until then the use of the orphan work would be, in practice, a free use exception. Alternatively, a fee may be charged irrespective. However, the licence that applies if and when an author comes forward fits the elements of the definition of a neutral collective licence, with the possible exception that it is potentially not uniform for all users of the work. Consequently, the effect of orphan works on China's public domain will depend upon what implementation regulations are made.

3.3. Folklore and indigenous culture

Where copyright laws protect folklore and indigenous culture, this is not done to expand the public domain. On the contrary, it usually contracts what would otherwise be part of the public domain by recognising collective rights over works so classified, requiring the permission of this collective before the works can be used.

In China, the status of folklore is somewhat unclear. On the one hand, only 'qǔyì'²³⁸ is specifically identified and protected in the copyright law.²³⁹ On the other hand, Judicial Interpretation by the Supreme People's Court (SPC) has enlarged the scope of copyright protection to all kinds of folklore,²⁴⁰ which virtually takes folklore out of public domain. Specifically, the ethnic minority or community that generated the work of folklore may own the copyright in such a work, which may be exercised by the competent authority on behalf of this community. While the authors of the new works based on the work of folklore may enjoy copyright, they must identify the source of the raw

²³⁴ *Copyright and the Digital Economy Report*, ALRC, 2013.

²³⁵ For example, Art 19 provides that in the case there is no succeeding entity, the work belongs to the state. Succession Law Art. 32 provides that "An estate which is left with neither a successor nor a legatee shall belong to the state or, where the decedent was a member of an organization under collective ownership before his or her death, to such an organization."

²³⁶ Copyright Law (China), Art. 51: Where users have tried their best to find the rights holders of works of which the period of copyright protection has not yet expired, without result, and the matter conforms to one of the following conditions, it is permitted to use the work in digital form after applying with a body appointed by the State Council administrative copyright management department and posting a use fee: (1) the identity of the copyright holder is unclear; (2) the identity of the copyright holder is clear but it is impossible to establish contact.

Specific implementation methods for the previous Paragraph are formulated separately by the State Council administrative copyright management department.

²³⁷ 2014 Draft Revision (China), Article 51.

²³⁸ See [2.2], footnote 46 above.

²³⁹ Copyright Law (China), Art. 3(3).

²⁴⁰ SPC Copyright-Dispute Guidelines (2002); Opinions on the Exercise of Intellectual-Property Judicial Functions to Promote Socialist Cultural Development and Prosperity and to Stimulate Autonomous and Harmonious Economic Development, published by the Supreme People's Court on Dec. 16, 2011.

materials and properly attribute the preservers and collectors of the folklore. They must also respect the work of folklore against any distortion and mutilation. To exploit the folklore, they must obtain the consent of the preservers, providers, and holders of such work, as well as the approval of the competent authorities. Lastly, they must reasonably share any benefits derived from the exploitation of such works with the community providing the work of folklore. Any inappropriate use of folklore may trigger civil liability if it causes harm, including moral harm, to the indigenous community.²⁴¹

Even more strongly, China's State Council has issued a consultation draft for the *Regulations on the Copyright Protection of Indigenous Literary and Artistic Works* in 2014, which puts all folklore under copyright protection.²⁴² It has not yet been enacted due to strong criticisms from the academic community, because the characteristics of folklore are at odds with the requirements of copyright. For example, the difficulty of identifying the owner or collective ownership, the unfixed nature of many forms of folklore, and the perpetual term of protection under the proposed regulation, make it difficult to fit within copyright concepts. In particular, the perpetual duration of the copyright would take folklore out of the public domain forever (except for possible collective licences). The requirement that users of such folklore must obtain the consent of the competent authority acting on behalf of the community, and that the terms of any such permission or licence are not determined in advance, puts such usage outside the 'neutral licensing' aspects of the public domain (on our definition). The urge to give copyright protection over folklore apparently stems from the 'nationalist' or 'protectionist' approach that views some Chinese folklore (e.g., the legends of Mulan, Panda, and Monkey King) as national treasures to be protected from the exploitation of foreign entertainment companies.

Australian copyright law gives far more restricted recognition to Aboriginal culture, with no short-term likelihood of change. There is no recognition of joint ownership of copyright by cultural groups, although an individual artist could have fiduciary obligations to a cultural group not to exploit works in ways contrary to traditional understandings.²⁴³ Therefore, some aspects of what could be called 'folklore' in other cultures will be in the public domain in Australia, in contrast with China where the SPC's Judicial Interpretation has already given it copyright protection, and stronger protection is proposed. These Chinese developments do not require any changes to the public domain categories, only recognition that in countries such as China, the public domain category discussed in [2.2] is likely to be more restricted.

4. Conclusions and implications

The result of the previous section is that we do not propose any additions to the fifteen categories of public rights that together make up the public domain, but we do propose a change to the definition of the public domain, in order to better accommodate opt-out provisions concerning exceptions. We do find that significant differences have emerged from comparison of the fifteen categories, but they are not as substantial as we might have expected, given the different social, historical and economic backgrounds of the two countries.

4.1. Differences between the public domains in China and Australia

This paper has only compared the formal categories of the public domain evident from the copyright laws of China and Australia. A full comparison also requires consideration of those social factors and institutions that support or constrain the effectiveness of these public domain categories.

²⁴¹ This paragraph is quoted from Li, 'China', § 9[1[b]].

²⁴² <http://www.law-lib.com/fzdt/newshtml/20/20140903093017.htm>

²⁴³ *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

We have only touched on these supports and constraints in relation to the extent of various types of licensing used in practice.

Within this somewhat limited scope of investigation, we have found differences and similarities in the two copyright public domains, which we can summarise as follows (numbered as previously).

China's public domain is stronger in relation to category (5), duration, in that China has a shorter term of protection for most categories of published works and more rapid expiry of copyright for unpublished works. In relation to category (8), despite academic arguments to the contrary, we doubt that the public interest may constitute a free use exception in China (even to the extent that that public interest considerations can consistently affect remedies in China), although the position remains open as case law on Article 4 of the Copyright Law is not well-enough developed to be certain.

It is difficult to make overall generalisations about two categories: (12) statutory free use exceptions; and (13) neutral collective licensing (remunerated licensing). As the Tables in relation to each of these categories show, the position is complex at the sub-category level. China's free access exemptions and its remunerated licensing may both be somewhat more extensive than Australia's, especially in relation to the objectives of achieving socially beneficial goals in such areas as education and rural poverty alleviation.

Australia is likely to have a stronger public domain in relation to the following categories:

- (1) The requirement of actual fixation of works in Australia, compared with the potential for fixation in China, makes China's minimum requirements for copyright less onerous than in Australia.
- (2) China has a more inclusive definition of copyright subject matter, so some subject matter is more likely to fall outside copyright protection in Australia.
- (11) China also has more extensive exclusive rights of the copyright owner. It also has an open-ended ability for courts to add additional types of rights, thereby reducing the scope of the public domain.
- (11) In addition, the express protection of folklore in China is not found in Australia, so Australia's public domain is broader in this respect.
- (14) Australia makes more use of neutral voluntary licensing to expand the public domain.

There do not seem to be significant differences between Australia and China in relation to at least half of the fifteen categories: (3) express exclusion of works from protection; (4) effect of constitutional rights; (6) public domain dedications (relinquishment); (7) public policy refusals to enforce copyright; (9) 'insubstantial parts'; (10) 'mere facts or ideas'; and (15) the *de facto* public domain of benign uses.

Overall, the public domain in modern Chinese copyright law is not unexpectedly somewhat different from that found in a 'western' country such as Australia, but not in the radical way that could be naively expected to stem from arguments that China's traditional philosophy privileged the sharing and copying of works, or that its socialist modern history espouses similar objectives. The harmonising effects of international treaties and the pressures of international trade are the most obvious reason for the relatively high degree of homogeneity. It is, overall, somewhat surprising to see that, compared with Australia, China's public domain appears rather narrow, at least when only formal legal sources are compared. Out of eight categories that the two countries differ significantly, Australia's public domain is stronger in five categories.

Will these findings that the formal public domains of China and Australia are more similar than might be expected change people's perception of China's public domain? Such perceptions are often rooted in expectations that China would allow a broader public domain because of its sharing

traditions based on Confucian philosophy and communist ideology. We think such change is unlikely, because the traditionally positive attitudes within China toward the sharing of published works are still very strong, among both officials and ordinary citizens. This seems to be reflected in China's public policy and judicial practices, notwithstanding the more strict appearance of its formal laws.

Our findings may instead indicate a disparity between the formal law and social reality in China, with the former trying to squeeze the public domain and the latter taking opportunities to enlarge it. Our findings further raises a possibility that a narrower public domain may benefit an authoritarian regime that attempts to take control of the free flow and sharing of ideas and information through strengthening copyright protection. This may be why concepts of 'public interest' have been used for content review and administrative enforcement of copyright. In comparison, Australia can be seen as more balanced in achieving the objectives of both government and the public in its lawmaking and law reform, and therefore the disparity between the formal law and social reality is not so large. In the context of this article, the possibilities raised in this paragraph can only remain as speculation, but we hope that they will prompt others to consider these questions further.

4.2. Implications for public domain theory

By adding consideration of China to the previous analysis of copyright public domains, we have identified that the previous formulation of the definition of the copyright public domain by Greenleaf and Bond was not sufficient, because of the modification required to include the opt-out provisions in relation to free use exceptions and collective licences. The effect of China's proposed 2014 Revision in relation to orphan works is likely to add content to existing categories of public rights, rather than to add a new category. Its broad recognition of folklore (and proposals for even stronger recognition) places a limit on one category of China's public domain, but does not change those categories. However, overall, the hypothesis that public domains can be sufficiently described by the fifteen categories previously used in relation to Australia and the UK remains unchanged by this additional analysis of China, because we did not identify any new categories necessary for a comprehensive description.