

# 中国著作权法规修改方向

Direction of Revising Copyright  
Regulations in China

华东政法大学 王迁

WANG Qian, East China University of Political  
Science & Law

## 2020年《著作权法》 第三次修订

The 3rd revision of  
Copyright Law in  
2020

### 《著作权法实施条例》

Implementation Regulation of  
Copyright Law

### 《信息网络传播权保护条例》

Regulation on Protection of Information  
Communication on Internet

### 《著作权集体管理条例》

Management Regulation on Collective  
Management of Copyright

# 一、权利限制的增加

The additions of rights  
restriction

## 《著作权法》第24条 Article 24 of the Copyright Law

- 在下列情况下使用作品，可以不经著作权人许可，不向其支付报酬，但应当指明作者姓名或者名称、作品名称，并且不得影响该作品的正常使用，也不得不合理地损害著作权人的合法权益：……（十三）法律、行政法规规定的**其他情形**。
- The use of a work under the following circumstances may be made without the authorization of the copyright owner and without making any payment remuneration, provided that the name of the author and the title of the work are specified, and that such use shall not affect the normal use of the work and shall not unreasonably jeopardize the lawful rights and interests of the copyright owner: ..... (xiii) **Other circumstances** stipulated by the laws and administrative regulations.

“法律”很难规定“其他情形”

“The laws” are hard to stipulate “other circumstances”



“其他情形”由行政法规规定

“other circumstances” are specified by administrative regulations

# **(1) 数据挖掘与人工智能训练**

## **Data mining and AI training**

训练人工智能时对作品“投喂”和分析

work feed-in and analysis to  
train AIs

**目前集体管理未能覆盖所有类型作品、代表性相对有限**

Current CMOs do not cover all types of works and  
representation is relatively limited

**缺乏美国式的公会集体协商机制**

Lack of collective consultation mechanism of  
U.S. guilds

## 建议的《著作权法实施条例》

### Suggested Implementation Regulation of Copyright Law

- 第 X 条 下列情形，属于著作权法第 24 条第（十三）项规定的“其他情形”：
  - Article X. The following are "other circumstances" as stipulated in Article 24 (xiii) of the Copyright Law:
    - 为科学研究目的，复制已经发表的作品并进行统计分析，但不得将复制品公开传播。
    - Reproduction of published works for the purpose of scientific research and statistical analysis, provided that the reproductions are not publicly disseminated.

“科学研究”不排斥商业性

Scientific research is not excluding commercialization



不得传播“训练”后生成的与在先作品实质性相似的内容

Cannot disseminate post training generated content that has

## **(2) 视听作品中的附带性使用**

### **Incidental use in audiovisual works**





友情出演 李乃文  
宾蓓蕊

电影《我不是药神》的片断

Episode from movie *Dying to Survive*





## 电影《我不是药神》使用摄影作品案 (北京市朝阳区人民法院2022年)

### Movie *Dying to Survive*'s using of photography works (People's Court Chaoyang District Beijing, 2022)

- **介绍、评论某一作品**应限于对涉案作品本身的介绍、评论，**说明某一问题**应限于使用涉案作品说明其他问题，适当引用的目的不是单纯展示作品而是介绍、评论和说明。本案中，涉案电影完整直接地展示了涉案作品，但并未对涉案作品本身进行介绍和评论，也未引用涉案作品说明其他问题，反而**以画面六分之一的篇幅持续2秒展示了涉案作品**。被告未经授权，也未向原告支付报酬即使用涉案作品，已经影响到了原告对其作品的对外授权并获取相应的经济收益，与原告对作品的正常利用相冲突。在此情况下，不能认定被告对涉案作品的使用构成著作权法中的合理使用，被告的该项抗辩不成立，本院不予支持。
- **Introducing and commenting on a work** should be limited to introducing and commenting on the work itself, and **explaining an issue** should be limited to using the work to explain other issues, and the purpose of proper citation is not to merely show the work, but to introduce, comment on and explain it. In this case, the movie shows the work in a complete and direct manner, but does not introduce and comment on the work itself, nor does it cite the work to illustrate other issues; instead, it shows the work **in one-sixth of the screen for a duration of two seconds**. The defendant without authorization, and did not pay compensation to the plaintiff for the use of the work, has affected the plaintiff's licensing of the work,

## 建议的《著作权法实施条例》

### Suggested Implementation Regulation of Copyright Law

- 第 X 条 下列情形，属于著作权法第 24 条第（十三）项规定的“其他情形”：
  - Article X. The following are "other circumstances" as stipulated in Article 24(xiii) of the Copyright Law:
- 因制作视听作品的需要而使用他人的美术、建筑或摄影作品，但使用部分不得构成背景画面的实质性内容。
  - The use of artistic, architectural or photographic work of the others for the purpose of producing an audiovisual work, provided that the used portion of the work does not constitute a substantial part of the background image.

## 制作视听作品时的“附带性使用”

Incidental use of visual and audio work in production



限定了作品类型：美术、建筑和摄影作品

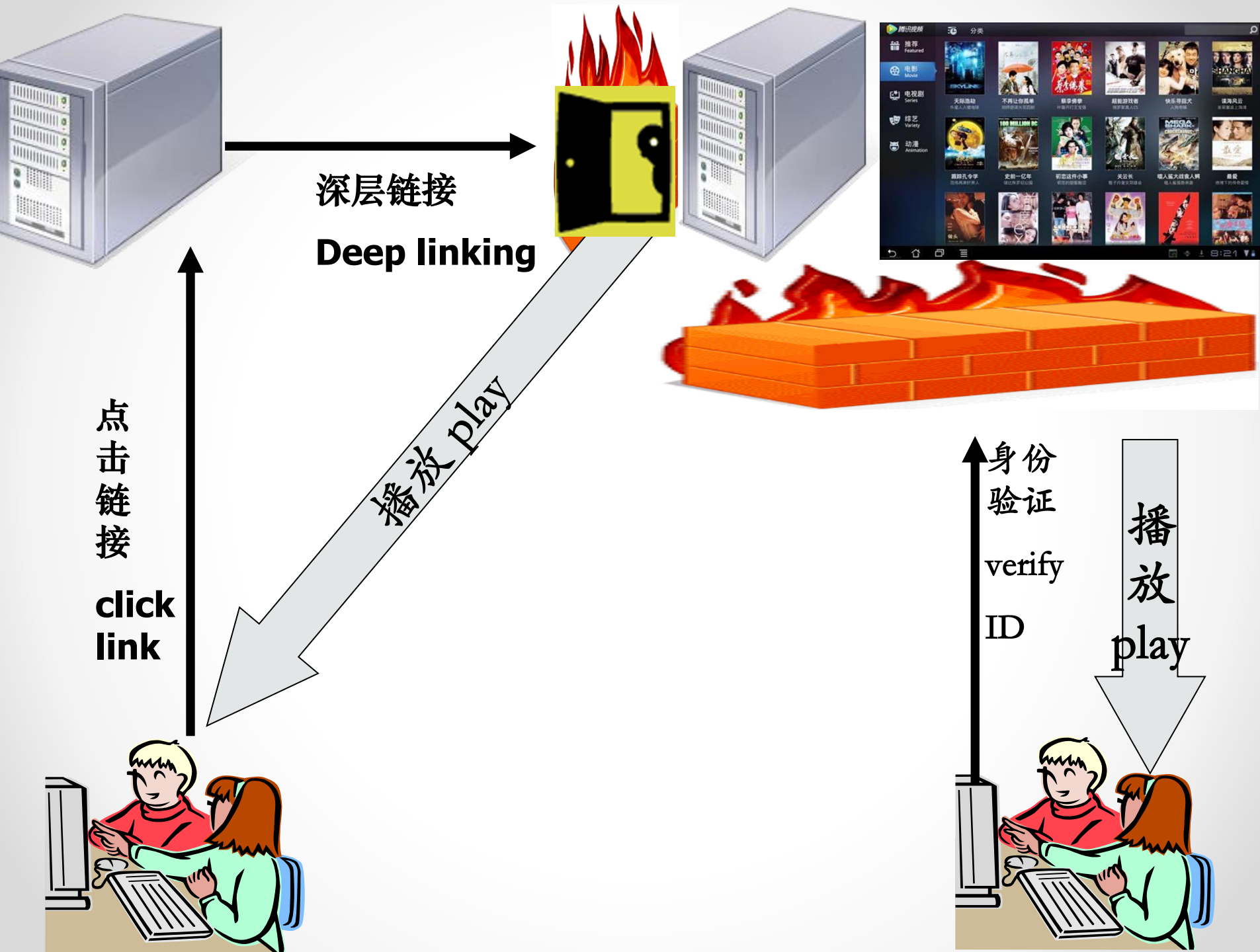
Limited to certain types of work: artistic, architectural,  
photographic

## 二、网络服务提供者责任的优化

Optimizing the responsibilities of  
online service provider

# **(1) 深层链接设置者的责任**

## **The responsibility of the deep linking setting role**



服务器标准:

将作品置于服务器中向公众提供

Server criteria:

Put the work in servers to be available to the public

对他人公开传播的作品设置  
深层链接不能构成直接侵权

Deep linking to another's publicly available work shall not constitute direct infringement

知道他人未经许可传播作品，设置链接构成间接侵权

Indirect infringement by linking to a work with such knowledge that the work has no licensing

实质呈现标准

Standard of substantial presentation

深层链接构成直接侵权

Deep linking constitutes direct infringement

不考虑被链接的作品  
是否经过许可传播

Does not think about whether the linked work been licensed for public communication



## 腾讯公司诉上海真彩多媒体（上海知识产权法院2018年）

Tencent Inc. v. Shanghai True Color Multimedia (Shanghai IP Court 2018)

- 破坏技术措施的行为与侵犯信息网络传播权的行为是两类不同性质的侵权行为，即使上诉人通过破坏技术措施的方式设置链接，**破坏技术措施行为的存在并不能够当然得出侵犯信息网络传播权的结论**。在上诉人未实施将涉案作品置于公众开放的服务器中的行为的情况下，其虽然实施了破坏技术措施的行为，但仍不构成对涉案作品信息网络传播权的直接侵犯。……上诉人未经许可，**破坏权利人为涉案影片采取的技术措施**，违反了著作权法的相关规定，客观上导致作品传播范围的扩大，且屏蔽了页面广告、片前广告等内容，给被上诉人造成巨大经济损失，应当承担相应的赔偿责任。
- The act of damaging technical means and the act of infringing the right of online dissemination are two different types of infringements. Even if the Appellor set up links by way of destroying technical means, **the act of destroying technical means does not ipso facto lead to the conclusion that the right of online dissemination has been infringed**. In the case that the Appellor did not take the action of placing the work in question on the server open to the public, although the Appellor did have destroyed the technical means, it still did not constitute a direct infringement of the right of online dissemination of the work in question... The appellor... violated the relevant provisions of the Copyright Law **by damaging the technical means taken by the right holder for the film in question** without authorization, which objectively led to the wider dissemination of the work, and page ads and the pre-film ads have been blocked causing the appellee huge economic losses, and therefore the Appellor should bear the corresponding liability for compensation.

建议的《信息网络传播权保护条例》 Suggested Regulation on Protection of Information  
Communication on Internet

- 第X条 网络服务提供者或服务对象提供搜索或者链接服务，具备下列条件的，不承担赔偿责任：
- Article X. A network service provider shall not be liable for compensation if it provides search or linking services for its service recipients under the following conditions:
  - (一) 没有故意避开或者破坏受著作权法保护的技术措施；……
  - (I) it has not intentionally avoided or damaged the technical means protected by the copyright law ...
- 搜索和链接服务提供者对已通过信息网络向公众提供的作品、表演、录音制品或广播、电视设置链接，损害他人合法权益，构成不正当竞争行为的，依照《中华人民共和国反不正当竞争法》处理。
- If a search and linking service provider sets links to works, performances, phonograms, or broadcasts and televisions that have been made available to the public through the internet, thereby harming the legitimate rights and interests of others and constituting an act of unfair competition, it shall be dealt with in accordance with the Law of the People's Republic of China Against Unfair Competition.

免责条件：不直接对深层链接进行行为定性

Disclaimer: No direct behavioral determination of deep links



由设链者举证证明未规避技术措施

The link setter should provide proof of non-circumvention of technical means



区别对待深层链接——给正常的搜索、链接留下生存空间

Treat deep links differently - leave room for normal searches, links

## **(2) 新类型网络服务提供者 的责任**

**Responsibility of new types of online service provider**



微信小程序：在微信  
中接入了一个第三方  
应用程序

Wechat mini program:  
a third party app connected to  
WeChat

## 杭州刀豆网络公司诉腾讯公司 (杭州互联网法院2019年)

Hangzhou Daodou Network Inc. v. Tencent (Hangzhou Internet Court 2019)

- **原告认为：**百赞公司未经其许可，擅自通过其所有并经营的微信小程序“在线听阅”等提供涉案作品的在线播放服务。腾讯公司作品微信小程序的平台管理者，具有审核的义务。腾讯公司在审核涉案小程序后，在应知的情况下，仍然放任百赞公司的侵权行为，构成帮助侵权行为。
- The plaintiff argued that Baizan had provided online playback services for the works in question through its WeChat app "Online Listening and Reading" without its permission. Tencent was the platform manager of the WeChat mini programs and had the obligation to review. After reviewing the WeChat app, Tencent - should have such knowledge - still allowed Baizan's infringing behavior, which constituted aiding and abetting the infringement.

## 区分的两种情况

Two different kinds of situations

将明显侵权的作品做成“小程序”  
(“小程序”=明显侵权的作品)

Turn works with obvious infringement into Mini program  
(Mini program = works with obvious infringement)

“小程序”提供在后台  
不断更新的作品

Mini programs provide works with continuously updates in the back stage



## 建议的《信息网络传播权保护条例》 Suggested Regulation on Protection of Information Communication on Internet

- 第X条 网络服务提供者**无法单独删除**服务对象所提供的作品、表演、录音录像制品或广播、电视，或**单独断开**与侵权的作品、表演、录音录像制品或广播、电视的链接，具备下列条件的，不承担赔偿责任：
  - Article X An internet service provider shall not be liable for compensation if **it is unable to individually remove** the works, performances, phonograms or broadcasts or televisions provided by the service recipient, or **individually disconnect** the links to the infringing works, performances, phonograms or broadcasts or televisions, provided that the following conditions are met:
    - (一) 未选择并且未改变所传输的作品、表演、录音录像制品或广播、电视；
      - (i) it has not selected and has not changed the works, performances, phonograms or broadcasts and televisions that it transmits;
    - (二) 未从服务对象提供作品、表演、录音录像制品或广播、电视中直接获得经济利益；
      - (ii) it has not directly derive economic benefits from the provision of works, performances, phonograms or radio or television by the service recipient;
    - (三) 在接到权利人的通知书后，及时将该通知转送服务对象；
      - (iii) upon receipt of the notification letter from the right holder, promptly transmits the notification to the service recipient;
    - (四) 对重复侵权的服务对象采取合理限制措施。
      - (iv) adopts reasonable restrictive measures for service recipients of repeated infringement.

对无法直接移除的侵权内容不适用“通知与移除”

"notice and takedown" doesn't applicable for infringing content that cannot be removed directly



接入的应用程序反复提供侵权内容的，应有限制措施

Restrictions should be imposed if the accessed app repeatedly provides infringing content

# 三、强制集体管理

## Compulsory collective management



**相当一部分权利人尚未加入集体管理组织**

Quite a large number of right holders haven't joined CMO



**律所或代理机构征集授权后，起诉使用者侵权**

After collecting licenses by law firm or representation agency, indicts users for infringement



**使用者此前已与集体管理组织签订了许可合同，  
仍然会被起诉**

Users signed licensing agreements with CMOs, still would be indicted



**部分国内法院参考集体管理组织的收费标准，  
大幅降低了此类侵权诉讼的赔偿金额**

Most domestic courts take reference of the fee standards of CMOS resulting in compensation volume of such infringement cases lowered

深圳市乐羚文化传媒诉福州市咖王派对娱乐公司  
(福建省福州市中级人民法院2022年)

Shenzhen Leling Culture Media v. Fuzhou City Kawang Paidui Entertainment Company  
(Fuzhou Intermediate People's Court of Fujian Province 2022)

- 对未加入著作权集体管理组织的权利人的作品，也应当考虑著作权集体管理组织的收费标准，依法予以同样程度的保护。……，（原告）因侵权所遭受的损失可参照音集协所公布的许可使用费收费标准予以确定。……参照音集协所公布的许可使用费收费标准，结合涉案160首作品在音集协管理的音乐电视作品数中所占比例、（被告）经营的包厢数、侵权行为的持续时间及（原告）为制止侵权所支出的合理费用等因素，确定（被告）赔偿（原告）经济损失和为制止侵权所支出和合理费用合计606.8元……。
- The works of right holders who are not members of a copyright CMO should also be given the same degree of protection in accordance with the law, taking into account the fees charged by the copyright CMOs... The damages suffered by the plaintiff due to the infringement can be determined by referring to the licensing fees published by the Music Collective Association... With reference to the licensing fee announced by the Music Collection Association, and taking into account the proportion of the 160 works in question, the number of music and television works managed by the Association, the number of booths operated by the (Defendant), the duration of the infringement, and the reasonable expenses incurred by the (Plaintiff) in order to stop the infringement, etc., it shall be determined that the (Defendant) shall compensate the (Plaintiff) for the total economic loss, the expenses and reasonable costs incurred to stop the infringement amounted to RMB 606.8 .....

## 建议的《著作权集体管理条例》 Suggested Management Regulation on Collective Management of Copyright

- 第X条 依照著作权法第25条（编写教科书法定许可）、第35条第2款（报刊转载法定许可）、第42条第2款（制作录音制品法定许可）、第45条（传播录音制品获酬权）、第46条第2款（广播作品法定许可）的规定使用作品的，**由著作权集体管理组织集中管理相关权利。**
- Article X. Where a work is used in accordance with the provisions of Article 25 (statutory authorization for the compiling textbooks), Article 35(2) (statutory authorization for reproduction in newspapers and magazines), Article 42(2) (statutory authorization for the production of phonograms), Article 45 (right to receive remuneration for the dissemination of phonograms), and Article 46(2) (statutory authorization for the broadcasting of works) of the Copyright Law, **the relevant rights shall be collectively managed by a copyright CMO.**
- 在使用者难以获取所有权利人授权的特定领域使用作品的，经国家著作权主管部门备案，**由著作权集体管理组织集中管理相关权利。**
- Where a work used in a specific field is difficult for the user to obtain licensing from all the right holders, **the relevant rights shall be collectively managed by the copyright CMO** upon filing with the competent national copyright authority.

强制集体管理：只能通过集体管理组织行使权利

Compulsory collective management: rights can only be exercised through CMOs



对集体管理提出了很高的要求

High requirement for collective management

**谢谢!**  
**Thank you**