

Original Paper

The Normative Framework and Judicial Practice of China's Fair Use System in Copyright Law from the Perspective of Artificial Intelligence

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Abstract

With the rapid development of artificial intelligence technology, the large-scale scraping and use of copyright-protected works during the training process of AI models has triggered widespread legal disputes. The fair use principle, as the core mechanism within copyright law for balancing the incentive for creation and the public interest, faces unprecedented interpretive tension in the context of artificial intelligence. This paper will examine the rules and limitations of the fair use system within China's Copyright Law and related guiding opinions.

Keywords

artificial intelligence, fair use, copyright, Sino-US comparison, generative AI

1. Introduction

The rise of generative artificial intelligence is profoundly reshaping the underlying logic of the copyright legal order. The pre-training of large models such as ChatGPT and Stable Diffusion heavily relies on the automated scraping and machine learning of massive amounts of text, images, and code. Whether this process, in legal terms, constitutes an infringement of the exclusive rights of copyright holders, or can be exempted through the fair use system, has become one of the most controversial frontier issues in the field of intellectual property law (Note 1). In terms of its institutional essence, fair use is a dynamic balancing mechanism. Its function is to delineate a flexible boundary between the protection of copyright holders' private interests and the public interest in the dissemination of knowledge. However, when artificial intelligence "consumes" humanity's existing intellectual achievements at an unprecedented scale and speed, it is necessary to deeply examine whether the

existing interpretive framework of fair use rules can continue to support this balancing function. Against this background, this paper systematically examines the judicial application experience of China's fair use system.

China's Copyright Law adopts an enumerated legislative model for limitations on rights, and its institutional logic, normative structure, and application boundaries all exhibit significant systemic differences. This difference does not mean that there are no institutional resources within the Chinese legal framework to respond to the copyright challenges of AI training. The integration path of the "four factors - three-step test" pioneered by the Supreme People's Court through judicial policy documents, along with the judicial exploration in the "Ultraman" case by the Hangzhou Internet Court, together constitute the institutional starting point for the evolution of China's fair use system in the AI era. The following analysis will be carried out from two dimensions: normative framework and judicial practice.

2. The Institutional Logic of the Enumerative Model of the Copyright Law and the Challenge of Normative Supply in the AI Era

China's Copyright Law's path for regulating limitations on rights presents the most fundamental systemic difference from the open-ended fair use system under Section 107 of the U.S. Copyright Act. Since its promulgation in 1990, Chinese law has consistently adopted an enumerated legislative model. The normative foundation for this systematic choice lies in the international treaty constraints of the "three-step test." (Note 2) Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, and Article 10 of the WCT collectively establish three sequential requirements for limitations on copyright: limited to "certain special cases," not conflicting with a normal exploitation of the work, and not unreasonably prejudicing the legitimate interests of the rights holder (Note 3). Chinese law has developed its institutional framework following this path. Article 24 of the Copyright Law, as amended in 2020, adjusted the wording of the proviso clause to "shall not affect the normal exploitation of the work, nor unreasonably prejudice the legitimate rights and interests of the copyright owner," thus fully incorporating all the normative elements of the "three-step test" into the text (Note 4).

However, it is precisely this enumerated model, characterized by statutory certainty and closure, that exposes a structural insufficiency in normative supply in the context of AI training. The twelve statutory categories enumerated in the first paragraph of Article 24, such as personal study and research, classroom teaching, and news reporting, are all institutionally presupposed for specific subjects, specific purposes, and limited-scale use (Note 5). There is an insurmountable gap between these presuppositions and the technical characteristics of AI training: the training subject is a legal entity rather than an "individual," the data scale is measured in PB, far beyond what "small-scale copying" can encompass, and the purpose of use points to commercial model development rather than education or research (Note 6). The newly added item (13) in 2020, a catch-all provision for "other circumstances stipulated by laws and administrative regulations," although creating an interface for future normative expansion through institutional reservation, currently lacks a normative basis for direct application, as

no law or administrative regulation has yet specifically addressed AI training (Note 7).

Before proceeding with comparative law analysis, it is necessary to clarify a common conceptual confusion. In the context of Chinese law, “fair use” refers to the system of limitations on rights under the Copyright Law, i.e., specific circumstances explicitly enumerated by law where permission is not required and remuneration need not be paid. Its institutional characteristics are closure and statutory nature; the use must fall within the specific enumerated circumstances to obtain exemption from infringement liability (Note 8). In the U.S. legal context, “fair use” is an independent, open-ended limitation on rights. Its essential characteristic lies in its “open stance towards future new forms of work use.” Any use not explicitly within the scope of the law can be exempted if it passes the four-factor analysis (Note 9). As accurately noted in academic circles, “the copyright laws of major countries and the major international conventions on copyright protection do not have a fair use system similar to that of the U.S. Copyright Act,” and after three amendments, Chinese law has not adopted such a system (Note 10). Clarifying this fundamental systemic difference constitutes the methodological premise for understanding all subsequent institutional analyses: the purpose of this paper is not to advocate for China to wholly transplant the U.S.-style open fair use model, but to explore how to achieve a “partial embedding” of the reasonable elements of the U.S. system through supplementation at the specific rule level, while maintaining China’s enumerated legislative model and the domestic legal provisions of the “three-step test.”

3. Article 8 of the “Opinions”: An Institutional Channel from Closed Enumeration to Factor-Based Review

The aforementioned normative supply dilemma of the enumerated model does not mean that there are no institutional resources within China’s legal framework to respond to the copyright challenges of AI training. The institutional channel pioneered by the Supreme People’s Court through judicial policy documents, specifically Article 8 of the “Opinions on Several Issues Concerning Giving Full Play to the Judicial Function of Intellectual Property to Promote the Great Development and Prosperity of Socialist Culture and to Promote Independent and Coordinated Economic Development,” provides a legitimate normative basis for the localized application of the four-factor analysis method (Note 11). This provision states: “In special circumstances where it is truly necessary to promote technological innovation and commercial development, considering factors such as the nature and purpose of the use of the work, the nature of the used work, the quantity and quality of the used portion, and the impact of the use on the potential market or value of the work, if the use neither conflicts with the normal exploitation of the work nor unreasonably prejudices the legitimate interests of the author, it may be deemed fair use.” The innovative value of this article lies in incorporating the U.S. “four factors” considerations into the judicial practice of fair use. By analyzing its normative structure through the creative integration of the fair use “four factors” and the “three-step test,” a two-stage, dual-criteria comprehensive review framework can be identified.

The first stage is the “four-factor review.” The court comprehensively considers the nature and purpose of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for or value of the work. These four factors correspond structurally to Section 107 of the U.S. Copyright Act. The second stage is the “review of the latter two steps of the three-step test.” This assesses whether the use conflicts with the normal exploitation of the work and whether it unreasonably prejudices the legitimate rights and interests of the rights holder. The logical relationship between the two stages is that the “four factors” fulfill the judgment of the first step of the “three-step test” (determining whether a specific circumstance exists), and the latter two steps then serve as independent normative constraints. The institutional sophistication of this review method—“using the three-step test as the framework and the four factors as the substance”—lies in the following: it maintains the systemic consistency of Chinese law with the international convention’s “three-step test” (i.e., the four factors do not replace but serve the judgment function of the three-step test), while absorbing the flexibility and operability of U.S.-style factor analysis in determining “specific circumstances,” thereby achieving an effective expansion of institutional function without breaking from the civil law tradition.

For the application to AI training scenarios, the institutional significance of Article 8 of the “Opinions” can be understood at three progressive levels. First, the prerequisite “in special circumstances where it is truly necessary to promote technological innovation and commercial development” is highly compatible with the technological innovation attributes of AI training data use. Although this article was issued in 2011 and could not have foreseen generative AI industrial development, the methodology it established—“recognizing fair use through case-by-case factor analysis beyond the statutory enumeration”—reserves discretionary space for the application of limitations on rights in the AI era. Second, the institutional embedding of the four factors provides a basis at the level of positive law for Chinese courts to refer to and learn from the specific analytical methods accumulated in U.S. judicial practice, particularly the standards for determining “transformative use” and the tiered review methods for “market impact.” Third, the articulation mechanism between the “four factors” and the “three-step test” ensures the systemic coherence of the institutional borrowing: Chinese courts do not need to wholly transplant the U.S.-style open fair use model but can achieve “partial embedding” of foreign experience through refined factor analysis within the “three-step test” framework (Note 12).

Of course, the limits of application of Article 8 of the “Opinions” must also be objectively assessed. In terms of legal hierarchy, judicial policy documents are different from judicial interpretations; they do not have the same binding force as law and have limited normative binding force in individual cases. Temporally, the document was issued over a decade ago, and its provisions do not provide any specific application guidance for the entirely new technological scenario of AI training. In terms of normative density, the review standards under the “four factors”—such as how to determine the “transformative” nature of AI training behavior, how to define the impact of AI output on the original work’s market, and the extent to which the legality of data sources constitutes an independent consideration—all need

to be gradually enriched through judicial practice in specific cases (Note 13).

4. The “Interim Measures”: The Dual-Track Separation of Public Law Regulation and Private Law Infringement

If Article 8 of the “Opinions” opens an institutional channel at the private law level for the case-by-case expansion of fair use, does the administrative regulation level provide a normative response to the copyright issues of AI training? An examination of Article 7 of the “Interim Measures for the Management of Generative Artificial Intelligence Services,” which came into effect in 2023, shows the answer is negative. At least on the core issue of the private law determination of fair use, public law regulatory norms cannot provide effective institutional supply.

Article 7 of the “Interim Measures” establishes the core framework for training data compliance obligations (Note 14). The “lawful source” principle established in Article 7(1) constitutes the foundational requirement for training data compliance obligations. In terms of its literal meaning, “lawful source” should encompass data obtained through licensing agreements, data in the public domain, data that qualifies as fair use under copyright law, and publicly available data obtained through lawful means that does not violate terms of service. However, this provision does not clearly define the criteria for determining “lawful source,” creating considerable interpretive flexibility. In particular, whether the scraping of publicly available online data constitutes a “lawful source” and whether permission must be obtained in advance for training on copyright-protected works are not explicitly addressed in the provisions. The statement in item (2), “where intellectual property is involved, the intellectual property rights lawfully enjoyed by others shall not be infringed,” directly incorporates copyright protection into the framework of training data compliance obligations. The theoretical significance of this provision is that it confirms, in the form of administrative regulatory norms, the applicability of copyright protection in training data processing activities, meaning that service providers cannot use “technological neutrality” or “data processing activities” as grounds to evade copyright infringement liability. However, its practical limitations are equally apparent: the provision only establishes a prohibitory obligation of “shall not infringe” without substantively defining what constitutes “infringement of intellectual property” in training data use, and particularly does not address whether fair use can serve as a lawful defense against this obligation. As argued above, under the enumerated legislative model of Article 24 of the Copyright Law, large-scale data copying in AI training is unlikely to fall within any current statutory fair use circumstance. The resulting institutional tension is that on the one hand, the “Interim Measures” require that training data not infringe intellectual property rights, while on the other hand, they do not provide a legal path for training activities to obtain exemption from copyright infringement liability.

A more fundamental issue is that the “Interim Measures” are a departmental rule, placing them at a lower legal hierarchy than laws and administrative regulations. According to the catch-all provision in Article 24(1) (13) of the Copyright Law, “other circumstances stipulated by laws and administrative

regulations.” Even if the “Interim Measures” intended to create a fair use exception for AI training, their status as a departmental rule would not satisfy the requirement of “laws and administrative regulations” for the application of this catch-all provision. In other words, the “Interim Measures” neither have the authority nor the function to directly expand the scope of fair use under the Copyright Law.

The resulting “dual-track separation” between public law compliance and private law infringement leads to the following normative conclusion: even if a service provider fully complies with all compliance requirements of Article 7 of the “Interim Measures,” this cannot serve as a defense in a copyright infringement lawsuit. The determination of fair use must still revert to the private law system constituted by Article 24 of the Copyright Law and Article 8 of the “Opinions.” The institutional implication of this structure is that the “Interim Measures” can serve as the administrative law basis for an AI training compliance system, but cannot replace the necessity of special institutional improvement at the level of the Copyright Law.

5. Recent Trends in the Evolution of the Fair Use System

The inherent instability implied by the aforementioned “dual-track separation” pattern—namely, that public law compliance requirements cannot provide protection in private law litigation, and case-by-case judicial discretion faces considerable uncertainty due to the lack of clear positive law basis—has already prompted a clear trend of institutional response at both the legislative and judicial policy levels.

At the legislative level, the drafting of an “Artificial Intelligence Law” has been continuously included in the State Council’s legislative work plan for 2023 and 2024. Although the wording in 2025 was adjusted to “arrange for deliberation depending on circumstances,” this adjustment is better interpreted as a prudent move by the legislature to preserve necessary institutional flexibility in the context of rapid technological iteration, rather than a substantive change in the legislative direction (Note 15).

Although the official draft has not yet been published, the academic community has put forward institutional proposals of reference value on the issue of copyright use of training data through several recommendation drafts. Among them, Article 24 of the “Artificial Intelligence Law of the People’s Republic of China (Scholars’ Recommendation Draft)” proposes a “data fair use” clause: “When artificial intelligence developers use copyrighted data belonging to others for model training, if the use is different from the original purpose or function of the data, and does not affect the normal exploitation of the data, nor unreasonably prejudice the legitimate rights and interests of the data rights holder, then this use constitutes data fair use. For data uses that meet the above fair use circumstances, artificial intelligence developers may use the data without permission from the data rights holder and without paying remuneration, provided that the data source is clearly marked in a prominent manner.” (Note 16). This provision has three noteworthy institutional features. First, it uses “different purpose or function of use” as the primary criterion for fair use, substantively introducing the core concept of

“transformative use,” functionally corresponding to the first factor of U.S. fair use analysis. Second, it uses “does not affect normal exploitation” and “does not unreasonably prejudice legitimate rights and interests” as limiting conditions, consistent with the latter two steps of the “three-step test.” Third, it attaches an obligation to “clearly mark the data source,” balancing the space for fair use with the protection of copyright holders’ right to information. Notably, the Intellectual Property Court of the Supreme People’s Court has cited this recommendation draft as an institutional plan “providing theoretical reference for judicial practice,” reflecting to some extent the direction of legislative discussion on extending the fair use system to AI training scenarios. In addition, Article 18 of the “Artificial Intelligence Model Law 2.0 (Expert Recommendation Draft)” drafted by institutions such as the Chinese Academy of Social Sciences Institute of Law also proposes to “establish a fair use system for artificial intelligence training data to ensure the supply of data elements in the field of artificial intelligence,” explicitly incorporating the construction of the fair use system into the institutional safeguard system for AI industry development.

At the judicial policy level, a clear institutional evolution path from grassroots judicial practice to Supreme People’s Court policy discourse has emerged, and its core concept can be summarized as “moderate openness at the training end, strict control at the output end.” Judge Lei of the Supreme People’s Court systematically argued for the “loose entry, strict exit” institutional design concept, which entails constructing a fair use system at the “input end” of training data and adopting stricter infringement determination standards at the “output end” of application, noting that rights holders can set up technological measures to restrict crawling to achieve “counter-restriction” (i.e., an opt-out mechanism) (Note 17). Researcher Song Jianbao of the China Applied Law Institute of the Supreme People’s Court clearly proposed two institutional transformation paths: revising the “Implementing Regulations of the Copyright Law” to bring AI training under the catch-all provision of Article 24(13), or amending the “Copyright Law” itself to add a special limitation on rights, with the latter suggestion particularly recommending “drawing on the fair use principles of relevant foreign copyright laws to provide a legal basis and judicial discretion space for future new types of work uses.” (Note 18) Vice President Du Changhui of the Beijing Intellectual Property Court also confirmed the “differentiated protection principle” at the 2025 Zhongguancun Forum, stating that “in the model pre-training stage, the focus is on promoting data acquisition and use; in the generation and dissemination stage, more emphasis is placed on rights protection.” (Note 19)

From the case-by-case adjudication in the Hangzhou Internet Court’s “Ultraman” case, to the legislative proposals of researchers at the Supreme People’s Court, and then to the judicial policy statements of the Beijing Intellectual Property Court, the institutional concept of “loose at the training end, strict at the output end” has crystallized within the judicial system, moving from individual case experience to policy consensus (Note 20). During the transitional period while special legislation is still being advanced, judicial adjudication is effectively assuming a “pioneering” function in rule formation.

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Note(s)

- Note 1. A. F. Cooper & J. Grimmelmann, The Files Are in the Computer: On Copyright, Memorization, and Generative AI, 100 Chi.-Kent L. Rev. 141, 142-44 (2025).
- Note 2. See Zhang Jiuyu & Wang Saifei, Research on Copyright Fair Use in Large Model Data Training, *Journal of East China University of Political Science and Law*, Vol. 27, Issue 4, 2024, p. 24.
- Note 3. See Berne Convention Article 9(2); TRIPS Agreement Article 13; WCT Article 10.
- Note 4. Copyright Law (amended 2020), Article 24.
- Note 5. See Article 24(1), items (1) to (12).
- Note 6. See Song Jianbao, The Copyright Law Characterization of Data Training for Generative AI Large Models, *Digital Law*, Issue 6, 2025. Also see Wei Lili, The Application Choice of Copyright Limitation Systems in Generative AI Data Training, *Political Science and Law Review*, Issue 5, 2025, p. 162.
- Note 7. Article 24(1), item (13).
- Note 8. Zhu Yiang, Copyright Law Regulation of Generative AI Work Training Activities, *Legal Application*, Issue 11, 2025, pp. 164-165.
- Note 9. See Zhang Tao, Copyright Dilemmas and Adaptation Paths for AI Large Model Training, *Modern Law Science*, Vol. 47, Issue 2, 2025, p. 196.
- Note 10. Ibid.

Note 11. Supreme People's Court, Opinions on Several Issues Concerning Giving Full Play to the Judicial Function of Intellectual Property to Promote the Great Development and Prosperity of Socialist Culture and to Promote Independent and Coordinated Economic Development (Fa Fa [2011] No. 18), Article 8.

Note 12. See Song Jianbao, *supra* note 6.

Note 13. *Ibid.*

Note 14. Interim Measures for the Management of Generative Artificial Intelligence Services (issued July 10, 2023, effective August 15, 2023), Article 7.

Note 15. See Legislative Work Plan of the Standing Committee of the National People's Congress for 2025.

Note 16. Artificial Intelligence Law of the People's Republic of China (Scholars' Recommendation Draft), Article 24, released at the "AI Good Governance Forum" on March 16, 2024. Also see Intellectual Property Court of the Supreme People's Court, AI Era: New Challenges for Intellectual Property Judiciary, on the official website of the Intellectual Property Court of the Supreme People's Court.

Note 17. See Lei, Legal Risks and Institutional Supply for AI Training Data, *People's Justice*, Issue 11, 2025.

Note 18. See Song Jianbao, *supra* note 6.

Note 19. Vice President Du Changhui's speech at the 2025 Zhongguancun Forum Global Intellectual Property Protection and Innovation Forum.

Note 20. Sun Jimin, From Fair Use to Fair Learning: Copyright Dilemmas and Normative Reconstruction of AI Training Data, *China Law Review*, Issue 5, 2025, p. 63.