Copyright Infringement Test (Re)visited: U.S. Spillover into China Yielding a Similar Test?

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ABSTRACT

One of the most pivotal doctrines in copyright law is its infringement test, which determines whether a defendant's acts violate reproduction rights. This test, which continues to plague U.S. copyright law, includes two widely adopted and influential prongs: (1) factual copying; and (2) improper appropriation. To establish factual copying, U.S. courts allow a sliding scale of proof between the defendant's *access* to the copyrighted work and *similarities* between the defendant's and plaintiff's works. The improper appropriation prong requires the similarities to reach a *substantial* level that is deemed improper. However, both prongs are fervently discussed, questioned, and criticized by U.S. courts, scholars, and practitioners. These critics neither form a unified understanding of each prong nor share similar viewpoints on the test's desirability and potential reform. Despite the test's intricate complications, its influence extends to other jurisdictions due to the global "reach" of U.S. copyright law.

China, a jurisdiction that has adopted many doctrines and rules from U.S. copyright law, seemingly uses a similar copyright infringement test: the rule of "substantial similarity" plus "access." The strikingly similar terminology, supported by anecdotal evidence, suggests a direct legal transplantation of this test from the U.S. to China. This observation implies that China essentially shares the same test as the U.S. due to this legal transplantation. However, positive discussions of China's law in books and

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empirical explorations of the law in practice in this Article reveal substantial differences from the U.S. version, despite the similar terminology, which remain unnoticed and underexplored in current literature. Although some spillover from the U.S. test to China is acknowledged, the similarities noted in the current literature are quite superficial. These differences raise several unexplored questions: Should China's test draw further from the U.S. to enhance future improvements? Does the Chinese version function effectively in practice and withstand theoretical scrutiny? If not, what should be the future direction for the Chinese version based on comparative insights? Should China consider a direct transplantation of the entire U.S. test in the future?

This Article unravels the differences between the U.S. and Chinese infringement tests and addresses these questions. It delves into the history of how the "substantial similarity" plus "access" test was introduced to Chinese copyright law and its relationship with the superficially similar U.S. test, indicating the potential spillover. It also offers some empirical evidence based on Chinese court cases applying the test to see how it functions in practice, with a particular focus on whether the Chinese test achieves similar outcomes to the U.S. test. The Article attempts to reveal whether the Chinese version achieves the intended function of copyright infringement tests and withstands theoretical discussions. This Article argues that the Chinese version is more desirable than the U.S. version for China. One reason is that the Chinese version better aligns with China's civil procedure law, which differs significantly from U.S. law. Also, the Chinese version can address the issues and problems identified in the current U.S. tests. Therefore, there should be caution about suggesting any future transplantation from the U.S. However, this Article acknowledges the vagueness and problems of the Chinese version and proposes a reformed test for Chinese law to better achieve its intended functions.

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INTRODUCTION

Copyright law remains at the forefront of the public's attention. The rampant spread of AI-generated works created through the ChatGPT or the more specifically designed Midjourney has catalyzed intensive judicial and scholarly debates on whether those works can ever receive copyright protection and whether they may potentially infringe prior copyrighted works.[1] The trending computer game available on Steam titled "Palworld," which used AI to create main characters imitating copyrighted Pokémon characters owned by The Pokémon Company, raised serious concerns about the copyright infringement issue yet was tremendously popular among players.[2] The essence of many copyright protection issues raised by the launch of a new controversial technology, product, or work centers on determining whether the conduct amounts to actionable copyright infringement.[3]

To sustain a copyright infringement claim, copyright holders need to establish the authorship or ownership of the copyrighted work, the copyrightability of the work, and, very importantly, the fact that alleged infringers' conduct falls into the domain of any of the copyright holder's exclusive rights.[4] While copyright holders enjoy various

1. *See, e.g.*, Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743 (2021); Jane C. Ginsburg & Luke Ali Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L.J. 343 (2019); Pamela Samuelson, *Fair Use Defenses in Disruptive Technology Cases*, 71 UCLA L. REV. (forthcoming 2024); Zhen (Katie) Feng et al., *Beijing Internet Court Grants Copyright Protection for AI Artworks, but Copyrightability Debate of AI-generated Output Continues*, HOGAN LOVELLS ENGAGE (Dec. 6, 2023), https://www.engage.hoganlovells.com/knowledgeservices/news/beijing-internet-court-grants-copyright-protection-for-ai-artworks-but-copyrightability-debate-of-ai-generated-output-continues [https://perma.cc/35U6-P6T6]; *The Yuan Global Talks on Generative AI and Human Creativity*, BERKELEY CTR. FOR L. & TECH (2024), https://www.law.berkeley.edu/research/bclt/bcltevents/yuan-global-talks/ [https://perma.cc/PXH2-6BGC].

2. *See, e.g.*, Adam Bankhurst, *The Pokemon Company Makes an Official Statement on Palworld: 'We Intend to Investigate'*, IGN (Jan. 25, 2024), https://www.ign.com/articles/the-pokemon-company-makes-an-official-statement-on-palworld-we-intend-to-investigate [https://perma.cc/2PB4-PX99] [https://web.archive.org/web/20241003002444/https://www.ign.com/articles/the-pokemon-company-makes-an-official-statement-on-palworld-we-intend-to-investigate]; Michael Nam, *'Palworld' Video Game Ignites Furor as It Becomes an Overnight Sensation*, CNN (Jan. 24, 2024), https://edition.cnn.com/2024/01/24/tech/palworld-sales-pokemon-with-guns/index.html [https://perma.cc/WDR6-ATQV] [https://web.archive.org/web/20240130160615/https://edition.cnn.com/2024/01/24/tech/palworld-sales-pokemon-with-guns/index.html].

3. An exception to this is the issue of AI authorship, which raises the question of whether AI-generated work can be copyrightable or whether AI can be considered as an author. Yet the ownership/authorship issue is also one of the steps in analyzing whether there is copyright infringement. The same applies to the fair use doctrine, which is also one critical step in copyright infringement analysis and is hotly debated as well. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Propertizing Fair Use*, 107 VA. L. REV. 1255 (2021); Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111 (2019).

4. *See, e.g.*, Shyamkrishna Balganesh, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 272 (2014); Zhang Xiaoxia (张晓霞) & Zhang Jiayi (张嘉艺), *Qin Quan Xing Wei Gou*

exclusive rights, the right to copy remains fundamental, even in today's digital environment.[5] The right to copy controls any unauthorized reproduction of the work, demanding the plaintiff to prove that their work was copied.[6] Yet the reproduction right does not just control literal copying (or copying verbatim), which should be an easy case for analysis.[7] It extends to some forms of non-literal copying, requiring courts to determine when and to what extent non-literal copying amounts to illegitimate copyright infringement.[8] That is why courts have developed and used the so-called copyright infringement test to decide whether there is actionable copying—a test that has long plagued courts and copyright experts and remains subject to heated debate.[9]

In the United States, the copyright infringement test primarily consists of two widely adopted and influential prongs: (1) factual copying; and (2) improper appropriation.[10] To establish factual copying, U.S. courts allow a sliding scale of proof between the defendant's *access* to the copyrighted work and *similarities* between the defendant's and the plaintiff's works.[11] The improper appropriation prong requires the similarities to reach a *substantial* level that is deemed improper.[12] However, U.S. courts, scholars, and practitioners fervently discuss, question, and criticize both prongs. They neither form a unified understanding of each prong nor share similar viewpoints on the test's desirability and potential reform.[13] Despite the test's intricate complications,

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Cheng Yao Jian Dui "Jie Chu Jia Shi Zhi Xiang Si" Gui Ze De Zhi Heng—Lun Qin Hai Zuo Quan Jiu Fen De Cai Pan Si Lu (*侵权行为构成要件对"接触加实质性相似"规则的制衡—论侵害著作权纠纷的裁判思路*) [*On the Balance of the Constituent Elements of Tort Against the "Access Plus Substantial Similarity" Rule—on the Adjudication Thinking of Copyright Infringement Disputes*], 12 ZHI SHI CHAN QUAN (知识产权) [INTELL. PROP.] 40, 45 (2021).

5. *See, e.g.*, Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 205 (2012). *See generally*, Glynn S. Lunney Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001); Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245 (2001).

6. Balganesh, Manta, & Wilkinson-Ryan, *supra* note 4, at 272.

7. *See* Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1822 (2013).

8. *See id.* at 1822–23.

9. *See, e.g.*, Shyamkrishna Balganesh & Peter S. Menell, *Proving Copying*, 64 WM. & MARY L. REV. 299 (2022); Clark D. Asay, *An Empirical Study of Copyright's Substantial Similarity Test*, 13 UC IRVINE L. REV. 35 (2022); Daryl Lim, *Saving Substantial Similarity*, 73 FLA. L. REV. 591 (2021); Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791 (2016).

10. The two-prong test originates from the Second Circuit in *Arnstein v. Porter*. 154 F.2d 464 (2d Cir. 1946). *See* Asay, *supra* note 9, at 43–50; Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S. 719, 721–22 (2010). It should be noted, however, that there are some differences between the tests adopted by the Ninth Circuit and the Second Circuit, though in essence they more or less both require the substance of the two prongs. *See* Douglas Y'Barbo, *The Origin of the Contemporary Standard for Copyright Infringement*, 6 J. INTELL. PROP. L. 285, 294–300 (1999).

11. Balganesh & Menell, *supra* note 9, at 304–05.

12. *See* Lim, *supra* note 9, at 602.

13. *See generally* Lim, *supra* note 9; Lemley, *supra* note 10; Asay, *supra* note 9 (giving empirical evidence on diverse approaches taken by courts across the states); Balganesh & Menell, *supra* note 9 (discussing some courts' misunderstandings of the first prong); Alan Latman, *Probative Similarity as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187 (1990) (focusing on the true meaning of "substantial similarity" in the first prong); Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303 (2012)

its influence extends to other jurisdictions due to the global "reach" of U.S. copyright law.[14]

China is one of the jurisdictions whose intellectual property ("IP") laws, including copyright law, have adopted many doctrines and rules from the United States.[15] The country uses a seemingly similar copyright infringement test—the rule of *substantial similarity* plus *access*—that allegedly derives from the U.S. test, consciously or subconsciously.[16] The strikingly similar usage of terminology, along with anecdotal evidence,[17] both point to a conclusion: There is a direct legal transplantation of the test from the U.S. to China. A further inference from this observation is that China shares essentially the same test as the U.S. due to this legal transplantation.

However, despite the similar terminology, the positive discussions of China's law in books and empirical explorations of the law in practice in this Article reveal substantial differences with the U.S. version.[18] These differences remain unnoticed and underexplored in current literature. Some literature hints at the spillover or potential transplantation of the Chinese test from the U.S. but fails to uncover the meaningful divergences between them, sloppily equating the two.[19] Some regretfully misunderstands the functions of each prong of the U.S. test and, accordingly, applies these misunderstandings to the Chinese test under the premise of legal transplantation.[20] Several others refuse to acknowledge any spillover, much less legal

(identifying the bias concerning the copyright infringement test); Daniel Gervais, *Improper Appropriation*, 23 LEWIS & CLARK L. REV. 599 (2019) (debating on the "improper appropriation" prong).

14. For example, due to its influence, some civil law jurisdictions, such as China, Japan, and Germany also adopt similar versions of the test. *See* Zhang & Zhang, *supra* note 4, at 42.

15. *See* Tianxiang He, *Transplanting Fair Use in China? History, Impediments and the Future*, U. ILL. J.L. TECH. & POL'Y 359, 361–62 (2020). For other IP laws, *see* Yang Chen, *Development of China's Trade Secrets Law in the US' Shadow: Negative Consequences for China and Suggestions*, 17 U. PA. ASIAN L. REV. 138, 161–68 (2022).

16. *See* Liu Lin (刘琳), *Woguo Banquan Qin Quan "Jie Chu" Yao Jian De Jian Tao Yu Zhong Gou* (*我国版权侵权"接触"要件的检讨与重构*) [*Review and Reconstruction of the "Access" Element of Copyright Infringement in China*], 11 ZHI SHI CHAN QUAN (知识产权) [INTELL. PROP.] 71, 72–73 (2021); Zhang & Zhang, *supra* note 4, at 42.

17. *See infra* Part II.A.

18. *See infra* Parts II–IV.

19. *See, e.g.*, Wu Handong (吴汉东), *Shi Lun "Shi Zhi Xiang Si + Jie Chu" De Qin Quan Ren Ding Gui Ze* (*试论"实质性相似＋接触"的侵权认定规则*) [*On the Rule of Infringement Determination of "Substantial Similarity + Access"*], 8 FA XUE [L. SCI.] 63, 63 (2015) (mentioning only that the test originates from the U.S. without offering more details or more nuanced comparison); Zhang & Zhang, *supra* note 4, at 41–43 (providing a brief discussion on China's transplantation of the test from the US without offering more details or specifics of the U.S. test); Liang Zhiwen (梁志文), *Banquan Fa Shang Shi Zhi Xiang Si De Pan Ding* (*版权法上实质性相似的判断*) [*Judgment of Substantial Similarity in Copyright Law*], 6 FA XUE JIA [JURIST] 37, 40–41 (2015) (discussing the origin of the second prong (substantial similarity) but does not mention the first prong (access) since it is not the focus of the article); Jinchuan Chen (陈锦川), *Xiao Yi "Jie Chu Jia Shi Zhi Xiang Si" Gui Ze* (*小议"接触加实质性相似"规则*) [*Brief Discussion on the Rule of "Access Plus Substantial Similarity"*], 1 ZHONG GUO BAN QUAN [CHINA COPYRIGHT] (Mar. 2, 2018) (mentioning that the China test was directly transplanted by Chinese courts from the U.S. as the Chinese statute never mentions any similar two-prong test), https://mp.weixin.qq.com/s/ESaLfdjci4mYOVMvArRI-w[https://perma.cc/25XN-ANY8].

20. *See, e.g.*, Liu, *supra* note 16, at 80–81 (misunderstands the "inverse ratio rule" which only exists in the first prong of the U.S. test rather than the second prong).

transplantation, from the U.S. test to the Chinese one,[21] which, in certain ways, muddies the understanding of the functions and purposes of the test.

The current literature not only fails to reveal the differences between the Chinese test and the U.S. version, but it also leaves important questions unexplored: Does the Chinese version function effectively in practice and withstand theoretical scrutiny? If not, what direction should the Chinese version take based on comparative insights? Should China directly transplant the entire U.S. test for future improvements? In other words, should China's test continually draw lessons from the U.S. for ongoing enhancements?

This Article addresses these research gaps. It acknowledges the spillover from the U.S. test to China, underscoring the importance of understanding the nuances of the Chinese test through the comparative lens of the U.S. test. However, the similarities observed in the current literature between the Chinese and U.S. versions are quite superficial. The empirical evidence presented in this Article, along with a deeper examination, reveals substantial divergences, making it inappropriate to equate the two superficially. This Article argues that these divergences stem from significant differences in the civil procedure laws of the two jurisdictions. Indeed, the Chinese version is more suitable for China as it aligns better with China's civil procedure law and addresses the issues and problems identified in current U.S. tests. Therefore, this Article cautions against any future legal transplantation from the U.S. It also acknowledges the vagueness and problems of the Chinese version and proposes a reformed test for Chinese law to better fulfill its intended functions.

To articulate these arguments, this Article is structured as follows: Part I provides more accurate details of the U.S. copyright test(s) that the current literature in China fails to offer, setting the stage for a more precise understanding and comparison with the Chinese test. Part II then provides a comprehensive account of the Chinese test by discussing the laws on the books and presenting empirical evidence on how the Chinese test functions in practice. Part III first delves briefly into the history of the substantial similarity plus access test in Chinese copyright law and its relationship with the superficially similar U.S. test, suggesting a spillover effect. It then builds on the explorations in Parts I and II, uncovering the substantial divergences between the

21. *See, e.g.*, Wenjie Ding (丁文杰), *Jie Chu Yao Jian De Ji Ben Nei Han Ji Ren Ding Gui Ze* (*接触要件的基本内涵及认定规则*) [*The Basic Connotation and Recognition Rules of Access Elements*], 3 ZHI SHI CHAN QUAN (知识产权) [INTELL. PROP.] 24, 29 (2019) (only footnote 33 briefly mentions the U.S. two-prong test); Xiaozhou Zhou (周小舟), *Lun Jie Chu Yao Jian Zai Jie Jie An Zhong De Cheng Xu He Shi Zhi Yi Yi—Cong "Xiao Zhan" An Qie Ru* (*论接触要件在剽窃案中的程序和实质意义—从《小站》案切入*) [*On the Procedural and Substantive Significance of the Access Element in Plagiarism Cases—From the Case of "Xiao Zhan"*], 2 HUA DONG ZHENG FA DA XUE XUE BAO [J. EAST CHINA UNI. POLIT. SCI. & L.] 108 (2016); Haijun Lu (卢海君), *Lun Zuo Pin Shi Zhi Xiang Si He Ban Quan Qin Quan Pan Ding De Lu Jing Xuan Ze—Yue Jian Zhu Yi Yu Zheng Ti Gai Nian He Gan Jue Yuan Ze* (*论作品实质性相似和版权侵权判定的路径选择—约减主义与整体概念和感觉原则*) [*On the Path Choice of Substantial Similarity of Works and Copyright Infringement Determination—Reductionism and the Principle of Overall Concept and Feeling*], 1 ZHENG FA LUN CONG [POLIT. & L. FORUMS] 138 (2015).

Chinese and U.S. tests, despite the spillover, and disproving the superficial equivalence between the two. Part IV justifies these divergences, advises against any future legal transplantation from the U.S., and offers normative suggestions for improving the Chinese test.

I. COPYRIGHT INFRINGEMENT TESTS IN THE UNITED STATES: SETTING THE COMPARISON FORUM

The U.S. copyright infringement test is important locally and globally because it spills over into other jurisdictions through explicit legal transplantation or implicit reference.[22] Yet the test still plagues U.S. courts and local copyright scholars despite its transnational effect.[23] This Article primarily intends to dissect the Chinese test by comparing it with the U.S. version, so there is no need to join the endless debate on how each prong of the U.S. test *should* be. It suffices to offer relatively accurate and commonly shared understandings of what the U.S. test is *now* and what functions each prong tends to achieve to set the stage for comparison.

The following sections briefly introduce the history of the U.S. copyright infringement test and discuss the two commonly used versions adopted by the Ninth Circuit and the Second Circuit. Then, they dive into the Second Circuit's two-prong test with a keen focus on what functions each prong strives to achieve from the perspectives of copyright and civil procedure law.

A. COPYRIGHT INFRINGEMENT TESTS: THE DIVISION BETWEEN THE NINTH AND SECOND CIRCUITS

Though U.S. courts currently lack a unified legal standard to determine copyright infringement,[24] most have relied upon the approaches adopted by the Second Circuit in *Arnstein v. Porter* and the Ninth Circuit in *Sid and Marty Krofft*.[25] Other circuits explicitly or implicitly follow one of these two approaches or treat them interchangeably, blending or switching between them.[26] These two approaches can serve as rough proxies for the copyright infringement tests used nationwide.

In *Arnstein*, the Second Circuit creatively introduced the "notorious" two-prong test to the copyright regime, though it was the *dicta* in the opinion that developed the test,

22. *See supra* note 14 and accompanying text.

23. *See supra* note 13 and accompanying text.

24. *See* Y'Barbo, *supra* note 10, at 285; Asay, *supra* note 9, at 43–50 (descriptions of seemingly similar but still different copyright infringement tests adopted by different courts in the U.S.); Balganesh & Menell, *supra* note 9, at 302 (Congress never set forth an infringement test, leaving room for judicial development).

25. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Lemley, *supra* note 10, at 719; Y'Barbo, *supra* note 10, at 285.

26. Y'Barbo, *supra* note 10, at 316; Manta, *supra* note 13, at 1334–1336 (explaining that most circuits adopted either the *Arnstein* or the *Krofft* test with occasional modifications depending on the circumstances).

the precedential influence of which Judge Frank may not have anticipated.[27] The *Arnstein* test uses two prongs to determine whether the defendant substantially copied and infringed the plaintiff's copyrighted work. It requires plaintiffs to prove "(a) that defendant copied from plaintiff's work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation."[28] Motivated by the Second Circuit's approach, the Ninth Circuit formulated its own version of this two-prong test, demanding the plaintiff to prove (a) whether there is substantial similarity of ideas (extrinsic test) and (b) whether there is substantial similarity in expressions (intrinsic test).[29]

Though the Ninth Circuit explicitly mentions the *Arnstein* test as the basis for its test and intends to achieve similar functions,[30] some scholars argue that the two versions still differ.[31] While the Second Circuit divides the infringing copying issue into two, with only the second prong dedicated to the question of unlawful appropriation, both prongs of the Ninth Circuit's test point to the improper appropriation issue.[32] Put another way, the Ninth Circuit's two prongs "implicitly subsume[]" the derivation (actual copying) issue, whereas the Second Circuit uses prong one to determine the actual copying.[33] Yet because both versions require similar elements, scholars also widely recognize their similar purposes and functions.[34]

This is one reason this Article primarily uses the *Arnstein* test as the comparison point and refrains from delving into the detailed differences between the two versions. The *Arnstein* test, as the model of the two-step test widely adopted in the United States, is sufficient for this comparative study. More importantly, as elaborated shortly, it is the *Arnstein* test that uses the same terms as the Chinese version of the copyright infringement test ("access" and "substantial similarity").[35] With these factors in mind, the following sections dissect the *Arnstein* test by exploring the prongs' unique relationship and procedural functions.

B. THE TWO PRONGS OF THE *ARNSTEIN* TEST: AN INTRICATE RELATIONSHIP

Each prong of the *Arnstein* test demands distinct proof and serves different functions. The first prong (the actual copying prong) can be established through direct

27. *See, e.g.*, Balganesh, *supra* note 9, at 804–09, 811–13.

28. *Arnstein*, 154 F.2d at 468.

29. *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164–65.

30. *Id.* at 1165.

31. *See, e.g.*, Samuelson, *supra* note 7, at 1829–30; Lim, *supra* note 9, at 610–11; Y'Barbo, *supra* note 10, at 294–300.

32. *See* Y'Barbo, *supra* note 10, at 295–96; Lim, *supra* note 9, at 611.

33. Y'Barbo, *supra* note 10, at 296; Gervais, *supra* note 13, at 610–11.

34. *See, e.g.*, Lemley, *supra* note 10, at 723 (stating the Ninth Circuit takes the same basic two-step approach).

35. *See infra* Part II.

or circumstantial evidence.[36] Direct evidence includes admissions made by defendants or eyewitness testimony about the copying conduct of defendants—both of which are rare.[37] The infrequent appearance of direct proof renders the circumstantial evidence pivotal in inferring the actual copying. Two common pieces of circumstantial evidence recognized by precedent to infer the existence of actual copying, which always function in combination with each other, are "the defendant's access to the plaintiff's work and what courts call 'substantial similarity.'" [38] As such, prong one can roughly be summarized as substantial similarity plus access.

The prevalent interpretation of access is proof of an opportunity to copy the copyrighted work.[39] In other words, the access does not need to be actual contact with the work; it can be a reasonable possibility of access as long as it is more than a "bare possibility based on mere speculation or conjecture."[40] The plaintiff may succeed in proving access through widespread dissemination of the copyrighted work or the defendant's receipt of the work from the plaintiff.[41] The threshold for proving access is, thus, relatively low, which may be why prong one is satisfied at a high rate, particularly when many courts simply rubber stamp prong one *only* through access (wholly disregarding the substantial similarity).[42]

While access is a relatively easier and much less contested issue, substantial similarity in the first prong is more controversial as it involves indirect proof of "similarities sufficient to prove copying."[43] One may, however, easily confuse it with the substantial similarities required to constitute the improper misappropriation in the second prong, as many courts use the same terminology to refer to the similarities required in both prongs.[44] Due to this double use of terminology, some courts have conflated substantial similarity in the two prongs, lumping them together as a single test.[45] As further explored in Part IV, this is likely the same "mistake" Chinese courts made when they transplanted the U.S. test consciously or subconsciously,[46] making the accurate understanding of prong one and its relationship with prong two pivotal.

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36. Balganesh & Menell, *supra* note 9, at 304; Lydia Pallas Loren & Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 641–42 (2019).

37. Loren & Reese, *supra* note 36, at 641; Balganesh & Menell, *supra* note 9, at 304; Lemley, *supra* note 10, at 719–20.

38. Lemley, *supra* note 10, at 719–20; Balganesh & Menell, *supra* note 9, at 304; Balganesh, Manta, & Wilkinson-Ryan, *supra* note 4, at 272–73.

39. Stacy Brown, *The Corporate Receipt Conundrum: Establishing Access in Copyright Infringement Actions*, 77 MINN. L. REV. 1409, 1417–18 (1993).

40. *Id.*; Lim, *supra* note 9, at 600.

41. Lim, *supra* note 9, at 600–01.

42. *See* Asay, *supra* note 9, at 75–77.

43. Latman, *supra* note 13, at 1193.

44. *See id.* at 1190–91; Lemley, *supra* note 10, at 720; Balganesh & Menell, *supra* note 9, at 305.

45. *See* Lemley, *supra* note 10, at 720; Latman, *supra* note 13, at 1190; Asay, *supra* note 9, at 76–77 (empirical evidence on some courts lumping the substantial similarity question together within the prong two).

46. *See infra* Part IV.

The circumstantial proof of substantial similarity in prong one never truly requires plaintiffs to raise the similarity to a substantial level, despite using the word "substantial" in some cases.[47] Instead, the substantial similarity in prong one can be proven by some similarities between the two works that suggest copying.[48] In other words, the role of prong one's substantial similarity is merely *probative*, allowing courts to infer copying from certain similarities along with other circumstantial evidence (particularly access).[49] It would be more proper to call it "probative similarity."[50] Nevertheless, the substantial similarity of prong one can be quite striking in some scenarios, even rising to a level higher than substantial. Yet, no matter how substantial or striking, the similarity in prong one would not, on its own, resolve the infringement issue.[51] Its function is purely probative in that a higher level of similarity can ease the evidentiary burden of plaintiffs in offering other circumstantial evidence.[52]

The famous "inverse ratio rule" vividly demonstrates the probative value of prong one substantial similarity.[53] According to the rule, "the more compelling the similarities supporting an inference of copying, the less compelling the evidence of access need be."[54] Striking or extensive similarity may even allow courts to dispense with proof of access altogether.[55] Conversely, the probative value of a lower level of similarity in proving actual copying can be compensated for by strong evidence of access, though similarity can never be dispensed even when there is striking evidence of access.[56] The rule recognizes the inversely proportional relationship between the probative values of substantial similarity and access in prong one, treating both as two points of inference on actual copying.[57]

Yet some courts' conflation of substantial similarity in prongs one and two also causes them to misapply the inverse ratio rule.[58] They erroneously allowed "a lower level of improper misappropriation, the second infringement prong, upon a showing of greater proof of access."[59] Put another way, they wrongfully applied the inverse ratio rule, which should only function in inferring actual copying in prong one, in deciding prong two. Such misapplication led to the Ninth Circuit rejecting the rule in its en banc opinion in *Skidmore v. Led Zeppelin*, which received applause from copyright scholars

47. *See* Latman, *supra* note 13, at 1204; Y'Barbo, *supra* note 10, at 290.

48. Asay, *supra* note 9, at 44.

49. *See, e.g.*, Latman, *supra* note 13, at 1204; Balganesh & Menell, *supra* note 9, at 306.

50. *See generally* Latman, *supra* note 13 (suggesting calling the substantial similarity in the prong one probative similarity).

51. Prong one only deals with the actual copying issue instead of the infringement issue. *See supra* text accompanying notes 10–12.

52. *See, e.g.*, Latman, *supra* note 13, at 1204–05.

53. For a comprehensive understanding of the inverse ratio rule, see generally Balganesh & Menell, *supra* note 9.

54. Rentmeester v. Nike, Inc., 883 F. 3d 111, 1124 (9th Cir. 2018); *see id.* at 310.

55. Balganesh & Menell, *supra* note 9, at 319; Latman, *supra* note 13, at 1204; Loren & Reese, *supra* note 36, at 642.

56. *See* Balganesh & Menell, *supra* note 9, at 319, 332.

57. Loren & Reese, *supra* note 36, at 642.

58. *See* Balganesh & Menell, *supra* note 9, at 305–06.

59. *Id.* at 305.

and lawyers who share the same mistaken view of the rule.[60] Nonetheless, a correct and more precise understanding of the *Arnstein* test treats substantial similarity in prong two as a standalone issue, leaving no room for applying the inverse ratio rule.

Prong two deals with the question of whether the copying by defendants (proven by prong one) amounts to improper appropriation.[61] The copying should result in a work that shares substantial similarities with copyrighted work to become illicit copying; in other words, a work that includes more than a *de minimis* amount of copyrightable expression. [62] Courts ask whether "a defendant's copying is quantitatively and qualitatively 'enough' to be rendered actionable" under prong two's substantial similarity requirement[63] and may examine whether the ordinary observer of the two works would consider the copying substantial enough to be wrongful.[64] Though the evidence on similarities can function twice in prongs one and two, prong two points to a distinct issue and entails differentiated criteria and requirements for the level of similarities. Thus, despite their intricate relationship, one should treat prong two as distinct from prong one for a more accurate understanding of the U.S. copyright infringement test.

C. DELINEATING THE RELATIONSHIP: THE PROCEDURAL FUNCTIONS OF EACH PRONG

While it is critical to understand the substantive functions of each prong, for comparison purposes, having a basic knowledge of why *procedurally* the *Arnstein* test adopts the bifurcated test is equally pivotal. The reason is that the unique procedural need for the United States to adhere to the two-prong test may explain why China has adopted a seemingly similar yet essentially different test.[65] The widespread adoption of the two-prong test in U.S. courts can be attributed to the special jury system (compared to China) and the availability of the distinctive summary judgment in U.S. civil procedure.[66]

Examining the history of the *Arnstein* test, one can see Judge Frank's procedural focus when formulating his opinions, with the substantive content attributed to the two prongs largely emerging as an ancillary outcome.[67] As a strong opponent to the

60. *See id.* at 306.

61. *See, e.g.*, Lim, *supra* note 9, at 601–02.

62. *See id.*; Lemley, *supra* note 10, at 720; Asay, *supra* note 9, at 45–46; Balganesh, Manta, & Wilkinson-Ryan, *supra* note 4, at 272.

63. Balganesh, *supra* note 5, at 216.

64. *Id.* at 217; The ordinary observer test is adopted by the Second Circuit, where the *Arnstein* test originates from. However, there are also different tests used to judge substantial similarity. *See* Asay, *supra* note 9, at 46–48, 79–86.

65. *See infra* Part IV.

66. For a history and deeper thoughts on why the *Arnstein* court created the two-prong test, see generally Balganesh, *supra* note 9. The primary reason for Judge Frank to bifurcate the copyright infringement test is his desire to ensure the plaintiff obtained a jury trial in lieu of summary judgment. *See* Balganesh, *supra* note 9, at 842–47.

67. *See id.* at 804–09, 839–42.

increasing trend of using summary judgment to resolve issues of facts, Judge Frank tried to require the lower court to only allow summary judgment in cases when there is the slightest doubt as to the facts; otherwise, the plaintiff deserves a jury trial.[68] He applied the same standard to copyright infringement and divided the issue of the slightest doubt, a factual question, into two prongs—a novel approach with little precedent.[69] For the actual copying prong, which is genuinely an issue of fact, Judge Frank allowed the use of expert witnesses and a dissection of the work for comparing similarities.[70] He should have stopped at the actual copying prong, as the trial court only dealt with whether the defendant truly copied the plaintiff's work.[71] However, Judge Frank was concerned that the trial court might use summary judgment to resolve the improper appropriation once the case was sent back. Therefore, he turned his attention to prong two.[72]

Prong two can be framed as a question of whether the ordinary observer or lay audience believes that enough of the parts "pleasing to [them]" have been taken (in other words, their impression about the impropriety of the appropriation).[73] Because the ordinary observer test concerns the reactions of lay observers, any expert testimony or dissection for comparison was deemed irrelevant to the determination.[74] In other words, applying the ordinary observer test, the court would not allow a component-by-component comparison but instead assess the overall similarity between the two works to determine prong two.[75] As the second part of the copyright infringement test, prong two can determine the merits of the case, which was why Judge Frank construed it as an issue of fact for the jury to decide.[76] However, he disregarded the fact that substantial subjective and normative judgments are required when determining whether the copying amounts to an improper level.[77]

Judge Frank's (over)focus on procedural needs makes prong two a hotly debated and criticized part of the copyright infringement test. Several scholars have questioned the exclusion of expert witnesses and of comparison after dissection in prong two.[78] They have expressed worries about lay observers' unfamiliarity with several important copyright doctrines which divide unprotected elements with protectable expressions, such as the merger and *scènes à faire* doctrines.[79] Without expert evidence and proper dissection, the jury could easily form their overall impression on similarities based on

68. *See id.* at 804.
69. *See id.* at 804, 842–44.
70. *See id.* at 804–05.
71. *See id.* at 806–07.
72. *See id.* at 807–08.
73. *Id.* at 807. *See also* Samuelson, *supra* note 7, at 1825.
74. Balganesh, *supra* note 9, at 805; Balganesh, *supra* note 5, at 217–18.
75. Balganesh, *supra* note 5, at 217.
76. *See* Balganesh, *supra* note 9, at 807–08, 844–47.
77. *See id.* at 807; Balganesh, *supra* note 5, at 217; Lemley, *supra* note 10, at 737–38; Lim, *supra* note 9, at 606–07 (arguing that every case becomes a decision maker's value judgment).
78. *See, e.g.*, Lemley, *supra* note 10, at 737–40; Samuelson, *supra* note 7, at 1826–27.
79. *See* Lemley, *supra* note 10, at 737–39; Samuelson, *supra* note 7, at 1826–27. *See generally* Manta, *supra* note 13, at 1335–36 (arguing that the test leads to inconsistent and unclear jury instructions).

unprotected elements, which should not be the basis for a finding of copyright infringement.[80] Other scholars have voiced concerns that jurors may easily allow a determination of actual copying to spill over to a finding of substantial similarity, making prong two easier to satisfy.[81] A lay jury is more likely to lump together the act of copying and the impropriety of the act.[82] Controversies on the bifurcated test in U.S. copyright law endure.

In this way, the two-prong test in U.S. copyright law originated from Judge Frank's desire to have copyright infringement decided by a jury rather than a court (on summary judgment).[83] The *Arnstein* court did not rationalize the division between actual copying and improper appropriation well, nor the substantive content of each prong, resulting in intense criticism from scholars and inconsistent application and interpretation by other courts.[84] Understanding the U.S. two-prong test and its procedural considerations can enlighten our positive and empirical explorations of the Chinese test in the next section, which uses seemingly similar terminology.

II. POSITIVE AND EMPIRICAL ACCOUNTS: CHINA'S SEEMINGLY SIMILAR TEST

A. CHINESE TEST ON THE BOOKS

Neither the PRC Copyright Act nor judicial interpretations and administrative regulations offer any guidance on determining copyright infringement.[85] Such a determination largely depends on the courts' discretion in approaching the issue—with no guarantee of uniform determinations. However, despite some cross-court divergences,[86] Chinese courts generally have adopted a facially similar version of substantial similarity plus access in deciding copyright cases.[87] Due to limited primary sources, it is not feasible to pinpoint when Chinese courts started to use the test and where they transplanted it from or, much more unlikely though possible, how and when they developed it from scratch. Anecdotal evidence shows that Chinese courts have applied the test at least since 2010, when the Guangzhou Intermediate Court decided one of the top ten IP cases that year (as designated by the Supreme People's

80. *See* Lemley, *supra* note 10, at 737–39; Samuelson, *supra* note 7, at 1826–27.

81. *See* Manta, *supra* note 13, at 1339–41; Samuelson, *supra* note 7, at 1826.

82. Manta, *supra* note 13, at 1341.

83. Balganesh, *supra* note 9, at 846.

84. For how different courts differ from each other even though they more or less adopt the similar bifurcated test, see Asay, *supra* note 9, at 75–89.

85. No provision in the PRC Copyright Act, the 2020 SPC Judicial Interpretation on the Copyright Act, or the Regulations on the Protection of Computer Software ever touches on the test for determining copyright infringement. Some argue that, in China, the determination of copyright infringement should follow the standard elements for torts. *See generally*, Zhang & Zhang, *supra* note 4.

86. *See infra* Part II.B for empirical results.

87. *See* sources cited, *supra* note 16.

Court ("SPC")).[88] In a case comment on another case in 2010, one of the judges explicitly referred to substantial similarity plus access as the basic rule for judging copyright infringement in Chinese judicial practice.[89]

On the surface, the Chinese appear to follow a two-prong test consisting primarily of access and substantial similarity.[90] To sustain the copyright infringement, the plaintiff should offer evidence to prove that the defendant has access to the copyrighted work. However, actual access to the work is not required; per common court practice, evidence of the possibility of access to the work or potential contact with the work will suffice.[91] In other words, plaintiffs can relatively easily dispense with the burden of proof under the access prong by showing that the defendants have chances to access the copyrighted work.[92] It allows courts to infer the existence of actual access to—or contact with—the work through a mere possibility of access, substantially alleviating the burden of proof for plaintiffs.[93] The overly low threshold for access in China receives harsh criticism from some scholars who argue for paying more attention to the access issue rather than treating it as an insignificant and subsidiary prong compared to substantial similarity."[94]

Substantial similarity is a more hotly discussed prong in the Chinese test because it serves a pivotal gatekeeping function.[95] Plaintiffs must prove substantial similarities between the copyrighted work and the defendant's work to sustain an infringement claim, which again seems akin to prong two of the U.S. test.[96] Indeed, the primary approaches Chinese courts use to judge the substantial similarity between works,

88. *See* Guangzhou Shi Ka Shi Tu Zhi Yi Youxian Gongsi v. Guangzhou Shi Jie Hui Fuzhuang Youxian Gongsi, Zhu Moumou (广州市喀什图制衣有限公司诉广州市杰晖服装有限公司、朱某某侵犯著作权纠纷案) [Copyright Infringement Dispute Between Guangzhou Kashitu Garment Co., Ltd., Guangzhou Jiehui Garment Co., Ltd., and Zhu Moumou], 知产宝 [Intell. Prop. House] (Guangzhou Intermediate People's Ct., 2010) (China). One of the three judges, Wenbing Zhu, a JSD candidate at City University of Hong Kong School of Law, claimed the case as the first one in China explicitly adopting the "Substantial Similarity" plus "Access" test in copyright infringement cases.

89. Jianjun Zhu (祝建军), *Pan Ding Qin Fan Zuo Quan Gui Ze De Fa Lu Shi Yong—Shen Zhen Zhong Yuan Pan Jue Da Zu Ji Guang Gong Si Su Ao Hua Ji Guang Gong Si Qin Fan Zuo Quan Jiu Fen An* (*判定侵犯著作权规则的法律适用—深圳中院判决大族激光公司诉奥华激光公司侵犯著作权纠纷案*) [*Legal Application of the Rule for Determining Copyright Infringement—Judgment of Shenzhen Intermediate Court on the Copyright Dispute Case Between Dazu Laser Company and Aohua Laser Company*], 6 REN MIN FA YUAN BAO [PEOPLE'S COURT DAILY] (2011).

90. *See, e.g.*, Zhou, *supra* note 21, at 108–10; Xiong Qi (熊琦), *Jiechu + Shizhixing Xiangsi Shi Banquan Qinquan Rending De "Shenqi" Ma?* (*接触+实质性相似是版权侵权认定的"神器"吗？*) [*Is "Access + Substantial Similarity" a "Magic Weapon" for Copyright Infringement Determination?*], 10 ZHONGGUO ZHISHI CHANQUAN BAO [CHINA INTELL. PROP. NEWS] (2017); Zhang & Zhang, *supra* note 4, at 41; Liang, *supra* note 19, at 38.

91. *See* Ding, *supra* note 21, at 26; Liu, *supra* note 16, at 78–80.

92. *See* Yu Zheng Yu Dongyang Xing Rui Yingshi Wenhua Chuanmei YouXian Gongsi (余征与东阳星瑞影视文化传媒有限公司) [Yu Zheng v. Dongyang Xingrui Film and Television Culture Media Co., Ltd.] (Beijing High People's Ct. 2015); Ding, *supra* note 21, at 26.

93. Ding, *supra* note 21, at 28; Zhou, *supra* note 21, at 112.

94. *See* Liu, *supra* note 16, at 74–78.

95. *See, e.g.*, Liu, *supra* note 16, at 71–72; Ding, *supra* note 21, at 24. In the U.S., there is also more attention drawn to the substantial similarity prong. *See* Balganesh & Menell, *supra* note 9, at 303.

96. *See* text accompanying *supra* notes 61–64.

namely comparison after dissection or the abstraction-filtration-comparison, come from U.S. law.[97] However, the intended function of the substantial similarity prong in the Chinese context remains unspecified, unlike prong two of the U.S. test, which is designed to exclude trivial copying and other instances of copying that do not reach the threshold of impropriety.[98] Some Chinese judges have hinted in case comments that the substantial similarity prong aims to test whether the defendant's work is original enough to receive standalone copyright protection.[99] Still, one may argue that the Chinese substantial similarity prong serves a similar function to the U.S. improper appropriation prong because they share similar approaches for determination.[100]

Despite the apparent and striking similarities to the U.S. test—particularly in employing a two-prong approach and utilizing identical terminology—distinct substantive and procedural differences emerge, as discussed later in Part III.[101] These differences raise the question of whether the divergent test adopted in China, despite the spillover from the U.S.,[102] is adequate with careful local adjustment, or if China should directly transplant the entire test from the U.S. to achieve the desired results. Before addressing these critical questions, the next section illustrates how Chinese courts have applied the test in practice, thereby elucidating its practical application to enhance the subsequent comparison.

B. THE CHINESE TEST IN PRACTICE: AN EMPIRICAL STUDY

No prior empirical work explores how the Chinese courts approach the copyright infringement issue concerning the substantial similarity plus access test. Therefore, this Article offers insight into how the two-prong test works in China to provide a more accurate comparison with the U.S. test. To be more precise, this section explores and tests the following questions to facilitate comparison: First, what approach(es) do Chinese courts take in terms of deciding the "access" prong? Specifically, what types of evidence are considered to establish the existence of access, and what functions does the access prong serve in the copyright infringement analysis? Second, how do Chinese courts determine "substantial similarity," and how do these methods compare to those used in the U.S.? Additionally, what role does the substantial similarity prong serve in terms of copyright infringement analysis in China? Third, and equally important, what

97. Lu, *supra* note 21, at 138–40; Liang, *supra* note 19, at 38–41; Haoning Feng (冯颢宁), *Lun Ban Quan Fa Zhong Shi Zhi Xiang Si Ren Ding Biao Zhun De Xuan Ze* (*论版权法中实质性相似认定标准的选择*) [*On the Choice of Substantial Similarity Determination Standard in Copyright Law*], 6 ZHONG GUO BAN QUAN [CHINA COPYRIGHT] 77, 77–78 (2016) (arguing that the tests used to judge substantial similarity originate from the U.S.).

98. *See supra* notes 61–64 and accompanying text.

99. *See* Guoquan Li (李国泉), Zhongliang Shou (寿仲良), and Wentao Dong (董文涛), *Shi Zhi Xiang Si Jia Jie Chu De Qin Quan Biao Zhun Pan Ding* (*实质性相似加接触的侵权标准判断*) [*Judgment of Infringement Standard for Substantial Similarity Plus Access*], 16 REN MIN SI FA [PEOPLE'S JUDICIARY] 37, 38 (2010). Some scholars in China also adopt the same viewpoint. *See* Zhang & Zhang, *supra* note 4, at 42–43.

100. *See, e.g.*, Wu, *supra* note 19, at 67–68. For a more detailed comparison, see *infra* Part III.

101. *See infra* Part III.

102. *See infra* notes 141–144 and accompanying text.

is the relationship between the access prong and the substantial similarity prong in China?

1. Study Design and Data Collection

This Article created an original dataset for this study. The data (coding results drawn from judgments decided by Chinese courts) comes from Wolters Kluwer ("WK"), one of the most widely used commercial legal databases in China.[103] The study used WK rather than China Judgments Online ("CJO"), the unified official judicial documents publication database maintained by the SPC, for three reasons. First, the CJO remains one of the primary sources from which WK would collect data on Chinese judgments. Therefore, WK includes most judgments available on the CJO, updating judgments published by all levels of Chinese courts on a daily basis.[104] Second, WK obtains additional judgments from other sources, such as important cases published in printed journals, making its database even more comprehensive than the CJO.[105] Third, WK is more convenient than the CJO for searching for judgments, making it a popular choice for empirical studies in China.[106]

To search for Chinese judgments in the WK database that apply substantial similarity plus access, we used the search function named "search in the whole

103. *See* WOLTERS KLUWER, https://law.wkinfo.com.cn/?tip= [https://perma.cc/LQ86-8UP6] [https://web.archive.org/web/20241118022505/https://law.wkinfo.com.cn/?tip=] (last visited Oct. 25, 2024). For an introduction to and comparison between different commercial legal databases available in China, see Sun Yudi (孙玉娣), *Zhongwen Falü Zhuanye Shujuku Bijiao Fenxi——Yi Beida Fabao, Weike Xianxing, Wanlü Zhongguo, Lü Shang Lianxun Wei Li* (*中文法律专业数据库比较分析——以北大法宝、威科先行、万律中国、律商联讯为例*) [*Comparative Analysis of Chinese Legal Professional Databases—Taking PKULAW, Westlaw China, LawInfoChina, and LexisNexis China as Examples*], Falü Xinxi Yanjiu Wang [Legal Information Studies Network], http://www.chinalawlib.org.cn/LunwenShow.aspx?CID=20081224141343797149&AID=20180528171907303543354&FID=20081224141110233122 [https://web.archive.org/web/20180919041320/http://chinalawlib.org.cn/LunwenShow.aspx?CID=20081224141343797149&AID=20180528171907303354&FID=20081224141110233122] (last visited Nov. 17, 2024).

104. See page 13 of the Wolters Kluwer user guide of the legal database, available at https://law.wkinfo.com.cn/help/mobile/index.html [https://perma.cc/ZQ77-XC7J] (last visited Oct. 21, 2024).

105. Lecture slides introducing the Wolters Kluwer database mention that it would collect additional judgments in addition to ones published on official websites. *See* http://lib.uibe.edu.cn/docs/2018-11/20181107170711627624.pptx [https://perma.cc/G462-GSYP] (last visited Oct. 11, 2024).

106. Quite a few studies in China use Wolters Kluwer as the database for conducting empirical studies. *See, e.g.*, Yi Ling (易玲) & Shi Aosheng (石傲胜), *Feiwuzhi Wenhua Yichan Shangbiao Zhuce Yu Shiyong: Zhidu Jili, Xianshi Kunjing Ji Guifan Lujing* (*非物质文化遗产商标注册与使用：制度机理、现实困境及规范路径*) [*Trademark Registration and Use of Intangible Cultural Heritage: Institutional Mechanisms, Practical Dilemmas, and Regulatory Pathways*], 12 ZHISHI CHANQUAN (知识产权) [INTELL. PROP.] 89, 90 (2023); Du Wen (杜闻), *Woguo Minshi Xianzhi Ziren de Hanyi, Leixing Ji Shiyong—Yi 24 Pian Caipan Wenshu Wei Shijiao* (*我国民事限制自认的含义、类型及适用—以 24 篇裁判文书为视角*) [*The Meaning, Types, and Application of Civil Limitations on Self-Recognition in China—From the Perspective of 24 Judicial Decisions*], 28 ZHENGJU KEXUE (证据科学) [EVIDENCE SCI.] 100, 103–104 (2020); Han Kangqi (韩康麒) & Ding Junfeng (丁俊峰), *Biaoxian Dai'li Zhong Beidailiren Ke Guizexing de Shizheng Yanjiu* (*表见代理中被代理人可归责性的实证研究*) [*An Empirical Study on the Attributability of the Principal in Ostensible Agency*], 17 FALV SHIYONG (法律适用) [L. APP.] 114, 115–17 (2018).

judgment." Two groups of search terms—two Chinese expressions for "substantial similarity" plus "access"—were used.[107] The search terms and the search function captured all judgments in the database that contain the terms "substantial similarity" and "access." We then limited the results to copyright infringement cases because other non-copyright cases might have included those two terms in an unrelated context.

The search time frame was limited to 2014–2021. We did not collect cases from 2022 and 2023 for two reasons. First, Chinese courts stopped publishing many of their judgments online in 2022 for unknown reasons.[108] Second, some cases may not have been published due to the potential delay between decision and publication.[109] However, the study collected a sufficient number of cases to unpack how the test works in Chinese courts.

Notwithstanding those search caveats, the initial search returned over 4,000 copyright judgments. In selecting samples for coding, this study primarily used the judgmental sampling method while drawing some insights from probability proportional to size ("PPS") sampling.[110] The judgmental sampling method was used because not every judgment that applied the two-prong test provided the court's reasoning for its application. Several judgments merely mentioned the two-prong test without providing any reasoning. Thus, we disregarded those judgments and chose the ones with some reasoning; otherwise, the dataset would not have been able to enlighten us on the application of the test in practice. We also considered the main insights from PPS by selecting the judgments for each year, each province, and each court level.[111] PPS aims to maintain the proportionality of the number of cases sampled from each year, each province, and each court level to the proportion of cases they represent in the overall population. Under these selection criteria, we chose approximately 30% of the judgments from the total pool for further analysis, resulting in a sample of 1,401

107. (1) "实质性相似" + "接触"; (2) "实质相似" + "接触".

108. Despite recent public outrage, the Supreme People's Court has assured the public through an official announcement that judgments from all levels of courts will continue to be published. *See Zuigaofa: Jiada Caipan Wenshu Shangwang Lidu* (*最高法：加大裁判文书上网力度*) [*Supreme Court: Increase Efforts to Publish Judicial Documents Online*], XINHUA SHE (新华社) [XINHUA NET] (Jan. 14, 2024), http://www.news.cn/20240114/7697db95b07d4463a18c2a643485b549/c.html [https://perma.cc/W27G-N9A7]
[https://web.archive.org/web/20240115101350/http://www.news.cn/20240114/7697db95b07d4463a18c2a643485b549/c.html].

109. Yang Chen, *Demystifying China's Trade Secrets Law in Action—A Statistical Analysis*, 13 QUEEN MARY J. INTELL. PROP. 198, 205 (2023).

110. *See generally*, Chris J. Skinner, *Probability Proportional to Size (PPS) Sampling*, WILEY STATSREF: STATISTICS REFERENCE ONLINE 1, 1–5 (2014); Hamed Taherdoost, *Sampling Methods in Research Methodology; How To Choose a Sampling Technique for Research*, 5 INT'L J. ACAD. RSCH. MGMT. 18, 23 (2016).

111. For example, consider a dataset comprising 4,000 total judgments, distributed annually as follows: 100 in 2014, 200 in 2015, 300 in 2016, 400 in 2017, 500 in 2018, 600 in 2019, 700 in 2020, and 1,200 in 2021. If the study aims to select a sample of 30% from these results, the number of judgments sampled each year would be approximately 30% of that year's total (e.g., 90 from 2016, 150 from 2018, 200 from 2019, etc.). This proportional selection approach is also applied to judgments from different provinces and court levels within each year.

judgments.[112] This sample included representative decisions, encompassing various reasoning, from each court level across all provinces between 2014 and 2021.

Each judgment in the sample was hand-coded for basic case information, including court level, province, decision year, proceeding, and type of copyrighted work.[113] Substantive coding criteria primarily included: (1) the court's reasoning on access; (2) doctrines adopted by the court in dissecting the work; (3) the court's reasoning on judging substantial similarities; (4) whether evidence from expert witnesses was used to judge substantial similarities; (5) the court's reasoning on the inverse ratio rule, if any; (6) the court's reasoning on independent development, if any; and (7) the phases in which the court addressed those issues.[114] Those coding criteria enabled our understanding of how Chinese courts have applied the two-prong test in practice.

2. Limitations

There are three limitations in our study design. First, we did not use a random sampling method, making the results of our study difficult to generalize. This sampling limitation is justified because our main aim is to unpack the reasoning of Chinese courts in applying the two-prong test. Thus, the selection of judgments with some minimal reasoning is necessary. Even though we cannot use any statistical inference to generalize, the sample size of our study is still large enough to offer valuable insights into how various court levels in different provinces have approached the copyright infringement issue. Second, there can be a source of error arising from hand-coding, which happens when the coding criteria are "ambiguous or include room for subjectivity," potentially causing "inconsistent application and negatively impact[ing] reproducibility."[115] We partially addressed these concerns by requiring coders to follow written coding instructions and highlight any ambiguous scenarios for internal discussion and confirmation.[116] Third, no database is perfect; it is very likely that some or many court decisions that include reasoning about the two-prong test are not

112. The final number of judgments coded is 1,401. Although the target sample proportion is 30%, the actual number of samples exceeds this target. This discrepancy arises because, in instances where the calculated sample size for a specific court level within a province for a given year is less than 1, the study opts to include at least one judgment. This approach ensures that the dataset captures the reasoning or application methods utilized by that court level in that province. Consequently, the aggregate sample size surpasses the 30% threshold.

113. Two research assistants ("RAs") were responsible for the hand-coding, which they did according to a pre-designed coding scheme with detailed instructions on each coding criteria. *See infra* Appendix A.

114. *See infra* Appendix A.

115. *See* Camilla Alexandra Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements that Act Like Noncompetes*, 133 YALE L.J. 669, 733 (2024).

116. The coders, two law school students with prior knowledge of copyright law, were assigned classical articles on the copyright infringement test in the U.S. and China before coding. They also contributed to selecting and creating the coding criteria. During the coding process, they were required to flag any court reasoning deemed too ambiguous for coding, for discussion in weekly meetings. These discussions ensured that each RA knew with relative precision how to code similar situations in subsequent judgments.

published or available in the WK database.[117] The reasons can be numerous.[118] However, we maintain that our sample size is large enough to offer valuable information as long as we bear in mind the inherent limitations of our dataset when interpreting the results.

3. Results

a. General results

The dataset shows a roughly linear growth trend in decision numbers by year, except for 2021, as presented in Figure 1. The numbers generally followed an upward linear trend between 2014 and 2020 and peaked in 2020. The year 2021, however, witnessed a sharp decrease in decision numbers, deviating from the linear trend, for reasons probably related to the pandemic and the delay between judgment decision and publication identified by previous studies.[119] Unsurprisingly, there are more copyright judgments on the substantial similarity plus access test in relatively more developed provinces or cities, with around 43% in Guangdong, 12% in Beijing and Zhejiang, 6% in Shanghai, 4% in Fujian, and 3% in Hunan and Jiangsu provinces.[120] The finding is similar to that from other empirical studies conducted on IP cases.[121] Figure 2 presents the judgment numbers by province/city.

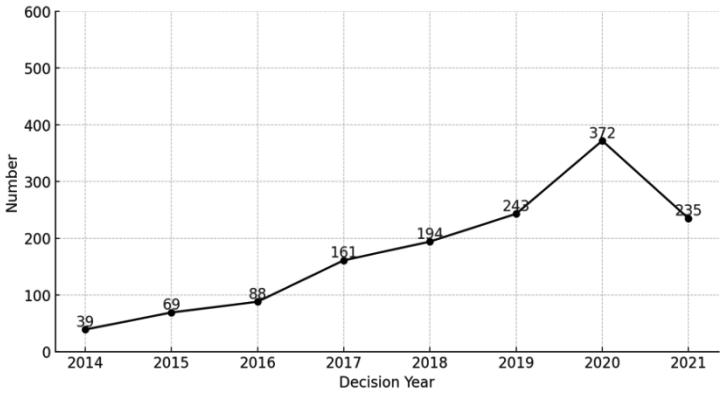


Figure 1: Judgment Numbers by Year

117. *See* Chen, *supra* note 109, at 205.

118. For limits of judgment publications in China, see *id.*

119. *See id.* at 207.

120. Guangdong (599); Beijing (173); Zhejiang (171); Shanghai (82); Fujian (58%); Hunan (41); Jiangsu (41).

121. *See, e.g.*, Chen, *supra* note 109, at 208 (The five provinces or cities where there are relatively more trade secrets cases are Guangdong, Beijing, Shanghai, Zhejiang, and Jiangsu.).

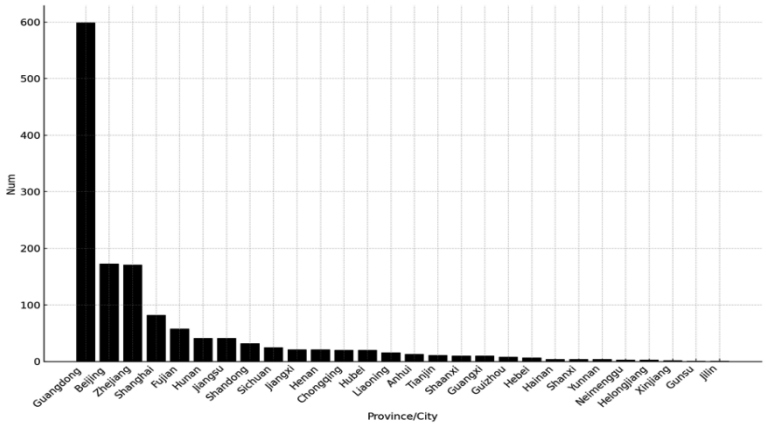


Figure 2: Judgment Numbers by Province/City

We see a significant number of judgments coming from intermediate courts (around 33%) and, unsurprisingly, primary courts (more than 50%). Yet the dataset also includes nearly thirty judgments from the SPC, which is influential in setting guidance for lower courts in applying the test. Of the judgments we studied, 66% were first-instance judgments, and 32% were appeal judgments, with retrial judgments only accounting for 2%, which generally conforms with the normal distribution of judgments across court levels and proceedings. Figure 3 illustrates the judgment numbers by court level and proceedings.

The results drawn from the types of copyrighted works are more surprising. Initially, the study expected to see literary works more frequently occurring in cases. Yet artistic works represent a majority (64.5%) of the judgments in the dataset, substantially larger than literary works (12.6%). Other copyrighted works appearing in more than 5% of judgments are photographic works (10.1%) and computer software (6.6%). Figure 4 presents the judgment numbers by work type. The overrepresentation of artistic works in the dataset reminds us that, when interpreting the substantial results below and when appropriate, the study may analyze the results per work type if courts adopt different approaches according to the work type.

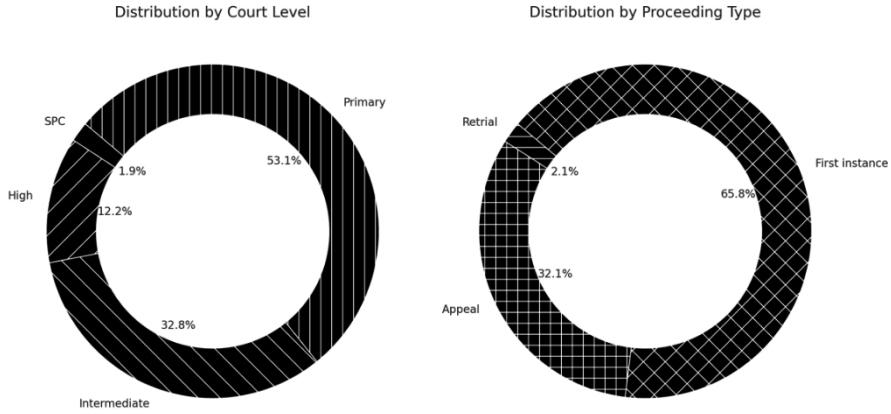


Figure 3: Judgment Numbers by Court Level and Proceeding Type

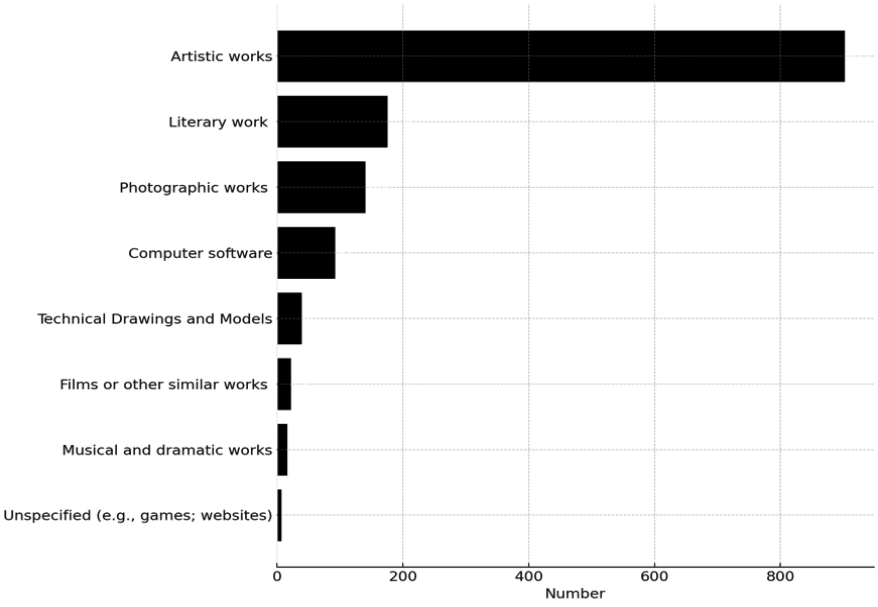
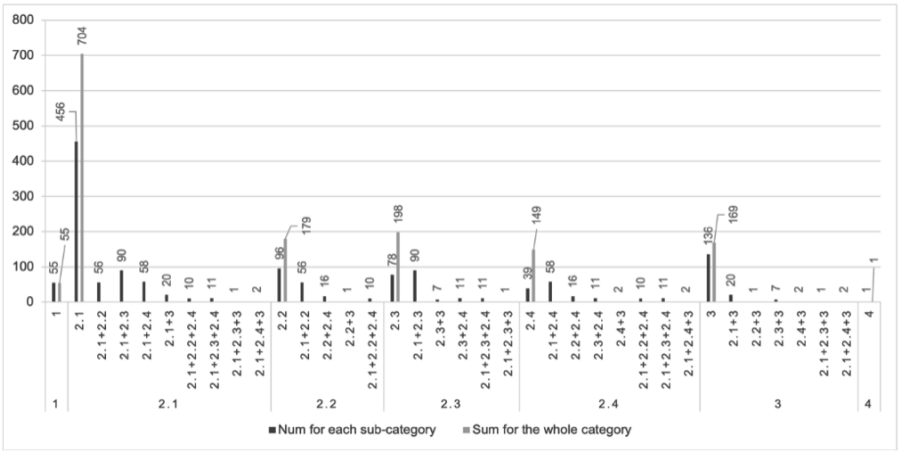


Figure 4: Judgment Numbers by Work Type

b. Access Prong

Of the 1,401 coded judgments in which the substantial similarity plus access test is explicitly mentioned, courts decided the access prong in 1,230 judgments and found that the access prong is fulfilled in 93% of judgments.[122] The high success rate is understandable given the very low threshold for the access prong required by Chinese courts, as pointed out in the current literature[123] and our empirical data. For those decisions where courts offer at least some reasoning on how to approach the access prong, the study further coded the specific reasons courts found or rejected the existence of access to the copyrighted work. The codes include seven types of evidence that either directly or, in some ways, indirectly prove access. Example circumstantial proofs coded include the fact that the copyrighted work has an earlier publication date (denoted as 2.1), dissemination of the copyrighted work (2.2 or 2.3, depending on how wide the dissemination was), the fact that both litigating parties were in the same industry (2.4), and prior dealings and relationships between litigating parties (3). Figure 5 depicts the details of evidence the courts accepted for establishing access.



1: Direct evidence (e.g., D's admission; witnesses see the whole process of D's access and use)
2.1: Published earlier than D's work
2.2: Widespread dissemination of P's work
2.3: Some dissemination of P's work (e.g., some sales in public channel)
2.4: In the same industry
3: Prior contact with P
4: Striking similarities between the works

Figure 5: Evidence for Access Prong

The low threshold for fulfilling the access prong is well delineated by the empirical data in this study. First, conforming with conventional wisdom, our data shows that

122. The access prong is satisfied in 1,146 decisions and failed in 84 decisions.
123. *See supra* notes 91–94 and accompanying text.

direct evidence of access is usually absent because direct evidence is cited in less than 5% of decisions where courts considered the access prong as satisfied (hereinafter "access decisions"). Chinese courts thus relied mainly upon circumstantial evidence to reach the ruling. However, in nearly 40% of cases, the court would rubber stamp the access prong as long as the plaintiff's work was published earlier than the defendant's alleged infringing work. In approximately 20% of access decisions, plaintiffs could fulfill their burden of proof by offering evidence of at least some dissemination (or wide dissemination) of their work in the public or that both parties were in the same industry. Some courts (representing around 20% of access decisions) would combine the aforementioned circumstantial evidence to draw an inference (e.g., combine evidence on earlier publication plus some spreading of the work in the public and/or situating in the same industry). Yet the combined approach still represents a low bar for proving access because it can be practically effortless for plaintiffs to offer evidence on each. A limited number of more discerning courts factored in one type of relatively convincing circumstantial evidence: defendants' prior actual contact or dealing with plaintiffs, which, by intuition, can make the inference on the existence of prior access to plaintiffs' works more reasonable. The percentage of those more satisfactory decisions is low (less than 15% of access decisions).

While Chinese courts usually dedicate some space, though notoriously limited, to what evidence they factored into access, they barely mention what function access would serve in copyright infringement.[124] They seem to list the evidence they considered and then start opining on the substantial similarity prong, leaving readers wondering about the purpose of proving access. This approach differs from the U.S. test, as discussed in Part III.[125]

c. Substantial Similarity Prong

Unlike the access prong, the substantial similarity prong enjoys much more attention from Chinese courts, as confirmed by our study and according to the conventional account in the current literature.[126] While U.S. courts generally follow specific approaches to determine substantial similarity or improper misappropriation, and many would specify the standard they used,[127] Chinese courts rarely speak about

124. This impression was drawn by RAs based on their reading of the judgments during the coding process.

125. *See infra* Part III.

126. *See, e.g.*, Liu, *supra* note 16, at 71–72; Ding, *supra* note 21, at 24. The impression on the relatively more detailed reasoning in the substantial similarity prong was drawn by RAs based on their reading of the judgments during the coding process.

127. It is admitted that there are some divergences in which approach U.S. courts choose to judge substantial similarity, and the number of distinct approaches is not low. Yet since there are still some common approaches taken by the courts, and U.S. judges more frequently tell readers what standard they adopt for their determinations, it is much easier to code these approaches in the U.S. empirical studies as compared to Chinese studies. For the relevant U.S. empirical studies, see Asay, *supra* note 9, at 79–89; Lim, *supra* note 9, at 622–23.

the approach or standard they would adopt in assessing substantial similarity.[128] Therefore, it would be more difficult to code the approaches taken by Chinese courts in the studied decisions.

Despite the ambiguity articulated in the current literature and reflected in the interim results of the test coding process, the study found that Chinese courts roughly follow the "total concept and feel approach" or "comparison after dissection" method to measure substantial similarity.[129] Accordingly, the study coded the two methods when they appeared in decisions. In several decisions, the study found that courts would engage in some form of quantitative analysis to see whether the defendants took a portion of copyrighted work that is quantitatively significant. As such, the study coded the decision as "quantitative" when it involved some form of quantitative analysis. For others where neither quantitative analysis nor the first two methods appeared, the study denoted them as "Not specified (some form of qualitative approach)."

It must be admitted that, in addition to decisions with too-limited reasoning to code any meaningful information, some courts still engage in comparisons centering on whether the defendants took qualitatively significant parts of the plaintiffs' work.[130]

128. This impression was drawn by RAs based on their reading of the judgments during the coding process.

129. The "total concept and feel" approach involves courts directly comparing the overall appearance of the works in question to determine whether there is substantial similarity. In contrast, the "comparison after dissection" method requires courts to first dissect the works, focusing solely on the copyrightable elements for comparison. *See, e.g.*, Feng, *supra* note 97, at 77–78; Lu, *supra* note 21, at 138–39.

130. *See, e.g.*, Zhongshanshi Anyiyuan Fushi Youxian Gongsi, Zhushi Huishe Yiwu Suoyou Deng Qinhai Zuopin Fuzhiquan Jiufen Minshi Shenqing Zaishen Shencha Minshi Caidingshu (中山市安逸猿服饰有限公司、株式会社一无所有等侵害作品复制权纠纷民事申请再审审查民事裁定书) [Anyiyuan Clothing Co., Ltd. v. Nowhere Co., Ltd. et al.], Zhongguo Caipan Wenshuwang (中国裁判文书网) [China Judgements Online] (Sup. People's Ct., June 29, 2021); Dongguanshi Changan Miluo Wujin Jiagongchang Yu Shenzhenshi Tianyifang Jingpin Zhizao Youxian Gongsi Zhuzuoquan Quanshu, Qinquan Jiufen Yian Minshi Ershen Panjueshu (东莞市长安米罗五金加工厂与深圳市天一坊精品制造有限公司著作权权属、侵权纠纷一案民事二审判决书) [Dongguan Changan Miluo Hardware Processing Factory v. Shenzhen Tianyifang Boutique Mfg. Co., Ltd.], Zhongguo Caipan Wenshuwang (中国裁判文书网) [China Judgements Online] (Guangdong Dongguan Intermediate People's Ct., July 24, 2020); Honglian Guoji Maoyi Youxian Gongsi Yu Shanghai Leifeng Dianqi Youxian Gongsi Zhuzuoquan Quanshu, Qinquan Jiufen Minshi Yishen Anjian Minshi Panjueshu (宏联国际贸易有限公司与上海磊峰电器有限公司著作权权属、侵权纠纷民事一审案件民事判决书) [Grand Union Int'l Trading Co., Ltd. v. Shanghai Leifeng Elec. Co., Ltd.] Zhongguo Caipan Wenshuwang (中国裁判文书网) [China Judgements Online] (Shanghai Putuo Dist. People's Ct. Dec. 30, 2021); Hunan Panzi Yu Suizhoushi Zengduqu Yufuren Hunsha Yinglou, Suizhoushi Jiading Wenhua Chuanmei Youxian Zeren Gongsi Zhuzuoquan Quanshu, Qinquan Jiufen Yishen Minshi Panjueshu (湖南盘子与随州市曾都区余夫人婚纱影楼、随州市佳鼎文化传媒有限责任公司著作权权属、侵权纠纷一审民事判决书) [Hunan Panzi Culture Tech. Co., Ltd. v. Suizhou City Mrs. Yu Wedding Studio et al.] Zhongguo Caipan Wenshuwang (中国裁判文书网) [China Judgements Online] (Hunan Changsha Intermediate People's Ct. Oct. 31, 2018); Huaqiang Fangte (Shenzhen) Dongman Youxian Gongsi Yu Fuzhoushi Cangshanqu Zhang Shoulin Bianlidian Zhuzuoquan Quanshu, Qinquan Jiufen Yishen Minshi Panjueshu (华强方特（深圳）动漫有限公司与福州市仓山区张寿林便利店著作权权属、侵权纠纷一审民事判决书) [Huaqiang Fantawild (Shenzhen) Animation Co. Ltd v. Fuzhou Cangshan Dist. Zhang Shoulin Convenience Store] Zhongguo Caipan Wenshuwang (中国裁判文书网) [China Judgements Online] (Fujian Fuzhou Intermediate People's Ct. Nov. 19, 2020); Gong Tianhua, Wuhan Diyier Keji Youxian Gongsi Zhuzuoquan Quanshu, Qinquan Jiufen Minshi Yishen Minshi Panjueshu (龚天华、武汉迪易尔科技有限公司著作权权属、侵权纠纷民事一审民事判决书) [Gong Tianhua v.

The typical reasoning behind that line of decisions is first identifying the most prominent features or parts of the copyrighted works and then deciding whether the two works are substantially similar.[131] Unfortunately, the courts did not clearly indicate whether they compared the overall appearance or the parts after dissection. Accordingly, it would be more rational to code them as a miscellaneous option for using some form of qualitative analysis. Otherwise, the risk of errors during the coding process would be too high as the determination would entail too many personal judgments. With these caveats in mind, Figure 6 details the approaches Chinese courts took to judging substantial similarity.

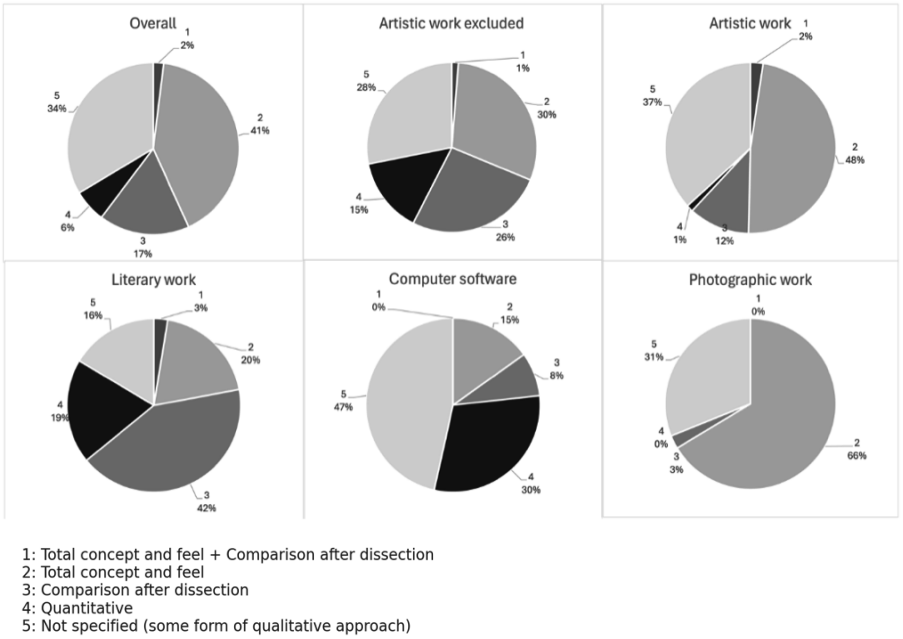


Figure 6: Approaches for Judging Substantial Similarity

Wuhan Diyier Tech. Co., Ltd.] Zhongguo Caipan Wenshuwang (中国裁判文书网) [China Judgements Online] (Hubei Wuhan Hanjiang Dist. People's Ct. Sept. 27, 2021).

131. *See, e.g.*, Zhongshanshi Anyiyuan Fushi Youxian Gongsi, Zhushi Huishe Yiwu Suoyou Deng Qinhai Zuopin Fuzhiquan Jiufen Minshi Shenqing Zaishen Shencha Minshi Caidingshu (中山市安逸猿服饰有限公司、株式会社一无所有等侵害作品复制权纠纷民事申请再审审查民事裁定书) [Anyiyuan Clothing Co., Ltd. v. Nowhere Co., Ltd. et al.], Zhongguo Caipan Wenshuwang (中国裁判文书网) [China Judgements Online] (Sup. People's Ct., June 29, 2021).

Comparing the pie charts in Figure 6, Chinese courts prefer certain approaches depending on the type of copyrighted work. About half of the decisions on artistic works involve the court using the total concept and feel approach to judge substantial similarity, with comparison after dissection and quantitative approaches being much less popular (under 15% of decisions in total). The prevalence of the total concept and feel approach can also be seen in decisions on photographic works (more than two-thirds). In contrast, the total concept and feel approach is less popular among courts for judging substantial similarity for literary works and computer software. In cases concerning literary works, courts are more likely to adopt the comparison after dissection approach (about 45% of decisions) and engage in some quantitative analysis (around 20% of decisions). Interestingly, there are five decisions on literary works where courts expressly mentioned the abstraction-filtration-comparison test, which originated from the United States as the way to compare two works after dissection.[132] In decisions on computer software, courts feel more inclined to conduct quantitative evaluations (30% of decisions).

Despite the tendencies towards one or two approaches depending on the type of copyrighted work, the Chinese courts lack a uniform approach in judging substantial similarity. There are a number of decisions where the courts did not offer much reasoning on their approaches or simply made some comparisons without spelling out any approach (nearly 35% of decisions overall). This general finding is consistent with the uniformity issue identified in U.S. empirical studies; it also aligns with Chinese law, where there is no explicit reference to any particular approach in statutes, judicial interpretations, or judicial documents.[133]

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132. *See* Hangzhou Youka Wangluo Jishu Youxian Gongsi Yu Guangzhou Changyou Xinxi Keji Youxian Gongsi, Guangzhou Dayu Xinyi Keji Youxian Gongsi Deng Zhuzuoquan Quanshu, Qinquan Jiufen Yishen Minshi Panjueshu (杭州游卡网络技术有限公司与广州常游信息科技有限公司、广州大娱信息科技有限公司等著作权权属、侵权纠纷一审民事判决书) [Hangzhou Youka Network Tech. Co., Ltd. v. Guangzhou Changyou Info. Tech. Co., Ltd. et al.] Zhongguo Caipan Wenshuwang (中国裁判文书网) [China Judgements Online] (Shanghai Pudong New Dist. People's Ct., Jan. 10, 2019); Wuhan Yawenhua Yishu Fazhan Youxian Gongsi, Huang Qiansheng Yu Liu Ruoying, Ye Ruting Deng Zhuzuoquan Quanshu, Qinquan Jiufen Yishen Minshi Panjueshu (武汉光亚文化艺术发展有限公司、黄乾生与刘若英、叶如婷等著作权权属、侵权纠纷一审民事判决书)[Wuhan Guangya Culture and Art Development Co., Ltd. v. Liu Ruoying et al.] Zhongguo Caipan Wenshuwang (中国裁判文书网)[China Judgements Online] (Hubei Wuhan Intermediate People's Ct., Oct. 25, 2019); Liu Jiajun, Xian Qujiang Yaya Yingshi Wenhua Gufen Youxian Gongsi Deng Yu Ni Xueli Zhuzuoquan Quanshu, Qinquan Jiufen Ershen Minshi Panjue Shu(刘嘉军、西安曲江丫丫影视文化股份有限公司等与倪学礼著作权权属、侵权纠纷二审民事判决书)[Xi'an Qujiang Yaya Screen Culture Co., Ltd. et al. v. Ni Xueli] Zhongguo Caipan Wenshuwang (中国裁判文书网) [China Judgements Online] (Beijing Intell. Prop. Ct., Dec. 14, 2017); Zhang Litao Yu Song Weiwei Deng Zhuzuoquan Quanshu, Qinquan Jiufen Yishen Minshi Panjueshu(张立涛与宋巍巍等著作权权属、侵权纠纷一审民事判决书) [Zhang Litao v. Song Weiwei et al.] Zhongguo Caipan Wenshuwang(中国裁判文书网) [China Judgements Online] (Beijing Xicheng Dist. People's Ct., Dec. 20, 2019); Dongyang Jinbaixing Yingshi Wenhua Chuanbo Youxian Gongsi Yu Ji Hua Deng Yishen Minshi Panjueshu(东阳金百星影视文化传播有限公司与季桦等一审民事判决书) [Dongyang Jinbaixing Film and Television Culture Commc'n Co., Ltd. v. Ji Hua et al.] Zhongguo Caipan Wenshuwang(中国裁判文书网) [China Judgements Online] (Beijing Haidian Dist. People's Ct., Dec. 31, 2020).

133. For the relevant US empirical studies, see Asay, *supra* note 9, at 79–89; Lim, *supra* note 9, at 622–23.

d. Other Results

In addition to coding the approaches for judging substantial similarity, the study documented whether the courts mentioned any dissection rules in their decisions (e.g., idea-expression dichotomy, functionality, *scènes à faire*, facts). Of 306 decisions, courts in more than half discussed one or more dissection doctrines before conducting an infringement analysis when they analyzed the originality requirement for plaintiffs' works.[134] Quite a number of courts (more than 40% of decisions) mentioned dissection doctrines shortly before or within their reasoning on substantial similarity to set the comparison base for the two works at issue.[135] A few cases (seven decisions) also discussed dissection doctrines only after analyzing substantial similarity and access because the defendants argued that only unprotected elements were copied, compelling the courts to address these arguments towards the end.[136]

For a better comparison with the U.S. test, it would also be valuable to explore in which phase Chinese courts discuss the possibility of independent creation. In the U.S. test, prong one deals with the independent development issue. In an influential decision, the SPC advised that the courts follow the sequence of substantial similarity-access-independent development defense in deciding copyright infringement cases.[137]

134. *See, e.g.*, Dongyang Jinbaixing Yingshi Wenhua Chuanbo Youxian Gongsi Yu Ji Hua Deng Yishen Minshi Panjueshu (东阳金百星影视文化传播有限公司与季桦等一审民事判决书) [Dongyang Jinbaixing Film and Television Culture Comm'cn Co., Ltd. v. Ji Hua et al.], 中国裁判文书网 [China Judgements Online] (Beijing Haidian Dist. People's Ct., Dec. 31, 2020) (China); Yin Yusheng Yu Huashan Wenyi Chuban She Youxian Zeren Gongsi, Bo Ku Shuzi Chuban Chuanmei Jituan Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen yishen Minshi Panjueshu (尹玉生与花山文艺出版社有限责任公司、博库数字出版传媒集团有限公司著作权权属、侵权纠纷一审民事判决书) [Yin Yusheng and Huashan Literature and Art Publ'g House Co., Ltd. v. Boku Digital Publ'g and Media Grp. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Hangzhou Railway Transport Ct., Nov. 6, 2020) (China); Cengzhaoyu, Quanzhou Yi Xiao Feng Maoyi Youxian Gongsi Zhuzuoquan QuN Shu, Qinquan Jiufen Ershen Minshi Panjueshu (曾招裕、泉州逸小风贸易有限公司著作权权属、侵权纠纷二审民事判决书) [Zeng Zhaoyu v. Quanzhou Yixiaofeng Trading Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Fujian High People's Ct., Aug. 31, 2020) (China).

135. *See, e.g.*, Xigang Qu Kelan Shipin Dian, Shanghai Ke Lan Shangmao Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen, Shangye Huilu Bu Zhengdang Jingzheng Jiufen Ershen Minshi Panjueshu (西岗区珂兰饰品店、上海珂兰商贸有限公司著作权权属、侵权纠纷、商业贿赂不正当竞争纠纷二审民事判决书) [Xigang Dist. Kelan Jewelry Store v. Shanghai Kelan Trading Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Dalian Intermediate People's Ct. of Lianing Province, Dec. 7, 2020) (China).

136. *See, e.g.*, Xu haojie Yu Sichuan Diwang Jieju Gufen Youxian Gongsi Qinhai Shangbiao Quan Jiufen Yishen Minshi Panjueshu (徐豪杰与四川帝王洁具股份有限公司侵害商标权纠纷一审民事判决书) [Xu Haojie v. Sichuan Diwang Sanitary Ware Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Chengdu Intermediate People's Ct. of Sichuan Province, Nov. 27, 2014) (China); Xiamen Xin Yixian Wenhua Chuanmei Youxian Gongsi, Xu Ziwei Zhuzuoquan Quan Shu, Qinquan Jiufen Ershen Minshi Panjueshu (厦门鑫一线文化传媒有限公司、徐紫薇著作权权属、侵权纠纷二审民事判决书) [Xiamen Xinyixian Culture Media Co., Ltd. v. Xu Ziwei], 中国裁判文书网 [China Judgements Online] (Xiamen Intermediate People's Ct., Fujian Province, Aug. 28, 2020) (China); Zhangjianhui Yu Mengfanpeng Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (张建辉与孟繁鹏著作权权属、侵权纠纷一审民事判决书) [Zhang Jianhui v. Meng Fanpeng], 中国裁判文书网 [China Judgements Online] (People's Ct. of Shenyang High-tech Indus. Dev. Zone, Liaoning Province, Sept. 17, 2019) (China).

137. Zhongshan Shi Anyi Yuan Fushi Youxian Gongsi, Zhushi Huishe Yiwusuoyou Deng Qinhai Zuopin Fuzhi Quan Jiufen Minshi Shenqing Zaishen Shencha Minshi Caiding Shu (中山市安逸猿服饰有

Our empirical results roughly confirm the SPC's approach in a majority of decisions; the possibility of the defendants' independent creation is mentioned and analyzed only after the court has reached a conclusion on substantial similarity.[138]

The SPC's approach seems different from the U.S. test, which deals with the independent creation defense in the first prong rather than the second prong. Admittedly, however, a few decisions merge the discussion on independent creation with the access prong, which seems similar to the U.S. approach.[139] As elaborated in Part III, even these cases differ markedly from the U.S. test in terms of addressing the independent creation defense.[140] With these empirical results or positive accounts of China's practical applications of substantial similarity plus access in mind, the following Part undertakes a more detailed and focused comparison of the U.S. and Chinese tests. It assesses whether the spillover from the U.S. has yielded a genuinely similar test in China. If not, what are the differences that remain underexplored by the current literature?

III. COMPARISON: SOME SPILLOVER BUT SUBSTANTIAL DIVERGENCES

A. THE TWO-PRONG TEST

Several secondary sources indicate that Chinese courts transplanted the test from U.S. law rather than developed it.[141] Some scholars even strongly criticize the direct

限公司、株式会社一无所有等侵害作品复制权纠纷民事申请再审审查民事裁定书) [Zhongshan Anyiyuan Clothing Co., Ltd. v. Yiwuyou Co., Ltd.], SUP. PEOPLE'S CT. GAZ. (Sup. People's Ct., June 29, 2021) (China) (a classical case identified by the SPC; included in the newly launched official database that includes only cases the SPC considers influential and important).

138. Admittedly, only a few decisions have ever mentioned the independent development (only eighty-one decisions). Seventy decisions discussed the possibility of independent creation after "substantial similarity" analysis.

139. There are ten decisions in total. *See, e.g.*, Xiang Wei Ren Yu Shenzhen Shi Guo Dashi Yishu Pin Touzi Youxian Gongsi, Zhangrucai Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (项维仁与深圳市国大师艺术品投资有限公司、张汝财著作权权属、侵权纠纷一审民事判决书) [Xiang Weiren and Shenzhen Guodashi Art Investment Co., Ltd. v. Zhang Rucai], 中国裁判文书网 [China Judgements Online] (Shenzhen Futian Dist. People's Ct., Guangdong Province, Dec. 27, 2018) (China); Shenzhen Shi Zhongshi Zongheng Sheji Youxian Gongsi Yu Chongqing Baoli Gaoerfu Qiu Hui Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (深圳市中世纵横设计有限公司与重庆保利高尔夫球会有限公司著作权权属、侵权纠纷一审民事判决书) [Shenzhen Zhongshi Zongheng Design Co., Ltd. v. Chongqing Poly Gold Club Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Shenzhen Futian Dist. People's Ct., Guandong Province, Nov. 11, 2016) (China); Chongqing Tian Zhihui Qi Keji Youxian Gongsi, Jinke Dichan Jituan Gufen Youxian Gongsi Yu Zhengzhou Shi Jinshui Dashan Peixun Xuexiao Youxian Gongsi Qinhai Zuopin Fuzhi Quan Jiufen Ershen Ershen Minshi Panjueshu (重庆天智慧启科技有限公司,金科地产集团股份有限公司与郑州市金水区大山培训学校有限公司侵害作品复制权纠纷二审二审民事判决书) [Chongqing Tianzhihuiqi Tech. Co., Ltd. v. Zhengzhou Jinshui Dist. Dashan Training Sch. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Chongqing First Intermediate People's Ct., Oct. 26, 2021) (China).

140. *See infra* Part III.

141. *See* Liu, *supra* note 16, at 72–73; Zhang & Zhang, *supra* note 4, at 41–42; Chen, *supra* note 19; Wu, *supra* note 19, at 66–67 (citing secondary sources in U.S. copyright law when talking about "substantial

application of a test deriving from U.S. law to Chinese cases when the PRC Law offers no guidance.[142] Moreover, in a case note published in 2010, the judges emphasized the importance of the substantial similarity plus access test in computer software cases and referenced a U.S. case when discussing how to determine substantial similarity.[143] This evidence suggests that the Chinese courts either subconsciously gained insights from U.S. law or explicitly transplanted the U.S. test with some modifications. Accordingly, it is safe to argue that though there is no direct, explicit evidence proving the direct legal transplantation of the U.S. test into China, there is evidently some spillover from the U.S. into the Chinese test.

Yet, the spillover from the U.S. has made some scholars in China inattentively equate the Chinese test with the U.S. one, without a deeper examination and comparison. Specifically, a number of scholars acknowledge the origin of the Chinese test from the *Arnstein* test, arguing that access and substantial similarity aptly corresponds to actual copying and improper appropriation.[144] Following that line of the reasoning, the access prong in China suggests the likelihood that the defendant's work is not independently created but rather derived from the copyrighted material, congruous to the actual copying prong in the United States.[145] The substantial similarity prong subsequently deals with whether an unlawful portion of copyrighted works is taken, based on the existence of actual copying instead of independent development, to complete the infringement.[146]

At first glance, the arguments equating China's two prongs with the *Arnstein* test seem reasonable. Given that Chinese courts use roughly similar approaches to judge substantial similarities, as indicated in our empirical results and the current literature,[147] one may easily equate that approach with improper appropriation under the *Arnstein* test. When the substantial similarity prong undertakes the role of improper appropriation, it becomes natural to approximate the remaining access prong as fulfilling the function of actual copying in the U.S. test.

However, there are a wealth of defects in making such an ostensibly straightforward equation, since the Chinese test shares features distinct from those of the U.S. test. First, if the Chinese test is comparable to the U.S. test, it should follow the same order in analyzing the two parts. In other words, because the *Arnstein* test strictly follows the sequence of actual copying to improper appropriation,[148] Chinese courts should always determine access before examining substantial similarity. Admittedly, some courts, notably the SPC, seem to allude to an order to follow in the determination from access

similarity" plus "access" in copyright law); Feng, *supra* note 97, at 77–78 (arguing that the tests used to judge substantial similarity originate from the U.S.); Liang, *supra* note 19, at 40.

142. *See* Chen, *supra* note 19; Qi, *supra* note 90.

143. Li et al., *supra* note 99, at 38–40.

144. *See, e.g.*, Liu, *supra* note 16, at 73.

145. *See, e.g.*, Zhou, *supra* note 21, at 115; Liu, *supra* note 16, at 73; Y'Barbo, *supra* note 10, at 295 (considering prong one as a separate derivation requirement from the "unlawful copying" prong).

146. *See, e.g.*, Liu, *supra* note 16, at 73; Zhou, *supra* note 21, at 115.

147. *See infra* Part II.

148. *See infra* Part I.

to substantial similarity.[149] However, none emphasized the order or expressly mandated that the order should be followed. They simply mentioned and followed the order without any clues as to why they first judged access rather than substantial similarity.[150] That is likely why numerous Chinese courts do not strictly follow the sequence, dealing with access only after resolving the issue of substantial similarity.[151] Some even merely

149. For SPC decisions, see, e.g., Beijing Zhong Rong Heng Shengmuye Youxian Gongsi, Zuo Shangming She Jiaju Yongpin (Shanghai) Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen Zaishen Shencha Yu Shenpan Jiandu Minshi Caiding Shu (北京中融恒盛木业有限公司、左尚明舍家居用品（上海）有限公司著作权权属、侵权纠纷再审审查与审判监督民事裁定书) [Beijing Zhongrong Hengsheng Wood Indus. Co., Ltd. v. Zuo Shangmingshe Home Furnishings (Shanghai) Co., Ltd.], SUP. PEOPLE'S CT. GAZ. (Sup. People's Ct., Dec. 29, 2018) (China); Guangzhou De Yi Wangluo Youxian Gongsi, Guangzhou Chengbei Xinxi Keji Youxian Gongsi Qinhai Jisuanji Ruanjian Zhuzuoquan Jiufen Ershen Minshi Caiding Shu (广州得翼网络有限公司、广州城北信息科技有限公司侵害计算机软件著作权纠纷二审民事裁定书) [Guangzhou Deyi Network Co., Ltd. v. Guangzhou Chengbei Info. Tech. Co., Ltd.], SUP. PEOPLE'S CT. GAZ. (Sup. People's Ct., May 20, 2020) (China). For other court decisions, see (武汉光亚文化艺术发展有限公司、黄乾生与刘若英、叶如婷等著作权权属、侵权纠纷一审民事判决书) [Wuhan Guangya Culture and Art Development Co., Ltd. v. Liu Ruoying], 中国裁判文书网 [China Judgements Online] (Wuhan Intermediate People's Ct., Hubei Province, Oct. 25, 2019) (China); Yongfu Youxian Gongsi Yu Shanghai Lin Yu Maoyi Youxian Gongsi, Zhengmingquan Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (永福有限公司与上海临宇贸易有限公司、郑明全著作权权属、侵权纠纷一审民事判决书) [Yongfu Co., Ltd. v. Shanghai Linyu Trading Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Shanghai Pudong New Area People's Ct., Mar. 30, 2020) (China); Chongqing Tian Zhihui Keji Youxian Gongsi, Jinke Dichan Jituan Gufen Youxian Gongsi Yu Zhengzhou Shi Jinshui Qu Dashan Peixun Xuexiao Youxian Gongsi Qinhai Zuopin Fuzhi Quan Jiufen Ershen Ershen Minshi Panjueshu (重庆天智慧启科技有限公司,金科地产集团股份有限公司与郑州市金水区大山培训学校有限公司侵害作品复制权纠纷二审二审民事判决书) [Chongqing Tianzhihuiqi Tech. Co., Ltd. v. Zhengzhou Jinshui Dist. Dashan Training Sch. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Chongqing First Intermediate People's Ct., Oct. 26, 2021) (China); Zhushi Huishe Mou Sheng Yu Guangdong Tai Mou Shipin Youxian Gongsi, Xiao Mou (Shanghai) Shipin Youxian Zeren Gongsi, Ao Mou Qinhai Zuopin Fuzhi Quan Jiufen, Faxing Quan Jiufen, Wangluo Chuanbo Quan Jiufen An (株式会社某生与广东泰某食品有限公司、小某（上海）食品有限责任公司、敖某侵害作品复制权纠纷、发行权纠纷、网络传播权纠纷案) [Mou Sheng Co., Ltd. v. Guangdong Tai Food Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Shanghai First Intermediate People's Ct., May 3, 2013) (China).

150. *See, e.g.*, Guangzhou De Yi Wangluo Youxian Gongsi, Guangzhou Chengbei Xinxi Keji Youxian Gongsi Qinhai Jisuanji Ruanjian Zhuzuoquan Jiufen Ershen Minshi Caiding Shu (广州得翼网络有限公司、广州城北信息科技有限公司侵害计算机软件著作权纠纷二审民事裁定书) [Guangzhou Deyi Network Co., Ltd. v. Guangzhou Chengbei Info. Tech. Co., Ltd.], SUP. PEOPLE'S CT. GAZ. (Sup. People's Ct., May 20, 2020) (China); Zhongshan Shi Anyi Yuan Fushi Youxian Gongsi, Zhushi Huishe Yiwusuoyou Deng Qinhai Zuopin Fuzhi Quan Jiufen Minshi Shenqing Zaishen Shencha Minshi Caiding Shu (中山市安逸猿服饰有限公司、株式会社一无所有等侵害作品复制权纠纷民事申请再审审查民事裁定书) [Zhongshan Anyiyuan Clothing Co., Ltd. v. Yiwuyou Co., Ltd.], SUP. PEOPLE'S CT. GAZ. (Sup. People's Ct., June 29, 2021) (China); Zhouhaohui Yu Yu Zheng, Zhou Jing Deng Qinhai Zuopin Shezhi Quan Jiufen Ershen Minshi Panjueshu (周浩晖与余征、周静等侵害作品摄制权纠纷二审民事判决书) [Zhou Haohui v. Yu Zheng], 中国裁判文书网 [China Judgements Online] (Jiangsu High People's Ct., Dec. 26, 2018) (China).

151. *See, e.g.*, Shanghai Shu Long Keiji Youxian Gongsi Yu Shanghai Jin Chang Wangluo Keji Youxian Gongsi, Shanghai Tao Jin Wangluo Keji Youxian Gongsi Deng Zhuzhuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (上海数龙科技有限公司与上海晋昶网络科技有限公司、上海淘进网络科技有限公司等著作权权属、侵权纠纷一审民事判决书) [Shanghai Shulong Tech. Co., Ltd. v. Shanghai Jinchang Network Tech. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Shanghai Pudong New Area People's Ct., Dec. 30, 2020) (China); Dongyang Shi Leshi Hua Er Yingshi Wenhua Youxian Gongsi Yu Beijing Zhongguancun Tushu Dasha Youxian Gongsi Deng Ershen Minshi Panjueshu (东阳市乐视花儿影

considered substantial similarity and left no room for access.[152] A few courts simply combined both into one analysis to find infringement.[153]

Indeed, many Chinese courts are lenient about the order and likely to consider both as two standalone elements for purposes of the copyright infringement test without a

视文化有限公司与北京中关村图书大厦有限公司等二审民事判决书) [Dongyang Leshi Huaer Film and Television Culture Co., Ltd. v. Beijing Zhongguancun Book Bldg. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Beijing Intell. Prop. Ct., Sept. 28, 2020) (China); Beijing Ding Tian Wenhua Yule Youxian Gongsi Yu Shenzhen Shi Long Ban Wenhua Fazhan Youxian Gongsi Qinhai Zuopin Xinxi Wangluo Chuanbo Quan Jiufen Yishen Minshi Panjue.. (北京鼎甜文化娱乐有限公司与深圳市龙版文化发展有限公司侵害作品信息网络传播权纠纷一审民事判决..) [Beijing Dingtian Culture and Ent. Co., Ltd. v. Shenzhen Longban Culture Dev. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Beijing Internet Ct., Dec. 16, 2020) (China); Guangzhou Zheng Bai Shangmao Youxian Gongsi, Jin Shi Wenhua Chuanbo (Fushan) Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen Minshi Ershen Minshi Panjueshu (广州正佰商贸有限公司、金狮文化传播（佛山）有限公司著作权权属、侵权纠纷民事二审民事判决书) [Guangzhou Zhengbai Trading Co., Ltd. v. Golden Lion Culture Commc'n (Foshan) Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Guangzhou Intell. Prop. Ct., Sept. 6, 2021) (China); Si Ping Ma Si Te Youxian Gongsi Minshi Panjueshu (斯平玛斯特有限公司民事判决书) [Civil Judgment of Spin Master Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Guandong High People's Ct., May 28, 2018) (China); (武汉光亚文化艺术发展有限公司、黄乾生与刘若英、叶如婷等著作权权属、侵权纠纷一审民事判决书) [Wuhan Guangya Culture and Art Dev. Co., Ltd. v. Liu Ruoying], 中国裁判文书网 [China Judgements Online] (Wuhan Intermediate People's Ct., Hubei Province, Oct. 25, 2019) (China); Chen Yang Yu Fuxiaofan Deng Yishen Minshi Panjueshu (陈扬与傅小凡等一审民事判决书) [Chen Yang v. Fu Xiaofan], 中国裁判文书网 [China Judgements Online] (Beijing Haidian Dist. People's Ct., Dec. 11, 2017) (China); Mou Keji (Shanghai) Gufen Youxian Gongsi Su Shenzhen Shi Mou Keji Youxian Gongsi, Shanghai Mou Dianzi Lingjian Youxian Gongsi Jicheng Dianlu Bu Tu Sheji Zhuan You Quan Quan Shu, Qinquan Jiufen An (某科技（上海）股份有限公司诉深圳市某科技有限公司、上海某电子零件有限公司集成电路布图设计专有权权属、侵权纠纷案) [Mou Keji (Shanghai) Co., Ltd. v. Shenzhen Mou Keji Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Shanghai High People's Ct., Sept. 23, 2014) (China); Jiang Yue Yu Zhongguo Shuji Chuban She Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (蒋跃与中国书籍出版社有限公司著作权权属、侵权纠纷一审民事判决书) [Jiang Yue v. China Book Publ'g Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Beijing Fengtai Dist. People's Ct., Feb. 27, 2023) (China); Pujiang Xian Ao Er Te Gongyipin Youxian Zeren Gongsi, Fujian Shu Jing Wenhua Keji Youxian Gongsi Qinhai Zuopin Fuzhi Quan Jiufen Ershen Minshi Panjueshu (浦江县奥尔特工艺品有限责任公司、福建书境文化科技有限公司侵害作品复制权纠纷二审民事判决书) [Pujiang County Aorte Crafts Co., Ltd. v. Fujian Shujiang Culture and Tech. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Zhejiang High People's Ct., Sept. 25, 2020) (China).

152. *See, e.g.*, Xin Si Keji Youxian Gongsi, Wuhan Xin Dong Keji Youxian Gongsi Qinhai Jisuanji Ruanjian Zhuzuoquan Jiufen Ershen Minshi Panjueshu (新思科技有限公司、武汉芯动科技有限公司侵害计算机软件著作权纠纷二审民事判决书) [Synopsys Inc. v. Wuhan Xindong Tech. Co., Ltd.], SUP. PEOPLE'S CT. GAZ. (Sup. People's Ct., Feb. 25, 2021) (China); Zhouliying Yu Wangliyun Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (周立英与王丽云著作权权属、侵权纠纷一审民事判决书) [Zhou Liying v. Wang Liyun], 中国裁判文书网 [China Judgements Online] (Kunming Intermediate People's Ct., Yunnan Province, Oct. 28, 2015) (China); Xiziruo Yu Xiang Chengshi Shui Zhai Yi Meng Fuzhuang Chang, Zhang Hui Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (谢子若与项城市水寨依梦服装厂、张辉著作权权属、侵权纠纷一审民事判决书) [Xie Ziruo v. Xiangcheng Shuizhai Yimeng Garment Factory], 中国裁判文书网 [China Judgements Online] (Guangzhou Internet Ct., May 9, 2020) (China).

153. *See, e.g.*, Zhuruyue Yu Jiangsu Fenghuang Wenyi Chuban She Youxian Gongsi Deng Zhuzuoquan Quan Shu, Qinquan Jiufen Ershen Minshi Panjueshu (朱茹月与江苏凤凰文艺出版社有限公司等著作权权属、侵权纠纷二审民事判决书) [Zhu Ruyue v. Jiangsu Phoenix Literature and Art Publ'g House Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Beijing's Second Intermediate People's Ct., Sept. 16, 2014) (China).

sequence to follow for determination.[154] For example, several first-instance courts that analyzed substantial similarity before access had their judgments appealed. Nevertheless, the appellate courts did not question the order these first-instance courts followed, even though they determined access before substantial similarity.[155]

The current literature also ignores the order of the two prongs in China, simply treating them as separate elements to satisfy without a meaningful sequence.[156] Even those scholars who recognize the U.S. origin of the Chinese test and try to equalize them do not care about the order; some have even proposed that Chinese courts consider substantial similarity first.[157] All told, it contradicts the current practice in China to opine that the Chinese test follows the same determination order as the *Arnstein* test, such that the two are congruous with each other.

B. DOES ACCESS EQUAL ACTUAL COPYING?

The application of the Chinese two-prong test, which adopts terminology similar to the U.S. test, remains chaotic in practice due to the ambiguity regarding the specific function each prong is intended to fulfill. As discussed earlier, the first prong of the U.S. test establishes that the defendants at least copied something from the plaintiffs to defeat the independent creation defense, while the second prong measures whether a substantial portion has been taken to make the copying improper.[158] In sharp contrast, the current literature rarely discusses the functions of the two prongs of the Chinese test in detail; the Chinese courts do not receive guidance from the current law or helpful

154. This impression was drawn by RAs based on their reading of the judgments during the coding process. For typical cases where courts consider access and substantial similarity as two standalone elements without a particular sequence for determination, see e.g., Guangzhou Shi Yuexiu Qu Shang Wei Baozhuang Cailiao Shanghang, Gao Yi Zhuzuoquan Quan Shu, Qinquan Jiufen Minshi Ershen Minshi Panjueshu (广州市越秀区上伟包装材料商行、高义著作权权属、侵权纠纷民事二审民事判决书) [Guangzhou Yuexiu Dist. Shangwei Packaging Materials Co., Ltd. v. Gaoyi], 中国裁判文书网 [China Judgements Online] (Guangzhou Intell. Prop. Ct., June 9, 2022) (China) (mentioning that the common test for copyright infringement would be access plus substantial similarity, meaning both elements should be satisfied without indicating any order to follow).

155. *See, e.g.*, Beijing Dong Ao Shidai Jiaoyu Keji Youxian Gongsi Deng Ershen Minshi Panjueshu (北京东奥时代教育科技有限公司等二审民事判决书) [Second Civil Judgment of Beijing Dongao Times Educ. Tech. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Beijing Intell. Prop. Ct., Nov. 22, 2021) (China); Chongqing Tian Zhihui Qi Keji Youxian Gongsi, Jin Ke Dichan Jituan Gufen Youxian Gongsi Yu Zhengzhou Shi Jinshui Qu Dashan Peixun Xuexiao Youxian Gongsi Qinhai Zuopin Fuzhi Quan Jiufen Ershen Ershen Minshi (重庆天智慧启科技有限公司,金科地产集团股份有限公司与郑州市金水区大山培训学校有限公司侵害作品复制权纠纷二审二审民事判决书) [Chongqing Tianzhihuiqi Tech. Co., Ltd. v. Zhengzhou Jinshui Dist. Dashan Training Sch. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Chongqing First Intermediate People's Ct., Oct. 26, 2021) (China).

156. *See generally* Ding, *supra* note 21 (arguing that access should be a standalone element from substantial similarity with no hints on the order to follow); Li et al., *supra* note 99, at 39 (treating each as dipositive element but no mentioning of the sequence though it used the terms "substantial similarity" plus "access" instead of in the reverse way).

157. *See, e.g.*, Zhang & Zhang, *supra* note 4, at 42–43; Liang, *supra* note 19, at 38.

158. *See supra* Part I.

insights from scholarship.[159] Some courts treat the two-prong test as a given, making little effort to understand the function of each prong, while others consider each prong as fulfilling the same function as its corresponding prong in the U.S. test.[160] Delving into the cases where Chinese courts have applied the two-prong test, we can easily identify the inherent difficulty in equating the function of access with actual copying and that of substantial similarity with improper appropriation.

The few scholars who equate the two prongs of the Chinese test with the U.S. test consider access to be the weaker version of the actual copying prong because proving access can showcase the likelihood that defendants copied the copyrighted works.[161] However, such a proposition is inherently defective because access is only one piece of circumstantial evidence from which to infer actual copying.[162] From the perspective of evidence law, it would be unreasonable to say that access alone can prove actual copying, fulfilling a similar function to the actual copying prong of the U.S. test.[163] Considering the empirical results, the under-scrutinized equating of the function of access with actual copying is even more unjustified. The most popular types of evidence accepted by Chinese courts to satisfy the access prong, at best and only to a very limited extent, indicate the defendants' *potential* contact with the copyrighted works.[164] If merely providing those types of evidence of access, which can quite plausibly satisfy the Chinese access prong, suffices to prove actual copying and to overcome the independent development defense, then the actual copying prong becomes fundamentally redundant. That is probably why these scholars treat access as a weaker version of actual copying while tacitly demanding the finding of similarities between two works to remedy the otherwise fragile inference.[165]

Many Chinese courts would not just rely on the typical types of access evidence to infer actual copying and rule out the possibility of independent development; they unavoidably have to take into account the similarities between the two works to make a more reasonable inference.[166] The typical line of reasoning for these courts is using

159. For the very few scholarly works that briefly mention the functions, see, e.g., Zhang & Zhang, *supra* note 4, at 42–43; Ding, *supra* note 21, at 25–26.

160. *See, e.g.*, Zhang & Zhang, *supra* note 4, at 42–43; Ding, *supra* note 21, at 25–26.

161. Liu, *supra* note 16, at 73.

162. *See supra* notes 36–38 and accompanying text.

163. *See* Balganesh & Menell, *supra* note 9, at 314–19 (detailing the evidential functions of access and probative similarity).

164. *See supra* Part II.

165. *See, e.g.*, Liu, *supra* note 16, at 73.

166. *See, e.g.*, Chen Yang Yu Fuxiaofan Deng Yishen Minshi Panjueshu (陈扬与傅小凡等一审民事判决书) [Chen Yang v. Fu Xiaofan], 中国裁判文书网 [China Judgements Online] (Beijing Haidian Dist. People's Ct., Dec. 11, 2017) (China); Zhongshan Shi Anyi Yuan Fushi Youxian Gongsi, Zhushi Huishe Yiwusuoyou Deng Qinhai Zuopin Fuzhi Quan Jiufen MInshi Shenqing Zaishen Shencha Minshi Caiding Shu (中山市安逸猿服饰有限公司、株式会社一无所有等侵害作品复制权纠纷民事申请再审审查民事裁定书) [Retrial of Zhongshan Anyiyuan Clothing Co.], SUP. PEOPLE'S CT. GAZ. (Supreme People's Ct., June 29, 2021) (China); Meiguo Mou Keji Youxian Gongsi Su Wuhan Mou Keji Youxian Gongsi Qinhai Jisuanji Ruanjian Zhuzuoquan Jiufen An (美国某科技有限公司诉武汉某科技有限公司侵害计算机软件著作权纠纷案) [US Co. v. Wuhan Co.], SUP. PEOPLE'S CT. GAZ. (Supreme People's Ct., Feb. 25, 2021) (China); Beijing Mou Keji Youxian Gongsi Su Shenzhen Shi Mou Keji Youxian Gongsi, Mou Jishu (Shenzhen) Youxian Gongsi, Shenzhen Shi Mou Jishu Youxian Gongsi Deng Zhuzuoquan Quan Shu,

the similarities between two works plus the defendants' probable contact with the copyrighted works (access evidence) to rule out the coincidence of independent creation.[167] This may be why we see, in our empirical results, that a majority of court decisions in China only start analyzing the possibility of independent creation after comparing two works to judge the substantial similarity.[168] They need to rely on the evidence of similarities to facilitate the inference. Even for these decisions identified by our empirical results where the possibility of independent creation is analyzed within the access prong,[169] they are not using the evidence of access to prove actual copying and thus rule out the independent creation possibility. Instead, they are simply mentioning the failure of the defendants to offer evidence of independent creation such that the probable access to the copyrighted works still exists based on the access evidence offered by the plaintiffs.[170]

Qinquan Jiufen An (北京某科技有限公司诉深圳市某科技有限公司、某技术（深圳）有限公司、深圳市某技术有限公司等著作权权属、侵权纠纷案) [Beijing-based Co. v. Shenzhen-based Co.]. 中国裁判文书网 [China Judgements Online] (Guangdong High People's Ct., Dec. 25, 2009) (China) ; Beijing Dong Ao Shidai Jiaoyu Keji Youxian Gongsi Deng Ershen Minshi Panjueshu (北京东奥时代教育科技有限公司等二审民事判决书) [Second Civil Instance of Beijing Dongao Times Educ. Tech. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Beijing Intell. Prop. Ct., Nov. 22, 2021) (China); Wang Qian Yu Beijing Kaixin Mahua Ying Ye Youxian Gongsi Deng Yishen Minshi Panjueshu (王倩与北京开心麻花影业有限公司等一审民事判决书) [Wang Qian v. Beijing Mahua FunAge Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Beijing Chaoyang Dist. People's Ct., Sept. 30, 2020) (China); Beijing Huayu Daye Wenhua Chuanmei Youxian Gongsi Yu Zhaoxinghua, Beijing Ya Xuan Wenhua Jiaoliu Youxian Zeren Gongsi Qinhai Zhuzuoquan Jiufen Shangsu An (北京华语大业文化传媒有限公司与赵兴华、北京亚轩文化交流有限责任公司侵害著作权纠纷上诉案) [Beijing Huayu Daye Culture Media Co., Ltd. v. Zhao Xinghua & Beijing Yaxuan Culture Exchange Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Beijing Second Intermediate People's Ct., Apr. 24, 2014) (China); Shanghai Fu Diao Shi Youxian Gongsi, Dongyang Shi OU Xiang Jiaju Yongpin Youxian Gongsi Deng Zhuzuoquan Quan Shu, Qinquan Jiufen Ershen Minshi Panjueshu (上海福雕家饰有限公司、东阳市欧象家居用品有限公司等著作权权属、侵权纠纷二审民事判决书) [Shanghai Fudiao Home Decoration Co., Ltd. v. Dongyang Ouxiang Home Furnishing Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Shanghai Intell. Prop. Ct., Apr. 2, 2018) (China); Heli Yi Jie (Beijing) Xinxi Jishu Youxian Gongsi Deng Yu Caizhibin Deng Qinhai Jisuanji Ruanjian Zhuzuoquan Jiufen Yishen Minshi Panjueshu (合力亿捷（北京）信息技术有限公司等与蔡质彬等侵害计算机软件著作权纠纷一审民事判决书) [Heliyijie (Beijing) Info. Tech. Co., Ltd. v. Cai Zhibin], 中国裁判文书网 [China Judgements Online] (Beijing Intell. Prop. Ct., Sept. 29, 2018) (China).

167. *See, e.g.*, Beijing Huayu Dayi Wenhua Chuanmei Youxian Gongsi Yu Zhaoxinghua Beijing Ya Xuan Wenhua Jiaoliu Youxian Zeren Gongsi Qinhai Zhuzuoquan Jiufen Shangsu An (北京华语大业文化传媒有限公司与赵兴华、北京亚轩文化交流有限责任公司侵害著作权纠纷上诉案) [Beijing Huayu Daye Culture Media Co., Ltd. v. Zhao Xinghua], 中国裁判文书网 [China Judgements Online] (Beijing Second Intermediate People's Ct., Apr. 24, 2014) (China); Wang Qian Yu Beijing Kaixin Mahua Ying Ye Youxian Gongsi Deng Yishen Minshi Panjueshu (王倩与北京开心麻花影业有限公司等一审民事判决书) [Wang Qian v. Beijing Mahua FunAge Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Beijing Chaoyang Dist. People's Ct., Sept. 30, 2020) (China); Shenzhen Shi Zhong Jia Xun Keji Youxian Gongsi, Kailide Xin Jishu Shenzhen Shi Kailide Jisuanji Xitong Jishu Youxian Gongsi Yu Beijing Chang Di Wan Fang Keji Youxian Gongsi Qinfan Zhuzuoquan Jiufen (深圳市中佳讯科技有限公司、凯立德欣技术深圳市凯立德计算机系统技术有限公司与北京长地万方科技有限公司侵犯著作权纠纷上诉案) [Shenzhen Zhongjiaxun Tech. Co., Ltd. v. Beijing Changdi Wanfang Tech. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Guangdong High People's Ct., Dec. 18, 2009) (China).

168. *See supra* Part II and note 138 and accompanying text.

169. *See supra* Part II and note 139 and accompanying text.

170. *See, e.g.*, Mengfanpeng, Zhangjianhui Zhuzuoquan Quan Shu, Qinquan Jiufen Ershen Minshi Panjueshu (孟繁鹏、张建辉著作权权属、侵权纠纷二审民事判决书) [Meng Fanpeng v. Zhang

Based on the empirical results, we can confidently consider the access prong in China to differ from the actual copying prong in the United States in terms of its functions. Because most decisions in China rely on evidence of access and similarities to assess the possibility of independent creation, this common approach of the Chinese courts perceives the access prong as merely one component in proving actual copying rather than a definitive and standalone criterion.

C. MUDDIED FUNCTIONS: DOES ACCESS PLUS SUBSTANTIAL SIMILARITY EQUAL ACTUAL COPYING?

If viewing the Chinese test in this way, it seems that access plus substantial similarity can function analogously to the actual copying prong in the United States because both aim to infer the existence of some copying from defendants to defeat the independent creation defense. That is to say, the previous understanding of the Chinese test uncovered by the empirical results and representative decisions reveals that substantial similarity in China ostensibly performs a similar role to probative similarity in prong one of the *Arnstein* test.[171] Substantial similarity also functions as circumstantial proof to facilitate the evidential inference as to the existence of actual copying, which functions just like the U.S. prong one probative similarity. Based on that proposition, one may conclude that China's access plus substantial similarity equals the United States' actual copying prong.

Superficially, this equation conforms with the current practice in China in some respects. For instance, a handful of decisions considered the appearance of common errors in the works of the plaintiff and the defendant as part of the substantial similarity analysis.[172] This is one of the parallels with probative similarity in prong one of the

Jianhui], 中国裁判文书网 [China Judgements Online] (Shenyang Intermediate People's Ct. of Liaoning Province, June 20, 2020) (China); Shenzhen Shi Zhongshi Zongheng Sheji Youxian Gongsi Yu Chongqing Baoli Gao'erfu Qiu Hui Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (深圳市中世纵横设计有限公司与重庆保利高尔夫球会有限公司著作权权属、侵权纠纷一审民事判决书) [Shenzhen Zhongshi Zongheng Design Co., Ltd. v. Chongqing Poly Golf Club Co., Ltd.]. 中国裁判文书网 [China Judgements Online] (Shenzhen Futian Dist. People's Ct., Guangdong Province, Nov. 11, 2016) (China); Xiang Wei Ren Yu Shenzhen Shi Guo Dashi Yishu Pin Touzi Youxian Gongsi, Zhangrucai Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (项维仁与深圳市国大师艺术品投资有限公司、张汝财著作权权属、侵权纠纷一审民事判决书) [Xiang Weiren v. Shenzhen Guodashi Art Inv. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Shenzhen Futian Dist. People's Ct., Guangdong Province, Dec. 27, 2018) (China).

171. *See supra* notes 47–57 and accompanying text.

172. *See, e.g.*, Beijing Shan Liang Shishang Xinxi Jishu Youxian Gongsi, Bu Luan Mai Dianzi Shangwu (Beijing) Youxian Gongsi Qinhai Jisuanji Ruanjian Zhuzuoquan Jiufen Ershen Minshi Panjueshu (北京闪亮时尚信息技术有限公司、不乱买电子商务（北京）有限公司侵害计算机软件著作权纠纷二审民事判决书) [Beijing Shining Fashion Info. Tech. Co., Ltd. v. Buluanmai E-commerce (Beijing) Co., Ltd.], SUP. PEOPLE'S CT. GAZ. (Supreme People's Ct., Dec. 23, 2019) (China); Guangzhou Shi Ming Jing Wutai Dengguang Shebei Youxian Gongsi, Guangzhou Shi Yu Zhan Dianzi Youxian Gongsi Qinhai Jisuanji Ruanjian Zhuzuoquan Jiufen Minshi Yishen Minshi Panjueshu (广州市明静舞台灯光设备有限公司、广州市煜展电子有限公司侵害计算机软件著作权纠纷民事一审民事判决书) [Guangzhou Mingjing Stage Lighting Equip. Co., Ltd. v. Guangzhou Yuzhan Elecs. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Guagnzhou Intell. Prop. Ct., Dec. 24, 2018) (China); Beijing Zhong Ke Heng Chao Keji Youxian

Arnstein test.[173] Furthermore, the common approach to *Arnstein* is allowing the dissection of the works to determine actual copying while not allowing any dissection in the improper appropriation prong.[174] As demonstrated in our empirical results, analytical dissection is one of the common methods Chinese courts use in their substantial similarity analysis,[175] making it more akin to prong one of the *Arnstein* test.

Meanwhile, some courts appeared to treat substantial similarity as probative similarity, though perhaps due to their confusions between the two, they adopted some arrangements touching the core of the inverse ratio rule. U.S. courts use a sliding scale approach to prove actual copying, allowing greater evidence on similarities to remedy less evidence on access, and vice versa.[176] Likewise, several Chinese courts utilized the essence of the inverse ratio rule. For example, some relied on the striking similarities between the two works to rule out the possibility of independent creation and find infringement.[177] Others used unconventional similarities between the two works to

Zeren Gongsi Yu Beijing Pei Te Lai Dianqi Youxian Gongsi Deng Qinhai Jisuanji Ruanjian Zhuzuoquan Jiufen Yishen Minshi Panjueshue (北京中科恒朝科技有限责任公司与北京佩特来电器有限公司等侵害计算机软件著作权纠纷一审民事判决书) [Beijing Zhongke Hengchao Tech. Co., Ltd. v. Beijing Peitelai Elec. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Beijing Intell. Prop. Ct., Aug. 30, 2018) (China); Chongqing Suo Ding Keji Youxian Gongsi Yu Lüxiaobo Zhuzuoquan Qinquan Jiufen Shangsu An (重庆索鼎科技有限公司与吕晓波著作权侵权纠纷上诉案) [Chongqing Suoding Tech. Co., Ltd. v. Lv Xiaobo], 中国裁判文书网 [China Judgements Online] (Chongqing First Intermediate People's Ct., Nov. 30, 2015) (China); Chen Zhe Yu Yu Zheng, Hunan Jing Shi Wenhua Chuanbo Youxian Gongsi, DOngyang Huan Yu Yingshi Wenhua Youxian Gongsi, Wanda Yingshi Chuanmei Youxian Gongsi, Dongyang Xing Rui Yingshi Wenhua Chuanmei Youxian GOngsi Qinhai Zhuzuoquan Jiufen Yishen Minshi Panjueshu (陈喆与余征、湖南经视文化传播有限公司、东阳欢娱影视文化有限公司、万达影视传媒有限公司、东阳星瑞影视文化传媒有限公司侵害著作权纠纷一审民事判决书) [Chen Zhe v. Yu Zheng], 中国裁判文书网 [China Judgements Online] (Beijing No. 3 Intermediate People's Ct., Dec. 25, 2014) (China); Shenzhen Shi Jianzhu Sheji Yanjiu Zong Yuan Youxian Gongsi, Jingmen Zhong Chen Zhiye Fazhan Youxian Gongsi Jianshe Gongcheng Hetong Jiufen Ershen Minshi Panjueshu (深圳市建筑设计研究总院有限公司、荆门中辰置业发展有限公司建设工程合同纠纷二审民事判决书) [Shenzhen Gen. Inst. of Architectural Design & Rsch. Co., Ltd. v. Jingmen Zhongchen Real Est. Dev. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Hubei Provincial High People's Ct., Aug. 10, 2017) (China).

173. Latman, *supra* note 13, at 1205; *see also* Balganesh & Menell, *supra* note 9, at 334.

174. *See* Lemley, *supra* note 10, at 726.

175. *See supra* Part II.

176. *See supra* notes 53–57 and accompanying text.

177. *See, e.g.*, Fuzhu Gongye Zhushi Huishe Yu Shantou Shi San Ma Sujiao Zhipin Youxian Gongsi Deng Qinhai Zuopin Fuzhi Quan Jiufen Minshi Yishen Anjian Minshi Panjueshu (福助工业株式会社与汕头市三马塑胶制品有限公司等侵害作品复制权纠纷民事一审案件民事判决书) [Fuzhu Indus. Co., Ltd. v. Shantou Sanma Plastic Prods. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Shanghai Xuhui Dist. People's Ct., Oct. 29, 2020) (China); Cengzhaoyu, Quanzhou Yi Xiao Feng Maoyi Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen Ershen Minshi Panjueshu (曾招裕、泉州逸小风贸易有限公司著作权权属、侵权纠纷二审民事判决书) [Zeng Zhaoyu v. Quanzhou Yixiaofeng Trading Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Fujian High People's Ct., Aug. 31, 2020) (China); Hangzhou Bi Ling Wangluo Keji Youxian Gongsi Yu Hangzhou Fanshen Wangluo Keji Youxian Gongsi, Hangzhou Li Xing Baihuo Jituan Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Panjueshu (杭州必灵网络科技有限公司与杭州反身网络科技有限公司、杭州利星百货集团有限公司著作权权属、侵权纠纷一审民事判决书) [Hangzhou Biling Network Tech. Co., Ltd. v. Hangzhou Fanshen Network Tech. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Hangzhou Railway Transp. Ct., Sept. 24, 2020) (China); Xie Ying Yu Hangzhou Maike Si Mei Maoyi Youxian Gongsi, Hangzhou Maike Si Mei Maoyi Youxian Gongsi Shanghai Zhangning Qu Fen Gongsi Deng Qinhai Zuopin Fuzhi Quan

infer actual access and, taken together, proved actual copying,[178] which implicitly borrowed insights from the inverse ratio rule. In addition, certain scholars hold the same view that the inverse ratio rule is available in the Chinese access and substantial similarity test.[179] These observations reinforce the impression that the Chinese substantial similarity is equivalent to probative similarity.

However, such alignment still suffers from critical flaws as it pronouncedly downplays the actual functions the substantial similarity prong in China achieves. Unlike probative similarity where any level of similarity may facilitate the inference of actual copying without any quantitative or qualitative conditions, Chinese courts meant the similarity to be of some degree or satisfy some requirements for the prong to be sustained. For example, as demonstrated in our empirical results, several decisions demand that the similarity between two works be quantitatively significant when analyzing substantial similarity.[180] Many require that similarities lie in the expression or other protectable elements of the plaintiff's works; not all similarities can necessarily satisfy the substantial similarity prong, regardless of how probative they may be.[181]

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178. *See, e.g.*, Cengzhaoyu, Quanzhou Yi Xiao Feng Maoyi Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen Ershen Minshi Panjueshu (曾招裕、泉州逸小风贸易有限公司著作权权属、侵权纠纷二审民事判决书) [Zeng Zhaoyu v. Quanzhou Yixiaofeng Trading Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Fujian High People's Ct., Aug. 31, 2020) (China); Zhongshan Shi Anyi Yuan Fushi Youxian Gongsi, Zhushi Huishe Yiwusuoyou Qinhai Zuopin Fuzhi Quan Jiufen, Qinhai Zuopin Faxing Quan Jiufen, Qinhai Zuopin Xinxi Wangluo Chuanbo Quan Jiufen Ershen Minshi (中山市安逸猿服饰有限公司、株式会社一无所有侵害作品复制权纠纷、侵害作品发行权纠纷、侵害作品信息网络传播权纠纷二审民事判决书) [Zhongshan Anyiyuan Clothing Co., Ltd. v. Yiwuyou Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Liaoning Provincial High People's Ct., Apr. 9, 2020) (China); Shenzhen Shi Xing Liao Da Jinshu Youxian Gongsi Yu Zhuhai Shi Yuan Fang Xi Gongyi Jishu Yanfa Youxian Gongsi Qinhai Zuopin Fuzhi Quan Jiufen Ershen Minshi Panjueshu (深圳市兴廖达金属制品有限公司与珠海市圆方锡工艺技术研发有限公司侵害作品复制权纠纷二审民事判决书) [Shenzhen Xingliaoda Metal Prods. Co., Ltd. v. Zhuhai Yuanfang Tin Tech. Rsch. & Dev. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Zhuhai Intermediate People's Ct. of Guangdong Province, Sept. 14, 2015) (China); *Id.*; Shenzhen Shi Jianzhu Sheji Yanjiu Zong Yuan Youxian Gongsi Yu Jingmen Zhong Chen Zhiye Fazhan Youxian Gongsi, Hubei Sheng Jian Ke Jianzhu Sheji Yuan Jianshe Gongcheng Hetong Jiufen Yishen MInshi Panjueshu (深圳市建筑设计研究总院有限公司与荆门中辰置业发展有限公司、湖北省建科建筑设计院建设工程合同纠纷一审民事判决书) [Shenzhen Architectural Design & Rsch. Inst. Co., Ltd. v. Jingmen Zhongchen Real Est. Dev. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Wuhan Intermediate People's Ct., Hubei Province, June 7, 2016) (China); Fan Hua Jiaju (Shanghai) Youxian Gongsi Yu Shanghai Mei Xuan Shiye Youxian Gongsi Zhuzuoquan Quan Shu, Qinquan Jiufen Yishen Minshi Caiding Shu (梵华家具(上海)有限公司与上海美旋实业有限公司著作权权属、侵权纠纷一审民事裁定书) [Fanhua Furniture (Shanghai) Co., Ltd. v. Shanghai Meixuan Indus. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Shanghai Pudong New Area's People's Ct., May 27, 2017) (China).

179. *See, e.g.*, Liu, *supra* note 16, at 86–87; Meng Ting (孟霆) & Dong Shi (董石), *Zuopinquan Qinquan de Shencha Lujing* (*著作权侵权的审查路径*) [*The Examination Path of Copyright Infringement*], CHINA BUS. L.J. (Mar. 1, 2022).

180. *See supra* Part II.

181. *See id.*

The inadequacy of equating substantial similarity with probative similarity or considering it as part of actual copying is amplified when we consider another main approach Chinese courts take in applying this prong: total concept and feel.[182] While many Chinese courts comfortably engage in the total concept and feel analysis to judge substantial similarities as indicated by our empirical results, especially in artistic works, this approach originates from U.S. courts when they determine the improper appropriation prong.[183] The practice of Chinese courts shown in decisions sends a signal to the public that they do not just use substantial similarity to infer actual copying. More significantly, just like U.S. courts, Chinese courts also engage in some level of normative judgment on whether the defendant takes too much—for example, whether or not a substantial amount of protectable material is taken.[184] As such, Chinese courts use the substantial similarity analysis not just to exercise its probative value but also to emphasize its function of judging the impropriety of the defendant's copying conduct.

D. SIMILAR TERMINOLOGY, DIVERGENT FUNCTIONS: A SUMMARY

Given the discussion above, one can easily perceive the inherent muddiness in understanding what each prong means and how it functions in China. It is inaccurate to equate access with actual copying or access plus substantial similarity with actual copying. Likewise, a simplistic matching between substantial similarity and improper appropriation is equally unprecise because substantial similarity in China also partially functions as probative similarity. Therefore, China currently adopts a somewhat distinct version of the two-prong test, despite the spillover from the United States and the use of similar terminology.

Specifically, the substantial similarity prong in China performs dual functions. First, it contributes to the finding of actual copying by defendants and, together with the access prong, operates to dismiss the independent creation defense. Second, and more importantly, substantial similarity is similar to improper appropriation in determining whether the defendant's copying from the copyrighted works has reached a substantial level that constitutes illegitimate infringement. Table 1 depicts the more apt comparison between the Chinese test and the United States' *Arnstein* test.

182. *See id.*

183. *See* Asay, *supra* note 9, at 81, 83 (finding that total concept and feel is one common approach adopted in the U.S. courts when judging improper appropriation according to the empirical results).

184. *See* Wu, *supra* note 19, at 67–68; Liang, *supra* note 19, at 38–39.

TABLE 1: THE CHINESE TEST VERSUS THE U.S. *ARNSTEIN* TEST

<table>
<tr><th>Functions</th><th>China</th><th>U.S.</th></tr>
<tr><td rowspan="2">Actual Copying
&
Independent Creation</td><td>Access</td><td rowspan="2">Access
&
Probative Similarities[185]</td></tr>
<tr><td rowspan="2">Substantial Similarity</td></tr>
<tr><td>Improper Appropriation</td><td>Substantial Similarity</td></tr>
<tr><td>Legal Outcome</td><td colspan="2">Finding of Copyright Infringement</td></tr>
</table>

IV. JUSTIFYING THE DIVERGENCES

A. SPILLOVER LEADING TO A JUSTIFIABLY DIVERGENT TEST

Judging from the perspective of legal transplantation, if one considers there is one, some may propose that Chinese courts have failed to fully transplant the copyright infringement test from the United States. It looks like the Chinese courts misread the *Arnstein* two-prong test and transplanted the two frequently occurring terms into their own test—access and similarity—without knowing the differences between probative similarity and substantial similarity; they did not have a clear picture of what distinct functions each tried to achieve in the United States.[185] During the transplantation, Chinese courts probably made the same mistake as some U.S. courts, which confused probative similarity and substantial similarity, construing both as the same element and fulfilling the same functions. As mentioned, the former achieves different functions from the latter such that the correct understanding of the *Arnstein* decision should differentiate the two.[186]

Nevertheless, this Article has pointed out the frequently occurring misreading of the *Arnstein* decision by follow-on U.S. courts because of its double use of the term substantial similarity in both prongs.[187] Even though some circuits (e.g., the Fifth and Second Circuits) have correctly used the term probative similarity to substitute

185. That is why the Chinese courts have quite divergent approaches in terms of analyzing the access and substantial similarity prongs in reality. *See supra* Part III.

186. *See supra* notes 47–64 and accompanying text.

187. *See supra* notes 44–45 and accompanying text.

substantial similarity in prong one to eliminate confusion,[188] several U.S. courts have conflated two types of similarities and lumped them together.[189] It can be argued by those who consider that there is a legal transplantation that, when transplanting the U.S. test, Chinese courts were equally confused by the dual determinations of similarity in the two prongs, similar to these U.S. courts, or subtly influenced by the U.S. courts' erroneous interpretations. As a result, Chinese courts may have conflated the two types of similarity into one overarching substantial similarity. The inaccuracies in the potential legal transplantation may be further evidenced by the flawed application of the inverse ratio rule by some Chinese courts.[190] These courts recognize a sliding scale between substantial similarity and access, mirroring the error made by some U.S. courts due to their conflation of the two types of similarity.[191] Following this line of reasoning, it seems that there should be further legal transplantations to "correct" the inaccuracies of the current Chinese test to better align it with the U.S. test.

However, this Article rejects this reasoning and proposes that there should be no further transplantation from the U.S. test, if there was one before, as the divergent Chinese test better suits the Chinese judicial system and offers more substantive benefits. First, as discussed earlier, there are unique procedural reasons behind why the *Arnstein* court divided the copyright infringement test into two prongs.[192] The *Arnstein* court adopted the bifurcated test by deliberately dividing the question of copying into actual (prong one) and improper (prong two) for the unique jury-judge division system as well as the availability of summary judgment in the United States.[193] The court wanted the *whole* question of copying to be resolved by a group of laypersons through a jury rather than trial court judges through the summary judgment proceeding.[194] Because the trial court in *Arnstein* only addressed whether the defendant had actually copied the work, leaving another copying question of whether the copying amounted to an infringing act untouched, Judge Frank was concerned that if he did not address improper copying as part of the overall copying question, the trial court would continue to rely on summary judgment rather than defer to a jury on the issue of improper copying after the case was remanded on the issue of actual copying.[195] That is why Judge Frank, despite very weak precedents adopting the same bifurcated test, insisted that the copying question should be separated into two and emphasized the importance of having juries decide the impropriety of copying.[196] Yet, the similarity

188. *See* Latman, *supra* note 13, at 1204; Asay, *supra* note 9, at 45; Lemley, *supra* note 10, at 722.

189. *See, e.g.*, Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706 (S.D.N.Y. 1987); Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Grp., Inc., 443 F. Supp. 291 (S.D.N.Y. 1977); Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090 (2d Cir. 1977); Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020) (en banc) (rejecting the inverse ratio rule because of conflations between substantial similarity and probative similarity). *See also supra* notes 44–45 and accompanying text.

190. *See supra* notes 177–179 and accompanying text.

191. *See supra* notes 58–60 and accompanying text.

192. *See supra* notes 67–84 and accompanying text.

193. *See* Balganesh, *supra* note 9, at 850.

194. *See id.* (emphasis added).

195. *See id.* at 807–08.

196. *See id.* at 808, 842–46.

between the works, originally a critical part of the entire copying question, now has to function twice in both copying prongs, acting as the dispositive element in both and the entire test.[197]

The division between probative and substantial similarity in the bifurcated prongs was further motivated by Judge Frank's disfavor of expert evidence in judging illicit copying and his allowance of it in determining actual copying.[198] His analysis construed the question of improper appropriation as a fact to be analyzed through the lens of laypersons such that "a judge should neither make the assessment nor indeed control it by allowing the jury to hear expert evidence."[199] This distinction stems from Judge Frank's concerns about trial courts using expert evidence to influence jury findings on illicit copying, essentially circumventing the jury's determinations on the overall question of copying.[200]

The Chinese legal system has no special procedural considerations supporting the *Arnstein* bifurcated test. Though there is certainly a distinction between questions of law and questions of facts in China, the distinction does not matter that much because Chinese courts do not have the unique judge-jury system as in the United States.[201] In most circumstances, Chinese judges determine all questions of law and facts.[202] Moreover, Chinese courts do not have any discretion to resolve an issue at an early stage of the proceedings, such as summary judgment, which is available to U.S. courts.

Generally, Chinese courts hear evidence presented by both parties and consider their debates to ascertain the facts and apply the law to reach a final decision.[203] The exception is the civil mediation process, a unique and complex system in China that goes beyond the scope of this Article. Expert evidence is generally available in Chinese court proceedings to assist judges in their determinations upon request by the parties

197. *See id.* at 844.

198. *See id.* at 850.

199. *See id.* at 852.

200. *See id.* at 850–52.

201. Chinese courts do invite some portions of the public to attend the court proceedings as people's assessors. However, people's assessors are by no means similar to jurors compatible with the jury system in the U.S. For an overview of the Chinese people's assessors system, see Guodong Du, *Does the Jury Exist in China?*, CHINA JUST. OBSERVER (Feb. 21, 2020), https://www.chinajusticeobserver.com/a/does-the-jury-exist-in-china [https://perma.cc/3UXG-D9R9] [https://web.archive.org/web/20240722024722/https://www.chinajusticeobserver.com/a/does-the-jury-exist-in-china].

202. Technically speaking, people's assessors would serve as members of the judge panel. The whole judge panel would vote to decide on the questions of facts and law. *See* FALIAN ZHANG, *Comparison Between Chinese Assessor System and Western Jury System*, *in* A COMPARATIVE STUDY OF CHINESE AND WESTERN LEGAL LANGUAGE AND CULTURE 382–83 (Qing Zhang & Hongfang Zhao trans., 2021). However, anyone familiar with China's judicial system can easily identify the limited decision power that people's assessors have in court proceedings.

203. For a brief introduction to Chinese civil procedure law and China's judicial system, see Guodong Du, *Litigation in China 101: A Basic Understanding of Civil Litigation in China*, CHINA JUST. OBSERVER (Nov. 24, 2019), https://www.chinajusticeobserver.com/a/china-litigation-101 [https://perma.cc/W2H2-5YBL] [https://web.archive.org/web/20240420155759/https://www.chinajusticeobserver.com/a/china-litigation-101].

or *ex officio* by the courts, especially in IP cases that require strong technical expertise.[204] No matter whether it concerns probative similarity in actual copying or substantial similarity in improper appropriation, Chinese courts may rely on expert evidence as they deem appropriate. Therefore, none of the procedural considerations justifying the division between probative similarity and substantial similarity in the two-prong U.S. test exist in the Chinese legal system. It then becomes much more understandable why Chinese courts, despite the spillover from the U.S. test, did not make a similar distinction between the two types of similarity but instead lumped them together as a single substantial similarity issue. They formulated a two-prong test that better aligns with China's own civil proceedings and judicial system.

Aside from the procedural considerations, the current version of the Chinese test is not necessarily inferior to the standard *Arnstein* test from a substantive viewpoint. As mentioned, the double use of and determination of similarity between two works in two prongs has confused many U.S. courts. The same evidence on similarities no doubt has to be used twice to satisfy both prongs if strictly adhering to the *Arnstein* division approach. [205] Using the same evidence twice in one infringement analysis seems burdensome and counterintuitive. There appears to be no substantive reason for a double determination of similarities, which often leads to confusion, instead of consolidating it into one, aside from the procedural concerns mentioned above.[206] It is also questionable whether fact finders (judges or juries) can keep the two types of similarity separate—rendering the distinction even less meaningful in practice.[207] Most likely due to the confusion and the lack of substantive considerations for the double determination, the most recent empirical work in the United States has indicated that "most courts address prong one simply by assessing the defendant's probable access to the plaintiff's work," with only slightly over 25% of the opinions discussing some form of similarity within their prong one analysis.[208] Though some courts made mistakes in combining two types of similarity, many courts deliberately leave the similarity question to prong two as they consider probative similarity in prong one redundant.[209] These courts try to avoid duplicating the efforts in judging similarities to achieve greater judicial efficiencies.[210] From this angle, the unified determination of similarities in the substantial similarity prong in China may not be that problematic.

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204. Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, rev'd Sept. 1, 2023, effective Jan. 1, 2024), art. 79, 2023 P.R.C. LAWS (China), https://www.lawinfochina.com/display.aspx?lib=law&id=41817 [https://web.archive.org/web/20240723165813/https://lawinfochina.com/display.aspx?lib=law&id=41817] . For the increasing use of expert evidence in IP cases, see Yang Chen, *Rebalancing the Burden of Proof for Trade Secrets Cases in China: A Detailed Scrutiny and Comparative Analysis of Article 32*, 84 U. PITT. L. REV. 826, 871–72 (2023).

205. *See* Balganesh, *supra* note 9, at 805.

206. *See id.* at 850; Samuelson, *supra* note 7, at 1825–26.

207. Samuelson, *supra* note 7, at 1826.

208. Asay, *supra* note 9, at 75.

209. *Id.* at 76.

210. *Id.* at 76, 78.

Moreover, the fact finders' sequential double determination of similarities tends to unfairly disadvantage the defendants due to their inevitable hindsight bias. To be more precise, once fact finders have established the probative similarity, indicating actual copying, they are likely to harbor some bias against the defendants because of their copying behavior.[211] They may unavoidably draw conscious or subconscious conclusions from the first prong copying and thus become more inclined to determine that the copying is substantial and, therefore, improper.[212] The potential spillover from a finding of actual copying to the determination of improper copying is quite real, as there is a general sense of free-riding rhetoric existing in intellectual property cases.[213] The rhetoric of free riding may predispose fact finders to view copying, once established in the first prong, as improper.[214] Empirical evidence has confirmed this bias, demonstrating that mere knowledge of copying can influence judgments of similarity. This effect is due to people's moral disapproval of copying and tendency to punish the copier.[215] Considering the inevitable bias stemming from the need to determine similarity in two separate copying prongs, the current approach in Chinese law appears less flawed because it only involves a single evaluation of similarity, thereby reducing the risk of hindsight bias.

However, the current Chinese approach and its practical application, which merges two types of similarities, may have some shortcomings. As such, despite cautions against suggesting any future transplantation, this Article normatively proposes a reformed test to address the pressing issues. These issues are identified shortly, followed by suggestions for reform.[216] Explanations and responses to the potential counterarguments to the reform suggestions also follow.

B. JUSTIFIED WITH LOOPHOLES: SOME SHORT PROPOSALS FOR REFORM

Although previous writings have suggested that there is no procedural need for China to separate two types of similarity into distinct prongs, and that there are substantive benefits to avoiding such a division, the current Chinese approach still suffers from some significant flaws that need to be addressed. The foremost issue with the current Chinese practice is the lack of any clear understanding of what functions each part of the test tries to achieve.[217] Most Chinese courts are unaware of probative similarity as a concept distinct from substantial similarity. This oversight is likely because China lacks a counterpart to the U.S. system's procedural considerations that result in the distinction such that they cannot understand or even envision a double

211. *See* Samuelson, *supra* note 7, at 1826; Manta, *supra* note 13, at 1339–41; Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1631 (2008).

212. *See* Manta, *supra* note 13, at 1340.

213. *See* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1039 (2005); *Id.* at 1340.

214. *See* Manta, *supra* note 13, at 1340.

215. Balganesh, Manta, & Wilkinson-Ryan, *supra* note 4, at 280–81.

216. *See infra* Part IV.B.

217. *See supra* Part III.

determination of similarities between two works.[218] They are nothing like certain U.S. courts that recognize the functions to be fulfilled by findings of different types of similarity and access, despite their disapproval of having to decide on similarities twice and genuinely considering one as redundant.[219] Quite a few have clumsily applied the substantial similarity plus access test. They assess the relevant evidence, make findings, and then reach conclusions on infringement without clearly delineating the purposes of each determination.[220] That is why it remains obscure in Chinese practice whether the courts should decide substantial similarity before access or vice versa.[221] It is also why some courts erroneously apply the inverse ratio rule when dealing with substantial similarity (rather than probative similarity) and access.[222]

In summary, under the spillover from the U.S. test, China inadvertently created a version more tailored to its own legal system. However, the ambiguous functions of the test's components still need clarification. Only then can the customized test be used consistently and effectively to judge copyright infringement in Chinese cases.

Considering these points, the Article offers suggestions to refine China's substantial similarity plus access test. The goal is to eliminate uncertainties while maintaining the test's original framework, thereby minimizing the learning curve for Chinese judges. The Chinese approach should be revised to a substantial similarity plus independent creation defense test, with a strict sequence of evaluation. Chinese courts should initially determine whether the works in question are substantially similar, focusing on whether the defendant has taken copyrighted expressions from the plaintiff's work. Then, the courts should examine the possibility of independent creation by the defendant.

In deciding the second prong, courts can use their findings of similarity from the first phase as circumstantial evidence. Additionally, they should consider whether the defendant likely had access to the copyrighted work. Other forms of circumstantial evidence, such as the presence of common errors in both parties' works, may also support the assessment of independent creation. Still, the similarities and potential access to the copyrighted work are the most crucial types of circumstantial evidence for deducing actual copying, thereby negating the possibility of independent creation. Defendants can present evidence of their creation process to counter the inference drawn from the plaintiffs' evidence.

Moreover, in the revised test, Chinese courts can safely apply the inverse ratio rule in the second prong, allowing the degree of similarity identified in prong one to compensate for a lack of evidence regarding access. Striking similarities could negate the need for the plaintiff to prove access, aligning with practices some courts already employ though the reverse is not true.[223] The ultimate function of the new version of

218. *See supra* Part IV.A.

219. *See supra* note 209 and accompanying text.

220. *See supra* notes 159–160 and accompanying text.

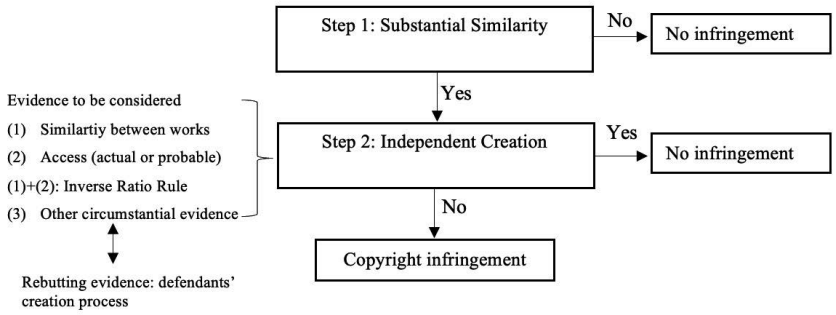
221. *See supra* notes 149–157 and accompanying text.

222. *See supra* notes 177–179 and accompanying text.

223. For cases where evidence of striking similarities between the works allows plaintiffs to dispense with the need to prove access, see, e.g., Xie Ziruo yu Xiangcheng Shuizhai Yimeng Fuzhuang Chang, Zhang

prong two, regardless of what circumstantial evidence courts pay more attention to, is to deal with the possibility of the defendant's independent creation such that the defendant shall be held liable for taking too much from the plaintiff's work (the function of the new version of prong one). Table 2 depicts the details and corresponding functions of the new version test.

TABLE 2: DECISION PROTOCOLS: A REVISED COPYRIGHT INFRINGEMENT TEST IN CHINA



While the current test is essentially holistic, allowing courts to make an overall analysis based on evidence of "access" and "substantial similarity" without a clear sequence, the revised test adopts a sequential approach with a strict order for evaluating the two components. This Article argues that the revised test offers several substantive benefits and addresses the pressing issues associated with the current test in China.

First and foremost, the revised test clearly defines the functions that each step is designed to achieve, thereby resolving the ambiguities that have confused Chinese courts when applying the current test. This clarity ensures more consistent application of the test and consideration of relevant evidence by courts, effectively addressing issues of judicial uncertainty. This stands in sharp contrast to the current holistic test, where courts conduct a combined analysis of both components without a clear

Hui Zhuzuoquan Quanshu, Qinquan Jiufen Yishen Minshi Panjueshu (谢子若与项城市水寨依梦服装厂、张辉著作权权属、侵权纠纷一审民事判决书) [First Instance Civil Judgment on the Copyright Ownership and Infringement Dispute Between Xie Ziruo and Xiangcheng Shuizhai Yimeng Garment Factory and Zhang Hui], 中国裁判文书网 [China Judgments Online] (Guangzhou Internet Ct., May 9, 2020 (China); Xin Si Ke Ji You Xian Gong Si, Wu Han Xin Dong Ke Ji You Xian Gong Si Qin Hai Ji Suan Ji Ruan Jian Zhuo Zuo Quan Jiufen Er Shen Min Shi Pan Jue Shu (新思科技有限公司、武汉芯动科技有限公司侵害计算机软件著作权纠纷二审民事判决书) [Civil Judgment of the Second Instance in the Dispute over Infringement of Computer Software Copyright Between Synopsys Inc. and Wuhan Xindong Tech. Co., Ltd.], 中国裁判文书网 [China Judgements Online] (Sup. People's Ct., Feb. 25, 2021) (China).

understanding of the distinct functions each is supposed to fulfill.[224] In this way, different courts may require distinct evidence and corresponding burdens of proof based on their individual understanding of the components' functions, which can lead to judicial uncertainty and inconsistency.[225]

In addition to reducing judicial inconsistency stemming from the current holistic test, the revised test's strict sequence can address the significant problem of the excessively low threshold for the "access" prong, as identified in current literature. It is widely recognized by scholars[226] and confirmed by this Article's empirical evidence[227] that the threshold for satisfying the "access" prong in China is too low. One of the "pills" offered by these scholars focuses on increasing the burden of proof for the "access" prong, such as elevating the standard from "mere possibility of access" to "reasonable possibility of access."[228] Alternatively, they also argue for introducing "probative similarity" into the "access" prong in China, essentially enlarging the definition of "access" to make the evidentiary inference more reasonable.[229] In essence, the revised test aligns with the second approach to address the low-threshold issue, but it does so in a more comprehensible manner. For one thing, the revised test rejects the first approach because, as mentioned, the inverse ratio rule permits a low level of evidence on access when there is a high level of evidence on similarities.[230] Thus, setting a threshold for the evidence of access is unnecessary as long as courts learn to use evidence of similarities as a remedial point for circumstantial inference. Additionally, with similarities in place, the issue of a low threshold for the "access" prong ceases to be problematic when courts understand how to combine different types of circumstantial evidence in Step 2 of the revised test to draw reasonable inferences about factual copying.

For another, the revised test departs from the existing scholarly approach by refusing to expand the notion of "access" to include "probative similarities." The reason is that the literal meaning of "access" struggles to encompass "similarities." This counterintuitive expansion of the definition may lead to confusion among courts. Instead, it is more straightforward to use "independent creation" as a framework to incorporate various types of circumstantial evidence. This not only includes both "access" and "similarities" but also clearly delineates the function of Step 2 for the courts. Furthermore, since the independent creation step also considers the similarities between the works, the revised test strategically places it in Step 2, following the determination of substantial similarity in Step 1. This sequence allows courts to leverage the results from Step 1 in Step 2, thereby avoiding duplication of efforts and enhancing judicial efficiency.

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224. *See supra* Part II.

225. *See supra* Part II.

226. *See, e.g.*, Zhou, *supra* note 21, at 110–13; Ding, *supra* note 21, at 25–26, 29; Liu, *supra* note 16, at 76–80.

227. *See supra* Part II.

228. *See, e.g.*, Ding, *supra* note 21, at 29; Liu, *supra* note 16, at 77–80.

229. *See, e.g.*, Ding, *supra* note 21, at 29–30; Liu, *supra* note 16, at 83–84.

230. *See supra* Part I.

Third, Chinese judges are familiar with the terminology, methods, approaches, and evidence utilized in the revised test. Many have frequently addressed issues of substantial similarity, access, and independent creation defense, albeit inconsistently and unsystematically.[231] The new version proposed here is a reshuffle and consolidation of the elements already familiar to them more systematically and clearly. It will present a minimal learning curve for Chinese judges. Also, to enhance the Chinese courts' understanding of the new version and the purpose of each step, future amendments to the PRC Copyright Act or judicial interpretations should explicitly recognize the test as substantial similarity plus independent creation defense. New provisions should clearly mention similarities and access as crucial circumstantial evidence in the second step while also acknowledging the possibility of considering other types of circumstantial evidence.

The proposal is not without any comparative support. Quite a few U.S. scholars have questioned the unsoundness of the current U.S. two-prong test and formulated reformed versions, which try to move the improper appropriation to the first step.[232] United States courts have not adopted any of these versions, possibly due to numerous procedural concerns. These concerns include the availability of expert witnesses and analytical dissection in each prong, the division between questions of fact and law, and the unique distribution of power between judges and juries in the U.S. judicial process.[233] However, it is important to note that the Chinese judicial system does not share these procedural concerns, as has been emphasized. Accordingly, there should be substantially fewer procedural hurdles for the Chinese courts to truly understand the meanings of substantial similarity and access and apply the new version in practice.

There may be arguments against conflating the two types of similarities as one in the proposed new version. For instance, certain U.S. scholars express significant concern over some U.S. courts conflating the two types of similarities. This conflation could result in courts halting their analysis at probative similarity without delving into whether these similarities constitute protectable expression that amounts to improper appropriation.[234] These scholars are concerned that permissible copying, such as the replication of uncopyrightable elements, might be wrongly prohibited, thereby disrupting the carefully delineated balance in copyright law.[235] However, though these concerns may be highly probable under the U.S. test, they are unlikely to exist in the Chinese context, even adopting the proposed new version because Step 1 of the new version is still substantial similarity. Previous writings have extensively argued that probative similarity is likely not recognized in Chinese courts. Typically, these courts assess similarities between copyrightable elements to determine substantial similarity

231. *See supra* Part II.

232. *See* Balganesh, *supra* note 9, at 858–62; Lemley, *supra* note 10, at 740–41.

233. This helps to explain why, when Professor Balganesh attempts to formulate a new version, he has to very carefully argue how the new version can deal with the questions of fact and law, the judges' and juries' duties, and the availability of expert witnesses and analytical dissection. *See* Balganesh, *supra* note 9, at 858–62.

234. *See, e.g.*, Asay, *supra* note 9, at 77–78.

235. *See, e.g.*, *id.*

rather than permitting the copying of ideas to meet this criterion.[236] As such, the proposed new version, emphasizing the original substantial similarity prong in Step 1, would not run the risk of wrongfully prohibiting permissible copying in China.

Another potential objection to the new version may lie in judicial efficiency. According to the argument, deciding the issue of actual copying before improper appropriation can filter out some cases where there is no copying by defendants but only independent creation at the early stage. For those cases, the judicial resources would no longer be wasted in determining the substantial similarity between works in the improper appropriation prong.[237] Likewise, this counterargument may be more plausible in the U.S. context but not in China. The reason is straightforward: the Chinese courts, under the current version of the test, would always decide on the substantial similarity issue, which is sometimes considered the sole or the most critical component in the whole copyright infringement analysis.[238] It is unlikely that they can dispense with the need to explore the substantial similarity issue as the threshold for access prong in China is very low.[239] Therefore, the proposed new version, which positions substantial similarity as the first step, is unlikely to significantly reduce judicial efficiency or waste resources in the non-copying cases in China compared to the current Chinese practice.

V. CONCLUSION AND FUTURE DIRECTIONS

The test for copyright infringement is a pivotal issue in copyright law that requires more focused attention. Currently, Chinese courts and scholarly discussions take for granted the application of the golden test—substantial similarity plus access—in Chinese copyright cases. However, there is a notable lack of effort to explore the true meanings and functions of these two prongs. The current literature treats the Chinese test as a transplantation from the United States and thus carelessly equates the two without meaningful comparisons or deeper examination. This Article represents the first endeavor to demystify the substantial similarity plus access test in China, employing empirical and comparative analyses. Despite the spillover from the United States, our empirical findings and detailed comparison reveal significant differences between the two versions. The divergences raise questions about whether the different test works well in China and whether China should further transplant the entire test from the United States to achieve the desired functions.

Nevertheless, this Article argues that the substantial divergences in the Chinese test are justified, as the test is more attuned to the Chinese legal context. Unlike the U.S. test, the Chinese test does not rely on the procedural underpinnings unique to the U.S. judicial system. Additionally, the version currently used by Chinese courts brings some substantive advantages. However, the Chinese version has shortcomings, notably a lack

236. *See supra* Parts II–III.
237. *See* Y'Barbo, *supra* note 10, at 297–300.
238. *See* Ding, *supra* note 21, at 24.
239. *See* Part III. *See also id.* at 28–29.

of a unified understanding of the objectives served by each prong, which have led to inconsistent applications, uncertain interpretations, and sometimes dubious decisions. Therefore, this Article proposes reforms to create a more streamlined and systematic approach to determining copyright infringement, aligning with the terminology, methods, and evidence familiar to Chinese judges. The revised test is designed to reduce ambiguities while preserving the framework of the original test, thus easing the learning curve for Chinese judges.

The findings in this Article also highlight potential directions for future research. Although the empirical findings primarily dissect the practical applications of the Chinese test, they provoke further questions. For example, the results indicate that when assessing substantial similarity, approaches vary depending on the type of copyrighted work involved. This variation raises important questions: Why do courts adopt different approaches, and should they continue to do so? Furthermore, it prompts consideration of whether a uniform test applicable to all types of works might be more desirable. These questions, while beyond the scope of this Article, are highly valuable for future studies.

APPENDIX A: CODING SCHEME

Case number, is the official number issued by the courts for cases

Court Level, is the level of the court
* Supreme People's Court (SPC)
* High Court
* Intermediate Court
* Primary Court

Court Location, is the province where the court situates

Decision Year, is the year in which the decision was issued

Procedural Posture
* First instance: the decision of the first instance
* Appeal: the appeal decision
* Retrial: the retrial decision

Criteria 1: Type of Copyrighted Works, is the statutory category of the work in issue
* Literary works
* Oral works
* Musical, dramatic, quyi, choreographic and acrobatic art works
* Artistic works
* Cinematographic works and works created in a way similar to cinematography (audiovisual works)
* Drawings of engineering designs and product designs, maps, sketches and other graphic works as well as model works
* Computer software
* Other works that meet the characteristics of works

Criterion 2, Access, is whether the court determines that the defendant had prior access to the copyrighted work
* Yes
* No
* N/A

If Criterion 2 is Yes→Criterion 3, evidence used by the court to establish access
* 1. Direct evidence
* 2. Potential access to P's work
    *2.1 P's work is published earlier than D's work
    *2.2 Widespread dissemination of P's work

*2.3 Some dissemination of P's work (e.g., some sales in public channels)
*2.4 P and D are in the same industry
* 3. Actual access to the work (e.g., prior dealings, relationships with P)
* 4. Striking similarities between the works
* 5. Suspicious facts (e.g., same technical errors in both works)

If Criterion 2 is No→Criterion 4, reasoning of the court
* 1. No evidence to show the publication date of P's work
* 2. P's work published later
* 3. Access evidence not sufficient

Criterion 5, Inverse ratio rule used or not
* Yes
* No

Criterion 6, Copyright Dissection, is whether the court dissected the works
* Yes
* No

If Criterion 6 is Yes→Criterion 7, where the court discussed the dissection
* 1. Before discussion on access + substantial similarity
* 2. After discussion on access + substantial similarity
* 3. After access but before substantial similarity
* 4. Within substantial similarity

If Criterion 6 is Yes→Criterion 8, what copyright exclusion doctrine discussed
* 1. Idea/Expression
* 2. Facts
* 3. *Scènes à faire*
* 4. Functional elements
* 5. Merger doctrine
* 6. Other public domain elements or public interest consideration

Criterion 9, Substantial similarity, is whether the court considered that the two works are substantial similar
* Yes
* No
* N/A

Criterion 10, Method for judging substantial similarity, is the approach(es) the court used to determine the substantial similarity
* 1. Qualitative
* 2. Quantitative
* 3. Compare overall appearance/impression (of the whole work)

* 4. Compare the dissected parts (the copyrightable parts)

Criterion 11, Expert evidence, is whether the court used expert evidence for the substantial similarity determination
* Yes
* No

Criterion 12, Independent creation, is whether the court discussed the possibility of independent creation
* Yes
* No

If Criterion 12 is Yes→Criterion 13, where the court considered the independent creation possibility
* 1. Before discussion on access + substantial similarity
* 2. After discussion on access + substantial similarity
* 3. Within access
* 4. Within substantial similarity