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BEHIND THE LOW ORIGINALITY OF CHINESE REALITY TV SHOWS: COPYRIGHT PROTECTION AND GOVERNMENT REGULATION FOR LOCALIZATION

Fan Cheng

Northwestern University Pritzker School of Law

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CHINESE REALITY TV SHOWS: COPYRIGHT
PROTECTION AND GOVERNMENT
REGULATION FOR LOCALIZATION**

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INTRODUCTION

What is the most popular TV program genre in China now? The answer is undoubtedly reality TV shows. There were more than 200 reality TV shows being put on air through Chinese satellite TV channels in 2015, which saw an outbreak of reality shows in China, and more than 400 in 2016.¹ Rising together with the popularity of Chinese reality TV shows are claims of copyright infringement.

Most of those reality shows do not owe their originality to domestic Chinese ideas, but are based on successful South Korean, American, and European formats.² The production teams of some shows, like *Daddy, Where Are We Going?*³ and *Keep Running*,⁴ purchase Intellectual Property

¹ See Xu Wei, *Reality, Variety TV Shows Continue to Boom*, SHANGHAI DAILY (Dec. 18, 2015), <https://www.shine.cn/archive/feature/art-and-culture/Reality-variety-TV-shows-continue-to-boom/shdaily.shtml> [<https://perma.cc/VDS6-JFMJ>].

² *Id.*

³ *Daddy, Where Are We Going?* was adapted from *Where Are We Going, Dad?*, a program produced by Korean Munhwa Broadcasting Corporation (MBC), with an annual licensing fee of RMB 11 million (about \$1.7 million). The advertising fee of the exclusive naming right for the Chinese edition *Daddy, Where Are We Going?* was RMB 500 million (about \$77 million) and the overall

(IP) rights from the original production teams and produce the show with the advice and cooperation from the original teams.⁵ Others, however, copy ideas and easily recognizable formats from popular foreign shows directly, “[f]rom theme to general concept, to story structure, to flow and to the dynamics of the cast,” and stuff them with domestic celebrities and scenes.⁶ What’s worse, these showrunners sometimes brazenly claim their shows are original to make the pretense of playing honorably and to attract more viewers.⁷ Rightfully so, some original show producers blamed Chinese producers for copyright infringement.⁸ The prevalence of those controversies can be seen in a disclosure from Rep. Kim Sung-soo of the ruling Democratic Party of Korea, the biggest source country of Chinese

advertising revenue was RMB 1.2 billion (about \$184.6 million). See Yuru Zuo & Haining Song, *Dianshi Jiemu Moshi de Kebanquanxing Tantaot*(电视节目模式的可版权性探讨)[*Copyrightability of Reality TV Format*], PATENTEXPRESSO (Sept. 16, 2015), <http://www.patentexp.com/?p=1402> [<https://perma.cc/VU7V-NLKY>].

⁴ *Keep Running*, previously known as *Running Man China* or *Hurry up, Brother* before 2017, was adapted from *Running Man*, also a Korean program produced by Seoul Broadcasting System, with an annual licensing fee of RMB 180 million (about \$27.7 million) in 2014. See *id.*

⁵ Betsy Tse, *How Korea’s Running Man Changed TV Production in China*, EJINSIGHT (Nov. 18, 2014, 6:19 PM), <http://www.ejinsight.com/20141118-how-koreas-running-man-changed-tv-production-in-china/> [<https://perma.cc/KE6P-S3AJ>]. Some foreign producers send experts to offer guidance on the “nitty-gritty” of the show to their Chinese counterparts while some others send an entire production team, including video specialists, to facilitate the production of Chinese localized programs. *Id.*

⁶ Si-soo Park, *China’s Brazen Plagiarism of Korean TV Shows Hits New Heights*, THE KOREA TIMES (Oct. 07, 2017), http://www.koreatimes.co.kr/www/art/2017/10/688_237317.html [<https://perma.cc/FRV8-TYPM>]. Some victims of Chinese rip-offs are JTBC’s “Hyori’s Homestay,” tvN’s “Youn’s Kitchen,” MBC’s long-lasting popular “Infinite Challenge,” tvN’s “Sisters over Flowers” and KBS’s “One Day Two Nights.” *Id.*

⁷ See Shan Ren, *Zhongguo Xingesheng Zaixian Banquan Jiufen, Weiyuanchuang Zongyi Heshi Xiu?*(《中国新歌声》再陷版权纠纷 伪原创综艺何时休?)[*Sing! China Involved In Copyright Lawsuit Again! When Could False Originality Stop?*], WENCHUANG INFO. (Mar. 17, 2017), <https://zhuanlan.zhihu.com/p/25839663> [<https://perma.cc/6UKK-9Q3E>]. TV show runners usually make this kind of claim by directly titling or marketing their shows as original, such as literally putting the words “original show” or “original” in Chinese before their show name. On the one hand, TV show runners try to use this extremely superficial and low-cost strategy to avoid potential lawsuits and tarnished reputations, which usually does not work. On the other hand, the title of “original” helps them comply with government regulations, at least in appearance. The claim of originality definitely brings them sharp criticism, especially from netizens who directly call out the TV shows as frauds. But show programmers do not necessarily view this as a bad influence because shows can become more popular due to widespread publicity, good or bad. *Id.*

⁸ Korean Broadcasting System (KBS) accused a Chinese TV show of plagiarizing its “Hello Counselor,” claiming that “the set design, the format of the show, voting and scoring, even the way that participants enter the stage all appear to be strikingly similar.” The statement officially demanded that the broadcasts of the show be immediately ceased, or they would “seek assistance from China’s State Administration of Radio, Film and Television, and take legal action.” K.Z., *KBS Threatens Legal Action Against Chinese Show Accused of Plagiarising “Hello Counselor”*, SOOMPI (Jan. 12, 2016), <https://www.soompi.com/2016/01/12/kbs-threatens-legal-action-against-chinese-show-accused-of-plagiarising-hello-counselor/> [<https://perma.cc/V4HE-D89M>].

variety shows, describing twenty-nine cases involving plagiarism by Chinese broadcasters.⁹

Few of the cases described above actually went to the court. In 2016, Shanghai Canxing Culture & Broadcast Co., the producer of one of the most popular shows, *The Voice of China*, was sued by Talpa, who owned the copyright of the original version, *The Voice of Holland*. This was the first lawsuit litigating the rights related to a reality TV show in China.¹⁰ However, Talpa did not sue for copyright infringement; rather, it sued for trademark infringement, claiming Canxing used its “*The Voice of . . .*” brand without licensing. The choice of trademark as the cause of action suggested that protecting the copyright of a reality show under Chinese copyright law may be difficult.¹¹

On the other hand, the dominance of localized foreign content in the Chinese reality show market brought an outpouring of disappointment and concern about lack of creativity among both the general public and supervising agencies.¹² Criticizing some satellite TV channels as “too dependent on broadcasting foreign-inspired program[s]” with no original ideas, the State Administration of Press, Publication, Radio, Film and Television (SARFT) issued a directive, *Directive About Strong Promotion of Innovation in Broadcasting and Television Programs* (Directive),¹³ limiting the airing of foreign-produced and foreign-adapted TV programs that satellite broadcasters are allowed to import.¹⁴ There are few foreign-

⁹ Park, *supra* note 6.

¹⁰ Matthew Dresden, *A China IP Reality Check*, CHINA L. BLOG (Sept. 6, 2016), <https://www.chinalawblog.com/2016/09/a-china-ip-reality-check.html> [<https://perma.cc/K7CT-T9KS>].

¹¹ Matthew Dresden, *A China IP Reality Check, Part 2*, CHINA L. BLOG (Sept. 8, 2016), <https://www.chinalawblog.com/2016/09/a-china-ip-reality-check-part-2.html> [<https://perma.cc/EGB8-CLB8>].

¹² Some netizens left frustrated comments on Weibo, a social platform in China, like “These people will never stop (plagiarizing),” “Why are they doing this again?,” and “When you look at it (‘Dear Inn’), you think of ‘Hyori’s Homestay’ immediately,” when another Chinese program (Dear Inn) recently copied a Korean program (Hyori’s Homestay). Park, *supra* note 6.

¹³ STATE ADMINISTRATION OF PRESS, PUBLICATION, RADIO, FILM AND TELEVISION OF THE PEOPLE’S REPUBLIC OF CHINA (SARFT), *Guojia Xinwen Chuban Guandian Zongju Fachu Guanyu Dali Tuidong Guangbo Dianshi Jiemu Zizhuchuangxin De Tongzhi* (国家新闻出版广电总局发出《关于大力推动广播电视节目自主创新工作的通知》)[SARFT Issued Directive About Strong Promotion of Innovation in Broadcasting and Television Programs] (June 20, 2016), http://www.sarft.gov.cn/art/2016/6/20/art_31_31064.html [<https://perma.cc/CGE2-K6WA>].

¹⁴ The directive clarified that foreign content includes both programs directly produced in a foreign country (like *The Big Bang Theory*) and programs adapted from a foreign format (like *The Voice of China*). It also stated TV channels streaming foreign content “(1) would have to secure prior government approval to air such programs, (2) could only show two foreign content programs during prime time each year, and (3) could only show one new foreign content program each year, and not during prime time in the first year.” Dresden, *supra* note 10; Jing Li, *China’s Media Regulator Vows ‘Severe Punishment’ for TV Programmes Ridiculing State Policies*, SOUTH CHINA MORNING POST

produced reality TV shows broadcast on Chinese satellite TV channels,¹⁵ so the main influence of the Directive on the reality show market fell on the foreign-adapted ones. Remarkably, the government did not categorize foreign-inspired TV programs, which were mostly low-quality copycat programs, as foreign programs regulated by the Directive.¹⁶ Unsurprisingly, there was considerable skepticism toward the effect this government regulation would have on the market. In fact, plagiarized TV programs were said to have increased after the introduction of the Directive as more and more Chinese localized program producers simply changed the name of the program and claimed it was domestic and original.¹⁷

The fact that the current regulation system does not provide an incentive to create original content does not mean that regulation per se is not a workable solution. More than twenty countries have some form of government regulation on TV programs to protect and promote local content. Among them, the local content rules in Australia and Canada are particularly valuable such that the Chinese government could adopt a similarly effective scheme.

Part I of this note examines the background of Chinese reality shows and the reasons China should offer protection to foreign content. Part II addresses to what extent a reality TV show may be protected under copyright law and how to establish infringement under Chinese copyright law. Part III tries to summarize the effect, if any, of the government regulation on localized reality shows and discusses what the government can learn from Australia and Canada's experiences of foreign content regulation. Part IV concludes that the difficulty of copyright protection and low-bar government regulation is probably the reason for the lack of originality in reality TV shows in China. To resolve this problem, the current government regulation on what counts as Chinese/foreign content should be changed to a multi-factor evaluation system.

(June 20, 2016), <http://www.scmp.com/news/china/policies-politics/article/1977991/chinas-media-regulator-vows-severe-punishment-tv> [<https://perma.cc/JNP3-L5B7>].

¹⁵ Audiences can view these foreign-produced shows on online platforms. Most of these shows are uploaded by individuals with no authorization from the copyright owner. But in the last two years, online platforms started to obtain licenses from foreign programmers, and videos uploaded by individuals are being taken down gradually.

¹⁶ Foreign-adapted programs refer to programs that are produced by Chinese programmers in cooperation with foreign programmers to adapt their original show models. Foreign-inspired programs, on the other hand, do not involve any cooperation or licensing from foreign program runners. They are fully made by Chinese programmers.

¹⁷ See Park, *supra* note 6.

PART I: BACKGROUND FOR REALITY TV SHOWS IN CHINA

Reality shows, compared to traditional TV programs, document “unscripted” situations and events, and “usually feature ordinary people instead of professional actors.”¹⁸ However, in the context of the Chinese market, most programs will have at least a basic plot or light script to direct the flow of the programs.¹⁹ Participants are usually assigned to a particular public persona to strengthen the entertaining effect.²⁰ However, the most entertaining feature of reality TV shows remains the true reactions of participants.

The reality show production involves substantial effort, which can be broken into four stages: “(1) coming up with a program idea; (2) creating a paper format; (3) adding production and business knowledge to create the program format; and finally, (4) airing the episodes.”²¹ The stages in most need of intellectual investment, and thus the most valuable, are the second and the third ones, which are also shown by the actual deals in the TV program market.²² Paper formats are mostly traded when they are unpublished between format creators, networks, and production companies, while program formats are more often traded after being published, especially after gaining success, by the way of licensing a localized version.²³ Since most reality show disputes in China fall into the second category between international content providers and Chinese producers, this article will focus on the copyright protection for the already published TV programs.

Another important question is why China should offer legal protection to foreign content producers. Despite China’s obligation to protect international copyright owners under conventions and treaties, problems resulting from low-cost copycat programs also urge China to take measures

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¹⁹ See Park, *supra* note 6.

¹⁹ Yiyang He, *Foreign Introduced Reality Te* 9-30/14523965/329542981/13a46d45e0102w4fn.shtml [https://perma.cc/N96H-6YZB]

²⁰ ColdEye Watching TV, *supra* note 19.

²¹ Neta-Li E. Gottlieb, *Free To Air?-Legal Protection For TV Program Formats*, 51 IDEA 211, 215 (2011)(emphasis omitted). “Paper format” is a written description of the basic idea and “a detailed layout” of the program, including names, rules and locations; “program format” is more a combination of different elements from “paper format” and “added production knowledge” like “music, set design, computer programs, participants’ and hosts’ characteristics.” *Id.*

²² *Id.* at 221, 245.

²³ *Id.*

to prohibit inane copying.²⁴ The low-cost nature of copycat programs led to the low quality of existing Chinese shows, the tarnished business reputation of Chinese programmers, and, most importantly, minimal incentives for local TV professionals to create truly original content.

First, without paying for the original format, the production cost for reality TV shows is so low that Chinese producers do not even try to “make high-quality shows with rich cultural content” to attract a broader audience and make up for the cost.²⁵ Instead, it seems most of them take chances on which show will succeed and turn the market into a numbers game. One of the main reasons to license the program format to a local production, instead of licensing the show as it is, is to tailor the program to the taste of local audiences and the needs of local broadcasters and advertisers.²⁶

Compared with the ease of appropriating a foreign program format,²⁷ it is difficult to localize a pre-existing format successfully.²⁸ Chinese producers made poor imitations and put on awkward TV programs when they copied only the format without updating details to properly mirror Chinese culture.²⁹ The result of this unmindful copying was low quality and high turnover.³⁰

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China is a signatory of the WTO-TRIPS; Berne Convention for the Protection of Literary and Artistic Works; the Universal Copyright Convention; the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms; the Beijing Treaty on Audio-visual Performances; and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

HOGAN LOVELLS, *Copyrights - Copyright Protection – China*, <http://limegreenip.hoganlovells.com/article/4/copyrights-copyright-protection-china> [<https://perma.cc/AP68-7CB5>].

²⁵ Alice Yan, *Chinese Television Screens Dominated by Copycat Reality Shows Featuring Local Celebrities*, SOUTH CHINA MORNING POST (Sept. 11, 2016), <http://www.scmp.com/news/china/society/article/2018297/chinese-television-screens-dominated-copycat-reality-shows> [<https://perma.cc/QP8Z-3PYM>].

²⁶ Gottlieb, *supra* note 21, at 245.

²⁷ *Id.* at 246 (“Most of the information contained in a program format can be easily inferred from broadcast episodes.”).

²⁸ Sanyou IP, *Jiran Chuangyi Wubanquan, Weihe Tianjia Goumai Haiwai Jiemu Muban? (既然创意无版权, 为何天价购买海外节目模板)* [Since the Idea has no Copyright, Why do You Buy an Overseas Program Template at a High Price?], (Mar. 31, 2015), <https://www.zhihedongfang.com/8754.html> [<https://perma.cc/BGU4-UWBY>]; see also Gottlieb, *supra* note 21, at 266. Before truly taking off when Shanghai Dragon TV licensed it from the original British producer, *Britain’s Got Talent* was copied first by Shandong Satellite TV (*Chinese Got Talent*) and later Hunan Satellite TV (*Who is the Hero?*). Neither was a big hit, even though the one from Hunan Satellite TV looked exactly like the original show. Behind the licensing is the secret know-how for the show, a “TV Format Bible” for targeting audiences, designing program plots, casting, and setting budget. Other guidance might be more specific with one category of TV shows like song choices and arrangement in “*The Voice of . . .*” series. *Id.*

²⁹ One Chinese TV show, *The Life We Long For*, even copied the dining table in its original Korean version, *Three Meals a Day*, when the dining table is common in Korean rural areas but does

Second, recognizing the effort and originality of foreign copyright owners would better the reputation of Chinese TV producers and therefore improve business opportunities for China. “Copying a program format that originated outside the copier’s territory” used to bear less risk of reputational damage, given that the copying may not ever be discovered.³¹ However, under an increasingly global environment it is easy for audiences themselves to discover the copying and the original content producers.³²

Third, long-term dependence on foreign originality could deprive Chinese producers of their ability to create their own works and make the Chinese reality show market void of independent production.³³ Enforcing copyright protection would push Chinese producers to create new programs with cultural and localized characteristics.

PART II: TRADITIONAL LEGAL APPROACH TO REALITY TV SHOWS AND APPLICATION IN CURRENT CHINESE CASES

Historically, TV format creators have not gained much success relying on copyright law protection.³⁴ Most failures are due to courts finding that TV show formats are generalized ideas which are not subject to copyright protection.³⁵

not appear in Chinese rural areas. See Dagen Wang, *Ganqing Nin Zhexiangwangde, Shi Hanguo Nongcun Shenghuo A?* (敢情您这向往的, 是韩国农村的生活啊?) [Is What You Dare to Love the Life in Rural Korea?], DOUBAN FILM (Jan. 19, 2017), https://www.douban.com/review/8301065/?dt_dapp=1 [https://perma.cc/3V5Q-N7X8].

³⁰ Fewer than ten percent of all the localized programs will have a second season and even fewer will actually survive. See Xiaofangfang, *Yinjin Banquan Jiemu Beihou: Qiangjiemu Ru Qiangmingbao, 90% Cheng Paohui* (引进版权节目背后: 抢节目如抢名包 90%成炮灰) [Behind the Licensing of TV Programs: Scrambling TV Programs is Like Scrambling Luxury Bags and Ninety Percent Became Cannon Fodder], TENCENT ENTERTAINMENT (Apr. 16, 2013), <http://ent.qq.com/a/20130416/000489.htm> [https://perma.cc/U3SH-WEVQ].

³¹ Gottlieb, *supra* note 21, at 249.

³² In the case of Chinese broadcasters copying Korean programs, a substantial portion of Chinese localized program audiences have access to and actually watch those original versions.

³³ Sanyou IP, *supra* note 28. However, there are some unreasonable opposing voices, stating that copying will not harm the Chinese television industry but will make it prosperous because television itself is an imported good. See Jun Hou, *Yinjinjiemu Dailing Dianshi Zongyijiemu Zouchu “Chao” Shidai?* (引进节目带领电视综艺节目走出“抄”时代?) [Localized TV Programs Lead Variety TV Shows Out of The Era of Copying?], CHINA ECONOMIC WEEKLY, Issue 22 (2013), http://paper.people.com.cn/zgjzk/html/2013-06/10/content_1254015.htm [https://perma.cc/ZY68-M4L8].

³⁴ FORMAT RECOGNITION AND PROTECTION ASSOCIATION, THE FRAPA REPORT 2011: PROTECTING FORMAT RIGHTS 5 (2011).

³⁵ This was especially true in earlier years when programs had simple structures and layouts.

Ideas v. Expressions

To be eligible for copyright protection, the “works”—reality TV shows in our case—should be “detailed expression[s]” of one’s creativity, which must be “more than ideas” for a TV program.³⁶ In the context of TV programs, although it is true that the general “reality game show/challenge format—whether it involves stranding people in remote locations, cramped quarters or luxurious resorts”—is hardly subject to copyright protection as high-level ideas,³⁷ multiple components of a TV show can be protectable under copyright law.³⁸ A typical list includes script, storyboards, music created for the show, graphical elements like set design and layout, and combined elements.³⁹ Different components are likely to be protected under different categories of copyright works.⁴⁰ In addition, the combinations of these different elements are protectable, and this protection is strong given that the elements are each entitled to copyright protection.⁴¹ On the other hand, the combination of standard, unprotectable, generic elements of reality shows is unlikely to satisfy the originality requirement and will only be subject to thin protection.⁴²

³⁶ FORMAT RECOGNITION AND PROTECTION ASSOCIATION, *supra* note 34, at 10. “Copyright law protects categories of creative works, such as literary, artistic, musical and dramatic works. Copyright will not protect a concept or an idea such as e.g. an outline or a high-level plot.” *Id.*; see also 17 U.S.C. § 102(a) (2012) (giving a list of works of authorship, including: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works” and excluding “idea, procedure, process, system, method of operation, concept, principle, or discovery” from the subject of copyright protection.); Zhuzuoquan Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991, amended Oct. 27, 2001 & Feb. 26, 2010), art. 3, http://english.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987430.htm [<https://perma.cc/A6RD-FU8L>] (defining “works” as including works of “literature, art, natural science, social science, engineering technology and the like made in the following forms: (1) written works; (2) oral works; (3) musical, dramatic, quyi, choreographic and acrobatic art works; (4) works of fine art and architecture; (5) photographic works; (6) cinematographic works and works created in a way similar to cinematography; (7) drawings of engineering designs and product designs, maps, sketches and other graphic works as well as model works; (8) computer software; (9) other works as provided in laws and administrative regulations.”).

³⁷ Thomas A. Smart et al., *Reality Check: When Will Two TV Shows in the Same Genre Be Considered Substantially Similar under Copyright Law?*, 21 ENT. & SPORTS L. 1, 20 (2003).

³⁸ FORMAT RECOGNITION AND PROTECTION ASSOCIATION, *supra* note 34, at 10.

³⁹ *Id.*

⁴⁰ *Id.* at 10-11. (“Literary copyright will protect the script; artistic copyright will protect storyboards, set-design and layout as well as any on-screen graphical elements; and musical copyright will protect the opening music or other music created for the show.”).

⁴¹ *Id.* at 11.

⁴² Smart et al. *supra* note 37, at 16; see also *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (holding copyright protection in a compilation of ideas must be thin since “copyright in

Under Chinese copyright law, it is not clear how the court will make rules about the copyright protectability of a reality TV show since there is no prior case about copyright infringement of reality shows. However, according to an answer issued by the Beijing Supreme Court, the “variety TV program format is the combination of multiple elements like variety show creation, process, rules, technical regulations and host style, which belongs to the scope of idea and is not subject to protection of copyright law.”⁴³ That being said, “works in the variety programs like the text script, stage art and design, and music, can be protected by copyright law.”⁴⁴ This answer is consistent with other countries’ practices in that high-level program elements are not copyrightable, while detailed expression within the programs is.

Originality and Fixation

In order to acquire copyright protection, copyright works must be “original” and “fixed or recorded in a certain medium.”⁴⁵ Proving fixation is usually not a problem for reality TV shows as long as they are captured on video. However, since reality TV shows consist of a substantial amount of spontaneous interaction between the hosts and the celebrity participants with little predetermined setting, they are usually harder to prove original and will be afforded thinner protection than scripted formats if they do pass the originality test.⁴⁶ It is arguable whether one’s emotional reactions and expressions under certain circumstances, like excitement about natural scenes or sorrow of competition failure, is original enough to warrant copyright protection.

a factual compilation is thin”); *CBS Broad., Inc. v. ABC*, No. 02 Civ. 8813· 2003 U.S. Dist. LEXIS 20258 at *24-25 (S.D.N.Y. Jan. 13, 2003) (“Providing protection to a combination of elements without more – that is, without consideration of the presentation or expression of those elements – would stifle innovation and would stifle the creative process that spawned the two shows at issue here.”).

⁴³ See Chen Liu, *Beijing Gaoyuan Guanyu Zongyijiemu Zhuzuoquan Jiufen Anjian 11 Ge Zhongyao Wenti Jieda* (北京高院于综艺节目著作权纠纷案件11个重要问题解答)[*Beijing High Court answers 11 important questions in the variety disputes of variety shows*], ZHIHU.COM (Apr. 15, 2015), https://zhuanlan.zhihu.com/p/20004506?from_voters_page=true[<https://perma.cc/4TSE-RWQ8>]; Sanyou IP, *supra* note 28.

⁴⁴ See Liu, *supra* note 43; Sanyou IP, *supra* note 28.

⁴⁵ FORMAT RECOGNITION AND PROTECTION ASSOCIATION, *supra* note 34, at 11; see also 17 U.S.C. § 102(a) (providing protection for “original works of authorship fixed in any tangible medium of expression”).

⁴⁶ FORMAT RECOGNITION AND PROTECTION ASSOCIATION, *supra* note 34, at 11 (A “tightly defined scripted” program with “detailed story, characters and narrative” will attract protection from copyright law most easily. Unfortunately, reality TV show is not one of those.).

Infringement Establishment

As mentioned above, a work must be original and fixed to earn a valid copyright. Once validity is established, two elements—ownership of the valid copyright and copying of original elements of the work—must be proven to establish copyright infringement.⁴⁷ Ownership of the copyright is usually easily proven by registration.⁴⁸ In our case, it is a general practice for reality TV show producers to put their name in the programs to demonstrate ownership. The second element, actual copying, usually consists of two steps: (1) copying and (2) substantial similarity.⁴⁹ First, copying is usually established through circumstantial evidences, which in most cases consist of “defendant’s access to the work” together with substantial or probative similarity between the two works.⁵⁰ Second, the court will assess whether the two works are substantially similar with respect to the copyrighted work’s original part. There is no mention of either direct copying or “substantial similarity” in China’s copyright law.⁵¹ But in practice, the Chinese courts use the same approach, copying plus “substantial similarity,” to establish copyright infringement.⁵² In the context of reality TV shows, the infringer’s access to the original program can be assumed when the original format is well-known or broadly on air.⁵³ In addition, courts will look for similarities with respect to “plot, themes, dialogue, mood setting or scenes, pace, sequence and characters.”⁵⁴

Application in Current Cases

Despite the usual difficulties of establishing a copyright infringement case for a reality TV show, it would be quite easy for foreign content owners to have a prima facie claim against Chinese producers for their recent copying of foreign content. The reason is that most Chinese producers copy directly without putting in even a slight effort to make

⁴⁷ *Feist Publications Inc.*, 499 U.S. at 361.

⁴⁸ See Smart et al., *supra* note 37, at 16.

⁴⁹ *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).

⁵⁰ See *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996); Smart et al., *supra* note 37, at 16.

⁵¹ See Zhuzuoquan Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People’s Republic of China].

⁵² See Beijing Xiaoming Wenhua Fazhan Youxian Zeren Gongsu Su Tongyi Qiye Zhongguo Touzi Youxian Gongsu (北京小明文化发展有限责任公司诉统一企业(中国)投资有限公司)[Beijing Xiaoming Culture Dev. Ltd. Co. v. Tongyi China Inv. Ltd. Co.], 2016 Beijing 73 Civ. Final 1078 [(2016) 京73民终1078号] (Beijing IP Ct. June 5, 2017) (rejecting infringement due to lack of “substantial similarity” despite of “actual access”).

⁵³ FORMAT RECOGNITION AND PROTECTION ASSOCIATION, *supra* note 34, at 12.

⁵⁴ *Id.*; see *CBS Broad. Inc.*, at 526 (concluding “the tone of the two shows” was so different from the expressions of the characters, the opening scenes of the two shows, the elimination of contestants, and the overall “look and feel.”).

changes to the plot, theme, dialogue, or scenes. In the case of *The Life We Long For*, an average audience could find recognizable similarities with respect to the location layout, one specific gaming mode,⁵⁵ hosts' lines and added captions,⁵⁶ category and number of pets and livestock,⁵⁷ and setting of relationship between hosts.⁵⁸ These easily identifiable similarities appeared in most of the localized programs Chinese broadcasters "borrowed" from foreign content creators.⁵⁹ As discussed above, the establishment of ownership and access is also unlikely to be a problem. Therefore, it should be easy for foreign content owners to at least make a prima facie case in a Chinese court for copyright infringement against a Chinese producer.

Coupled with the supposed ease of proving a case are the low statutory damages under Chinese law, which is probably the reason why so many foreign producers accused Chinese broadcasters for copyright infringement but did not file a lawsuit in court.⁶⁰ The cap of damages awarded to a plaintiff under Chinese copyright law (500,000 Yuan, equivalent to around \$77,000) is far less than the market price of official authorization or cooperation (usually 2 million Yuan to 180 million Yuan, equivalent to around \$307,000 to \$27.7 million).⁶¹

⁵⁵ Wang, *supra* note 29. In the Korean show *Three Meals a Day*, hosts need to harvest a pot (20kg) of corn in exchange for 500g of meat; similarly, hosts in the Chinese version had the option to exchange 200 self-harvested corncobs for 500g of meat. *Id.*

⁵⁶ *Id.* In the Korean show, there was one caption of "they sold their souls for meat" in the setting of harvesting corn; in the Chinese show, a similar caption showed as "Sell soul for meat and snacks" in the same circumstance. *Id.*

⁵⁷ *Id.* In both shows, there was one puppy, three chickens, and one sheep regarded as family members. In the setting of the chickens' first appearance, one specific host in each program said they thought of fried chicken. *Id.*

⁵⁸ *Id.* In both shows, there was a setting of a family of three, with father, mother, and son. *Id.*

⁵⁹ Other obvious examples include *Informal Talks*, *Divas Hit the Road*, *Oh My God of Singing*, *Listen to Your Trouble*, and *Dad is Back*. See Nancyette, *Xishu Woguo Naxie Maile Banquan Huo Zhijie Chaoxi Hanguo De Zongyi Jiemu* (细数我国那些买了版权或直接抄袭韩国的综艺节目) [Listing Our Variety Shows with Korean Licensing or without], DOUBAN GROUP (Feb. 27, 2017), <https://www.douban.com/group/topic/97349885/?start=0> [https://perma.cc/LN2Y-BLZY].

⁶⁰ See Zhuzuoquan Remin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China], art. 49 ("The infringer shall, when having infringed upon the copyright or the rights related to copyright, make a compensation on the basis of the obligee's actual losses; where the actual losses are difficult to be calculated, the compensation may be made on the basis of the infringer's illegal gains. The amount of compensation shall also include the reasonable expenses paid by the obligee for stopping the act of tort. Where the obligee's actual losses or the infringer's illegal gains cannot be determined, the people's court shall, on the basis of the seriousness of the act of tort, adjudicate a compensation of 500,000 Yuan or less.")

⁶¹ See *id.*

PART III: THE INTERFERENCE FROM GOVERNMENT REGULATION

To “boost self-innovation of Chinese TV channels,” China’s entertainment censor, SARFT, imposed “strict limits” on TV programs which are directly adapted from overseas content like *The Voice*.⁶² According to the new Directive issued by SARFT around June 13, 2016, TV channels streaming foreign-produced and foreign-adapted content “(1) would have to secure prior government approval to air such programs, (2) could only show two foreign content programs during prime time⁶³ each year, and (3) could only show one new foreign content program each year, and not during prime time in the first year.”⁶⁴ In addition, the localized shows are allowed to be on air with “only one season each year.”⁶⁵ Any violation of these regulations will not only result in “the removal of the program,” but also the local producer’s “losing the right to broadcast any foreign-adapted programs for the entirety of the following year.”⁶⁶

By trying to encourage local broadcasters “to focus more on original programs instead of purchasing new copyrighted ones from abroad,” SARFT had an unrealistic hope that all prime-time slots would be reserved for “self-innovated TV programs with Chinese cultural inheritance and characteristics.”⁶⁷

It has long been argued whether protectionist policies, like what SARFT is doing here, are legitimate. One of the often-cited arguments is the “infant industry argument,” which argues a local market needs a period of protection before it grows to an economically competitive scale.⁶⁸ It is true that the China reality TV show market is an infant industry. However, there is some doubt as to whether the protection would create an innovation-inspiring environment. To the contrary, importing high-quality foreign content would at least improve the taste of general audience, which might in turn force local producers to create original quality content.⁶⁹

⁶² Hannah Beech, *China Imposes Harsh New Controls on Foreign-Inspired TV Shows*, TIME (June 21, 2016), <http://time.com/4376044/china-tv-television-censorship-socialism-taboo/> [<https://perma.cc/TU4C-RZYR>].

⁶³ 7:30pm to 10:30 pm. SARFT, *supra* note 13.

⁶⁴ *Id.*

⁶⁵ Li, *supra* note 14.

⁶⁶ See SARFT, *supra* note 13.

⁶⁷ Beech, *supra* note 62; see Xi Wei & Tingting Huang, *China’s Watchdog Restricts Foreign-adapted TV Programs*, GLOBAL TIMES (June 21, 2016), <http://www.globaltimes.cn/content/989688.shtml> [<https://perma.cc/4NPQ-KWBW>].

⁶⁸ M.S. Shedd et al., *An Economic Analysis of Canadian Content Regulations and a New Proposal*, 16 CANADIAN PUB. POLICY/ANALYSE DE POLITIQUES 60, 62 (1990).

⁶⁹ In fact, it is not until recently when general audiences have access to American TV dramas and Korean reality shows that they have realized how much Chinese local programs could improve and have demanded high-quality shows. See Wangjubang, *Guochan Dianshiju He Meiju De Chabie*

Another interesting argument is the “public good argument” that claims domestic TV programs could bring some positive value to society that foreign-imported content is unable to.⁷⁰ A typical example would be “mutual understanding of different regions or subsets” of the society, which could then promote “greater national unity” and a distinct culture.⁷¹ However, this is not necessarily true since foreign programs, especially those produced by neighboring countries, could give a nice introduction to local regions and cultures. One of the most popular travel programs about China is actually a Korean travel-reality show, *New Journey to the West*, which took the participants to cities in China and had a detailed and interesting introduction to the natural scenes and the cultures.⁷² The show also offers a unique perspective about Chinese culture through the eyes of foreigners.

In spite of the theoretical doubt about the effect of limiting foreign content, the Directive completely shocked industry professionals at its issuance. However, the limitation has not resulted in an immediate shrinkage of localized programs, except that some programs with multiple seasons in one year were rescheduled.⁷³ Possible negative impacts from the new ban on existing TV programs, “such as a drop in audiences numbers or losing out on investment,” were expected but did not actually happen.⁷⁴

Zinaer?(国产电视剧和美剧的差别在哪儿?) [*What is the Difference Between Chinese TV Series and American TV Series?*] (Sept. 29, 2018), Sohu Culture, http://www.sohu.com/a/256965571_100113123 [<https://perma.cc/J2V2-LEGJ>]; Juice-Spitting Octopus, *Five Gaps between Mainland Reality Shows and Korean Shows, Do You Agree?*, Entertainment, KK News (Feb. 4, 2017), <https://kknews.cc/entertainment/eom8rq4.html> (last visited Apr. 23, 2019).

⁷⁰ Shedd et al., *supra* note 68, at 63.

⁷¹ *Id.*

⁷² *New Journey to the West*, WIKIPEDIA, https://en.wikipedia.org/wiki/New_Journey_to_the_West [<https://perma.cc/T5XY-HM8D>]; see *Xin Xiyouji Diyiji*(*新西游记*第一季)[*New Journey to the West Season 1*], DOUBAN FILM, <https://movie.douban.com/subject/26581214/> [<https://perma.cc/TDJ8-W3CM>]; Ruhe Pingjia Hanguo Zongyi Xin Xiyouji(如何评价韩国综艺《新西游记》)[*How to Evaluate the Korean Reality Show “New Journey to the West?”*], ZHIHU, <https://www.zhihu.com/question/54581389> [<https://perma.cc/V4XE-SNN5>].

⁷³ See Yuhe Xia, *Guangdian Tuichu Shishang Zuixiangxide Yiban Xianling, Xianzhi Zongyi Jiemu*(广电推出史上最详细的一版限令,限制综艺节目)[*Radio and Television launched the most detailed version of the history of restrictions on variety shows*], APOLLO NEWS (June 19, 2016), <https://www.aboluowang.com/2016/0619/757201.html> [<https://perma.cc/BXX5-HTZV>]. The program being influenced most directly is *Keep Running*, which switched from prime time to after 10:30 P. M. Also, the program was prohibited to rebroadcast during day time. See Fan Wang, *Guangdian Chu “Sandianlingban Xianyuling”, Wei Fengkuang Yinjin Hua Judian*(广电出“3.0版限娱令”为疯狂引进画句号)[*SARFT Issuing 3.0 Entertainment-Restriction Order so as to Putting a Period to Crazyness*], DW (June 20, 2016), <https://www.dw.com/zh/%E5%B9%BF%E7%94%B5%E5%87%BA30%E7%89%88%E9%99%90%E5%A8%B1%E4%BB%A4%E4%B8%BA%E7%96%AF%E7%8B%82%E5%BC%95%E8%BF%9B%E7%94%BB%E5%8F%A5%E7%82%B9/a-19342371> [<https://perma.cc/K6DB-2SZV>].

⁷⁴ See Wei & Huang, *supra* note 67.

Compared with its negligible impact on existing programs, the Directive will have a major influence on the future localization of foreign programs. The Directive clarified that “[s]hows that are co-developed with foreign institutions, feature foreigners in major staff positions or in leading roles will also be treated as foreign-adapted programs if the IP rights for the show [are] shared with any foreign entity.”⁷⁵ Under this guidance, localized programs with full licensing and cooperation from foreign content owners, like *The Voice of China*, *Daddy, Where Are We Going?*, and *The Amazing Race*, will be considered foreign content and be subject to the regulations.⁷⁶ On the other hand, copycat programs, or the so-called “foreign-inspired programs,” survive the Directive since they are conceived, ironically in a sense, as “being developed by the broadcasters themselves.”⁷⁷

Since officially authorized content is banned under the Directive but low-quality copycats are not, SARFT’s full-scope ban of foreign cooperation will probably promote low-cost copying of foreign content, at least in the short term. Satellite TV channels stopped licensing from and cooperating with overseas TV production teams.⁷⁸ Instead, they turned to producing copycat programs and avoided being subject to the Directive by simply retitling the programs.⁷⁹

The current failure of the Directive in China does not mean government regulation should not be introduced into the copyright system. At least twenty-two other countries around the world have rules regulating TV programs to protect and promote local programming.⁸⁰ I will discuss the

⁷⁵ SARFT, *supra* note 13; see Wei & Huang, *supra* note 67.

⁷⁶ Wei & Huang, *supra* note 67. A complete transfer of IP rights from the original copyright owner to its Chinese broadcasters is not impossible but is highly unlikely. This provision mainly prohibits licensing under the shroud of “development.” Media 360, *Zongju Fawen Xianyu Sandianling: Yuanchuang Zongyi Caiyou Weilai*(总局发文限娱3.0：原创综艺才有未来) [SARFT Issuing Entertainment Restriction 3.0: Only Variety Shows Have a Future], FREE WECHAT (June 18, 2016), <https://freewechat.com/a/MjM5MTM1NTA2MA==/2649311794/2> [<https://perma.cc/846B-P3EA>].

⁷⁷ See Media 360, *supra* note 76.

⁷⁸ *Id.*

⁷⁹ According to one professional from the production team of *Keep Running*, “[t]he limitation on imports, in fact, does not affect [their] work very much” because they “changed the title (in Chinese characters: 改头换面) and the business model of cooperation.” Wenna Zeng & Colin Sparks, *Production and Politics in Chinese Television*, 41 MEDIA, CULTURE & SOC’Y 54, 61 (2018).

⁸⁰ Robert E. Lighthizer, 2018 National Trade Estimate Report on Foreign Trade Barriers 21, 475 (2018), OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20National%20Trade%20Estimate%20Report.pdf> [<https://perma.cc/7JSD-42H8>] (including the following countries: Argentina, Australia, Bangladesh, Brazil, Canada, Colombia, the Europe Union, France, India, Indonesia, Israel, Italy, Korea, Malaysia, Mexico, the Philippines, Poland, Portugal, Russia, Saudi Arabia, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Thailand, Ukraine, and Vietnam). The regulations mainly come in three forms: “restrictions on foreign ownership and control of broadcasting services; the provision of tax incentives and government subsidies to local producers; and local content rules for television and radio

local content rules in two countries, Australia and Canada—and in particular the definition of “local content”—to see if a better rule can be adopted by SARFT to achieve its ultimate purpose: creativity.⁸¹

Australia

Australia issued the Australian Content Standard to help promote “a sense of Australian identity, character and cultural diversity” by supporting “the community’s continued access to television programs produced under Australian creative control.”⁸² Commercial TV broadcasters in Australia are required to include a certain amount of Australian content in prime time, calculated by content scores.⁸³

To qualify as an Australian content under the Standard, a program must be “produced under the creative control of Australians” and “made without financial assistance from the television production fund.”⁸⁴ In evaluating whether one program meets the first requirement, multiple factors, including the producer, the director, the writer, the leading actors, the major supporting cast, and the location of production, will be considered.⁸⁵ Interestingly, the producer(s) and the location of production have to be Australian, while only either one of the director or the writer of the program needs to be Australian.⁸⁶ Additionally, the leading actors and the major supporting cast of the program only need to meet a percentage requirement, which is 50% and 75% respectively.⁸⁷

broadcasters.” Ken Bhattacharjee & Toby Mendel, *Local Content Rules in Broadcasting 2* (2001), <https://www.article19.org/data/files/pdfs/publications/local-content-rules.pdf> [https://perma.cc/7JSD-42H8].

⁸¹ I chose these two countries because both are large countries in similar circumstances as China is today, have moderately developed broadcasting sectors, and more importantly, have a strong cultural neighbor. Australia and Canada’s broadcasting sectors are highly influenced by the United States and the United Kingdom, while China is mainly influenced by Korea today.

⁸² THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY, *BROADCASTING SERVICES (AUSTRALIAN CONTENT) STANDARD 2016*, 4 (2016) <https://www.acma.gov.au/-/media/Community-Broadcasting-and-Safeguards/Information/pdf/ACS-23-March-2016---F2016L00392-pdf.pdf?la=en> [http://perma.cc/8URZ-63H7].

⁸³ The content score mainly reflects the format and the duration of the program. *See id.* at 12.

⁸⁴ *Id.* at 8.

⁸⁵ *Id.* “[I]n the case of an animated program — the program is Australian if the program satisfies at least 3 of the following requirements: (i) the production designer is Australian; (ii) the character designer is Australian; (iii) the supervising layout artist is Australian; (iv) the supervising storyboard artist is Australian; (v) the key background artist is Australian.” *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

After the implementation of the Standard, the percentage of Australian content broadcasted increased between 2005 and 2014, which was at least partly attributable to government regulation.⁸⁸

Canada

An alternative approach would be Canada's rating system in the music industry, which was established mainly to create more opportunities for domestic recordings.⁸⁹ The content of private radio and TV programs in Canada is regulated by the Canadian Radio-television and Telecommunications Commission (CRTC), which has a similar objective as the Chinese regulator SARFT: "that the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources."⁹⁰ "Under [this] system, one point is granted for the Canadian status of each of the music, lyrics, artist, and production categories in a recording," and "[a] recording must achieve at least two points to qualify as Canadian."⁹¹

After the introduction of the regulation system, Canadian popular music went through three different stages, from struggling to establish itself by imitating foreign content, to achieving Canadian recognition, and finally to reaching international success.⁹² This transformation was not only attributed to the Canadian musicians who kept learning and creating Canadian music, but also to the audience whose tastes were cultivated in the era of Canadian regulation.⁹³ Their tastes in turn incentivized the continuous development of the Canadian music industry to the point where it became mature.⁹⁴

Canada has a similar point system for audio-visual works, but is instead based solely on the key creative positions taken by Canadians: director (2 pts.), screenwriter (2 pts.), first and second lead performers (1

⁸⁸ All three Australian core channels reported an increase in the percentage of Australian content, with the biggest one from 55.53% to 70.46% and the modest one from 59.25% to 62.90%. This increase could also reflect changes in audience preferences. AUSTRALIAN GOVERNMENT DEPARTMENT OF COMMUNICATIONS AND THE ARTS, POST IMPLEMENTATION REVIEW: ENSURING AUSTRALIAN CONTENT ON COMMERCIAL FREE-TO-AIR TELEVISION BROADCASTERS' PRIMARY AND MULTICHANNELS, 10 (2016) https://ris.pmc.gov.au/sites/default/files/posts/2017/01/proposal_pir.pdf [<http://perma.cc/V6DJ-GHWS>].

⁸⁹ Larry LeBlanc, "Canadian-Content" Discontent: Quota Slots Seen Squeezing Domestic Acts, 104 BILLBOARD, 40 (1992).

⁹⁰ Shedd et al., *supra* note 68, at 60.

⁹¹ LeBlanc, *supra* note 89.

⁹² Scott Henderson, *Canadian Content Regulations and the Formation of a National Scene*, 27 POPULAR MUSIC 307, 308 (2008).

⁹³ *Id.* at 314.

⁹⁴ *Id.*

pt. each), production designer (1 pt.), director of photography (1 pt.), music composer (1 pt.), and picture editor (1 pt.).⁹⁵

Lessons for China

In a close comparison to the content rules in Australia and Canada, the Directive issued by SARFT has at least two main differences. First, it allows each broadcaster to first release only one foreign format per year while most countries have a more tolerant percentage requirement.⁹⁶ Second, although it does not define what qualifies as Chinese content, it does exclude those programs produced in cooperation with foreign production teams.⁹⁷ By implementing such a rigid requirement, China fully protected its reality show industry, but at the same time deprived the nascent industry of the opportunity to learn from their experienced foreign peers.

Chinese regulators could change these circumstances by establishing a Chinese-content point system in terms of script, storyboards, set design, layout, host, and music, or at least consider multiple factors in determining whether content should be listed as foreign or Chinese. In this way, Chinese broadcasters could establish the originality of the reality TV shows element by element when they cooperate with, and learn from, foreign content producers. The reality show industry in China will likely go through different stages from imitation to international recognition, like the Canadian music industry.

From a long-term perspective, the enforced reduction of local remakes of foreign programs could facilitate the creation of original programming, help build audiences' tastes for such shows, and lower production costs.⁹⁸ However, prohibiting all kinds of cooperation with foreign content producers from the beginning is not the right way to do it. As shown by the Canadian regulation system, recognizing content with foreign elements as local content could help the industry grow and transform into a mature one in the end.

⁹⁵ Canadian Radio-television and Telecommunications Commission (CRTC), *So What Makes it Canadian?*, CANADIAN RADIO-TELEVISION AND TELECOMM. COMM'N, https://crtc.gc.ca/eng/cancon/c_cdn.htm [<https://perma.cc/7JSD-42H8>].

⁹⁶ See SARFT, *supra* note 13; Lighthizer, *supra* note 80, at 30 (Argentina), 35–36 (Australia), 62 (Brazil), 84–85 (Canada), 116 (Columbia), 186–87 (EU), 298 (Korea) and 418 (South Africa).

⁹⁷ It is said that SARFT made this purposefully vague so that they could obtain a detailed plan for each program during the approval application. Zeng & Sparks, *supra* note 79, at 62.

⁹⁸ See Wei & Huang, *supra* note 67.

CONCLUSION

Neither litigation nor government regulation has effectively protected foreign content producers in China. Copyright protection under Chinese copyright law should be the obvious solution considering the substantial copying between current localized shows and original programs. However, low statutory damages, in combination with high licensing fees, offer incentives for local broadcasters to copy, rather than to formally license from original content providers. Government regulations have the potential to benefit the Chinese reality TV show industry in the long run but will likely lead to brazen plagiarism in the short term. Incorporating a multi-factor rating system into the current regulation could resolve this problem and help build a mature industry where originality is recognized and therefore incentivized.

