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New challenges for copyright protection – Co-Reach in IPR in New Media Workshop II

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ABSTRACT

The Co-Reach IPR in New Media organised a workshop on ISP Liability in London on December 7, 2010 and an EU-China Copyright Policy meeting in Vienna from December 9–12, 2010. The Workshops come at the crucial time when new regulations are being crafted to tighten copyright protection in cyberspace.

1. Introduction by Prof. Sylvia Kierkegaard (sylvia.kierkegaard@iaitl.org) CLSR Editorial Board

Since the establishment of the framework for the IP system in the 19th century, economic globalization and technological revolution has brought drastic changes in both the schemes and the subject of IP protection. These changes are affecting our legal system from top to bottom. In an information society, intellectual property law presents fundamental questions of politics and policy. What is the correct balance between the public domain and intellectual property, or between intellectual property rights and free speech?

The Co-Reach IPR in New Media project explores these issues in a series of workshops.

Co-Reach IPR in New Media (www.coreach-ipr.org) is a network of German, Dutch, Austrian, Chinese and British institutions involved in promoting research co-operation with China in the area of intellectual property rights. The project is funded by the European Union and the aforementioned governments and aims to stimulate joint research between Europe and China by initiating and/or participating in relevant policy discussions about critical research needs and priorities, challenges and opportunities, in both Europe and China.

Prof. Sylvia Kierkegaard, member of the editorial board of CLSR and visiting professor at Southampton Law School, heads the consortium comprising Prof. Ian Lloyd (Senior Research Fellow, Institute for Law and the Web at Southampton University), Dr. Wolfgang Schulz (director of Hans Bredow Institute), Prof. Andreas Wiebe (director of InfoLaw, Vienna), Prof. Li Mingde (director of the IPR Institute of the Chinese Academy of Social Science) and Prof, Wilhem Grosheide of Utrecht University.

The project is currently conducting an in-depth research and clarification on a number of issues involving the scope and rights in the digital networked environment. The project seeks to contribute towards identification and resolution of the most important issues relating to the application and enforcement of intellectual property rights within an online context.

In order to pursue this aim, the project has organised several workshops in key cities to tackle specific topics. The first workshop was held in Beijing, China in 2009 and was attended by the Supreme Court of China, National Copyright

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Enforcement officials, members of the judiciary and legal scholars. This was followed by a second workshop in Hamburg Germany in June of 2010, where representatives of the music industry, judiciary and consumer advocates tackled the contentious debate on regulating the Internet. The third workshop was held in London and Vienna from December 7 to December 12, 2010. The London workshop focused on the role of Internet Service Providers in enforcing copyright protection in cyberspace, while the Vienna Workshop dealt with the issues of collective management of copyright and comparative analysis of the development of copyright in Europe and China.

The Workshops come at the crucial time when copyright issues are reaching boiling point with Hollywood calling out the shots. The controversial the plurilateral Anti-Counterfeiting Trade Agreement (ACTA) narrowly escaped the attempts of US policy makers to impose a secondary liability mandate after Internet companies mounted pressure to remove the secondary liability proposal. On April 19, 2011 the Greens/EFA Group wrote to the President of the European Parliament requesting for an Opinion of the European Court of Justice on this question: *Is the envisaged Anti-Counterfeiting Trade Agreement (ACTA) compatible with the Treaty on European Union and Treaty on the Functioning of the European Union?* The move was in accordance with the decision of the Committee on Constitutional Affairs in the file *REG/2011/2059 EP Rules of Procedure: exercise of Parliament's rights vis-à-vis the Court of Justice, interpretation of Rule 128* in pursuance to Article 218 (11).[1]

There are also fears that the US will include a secondary liability doctrine in the legal text on intellectual property rights at the fifth round of Trans-Pacific Partnership (TPP) negotiations.

In the European Union, the EU has just completed a public consultation process on the "impact assessment" of the European copyright enforcement policy, and of the 2004/48/CE "IPRED" directive (also known as the Fourtou directive),[2] which are heavily influenced by the arguments of the entertainment industry espousing tighter control on the Internet to "avert" piracy. The European Commission backed by the entertainment industry is pushing to transform Internet companies into a copyright police monitoring in the upcoming revision of the IPRED enforcement directive. However, compelling Internet access providers to filter its subscriber's communications to block unauthorized transmission s of copyrighted works are too restrictive and runs counter to fundamental rights.

In the *Scarlet v Sabam* (C-70/10), Scarlet, a Belgian ISP was ordered by a national court to implement technical measures to block all P2P traffic in order to protect intellectual property rights. The court's decision was subsequently referred to the ECJ who has to clarify whether the requirement to implement traffic-filtering mechanisms is consistent with EU legislation and whether a proportionality test has to be applied if this is the case. The European Commission contends that filtering systems did not require any active involvement by the Internet Access Providers and should not be considered a general obligation to monitor information. The Advocate General Pedro Cruz Villalon has opined that

> *The installation of that filtering and blocking system is a restriction on the right to respect for the privacy of communications and the right to protection of personal data, both of which are rights protected under the Charter of Fundamental Rights. By the same token, the deployment of such a system would restrict freedom of information, which is also protected by the Charter of Fundamental Rights. The Advocate General recommended that the European Court of Justice should declare that EU law precludes a national court from making an order, requiring an ISP to install, in respect of all its customers, in abstracto and as a preventive measure, entirely at the expense of the ISP and for an unlimited period, a system for filtering all electronic communications passing via its services (in particular, those involving the use of peer-to-peer software) in order to identify on its network the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which a third party claims rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at the point at which they are sent.*[3]

The proposed Directive aimed at extending the term of copyright protection for sound recordings from 50 to 70 years is back on the European Council's agenda. The Directive will benefit only a small number of artists and businesses as 96% of the economic returns will go to the major record labels and to the top 20% of performers.[4] This will also result in higher prices for consumers.

In a more controversial move, the Commission has once again demonstrated that it cannot be trusted to handle copyright-related issues in a fair and balanced manner with its appointment of lobbyist Maria Martin-Prat as the new EU head of Unit for the department responsible for copyright-related issue. She was the former director of legal policy the International Federation of the Phonographic Industry and had been vehemently argued that "private copying had no reason to exist and should be limited further than it is".[5]

China is also under intense US pressure to strictly enforce copyright protection, In 2006, China passed the Regulation on Protection of the Right of Communication over the Information Networks of 2006, which is Regulation is based on the US Digital Millennium Copyright Act of 1998 and the EU Copyright Directive. At a news conference held alongside the National People's Congress, Chinese officials from six agencies reported the results of a campaign to strengthen IP enforcement. According to a story in the People's Daily, the campaign was launched at the end of 2010 in advance of President Hu

[1] *http://en.act-on-acta.eu/Letter_to_President_of_the_European_Parliament_for_an_opinion_of_the_ECJ_on_ACTA.*

[2] *This directive was adopted in the first reading with. Janelly Fourtou as rapporteur for the European Parliament. She is married to the then CEO of Vivendi-Universal.*

[3] *Press Release 37/11. (2011). Advocate General's Opinion in Case C-70/10. Available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/cp110037en.pdf.*

[4] *http://www.cippm.org.uk/downloads/Term%2520Statement%252027_10_08.pdf.*

[5] *Love, James (2011) Maria Martin-Prat reported to replace Tillman Lueder as head of unit for copyright at European Commission. Knowledge Ecology International. Retrieved from http://www.keionline.org/node/1105.*

Jinatao's state visit to the US.[6] The crackdown has resulted in the report of 16,036 cases of infringement and counterfeiting, the confiscation of 98.77 million yuan (14.98 million U.S. dollars), and the arrests of 4157 suspects involving cases that were worth 2.3 billion yuan.[7] For the first two months of the campaign, China's procurators had indicted 598 suspects in 330 cases and the courts had sentenced 303 criminals to prison in 221 legal cases.[8] The crackdown had also resulted in the revocation of 103 business licenses in the country.[9] China's Minister of Commerce, Chen Deming, said:

we have established a relatively sound legal system to protect IPR, but we have to acknowledge that the enforcement still falls short of expectations and China's drive to build itself into an innovation-driven country.

Although the amended Chinese Copyright Law complies with the WIPO Internet treaties, many issues involving the scope and exercise of rights in the digital networked environment have yet to be clarified. Similarly, the harmonization directives adopted within the European Union leave national legislatures so much leeway which often results in differing national standards.

The Vienna Workshop focused on identifying fields of further harmonization of copyright in Europe and possible impediments to this process. This was shown and discussed in an exemplary way on the development of the sui-generis-right for databases in Europe as well as policy proposals for introducing a "cultural flat rate" for internet uses of protected works in some European countries.[10] The cultural flat rate scheme is a concept of charging a fixed fee for using cultural content (music, film, etc). Implementation of cultural flat rates has the intended effects of decriminalizing P2P users, remunerating creators and relieving the judicial system and the ISPs from mass-scale prosecution. At the same time, the scheme would benefit the artists who would receive monetary compensation instead of the current single payment benefiting primarily the music companies. In sum, the cultural flat rate would free the Internet from the repressive dictates of the music industry and at the same time, meet the copyright demands of the artists. European decision makers have largely ignored the financial model of "cultural flat rate".[11]

The Vienna workshop illustrated the urgent need to balance the interest of freedom of expression and private interest (copyright) in Europe. While China faces similar problems, similarities and differences of Chinese copyright as compared to continental copyright were shown in detail and provided valuable input to the discussion of copyright reform in Europe and China.

These workshops offered a starting place for answering many of the emerging issues in copyright and provided valuable insight into the problems and caveats in establishing new instruments in the copyright field. It is an attempt to see and hear the expert's opinions and find some sensible structure amongst the chaos.

2. Country report for Germany: pondering about the mid-range future of copyright policy by Wolfgang Schulz (w.schulz@hans-bredow-institut.de), Director of the Hans Bredow Institute, Hamburg

2.1. Introduction

Germany has seen a succession of copyright amendments during the last couple of years. Many of those have been technologically driven.[12] The internet and related issues played a major role. During the last month a meaningful debate arose on the mid-range future of copyright policy in Germany. One trigger is definitely the academic debate on copyright issues. The report by van Eechoud and others[13] has been influential as well as publications on the whole concept of copyright.[14] Furthermore, certain parties interested in a more flexible and Internet-adequate copyright regulations have been lobbying for changes to the law.

One reaction to the problem of coping with Internet related issues – is the setting up of the so-called Enquete Kommission "Internet und digitale Gesellschaft", a committee of enquiry set up by the German parliament (Bundestag) to study the relationship between our digital society and the Internet.

2.2. The Enquete Kommission on internet and society

The Enquete Kommission is a specific parliamentary committee specially set up to deal with major new developments and with broad terms of reference to make suggestions to the parliament as regards mid-range policy in view of the respective development; the actual Enquete Kommission targets 'Internet and society'. It is composed of 17 MPs and 17 independent experts from different sectors. It was set up by parliamentary act on 3 May, 2010 and focuses on the issues of culture and media, economy and environment, education and research, consumer protection, law and international affairs, society and democracy – thus the remit is rather broad.

It is interesting to observe that every single parliamentary faction, apart from the party of the Left, decided to nominate at least one representative from the so-called "net community". The Enquete Kommission is to publish its interim report in the summer of 2011 and the final report in the summer of 2012. Part of the work is a detailed stock-taking; however, the

[6] http://infojustice.org/archives/1700.

[7] China Strikes a Tougher Note for IPR Protection at http://www.chinaipr.gov.cn/newsarticle/news/headlines/201101/1186155_1.html.

[8] Id.

[9] China promises better protection of IPR after successful crackdown at http://www.chinaipr.gov.cn/newsarticle/news/government/201012/980962_1.html.

[10] Kierkegaard, S. (2011) Co-Reach 2011 Annual Report.

[11] http://www.creationpublicinternet.

[12] Director of the Hans Bredow Institute, Hamburg; Professor for Media Law, Public Law and their theoretical foundations; Expert Member of the "Enquete Kommission" on Internet and Digital Society set up by the German parliament (Bundestag). The author thanks Stefanie Hagemeier for her support in drafting the text.

[13] M. van Eechoud, P.B. Hugenholtz, S. van Gompel, L. Guibault & N. Helberger, Harmonizing European Copyright Law: The Challenges of Better Lawmaking, 2009.

[14] T. Kreutzer, Das Modell des deutschen Urheberrechts und Regelungsalternativen, Nomos Verlag 2008.

section of the report that will be watched especially closely is the one consisting of recommendations.

2.3. *The framework*

In the copyright project group of the commission there have been intensive debates about the roots of the concept of copyright which are found in the continental-European system of *droit d'auteur* and which are closely related to the concept of intellectual property. It is this very analogy to (physical) property that – according to a growing body of opinion in Germany – is no longer adequate in the digital age. However, the Enquete Kommission has seen at an early stage that the debate about terms and concepts is no substitute for a proper analysis of the problems in specific fields of copyright, where of course the basic assumptions of what copyright should aim at play a major role.

According to the Federal constitutional court, the German Constitution protects copyright under both the right to property clause and the personality right clause. However, the court has ruled that public interests can lead to legitimate limits to copyright protection under the German constitution (cf. BVerfGE 31, 229). Therefore, to some extent, the German constitutional framework is open for more utilitaristic approach.

2.4. *Current issues in the course of the discussion*

In order to convey a more in-depth insight into the work of the Enquete Commission, the state of debate on selected issues presented below.

What is of critical importance in this case are technological developments of bi-directional infrastructures, that is to say networks, which do not only facilitate receipt but also the modulation of, and the ability to describe, content. In the wake of digitisation, a process of democratisation of work creation and presentation has been discernible, causing professional mediators of copyright-protected works in particular (press and book publishers, producers of sound storage media and films) to face structural changes.[15]

2.4.1. *Limits to copyright*

In order to ensure an adjustment to the prevailing circumstances in legal terms, for one thing an extension of new, specific intellectual property rights (ancillary or neighbouring copyrights), such as a right of this kind for press publishers, and the fundamental revision of a remuneration system for the use of works on the Internet, is under consideration[16], for another, however, the study includes developments on the Internet which make it appear necessary to readjust the borderline relating to the permissibility of a non-commercial use of works protected by intellectual property rights.

The fact that users take part in public communication by producing contributions of their own, uploading these and exchanging them on platforms, illustrates the changed user patterns in the digital information age. Accordingly, forms of work exploitation are evident that generally entail the assertion of intellectual property rights but extremely rarely compete commercially with the professional mediation of works in the actual sense, for instance because they serve exclusively for social communication purposes (e.g. the integration of protected content into own videos, creating a persiflage of original videos by blending in new sound tracks or by changing image sequences, also in the form of "fan videos"). Even though these actions relating to use of works protected by copyright are of a private nature and, if at all, indirectly of a commercial nature (only for the platform operator), under the current legal framework they represent a violation of intellectual property rights because they do not reach the threshold of free use (par. 24 of the German Copyright Act – UrhG) in principle according to the prevailing opinion at present. Whereas the private use of works protected by intellectual property rights is free at present, when newly publishing a work in collaged form, not only must the consent of the creator be obtained, but that of a holder of ancillary or neighbouring copyrights as well.

Provisions impinging on original property rights that would allow for the creation of "new or derived works" do not exist yet at this point. What is in favour of extending provisions of this kind, however, is that works can be created only if there is scope for action, if there is a process that sets innovative communication processes in motion. The EU Commission already made it the subject of its Green Book 2008[17] that the "obligation to study the rights to the underlying work before publishing any adaptations […]" can be "viewed as an impediment to innovation" since it obstructs the spread of new, potentially valuable works.

Accordingly, the debate focuses on ideas to introduce barriers for user-generated content that allow for private, productive user actions, for instance, and link these to mandatory remuneration. From the perspective of the business community, there is also a great deal to be said for considering such forms of exploitation of works not as serious threats, provided they are constructed in such a manner as to ensure that they are confined to the said revision work and public access. An exception of this kind had previously been taken into consideration at the European level, but this has not been pursued any further to date. An amendment to the Information Directive of 2001, which contains an exhaustive catalogue of barriers and permission-free forms of exploitation, is not planned at present.

There is some support for the suggestion to legalise non-commercial adaptations of protected works even if they do not fall within the scope of "free use" under the current copyright regime. This is seen as an adequate and necessary reaction to the remix culture you can witness in some online communities. Remixers adopt protected works and transform

[15] *PGUR, 29 February 2011, p. 2, available for download at: http://www.bundestag.de/internetenquete/dokumentation/2010/Urheberrecht/11-02-25_PGUR_Internet_und_digitale_Technologien_als_Mittel_fuer_kreatives_Schaffen.pdf.*

[16] *cf. discussion status: Frey MMR 2010, p. 291 ff., BdP an BJM, 27.01. 2011, available for download at: http://leistungsschutzrecht.info/stimmen-zum-lsr/stellungnahme/leistungsschutzrecht-fuer-presseverleger-bundesverband-deutscher-pressesprecher-an-bundesjustizmin.*

[17] *EU-COM (2008), 466 final, available for download at: http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf.*

them in a more or less amusing way. Furthermore, there is a suggestion to broaden the scope for the use of copyright-protected works in research and for teaching purposes.

There is something like consensus that the current regulation on private copying is still not satisfactory. The wording of section 53 para 1 UrhG (Copyright Act) says that private copying is illegal if the copying is done from an obviously illegal source. When this is obvious is by no means obvious.

Yet every change to copyright limitations faces restrictions set by European law.[18]

2.4.2. *Enforcement*

A central point is obviously the enforcement of copyright law in online environments. The solution in Germany is still unsatisfactory and the issue is being hotly debated in the wholes EU. As regards this issue, a variety of solutions have been put forward, including stricter law enforcement to protect intellectual property and broadening the scope of limitations, sometimes to the extent that private copying would be completely free, combined with the introduction of a specific levy to compensate the rights holders (a so-called "culture flat rate"). These plans have, however, very limited chance of becoming law in Germany. One line of approach might be to initiate a sector-specific analysis of enforcement problems and to use the whole range of options from stricter legal enforcement to the acceptance of practices in the online environment; to legalise the latter, and in the meantime try to bring social norms in line with legislation by educating users and by encouraging the rights holders to offer works on more convenient platforms.

It is interesting to observe that the issue of law enforcement has brought copyright from the arcane area of civil law experts into the open space of regulatory research.

Within the scope of an open access initiative, approaches are under discussion at present to support barrier-free access to scientific publications. One particular solution approach provides for so-called secondary utilization rights to be introduced for scientific contributions that arose via educational and research activities funded by the public sector.[19]

2.4.3. *Protection period*

In addition, in order to do justice to the dynamic development under way in the digital society and not to unnecessarily impede processes of innovation, shorter protection periods for the free and unfettered use of works and specific intellectual property rights are under discussion. In the current version of par. 64 UrhG, works protected by copyright are subject to a term of protection of 70 years "post mortis auctoris".

According to German law, a distinction needs to be drawn in the case of so-called specific intellectual property rights. The latter are tied to first publication and are subject to different protection periods. In the process, proposals are to be studied which argue in favour of standardising the term of protection as a whole. In contrast, however, ideas are also being discussed that argue in favour of extending specific intellectual property rights and the corresponding regular term of protection[20]. To some extent, applications have even been submitted that call for non-commercial use of works protected by copyright immediately after publication and for the term of protection for commercial exploitation to ten years after first publication.[21]

2.5. *Conclusion*

At the end of the day the Enquete Kommission is a political platform and has its problems even to agree on the changes taking place in reality as regards forms of production, business models and the extent of (illegal) usage. However, it at least tries to form a broad consensus and in doing so might at least produce some input which can stimulate the debate on a European level as well.

3. Chinese copyright law from a comparative perspective by Prof. Dr. Theodor Enders, L.L.M. (enders@unit-consult.eu). Fachhochschule Jena, Department of Business Administration Fachbereich Betriebswirtschaft Carl-Zeiss-Promenade 2, 07745 JenaCarl-Zeiss-Promenade 2, 07745 Jena

3.1. *International conventions*

Intellectual property relates to the principle of ubiquity because copyright does not respect any frontiers. It is therefore of great importance to refer to international conventions inter alia the Berne Convention and the TRIPS agreement as these international conventions are relevant standards. China's copyright law will be primarily compared with international conventions and in second place with Anglo-American and Continental-European copyright law, esp. that of Germany.[22]

China's entry to the World Trade Organization (WTO) in 2001 is the determining impulse factor for all protective rights of intellectual property. As a member, China has to adapt the national regulations with respect to the TRIPS Standards. Furthermore China also signed the WIPO Copyright Treaty (WCT) in 2007. The WIPO Performances and Phonogram Treaty (WPPT) came into force in China in 2007.

[18] *Directive 2001/29/EC.*

[19] *Printed matter 17/5053 – 16 March 2011, p. 2; PGUR-25 February 2011, 2 ff., available for download at: http://www.bundestag.de/internetenquete/dokumentation/2010/Urheberrecht/11-02-25_PGUR_Zugang_zu_wissenschaftlichen_Informationen_ueber_sogen_Open_Access-Verwertungsmodelle.pdf; http://www.bundestag.de/internetenquete/dokumentation/2010/Urheberrecht/11-02-25_PGUR_Fragen_der_Schutzdauer.pdf.*

[20] *PGUR-25 February 2011, p. 2, available for download at: http://www.bundestag.de/internetenquete/dokumentation/2010/Urheberrecht/11-02-25_PGUR_Fragen_der_Schutzdauer.pdf.*

[21] *Bundesparteitag – 5 November 2010, http://wiki.piratenpartei.de/Bundesparteitag_2010.2/Antragskommission/Antr%25C3%25A4ge_2010.2/2010-11-05_-_LiquidFeedback_-_Freie_Verwendung_von_urheberrechtlich_gesch%25C3%25BCtzten_Werken_nach_10_Jahren#Zur_L.C3.A4nge_der_Schutzdauer.*

[22] *FENG Xiaquing/HUANG Xiafeng, International Standards and Local Elements of Copyright Law in China, in: Journal of the Copyright Society of the USA, Vol. 49, 2002, p. 939; XU Chao, An Overview of the Amendment of the Copyright Law in China, China Patents & Trademarks 2002, p. 52; Enders/Steiner, Urheberrechtsreform und Urheberrechtsdurchsetzung (Copyright reform and copyright penetration) in China, Zeitschrift für Chinesisches Recht (Journal of Chinese Law) 2010, p. 91; Theodor Enders, www.humboldt-forum-recht.de/english/1-2007/index.html.*

Art. 41 ff. TRIPS stipulate special rules of law enforcement which effect legal reforms and an increasing number of civil procedures shown by the following diagram.[23]

The civil legal procedures mentioned above have increased in the period from 1950 to 2007 up to about 600,000 complaint entrances.

The entry of China to different international organizations and agreements has improved the copyright since 1990 though not in his structure, however, concerning the contents and in his penetration.

3.2. *Legal basis and organization*

The first new Copyright Protection Act in the People's Republic China (CA) dates back to September 7, 1990 and became effective on June 1, 1991, on May 30, 1991. This Act was supplemented by passing the Implementation Regulations (IR) which became effective on June 1, 1991. Although the Copyright Protection Act classifies computer programs as literary works, the protected legal positions are governed in the provisions concerning the protection of computer software of June 4, 1991 and became effective October 1, 1991.

The version revised by the October 27, 2001 adopted at the 24th Session of the Standing Committee of the ninth National People's Congress is decisive.[24] On August 2, 2002, the dependent Implementation Regulation (IR) was remitted which came into force in September 15, 2002. The Computer Software Protection Rules were remitted in the December 20, 2001 and came into force in the January 1, 2002. Finally, the Implementation Rules for Collecting Societies from December 28, 2004 are valid since March 1, 2005 which contains comprehensive regulations for collecting societies. The changes should repair the still available deficits in view of the TRIPS Standards which have not yet completely succeeded in some areas, because the whole structure of the copyright legislations of 1990 was preserved in the essentials and are the changes of rather selective nature. The question now is whether the modern copyright system of China orientates itself more by the Anglo-American or Continental-European copyright law or is a result of its own "socialist" copyright.[25]

Dietz[26] explains the affiliation to the Continental-European system with the statement that the Chinese copyright follows structurally the "five-column model" developed by him. Therefore, China, just as the German copyright law disposes, is structured in five "parts": material copyright, neighbouring rights, contractual copyright, rights of collecting societies as well as the enforcement of rights. He concludes that the right holder's personality right, the right of collecting societies and the originator's law of contract follow the Continental-European system. However, there also exists the possibility of the original allocation of the copyright in favour of the risk bearer. Whether this is to be interpreted now as a peculiarity of the socialist stamped copyright or as an Anglo-American coinage, remains doubtful.

In contrast to the continental system but quite similar to US copyright law[27], there exists in China a "dual system" with two branches: first judicial enforcement and second a special administrative institution. The National Copyright Administration of China (NCAC) was founded in 1985. Its areas of responsibilities are investigating and sanctioning copyright infringement cases that are of major importance to the state; the approval, establishment and monitoring of performing rights societies,[28] worthy of mention is the additional responsibility of approving the issuance of licenses to

[23] *See JIN Haijun, The Impact of Culture on Intellectual Property Enforcement in China; lecture from February 2, 2010 at the Goethe University Frankfurt/Main.*

[24] *See www.chinaiprlaw.com/english/laws/laws10.htm.*

[25] *QU Sanqiang, Copyright in China, Beijing 2002, p. 403 ff.*

[26] *Adolf Dietz, Das chinesische urheberrecht: Copyright oder droit d'auteur?, in: Festschrift (Commemorative Volume) für Wilhelm Nordemann, München 2004, p. 527 ff.*

[27] *In the USA there is also a special Copyright Administration, seated in Washington D.C.*

[28] *The first collecting society "Music Copyright Society" was founded in 1992.*

international companies. In the meantime, each province has set up a local National Copyright Administration, and, with that, has implemented the organizational prerequisites for a further activity, that being, the setting up and maintenance of conciliation boards responsible for copyright disputes.

3.3. *Term of works and work categories*

The term of "works" as referred in the Copyright law means intellectual creations with originality in the literary, artistic or scientific domain, insofar as they can be reproduced in tangible form (Art. 2 IR). Chinese Copyright law demands a higher level of individuality than under German law where only a "kleine Münze" (low level of originality) is enough (e.g. simple pop songs).[29]

In accordance with Art. III of the Universal Copyright Convention (UCC), there are no formalities to consider. Art. 6 IR says: "*A copyright shall subsist on the date when a work is created*." Dealing with computer programs Art. 7 Computer Software Protection Rules has the following wording: "*A software copyright owner may register with the software registration institution recognized by the copyright administration department of State Council. A registration certificate by the software registration institution is a preliminary proof of the registered items*". In contrast to the Software Implementation Rules 1991, the actual law does not require any registration, but provides such a possibility to ease the proof of burden in litigation.

Article 4 paragraph 1 CA which regulated the "forbidden works" was revoked after the US complained to the WTO in 2009 because of a contravention against article 9 paragraph 1 TRIPS in conjunction with article 5 paragraph 2 Bern Convention. The old stipulation was recognized as a censorship regulation against "uncomfortable" (including political) contents.[30] Since 2010 the revised version is: "*Copyright owners should not exercise their copyright in a manner that violates the constitution or relevant laws, or harms the public interests. The country will supervise publication and distribution of the works in accordance with laws*." Now the authorities can supervise a work after his presentation to the public but not in advance.

There are differences between German and Chinese copyright concerning the work categories. A Chinese peculiarity is "quyi" ("Bänkelgesang", special folklore-songs, folk-dances etc.) which is not a Standard of the Berne Convention. In Germany such a work is not protected. In contrast to German law, works of the applied art are not under that scope. A protection, however, is admitted since the judgment of the Higher Court of Beijing ("interlego").[31] Additionally, the data bank work (article 14 CA) is protected; in contrast to German legislation, it is though not the "simple" data bank as an aggregation of data and a great investment (e.g. telephone book).

3.4. 3.4. *Copyright or droit d'auteur?*

The copyright can be divided in two different systems. The Anglo-American copyright on the one hand and the Continental-European, natural law oriented droit d'auteur system on the other hand. The "copyright" is aimed on economic interests, mostly those of the producers or in general the risk holders. It does not see this origin in the personal creation interests of the originator, but rather in the incentive system of the state to be active in the academic, artistic or economical area and to exploit the pursuant results. The concept of the copyright corresponds to the Chinese name "banquan" (right of the plate) and is another idea than the concept of "zhuzuoquan" (author's right, work right) which originally comes from Japan. Though in the academic discussion about the systematical allocation of the copyright these different concepts are stated over and over again, but article 56 CA says, that *for the purpose of this law, the term "zhuzuoquan" is "banquan"*.

The legal background of these different terms is to answer the question of who should be deemed as an author. Protective subjects for the purposes of the copyright are the originator's entitled persons. Pursuant to German copyright law the right holder is the "creator" of a work (Art. 7 German CA).[32] Under German law exclusively natural persons can be deemed as authors ("Schöpferprinzip", creator's principle). Legal entities can attain the copyright merely by inheritance (Art. 28 German CA). Also in China, the copyright belongs to the author (Art. 11 paragraph 1 CA) but the legislator reserves himself the right to determine something else by which the creator's principle exists in China in limited measure. The author can be a natural person (Art. 11 paragraph 2 CA) as well as a legal entity or organization ("unit") (paragraph 3). The Chinese copyright differs in this point considerably from the German regulations because the right holder must not necessarily be the creator. Therefore the copyright is not always entitled to the creator. Nevertheless it cannot be concluded that the copyright can be transferred basically in total, i.e., the moral and the exploitation rights. Art. 10 paragraphs 2 and 3 CA stipulates the granting of permissions of utilization or legal transference only concerning to the exploitation rights (Art. 10 paragraphs 1 No. 5 to 17 CA). Not transferable are the personality rights ("moral rights", see Art. 10 paragraph 1 No. 1 to 4 CA).[33] This provision comes close to the German "doctrine of purpose-related transfer" (Art. 31 paragraph 5 German CA). If, for example, a publishing contract only refers to the "publication", that is the reproduction and distribution of a work (Art. 57 CA), the publisher is not permitted to make the work available on an

[29] *QU Sanqiang, Copyright in China (see Footnote 4), p. 90 ff.*

[30] *Peter Ganea, Internationales WTO-Panel veröffentlicht Ergebnisse zum Streit zwischen den USA und China wegen Defiziten im chinesischen Immaterialgüterschutz (International WTO-Panel published results concerning the dispute between the USA and China because of deficiencies in Chinese IP Protection), in: Gewerblicher Rechtsschutz und Urheberrecht (GRUR) Int. 2009, p. 274 ff.*

[31] *See ZHANG Guangliang, Comments on and Analysis of the Case Interlego AG v. Kegao Company and Fuxing Business Centre Arising from Dispute over Copyright Work of Applied Art, in: China Patents & Trademarks 2003, Vol. 3, p. 77 ff.*

[32] *So he is not the "owner" of the copyright.*

[33] *Another Chinese "speciality" is the fact that the right of authorship, alteration and integrity of an author shall be unlimited in time (Art. 20 CA), the exploitation rights are under the limitation of 50 years after the death of the author. Pursuant to Art. 64 German CA the duration is 70 years post mortem auctoribus (the same in the USA).*

internet server on the basis of this contract.[34] This should prevent the author from copyright "buy out" clauses.

3.5. *Final remarks*

Although the Chinese legal framework considers international standards, there are still some deficiencies which are owed not only to what is called "Confucianism"[35] but to the fact that the modern Chinese copyright law is "*not a fruit of the 5000 years old Chinese culture and tradition but an article of import from the west*". This quotation from WEI *Zhi*[36] shows that it is a real challenge to implement western ideas of copyright protection in china.

To improve copyright in China it is necessary to change awareness of copyright protection from external pressure to internal need, to give judicial progress a chance case by case and to evolve relation between state and civil society.

4. The right of communication over information network and its development in China by Mingde Li (mdli@cass.org.cn), Professor and Director of the Intellectual Property Center, China Academy of Social Science

4.1. *Legislation*

In October 2001, China amended its Copyright Law.[37] One of the amendments is to provide a new right of communication over information network, applying to authors of works, performers, and phonogram producers. The "right of communication over information network" is a term coined by Chinese legislators, demonstrating that this right is concerned only with the internet.

Specifically, paragraph 12 of Article 10 of the Law provides that copyright owners shall have "the right of communication over information network, that is, the right to make a work available to the public by wire or by wireless means, so that people may have access to the work from a place and at a time individually chosen by them." This paragraph apparently originated from article 8 of the WIPO Copyright Treaty (WCT). In addition, article 37 of the Law provides that performer shall enjoy a right "to authorize others to make his performance available to the public over information network, and receive remuneration thereof". Article 41 provides that the producer of a sound recording or video recording shall enjoy a right to "authorize others to make his recording available to the public over information network and to receive remuneration thereof." This is concerned with performers and producers of phonograms, apparently originated from the articles 10 and 12 of the WIPO Performances and Phonogram Treaty (WPPT).[38]

As the amendments in the copyright protection in the internet are too general, article 58 of the Law authorized the State Council to promulgate a regulation on the protection of the right of communication over information network.[39] In May 2006, the State Council passed "The Regulation on the Protection of Right of Communication over Information Network", which went into effect on July 1, 2006.[40] In addition to the right of communication over information network, the Regulation provides as well the protection of technological measures and right management information, and some liability exemptions for the internet service providers, following the examples such as U.S. Digital Millennium Copyright Act and E.U. Electronic Commerce Directive.[41]

According to articles 1 and 2 of the Regulation, copyright owners, performers, and producers enjoy the right of communication over information network, and if others are going to communicate the works, performances, and sound or video recordings related, they shall get permission from the right owners. Consequently, in light of article 18 of the Regulation, anybody who communicated the works, performances, and sound or video recordings without the right owners' permission, shall be liable to civil, administrative, even criminal responsibilities. On the other hand, the Regulation provides as well some limitations and exceptions for the right of communication over information network.[42]

In comparing with WPPT, which provides the right of making available of fixed performances and phonograms, the Regulation granted the right of communication over information network not only to the performer, and producers of phonograms, but also to the producers of video recordings.[43] In contrast to the EU Information Society Directive, which not only provides the right of making available to the public other subject matters for performers, phonogram producers, but also for the producers of first fixation of films and broadcasting organizations,[44] the Regulation does not grant the right of communication over information network to the producers of first fixation of films and the broadcasting organizations. So a broadcasting organization in China

[34] *Peter Ganea, Copyright, in: Ganea/Pattloch/Heath (editor), Intellectual Property Law in China, The Hague 2005, p. 254.*

[35] *William Alford, To Steel a Book is an Elegant Offence, Intellectual Property in Chinese Civilisation, Stanford 1995, p. 9.*

[36] *Der Urheberrechtsschutz in China mit Hinweisen auf das Deutsche Recht (Copyright in China with some remarks on German law), München 1995, p. 1.*

[37] *2001 Copyright Law of China, passed by the Standing Committee of National People's Congress on October 27, 2001.*

[38] *See articles 10, 37, and 41, 2001 Copyright Law of China.*

[39] *Article 58, 2001 Copyright Law of China.*

[40] *"The Regulation on the Protection of Right of Communicating Works over the Information Network", order of the State Council, No.468, was adopted at the 135th executive meeting of the State Council on May 10, 2006.*

[41] *US Digital Millennium Copyright Act, October 1998; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16.*

[42] *See articles 6, 7, 8, 9, and 10 of the Regulation.*

[43] *On the basis of the Copyright Law of China, a video recording is something like motion pictures but does not reach the standard of originality for a work, thus the producer of a video recording enjoys a related right but not copyright.*

[44] *See article 3, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, OJ, 167/10, June 22, 2001.*

cannot claim the right of communication over information network with its broadcasting.[45]

Although China provided the right of communication over information network in October 2001, and enacted the Regulation in June 2006, the judicial system, however, had protected such a right dated back to 1999. In a case decided by Haidian District Court of Beijing in 1999, the defendant Century Communications Interoperability Technology Ltd. communicated some works of six well-know writers over the internet without permission, and the six writers, including Mr. Wang Meng, former minister of Cultural Ministry of China, sued Century Communications Interoperability Technology Ltd for copyright infringement, specifically disseminated their works in the internet. During that time, article 5 of Copyright Law of China provided that copyright owners should enjoy the right to use the work by reproducing, performing, exhibiting, distributing, and so on, and to use the work by other ways. Nevertheless, the Law did not provide a right of communication of works over the internet. So the defendant argued that the plaintiffs had no legal basis to the litigation, and there was no infringement of copyright therein. The Court, however, reasoned in another way. According to the court, the article 5 of 1991 Copyright Law did not exhaust the possible means of exploiting works because it provided a general clause "to use the work by other ways". Thus the communication of plaintiffs' works over the Internet by the defendant should be regarded as one of the means to use the works, and constituted as copyright infringement.[46] The appeal court, First Intermediate Court of Beijing, affirmed the reasoning and decision by Haidian District Court. The Appeal Court further opined that while legislators drafted the Copyright Law in 1980's, they could not envisage the use of a work in the internet. However, this did not mean that the use of other's work without permission should not be regulated by the Copyright Law.[47]

4.2. *Judicial development*

After the amendments of the Copyright Law in October 2001, especially after the enactment of the Regulation in June 2006, the Chinese judicial system has decided many cases concerning the right of communication over information network. However, with the rapid development of media technology, some new challenges to the right of communication through information network have emerged from both the network industry and the judicial practices.

In a case decided again by Haidian District Court of Beijing in 2008, *Chenggong Multimedia v. Shiyue Network Technology*,[48] plaintiff is an exclusive licensee for a TV series consisted of 32 programs, and the defendant broadcasted the programs over the internet without permission. Plaintiff claimed that the defendant infringed its right of communication over information network. The defendant, however, argued that it did not infringe plaintiff's right of communication over information network because the programs broadcasted were preset, and the member of public could not choose the time they wished to watch the programs. In other words, the time or period for the web-broadcasting was controlled by the defendant, like traditional radio or TV broadcasting, rather than to access to the work from a place and at a time individually chosen by the member of public.

But the Haidian District Court was not persuaded by this view and held that the defendant did infringe plaintiff's right of communication over information network. The court reasoned that although the defendant broadcasted the programs at a time preset by itself, any website subscriber could still watch one specific program at a time chosen by them, thus falling into the definition that people "may access to the work from a place and at a time individually chosen by them." According to the court, the Law does not require the people must access the whole TV series or one program at a time. Therefore, if any member of public can access to any part of a program from a place and at a time chosen by them, it does fall into the definition of communication over information network.

Although this is not a sound reasoning, the appeal court, First Intermediate Court of Beijing, affirmed.[49] After the decisions, many commentators criticized the reasoning and holding above, in a view that the decision went beyond the definition of the right of communication over information network. They believed that the definition is merely concerned with interactive behaviors in the information network, such as to access to a work from a place or at a time chosen by the public, and has nothing to do with the web-broadcasting. In the case of web-broadcasting, the point of time is preset by the web-broadcasters, the subscribers can only negatively accept the time period and the program broadcasted.[50]

It seems that in *Chenggong Multimedia v. Shiyue Network Technology*, both the first instance court and the appeal court concerned that the defendant did use the plaintiff's work without permission, and should be liable. So they interpreted the right of communication over information network a little bit broad to cover the act of web-broadcasting. It is no doubt that the interpretation is not in accordance with the definition by the Copyright Law of China and the related provisions in WCT and WPPT.

After this case and other cases similar, academics, judies, government officials, and industry representatives in China

[45] *For example, a website intercepted the broadcasting of Spring Festival Gala by China Central Television and re-broadcasted in the internet, Although CCTV can claim its right as the owner of compilation work against the website, it cannot claim the right of broadcasting organization. This is a real case in Chaoyang District Court of Beijing, but the parties reached a settlement before the judgment of the court.*

[46] *Wang Meng etc. v. Century Communications Interoperability Technology Ltd, first Instance Civil Judgment(1999) No. 57, Haidian District Court in Beijing.*

[47] *Wang Meng etc. v. Century Communications Interoperability Technology Ltd, Final Civil Judgment(1999) No.185, First Intermediate Court in Beijing.*

[48] *Chenggong Multimedia v. Shiyue Network Technology, first instance civil judgment (2008) No. 4015, Haidian District Court of Bejing.*

[49] *Chenggong Multimedia v. Shiyue Network Technology, Final Civil Judgment (2008) No.5314, First Intermediate Court of Beijing.*

[50] *For example, Wang Qian, "On the Correct Application of the Right of Communication through Information Network, a Comment on Chenggong Multimedia v. Shiyue Network Technology", Law Application, No 12, 2008.*

realized that not all of the acts to use a work in the internet are fall within the right of communication over information network, and the acts such as reproduction, performance, exhibition, broadcasting, may be conducted in the network. Two views have resulted thereof. On one hand, if one is going to get a license to use a work in the internet, one shall contract the scope of using, not just say this or that right, since to use a work in the internet may cover many rights. On the other hand, many Judges realized that plaintiffs should not be required to specify which of their rights, such as reproduction, communication over information network, has or have been infringed. In this respect, if somebody else used the copyrighted work without permission, and the use does not belong to the limitations and exceptions, it is an infringement. Consequently, the court may have some room to decide which right or rights have been infringed.[51]

To resolve the dilemma of whether the right of communication over information network can be applied in web-casting, some academics suggested regulating web-broadcasting by the right of broadcasting in the Copyright Law of China. However, the right of broadcasting in the Law originated directly from Berne Convention. In light of the Berne Convention, the right of broadcasting was first recognized in Roma Version (1928), and revised in the Brussels Version (1948), and finalized in Paris Version (1971).[52] The right of broadcasting in Berne Convention is a response to the technology of wireless or wire broadcasting in that time, has nothing to do with the internet or web-broadcasting. Therefore it is difficult for a court to apply the right of broadcasting to the newly emerged web-broadcasting.

In a case decided in 2008, *Anle Film Co. v. Shiyue Network Technology*,[53] the Second Intermediate Court of Beijing held that the act of web-broadcasting could be controlled by the term "other rights" in article 10 of the Copyright Law. In this case, the plaintiff is the copyright owner of a movie "Hue Yuanjia" (a famous master of martial art), while the defendant broadcasted the movie in the network without permission. The Court reasoned that, article 10 of the Copyright Law provides "the copyright include the following personal rights and economic rights", such as the rights of reproduction, distribution, broadcasting, communication over information network. It should be noted that after listing several personal rights and economic rights, the article 10 provides a general clause in paragraph 17 "the other right shall be enjoyed by copyright owner". According to the Court, although a right of web-broadcasting is not listed in article 10 as one economic right, it does fall into "the other rights shall be enjoyed by copyright owners". Thus the web-broadcasting of the movie by the defendant infringed the plaintiff's copyright.

In the appeal, the High Court of Beijing affirmed the decision and the reasoning involved.[54] The High Court explained that the right of communication over information network is concerned only with the interactive behaviors, i.e. any subscriber can access to a work from a place and at a time positively chosen by them, rather than negatively accepted by them. Because the defendant preset the time and period that the movie was broadcast, and the subscribers could not chose the point of time to access to the movie, it did not fall into the right of communication over information network. Furthermore, the act of web-broadcasting did not fall into other economic rights in article 10 of the Copyright Law either. So it should be regulated by paragraph 17, article 10 of the Copyright Law, "the other rights shall be enjoyed by copyright owner".

In May 2010, the High Court of Beijing issued a Guidance concerning the cases relating to the disputes over information network. It provides that if an internet service provider makes available to the public a work by online-broadcasting under a preset timetable, it does not fall into the right of communication over information network, but shall be regulated by paragraph 17, article 10 of the Copyright Law.[55]

4.3. *New views*

In the last two or three years, Chinese academics have carefully discussed once again the right of communication over information network, and the challenges brought by web-broadcasting. Some scholars believe that the definition for the right of communication over information network is far narrower than the definition in WCT and WPPT. For example, article 10 of WCT provides that "authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire and wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." Nevertheless, the definition for the right of communication over information network in article 10 of the Copyright Law, and article 3 of the Regulation only copied the later part of the definition of WCT, "to make a work available to the public by wire or by wireless means, so that people may have access to the work from a place and at a time individually chosen by them," but lost these words "authors shall enjoy the exclusive right of authorizing any communication to the public of their works". These scholars believe that if the definition in the Copyright and the Regulation did include the former part of the definition of WCT, the right of communication over information network would be broader to cover the act of web-broadcasting. Some of them even criticized that Chinese legislators missed almost 90 percent of the definition of WCT and WPPT when they defined the right of communication over information network.

Some other scholars oppose the right of communication to the public in WCT and the right of making available of fixed performances and phonograms are the rights confined to the interactive behaviors in the internet. Therefore, even if the definition for the right of communication over information network did copied the whole sentence from article 8 of WCT and articles 10 and 14 of WPPT, it would not cover the act of

[51] *For example, a report, submitted to the Supreme Court of China by the First Intermediate Court of Beijing in 2010, explained this view.*

[52] *See WIPO Guide to the Berne Convention (Paris Act, 1971), about article 11bis.*

[53] *Anle Film Co. v. Shiyue Network Technology, First Civil Judgment (2008) No.10396, Second Intermediate Court of Beijing.*

[54] *Anle Film Co. v. Shiyue Network Technology, Final Civil Judgment (2009) No.3034, the High Court of Beijing.*

[55] *Article 10, Guidance on the Judgment of the Copyright Dispute Cases in the Internet, May 2010, the High Court of Beijing.*

web-broadcasting.[56] It is suggested that Chinese legislators shall broad the scope of the right of broadcasting to cover the act of web-broadcasting.

In view of the right of communication over information network and its development in China, it seems it is the time now for China to rethink about the way to list the contents of copyright.

4.4. *Final remarks*

China started to draft its copyright law in the early 1980. While drafting the law, the legislators envisaged that China should adhere to Berne Convention soon. Therefore, when the Copyright Law lists the specific rights of the copyright, it followed the Berne Convention, providing the authors should enjoy the right of reproduction, right of performance, right of broadcasting, right of translation, right of adaptation, cinematograph rights. In addition to these rights, the Copyright Law further lists some other rights, such as right of distribution, right of exhibition, right of compilation, right of showing films, and right of communication over information network. It is clear that the legislators are trying to clarify something. Consequently, there are four items of moral rights, and thirteen items of economic rights. While the bundle of rights are scattered and complicated, it is very difficult for a copyright owner or a judge to identify which of the right or rights have been infringed. For example, the Copyright Law of France only provides that economic right in copyright belong to the author shall comprise of the right of performance and the right of reproduction.[57] This does not mean that France has a weaker copyright protection. As another example, the Copyright Act of United States provides that copyright owners shall enjoy five exclusive rights, such as reproduction, distribution, adaptation, performance, and exhibition.[58] Again this does not mean that the copyright protection in the United States is weaker than China.

After more than twenty years of the copyright protection, Chinese legislators are rethinking the way to list the contents of copyright keeping in mind that Berne Convention added those different rights in response to the development of media technology and the social and economic changes in the world, and some of them are cumulative. Furthermore, it is not necessary to clarify some specific rights on the basis of the media technology, such as right of broadcasting, right of showing film, and the right of communication over information network. It seems that we may provide that the copyright owner shall enjoy only several rights, such as the rights of reproduction, distribution, adaptation, performance, and expand the scope of those rights to cover more acts. In this way, the act of web-broadcasting may be covered by a broad right of performance.

[56] *For example, see Wang Qian, Copyright Protection in the Network Environment, Law Press of China, 2011, pp 110-143. See as well Jorg Reinbothe, Silke Lewinsky, the WIPO Treaties, WCT and WPPT: Commentary and Legal Analysis, Butterworth, 2002, p 109.*

[57] *L. 122-1, 122-2, 122-3, Intellectual Property Code of France.*

[58] *Article 106, US Copyright Act.*