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Issues and Evolution of the Chinese Copyright Law facing Digital Environment in a Comparative Law Perspective (US and EU)

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« L’université n’entend ni approuver ni désapprouver les opinions particulières de l’auteur. »

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SOMMAIRE

LISTE DES ABREVIATIONS

AI	Artificial Intelligence
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
CJEU	Court of Justice of the European Union
Final Draft	Final Draft of Copyright Law Revision of People's Republic of China
ISP	Internet Service Provider
PRC	People's Republic of China
SAPPRFT	State Administration of Press, Publication, Radio, Film and Television
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WTO DSB	World Trade Organization Dispute Settlement Body
UCC	User Created Content

Introduction

1. The copyright protection has always been shaped by the development of technology. Chinese copyright protection has been constructed in an era of the digital environment. History tells that the copyright protection has evolved with the development of technology:

When the written words were firstly invented around 3000 BC[1], it was regarded as the dawn of civilization. The written language enabled human to pass their knowledge from one generation to the next.

When the movable type of printing technology was invented and democratized around fifteenth century in Europe[2], the development of this technology of communication enables authors and publishers to disseminate their knowledges and their works to wider group of people. This period of time was also recognized as "Renaissance" in Europe which was recognized as the dawn of the modern history. Later, the statute of Anne was enacted in 1709 which has been regarded as the first modern legislative text of "copyright."[3]

At the beginning of nineteenth century, it opened a new era of telecommunication. Telegraph and telephone was invented in 1837 and 1876 respectively. Radio and television was invented in 1832 and 1925. These technologies of communication had been democratized fast. It has revolutionized the way how the works are created and distributed: Enormous audiovisual works have been created. The distribution of these works could reach the audiences much larger than before. It was during this period of time when the Berne Convention was firstly signed in 1886. A group of public communication rights were recognized in the Berne Convention. Articles 11, 11bis, 11ter, 14 and 14bis of the Berne Convention provide a range of public communication, public performance rights to copyright

[1] See Wikipedia "history of writing." https://en.wikipedia.org/wiki/History_of_writing

[2] See Wikipedia "history of printing." https://en.wikipedia.org/wiki/History_of_printing

[3] Françoise Benhamou, Joëlle Farchy. Doit d'auteur et copyright. Collection Repères. 2014. p, 6. "Le premier véritable texte législatif moderne qui organise le copyright n'est toutefois adopté qu'en 1709, en Angleterre: c'est le Statute of Anne, qui attribue aux auteurs le droit de demander un copyright, limité à quatorze années…"

holders.[4]

Every time the technology of communication developed, it brought the prosperities to the civilization of humanity as a whole. Naturally and logically, the development of copyright law has been adapted to facing the challenges caused by the new ways of communication.

2. Now, in the twenty first century, it is the era of internet. The internet as a new technology of telecommunication has created a the digital environment where every user is inter-connected. It is unnecessary to dig into the specific technical details of how it enables the massive and rapid transmission of contents, because the technologies would vary fast.

Similar to the precedent developments of communication technology above, the internet has facilitated the dissemination of works. It has enabled some new ways of how the works could be created.[5] According to the history we have already experienced, it could be foreseen that varieties of activities and creativities will prosper in the digital environment and the copyright law must be adapted to the digital environment.

In regard of the internet, the copyright law has been changed facing the challenges of the digital environment in order to not only preserve and stimulate the creativities of authors but also facilitate and promote the public access to works.

"A code of cyberspace, defining the freedoms and controls of cyberspace, will be built…But by whom, and with what values? That is the only choice we have left to make."[6] Copyright is capable of controlling the online piracy, but what value it would like to embrace?

3. In China, after the invention and the democratization of woodblock printing and movable type of printing technology around tenth century, in the year of 1068, Song dynasty in China, for the protection of a series of books edited by the royal family, a prohibition of

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[4] the Berne Convention for the Protection of Literary and Artistic Works was firstly signed in Berne, Switzerland, in 1886.
Article 11 Certain Rights in Dramatic and Musical Works (1)(ii) of the Berne Convention grants authors of dramatic, dramatico-musical works the exclusive right of authorizing any communication to the public of the performance of their works.
Article 14 Cinematographic and Related Rights (1) (ii) grants authors the right of authorizing the communication to the public by wire of their works adapted or reproduced by means of cinematography.
Article 11bis Broadcasting and Related Rights (1) grants authors of literary and artistic works the right in various forms of communication to the public such as the right of broadcasting, the right of communication to the public by wire and the right of rebroadcasting of a broadcast, the right of public communication of the broadcast by loudspeaker and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images.

[5] Goldstein, Paul. Copyright's Highway: From Gutenberg to the Celestial Jukebox. Revised edition. Stanford, Calif: Stanford Law and Politics, 2003. Chapter 7. The Celestial Jukebox. p, 198.

[6] Lessig, Lawrence. Code: version 2.0. New York, NJ, Etats-Unis d'Amérique: Basic books, 2006. p, 6.

reproduction was issued by the king of Song dynasty.[7]

For the reason that the technology of communication stagnated in China from 10th century Song dynasty to nineteenth century Qing dynasty, the copyright rules had remained on the decrees of the king to prohibit the unauthorized reproduction of works.[8]

From the collapse of Qing dynasty in 1912[9] to the Reforming and Opening Policy in People's Republic of China in 1976[10], China had gone through several governments[11] and several wars[12] to finally established People's Republic of China in 1949. However, the following very wrong policies of "Great Leap Forward"[13] and "Cultural Revolution"[14] ravaged the whole China destroyed the copyright legal system and the copyright industry as a whole.

4. Internet has been introduced to China for only forty years. But it has constructed a virtual space, a the digital environment which contains huge potential. The internet is the global system of interconnected computer networks that use that internet protocol suite (TCP/IP) to link devices worldwide. The origins of the internet date back to research commissioned by the US government in the 1960s to build robot, fault tolerant communication via computer networks.[15] Since the internet was democratized and commercialized in 1990s, it has enjoyed a rapid development worldwide.

In terms of China, similar to Chinese Copyright Law, the Chinese internet was also started from the Reforming and Opening Policy in 1980s.[16] In August 1986, Professor Wu sent the first e-mail from Beijing to Professor Steinberger at CERN (Conseil Européen pour

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[7] 郑成思. 版权法. 中国人民大学出版社. 1997, p, 4.
Zheng Chengsi. Copyright Law. Chinese People's University Press. 1997, p, 4.
[8] Ibid. pp, 5-8
[9] See Wikipedia, Qing Dynasty. https://en.wikipedia.org/wiki/Qing_dynasty
[10] See Wikipedia, Chinese economic reform. https://en.wikipedia.org/wiki/Chinese_economic_reform
[11] Government of Beiyang Army, 1912-1928. See Wikipedia, https://en.wikipedia.org/wiki/Beiyang_Army
Government of Kuomintang, 1928-1949, See Wikipedia, https://en.wikipedia.org/wiki/Kuomintang
People's Republic of China, 1949-, See Wikipedia, https://en.wikipedia.org/wiki/China
[12] Xinhai Revolution in 1911, overthrew Qing dynasty. See Wikipedia, https://en.wikipedia.org/wiki/Xinhai_Revolution
Northern Expedition from 1925 to 1928, unified China and ended the Beiyang Army government. See Wikipedia, https://en.wikipedia.org/wiki/Northern_Expedition
Chinese Civil War from 1927 to 1949, between Kuomintang and Communist Party of China. See Wikipedia, https://en.wikipedia.org/wiki/Chinese_Civil_War
Second Ward War from 1937 to 1945, See Wikipedia, https://en.wikipedia.org/wiki/World_War_II.
[13]See Wikipedia, Great Leap Forward. https://en.wikipedia.org/wiki/Great_Leap_Forward
[14]See Wikipedia, Cultural Revolution. https://en.wikipedia.org/wiki/Cultural_Revolution
[15] Wikipedia, Internet. https://en.wikipedia.org/wiki/Internet
[16] See, Part 1 Title 1.

la Recherche Nucléaire) in Suisse.[17] This e-mail has been considered as the first step of China towards the global internet.[18]

In October of 1990, on behalf of China, Professor Qian Tianbai officially registered China's top domain name as CN in DDN-NIC, the former international Internet information center. As a network center of ARPANET under the United States' Department of Defense, DDN-NIC was in charge of distributing Internet domain names and IP addresses worldwide. On April 20, 1994, the NCFC project opened a 64K international dedicated circuit to Internet through Sprint Co. of the United States, realizing a full-function linkage to Internet. Since then China has been officially recognized as a country accessible to Internet.[19]

In September of 1994, China Telecom and Brown, the U.S. Secretary of Commerce, signed a Sino-American Internet agreement. Under the agreement, China Telecom would open two 64K dedicated circuits in Beijing and Shanghai, respectively, through Sprint Co. of the United States. As a result, work on China's Internet, the Chinanet, started.

From 1994 to 2000, the internet has been rapidly democratized in China. During this period, it is the state owned companies which started to construct the infrastructures of Chinese internet. In July 2000, China had already 16.9 million regular internet users, average 16 hours per week.[20]

The private companies which later become the Chinese internet giants were born as this period: In June 1996, Sina made its website available online (Chinese biggest internet portal); In November 1998, Tencent company was registered in ShenZhen (Chinese biggest instant communication software); In Mars 1999, Alibaba was established (Chinese biggest internet retailer); In January 2000, Baidu was established (Chinese biggest searching service provider).

Since 2000, the Chinese internet has been continuously developed. The internet not only democratized but also commercialized. It has created a virtual space where all kinds of commercial activities thrive.

5. The development of the internet infrastructure in China has laid down the foundation for the development of Chinese online commercial activities.

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[17] Wu Weimin, The Beauty of Physics. World Scientific Publishing Co. Pte.Ltd. 2007, p,6

[18] 陈建功，"中国互联网发展的历史阶段划分"，互联网天地，2014年3月第3期。
Chen Jiangong, "Historical Stage Division of China's Internet Development." China Internet. Mars, 2014, No.3.

[19] "Evolution of Internet in China." China Education and Research Network. 2001. available at http://www.edu.cn/introduction_1378/20060323/t20060323_4285.shtml

[20] "Statistical Report on Internet Development in China", June 20016. China Internet Network Information Center.

According to the latest report of China Internet Network Information Center (CNNIC)[21], in June 2016, China had 710 million internet users which covers 51.7% of its total population. In comparison, the first report conducted by CNNIC in 1997 showed that the number of internet users in China was 0.62 million. From 1997, the number of internet users has increased rapidly: in 2000, 16.9 million, in 2003, 68 million, in 2006, 123 million, in 2009, 338 million, in 2012, 538 million.[22]

There were totally 36.98 million domain names in the country. Specifically, .”CN” domain names increased by 19.2% to 19.5 million during the first half of this year, and accounted for 52.7% of the total domain names in China. There were altogether 4.54 million websites, a semi-annual increase of 7.4%, among which 2.12 million were .”CN” websites. International Internet bandwidth reached 6,220,764 Mbps, with a semi-annual growth rate of 15.4%.[23]

In China, the internet has created a digital environment with huge potential. Together with the Chinese economic and social transformation, they will shape the Chinese Copyright Law.

6. It will firstly present the interests at stake in the digital environment in the field of Chinese Copyright Law (I). Secondly, it will demonstrate the methodology and the problematics (II). Finally, it will announce the two main issues (III).

I. Economic and social interests in the digital environment

7. After the Reforming and Opening Policy in 1976, the Chinese copyright protection has evolved with the social, economical and technological development.

The construction of the Chinese Copyright Law was “artificial.” That is to say, the promulgation of first Chinese Copyright Law in 1990 was mainly for the purpose of ratifying the Berne Convention which was mainly under the pressure of the US trade retaliation. Normally, the copyright protection would be constructed gradually in response to the social, technological or economical development. However, without the developed copyright industry, Chinese Copyright Law established a very high level standard for the purpose of ratifying the Berne Convention. Therefore, it was extremely hard to enforce the rights of copyright holders, because there are no motivation for domestic right holders and local copyright authorities since the domestic market of copyright was not constructed.

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[21] Ibid.
[22] Ibid.
[23] Ibid. p, 5.

The concept of copyright was implemented into Chinese culture. The value of the western copyright could not perfectly match with the traditional Chinese values. The process of the Chinese modernization of copyright law started from Reforming and Opening Policy. It is almost the same time when the internet is firstly introduced into China. The process of the Chinese modernization of copyright law is the conflicts between the western value and the Chinese traditional value, the copyright and the internet.

Specifically, the Chinese copyright protection in the digital environment has significant economic and social interests at stake. The copyright infringements in the digital environment has jeopardized the interests of the copyright holders.

The potential copyright market in the digital environment is at stake. The potential copyright market in the digital environment is huge. Since the audiences have shifted into the digital environment, the existing copyright industries, the press, the music industry, the film industry, also have to follow the appetite of the audiences.

In the year of 2016, Chinese internet users have spent 26,5 hours online per week. Their top 10 online activities are online communication (641 million users), online searching (592 million users), online news (579 million users), online video (513 million users), online music (502 million users), online payment (454 million users), online shopping (447 million users), online game (391 million users), online bank (340 million users), online books (307 million users).[24]

Based on the huge numbers of internet users, the online market is immense: according to BBC news, at 11 November 2016 (a double 11 discount day created by online retailers), the turn-over of TaoBao (Chinese online shopping website) reached 14 billion the USD.[25] It was only one online retailer. There exist several similar online shopping websites such as Amazon China, Jing Dong, Dang Dang, etc. According to the report conducted by the Ministry of Industry and Information Technology of China, in 2015, the online market volume of Business to Customer reached 3800 billion CNY.[26] Fascinatingly, since 447 million users of online shopping have created such huge online market, the potential of the online copyright market is enormous regarding 513 million users of online video, 502 million users of online music and 307 million users of online books.

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[24] Statistical Report on Internet Development in China. supra note 20. p, 21. p, 24.

[25] Available at BBC News: http://www.bbc.com/zhongwen/simp/china/2016/11/161111_alibaba_singles_day_e-shopping_2016

[26] "Research Report of Chinese Online Shopping Market" Conducted by the Ministry of Industry and Information Technology of China and China Internet Network Information Center. Available at http://www.miit.gov.cn/ and https://www.cnnic.cn/hlwfzyj/hlwxzbg/dzswbg/201606/P020160721526975632273.pdf

In 2015, the online market volume of Business to Customer reached 3800 billion CNY.[27] In regard of the large numbers of audiences in the digital environment, the potential of the copyright market in the digital environment is immense.

8. It is impossible to calculate how much damage the copyright infringements in the digital environment has caused to copyright holders. However, it could be demonstrated that the commercialization of the copyright infringing activities are highly lucrative because it takes advantages of the new technology of communication and does not need to pay for the copyright authorization fees.

It could take illegal websites of BitTorrent and online streaming as an example: A BitTorrent website which had less than 1 million monthly unique visitors, the annual average revenue from advertisement was amounted to nearly 100,000 the USD meanwhile the annual cost was less than 10,000 the USD. A BitTorrent website had more than 5 million monthly unique visitors, the annual revenue from advertisement reached 6 million the USD while the annual cost was about 360,000the USD.[28] That is to say, the margin of the BitTorrent websites were amazingly high which surpassed 90%. In terms of the illegal streaming link sites, the small one which had less than 1 million monthly unique visitors generated about 60,000the USD annually at the cost of 10,000 the USD; the large one which had more than 5 million monthly unique visitors generated about 2.5 million the USD at the cost of 300,000the USD. In term of the illegal video streaming host sites, the small one generated about 60,000 the USD while the large one generated 1.2 million the USD.[29]

Regarding the amount and the efficiency of how the online copyright infringing activities make profits, how to enforce copyright in the digital environment is crucial to the revenue of existing copyright industry. Because every penny the copyright infringing activities have made is the potential loss of the legitimate copyright industry.

9. The protection of copyright is fundamental for the potential copyright market in the digital environment. The protection of copyright in the digital environment would motivate copyright holders to exploit their works in the digital environment.

Because if the copyright holders could not control their works in the digital environment, they would not make their works available in the digital environment no matter

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[27] "Research Report of Chinese Online Shopping Market" Conducted by the Ministry of Industry and Information Technology of China and China Internet Network Information Center. Available at http://www.miit.gov.cn/ and https://www.cnnic.cn/hlwfzyj/hlwxzbg/dzswbg/201606/P020160721526975632273.pdf

[28] "Good Money Gone Bad, Digital Thieves and Hijacking of the Online Ad Business", Prepared by Digital Citizens Alliance, 2014. Available at www.digitalcitizensalliance.org/followtheprofit. p, 11.

[29] Ibid. p, 13.

how lucrative the potential market is in the digital environment. Moreover, the copyright holders would prevent their works from being made available in the digital environment by using encryption technologies. For instance, the CSS encryption system of DVDs.[30] Consequently, the potential market would remain unexploited.

10. The protection of copyright in the digital environment is crucial to the development of new copyright business model. Because both the legitimate copyright business model emerging in the digital environment and the illegal copyright infringing websites are using the superpower of internet to distribute the works to the widest audiences. The difference is that the legitimate one has get the authorization of copyright holders, the illegal has not. Therefore, without the proper copyright protection, the legitimate copyright business model in the digital environment would not survive because they naturally bear additional costs of copyright authorization.

Since the whole copyright industry in China was built from the Reforming and Opening Policy in 1976, there does not exist powerful copyright association to smash the illegal activities in the digital environment. Foreign copyright holders complains continuously about the copyright infringement in the digital environment in China. But without domestic interests at stake, without a domestic market of copyright, it was hard to find a motivation to enforce the foreigner's copyright in China at its own cost. A lot of Chinese enterprises were thriving in the digital environment by taking advantages of fable copyright enforcement to undertake their gray businesses.

As long as these legitimate businesses had developed, they need the rules in the digital environment to regulate the market, to guarantee their transaction, to protect their business model. Consequently, Chinese Copyright Law had the motivation to be revised, adapted, enforced to protect the emerging copyright market in the digital environment.

For instance, the current Chinese biggest legal online video sharing website, Youku, had massively been complained by copyright holders. Meanwhile, after Youku has complied with the copyright rules by obtaining the authorization of copyright holders, it has started to fight against the online piracy to protect its own interests.[31]

Therefore, the development of Chinese internet plays an important role in the Chinese modernization of its copyright law. Internet is a great challenge for both Chinese copyright legislations and enforcements because China has just constructed its copyright protection

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[30] Universal City Studios, Inc. v. Reimerdes. 111F. Supp. 2d 294 (2000)

[31] See Part II, Title II, Chapter I Chinese existing copyright enforcement practices Section II. Legal offer of contents by Chinese online audiovisual media

system for the purpose of the ratification of the Berne Convention. Internet is also a forger of the Chinese copyright protection. As long as the development of the copyright industry in the digital environment, the Chinese legislative bodies and copyright authorities would be motivated to properly protect the copyright in the digital environment because there exists significant interests.

In a word, regarding the immense market potential in the digital environment, it is crucial to protect copyright in order to motivate the copyright holders to exploit this market and to facilitate the legitimate new copyright business model.

11. In regard of social interests, the creativity is at stake. The way how works are transmitted and created has been revolutionized in the digital environment. In response to this change, the copyright protection is crucial to stimulate the creativity and safeguard the copyright holders' interests. The change of how the works are created and the response of the copyright protection to the digital environment will be demonstrated respectively.

The new technology of communication has make the existing creative activities more efficient. For instance, the painting, the music and film editing in the digital environment have become more efficient enabled by different softwares.

12. Concretely, in the digital environment, creating a work has become more efficient for two reasons. One reason is that a lot of useful editing softwares are available in the digital environment. They have facilitated the writing, citing and editing process. Another reason is that enormous materials are either directing available in the digital environment or could be located by internet. The creators would have more sources to create new works. Consequently, thanks to the tools and materials provided in the digital environment, the existing artistic creations would be more efficient.

In terms of copyright protection, the essential problematic would be how to guarantee the user's legitimate use of copyrighted materials and how to promote the public access to copyrighted materials for the purpose of facilitating the new creation. Meanwhile it is also crucial to guarantee the copyright holder's control of their works in the digital environment for the purpose of motivating them to make their works available online.

13. Not only the existing creations have been rendered efficient, but also the new ways and new forms of creation have emerged from the internet. Because the digital environment gives its online citizens the power that "anyone anywhere could publish to everyone everywhere"[32], the works could be created and distributed by individual users. This

[32] Lessig, Lawrence. Code. supra note 6. p, 19.

phenomenon would boost the creativities in the digital environment.[33]

14. The Chinese platform called WeChat would be a good example. WeChat enables its users not only to send text and voice messages but also to share text, photos and videos among friends or to the public. In May 2016, WeChat had one billion registered accounts, 864 million active users.[34] On WeChat, individual users generate their own texts, videos and circulate these contents via WeChat by one to one communication or sharing among friends via a service called "Moments." The contents published in "Moments" by a user could be accessed by all his friends. Moreover, the contents could also be made available to the public. WeChat providers a subscription service. User could create a channel and other users could subscribe the channel to get access to the contents published in this channel. Basically, every individual user on WeChat could be a radio station, a press, a film studio. It is not only a new way of how the works could be circulated but also a new way of how the works could be created.

15. Thanks to the power of communicating with everyone everywhere provided by the digital environment, the new ways of creation have been emerging. How to motivate individual users to create more ingenious copyrighted contents? It would have to examine what are the individual user's intention of creation and facilitate individual user to achieve the goal. For instance, if the individual user's intention is money, copyright protection would have the interests to guarantee the remuneration in order to stimulate the creation.

Meanwhile if the intention is reputation, copyright protection would have to protect the moral rights and facilitate the dissemination of works. For instance, influenced the Chinese traditional value of creation, the Chinese users who create ingenious contents in the digital environment maybe motivated by the fame, like "the thumb up", other than direct monetary remuneration.

The ultimate goal of Chinese Copyright Law is to stimulate the progress of the "socialist culture and sciences".[35] It would take the individual users' creativities into

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[33] Lessig, Lawrence. Free culture: the nature and future of creativity. New York, Etats-Unis d'Amérique: Penguin Books, 2005. p, 9. "Digital technologies, tied to the Internet, could produce a vastly more competitive and vibrant market for building and cultivating culture; that market could include a much wider and more diverse range of creators; those creators could produce and distribute a much more vibrant range of creativity."

[34] Wikipedia, WeChat. Available at https://en.wikipedia.org/wiki/WeChat. "WeChat (Chinese: 微信; pinyin: About this sound Wēixìn; literally: "micro message") is a cross-platform instant messaging service developed by Tencent in China, first released in January 2011. It is one of the largest standalone messaging apps by monthly active users. As of May 2016, WeChat has over a billion created accounts, 700 million active users; with more than 70 million outside of China (as of December 2015). In 2016, WeChat has currently 864 million active users."

[35] Chinese Copyright Law 2010 text. Article 1.

consideration. The copyright exceptions maybe could leave more spaces for the internet users to use the existing works to remix and to create more creative works. It could also take the different intention of the creation of the Chinese users into consideration. Since their primary intention of creation is not for the money, Chinese Copyright Law could probably find a way to facilitate the access to their works by the public and at the same time motivate the Chinese internet users to create more works.

16. As the development of technology, the creation has gradually become non-exclusive to human. It would be fascinating that if the computer software could be capable of creating the artistic works similar to the human creations. What impact it could bring to copyright? In addition, the quality of the machine created works would be higher than the human created one; and the provision is infinite. That is to say, the creativity would be largely advanced.

The creation of new works would always based on the existing works. If the computer software could generate the artistic works which are similar to the creative works of human, it would also base on using, imitating and developing the existing works. Again, for the purpose of serving the goal of Chinese Copyright Law, it would on the one hand protect the copyright of the existing works, on the other hand, leave some latitude for the new forms of creation.

Therefore, the creativity in the digital environment is at stake. It is significantly enlarged and transformed. The copyright protection would have to adapt itself to preserve and stimulate the creativity in the digital environment.

II. Methodology

17. Regarding the significant economic and social interests at stake in the digital environment, three major questions could be asked: How the Chinese Copyright Law has been constructed? What is the current Chinese Copyright Law in the digital environment? How to protect Chinese copyright in the digital environment in the future? The demonstration of the three questions would present the evolution of the Chinese Copyright Law in the digital environment.

18. In terms of the first question: how the Chinese copyright protection has been constructed?

Precisely, The Chinese ratification of the Berne Convention is the corner stone of the modernization of Chinese copyright legislation. From Reforming and Opening Policy in 1976

to the adoption of first Chinese Copyright Law in 1990[36], the whole legislative efforts made by China were for the purpose of complying with the minimum standard of the Berne Convention.[37] More over, the later revisions of Chinese Copyright Law in 2001 and 2010 were for the purpose of complying with the minimum standard of the Berne Convention.

The reason why China would want to ratify the Berne Convention is because that starting from Reforming and Opening Policy in 1976, China opened its longly closed border and was willing to learn from and to cooperate with the foreign countries. Without a national copyright law to protect the foreign copyright holders interests, it was a great risk for the foreign investors to cooperate with China in several field, for instance, they refused to sell the computer softwares to China without a copyright law at national level.[38] Moreover, for the purpose of engaging into the international trade with US, the ratification of Berne Convention was required as an obligation in an agreement between US and China.[39]

Therefore, the elaboration of the first Chinese Copyright Law and the ratification of Berne Convention are the consequences of the social and economic transformations after the Reforming and Opening Policy. They are pushed by the foreign investors and the foreign right holders.

It could be a problematic because when the first Chinese Copyright Law was enacted and the Berne Convention was ratified by China in 1990s, there was no domestic copyright market which the domestic copyright holders could make profits from. Without a copyright market, the audiences had also limited access to the copyrighted works. As a consequence, the first Chinese Copyright Law implementing the copyright standard of the Berne Convention had no actual need domestically. It was the law for the purpose of facilitating the Chinese "opening" policy.

19. It will take a chronological approach to introduce the historical evolution of copyright legislations in People's Republic of China. It would be necessary to distinguish the term of "China".

Chronologically, it focus on the issues of copyright after the Reforming and Opening

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[36] 中国著作权法, 1990年.
Copyright Law of People's Republic of China. 1990 Text.
[37] Part 1 Title 1 Chapter 1 Chinese Ratification of Copyright Conventions Section 1. Chinese copyright legislation background for the ratification of the Berne Convention
[38] 中国版权备忘录，p,165.
Wu Haimin, Road to Berne-Chinese Copyright Memorandum. China Academic Journal Electronic Publishing House. 2006. p, 165.
[39] Memorandum of understanding between the government of the People's Republic of China and the government of the United States of America on the protection of intellectual property. 1992.

Policy in 1976. Because it is at this point of time in China. The market was started to be constructed. The internet started to be democratized. The copyright law started to be modernized. It is indeed interesting to conduct the research of the notion of copyright possibly existed in ancient China and it is also interesting to study the significant mutation of Chinese copyright law from the collapse of Qing dynasty to the Second World War. But these issues would be outside the scope of the subject.

Geographically, it focus on the People's Republic of China in mainland. It will not discuss the copyright protection in TaiWan, HongKong, Macao. Because each place has its own unique legal system and the copyright legislations, jurisprudences and enforcement measures are very different. In Taiwan, the legal system is the civil law system based on the Six Codes which was similar to Japanese law. After 1949, the mainland of China has gone to another different direction. In HongKong, as former colony of UK, the legal system has been maintained similar to common law system based on the legislations and jurisprudences of UK. In Macao, as former colony of Portuguese Empire, the legal system is the civil law system based on Portuguese law.

It will take both international and domestic point of view to analyze the impulse and the interests at stake in terms of the ratification of the Berne Convention. Both the procedures and the substantial rights revised will be analyzed to demonstrate how the Berne Convention has been implemented in China.

The revisions of Chinese Copyright Law are the perfect clues to demonstrate the Chinese implementation of the Berne Convention. The existing two revisions of Chinese Copyright Law were mainly for the purpose of complying with the minimum standard of the Berne Convention. The procedures of the revisions and the substantial rights revised would be analyzed. The most interesting one is the third revision of Chinese Copyright Law which is ongoing. It is not only for the purpose of complying with the Berne Convention but also for the purpose of envisaging the challenges of the digital environment.

20. In terms of the second question: what is the current Chinese Copyright Law in the digital environment?

As two sides of one coin, the rights of copyright holders are always accompanied with the copyright exceptions under copyright law. Because in order to serve the purpose of copyright law: to promote the progress of science and useful arts, on the one hand, the copyright holders' interests must be protected to motivate them to create more works, on the other hand, the public access to works shall also be guaranteed and facilitated. It has been the

balance of interests existed in copyright.

In the digital environment, this balance of interests has the difficulties to be maintained particularly in China. On the one side, the copyright holders' interests could be undermined because the digital environment provides the new way of transmission of the copyrighted contents which would surpass the scope of the traditional rights copyright holders have. Even the copyright holders have the rights to prohibit the infringing activities, the anonymous and borderless digital environment weakens the copyright enforcement. On the other side, if the copyright law chooses to strictly protect the copyright holders' interests, the creativities in digital environment have the risk to be smothered because the copyright exceptions always leave the legitimate use of works for the purpose of the scientific researches, the educations and the other transformative use. This is also an indispensable part of the copyright law.

Therefore, the rights shall be elaborated to cover the new way of transmission in digital environment. The enforcement measures shall be reinforced to guarantee the copyright holders interests. Correspondently, the exceptions for promoting the creativities shall be established.

In China, the particular problematic is the conflict between the concept of copyright law and the Chinese traditions. The elaboration of the Chinese Copyright Law was obliged by the pressure of the ratification of Berne Convention. The concept of copyright was transplanted into Chinese culture. Therefore, the Chinese Copyright Law has always had the difficulties to be recognized by its population. In the digital environment, the problematic caused by this difficulties has been magnified. Without the population which believe the Chinese Copyright Law, the rights and exceptions would not served the purpose of the copyright law. In digital environment, it would be critical for the Chinese Copyright Law to elaborated the rules of the rights, the exceptions and the enforcement measures which would be compatible with its own traditions and thus could be recognized by its internet users.

21. The author's rights and the copyright exceptions will be analyzed in a comparative law perspective. The Berne Convention and WIPO Copyright Treaty (WCT) has prescribed

the rights and the exceptions facing the development of technologies.[40] In comparison, it will examine whether the Chinese author's rights and the copyright exceptions could comply with the international obligations.

In the WCT and the Berne Convention, the rules in regard of the author's rights and the copyright exceptions have been adopted after difficult reconciliations.[41] Lots of compromises have been made. Therefore, it is indispensable to not only examine the articles themselves but also to examine the interpretations made by the Diplomatic Conferences[42] and WIPO[43].

The US and the EU copyright legislations have influenced the Chinese author's rights and the copyright exceptions. It would be interesting to compare the author's rights and the copyright exceptions under the US, the EU legislations with China in order to extract some differences and similarities. This comparison would not only help to understand the existing Chinese rules of the author's rights and the copyright exceptions but also help to anticipate the future development in China.

Beside the substantial rights, the enforcement measures under Chinese copyright legislations are also essential for the protection of copyright holders' rights in the digital environment. It would also take a comparative law approach to compared the enforcement measures under the WCT, the US and the EU legislations with the Chinese copyright legislations.

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[40] the Berne Convention Article 9 Right of Reproduction (2) Possible exception: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." WIPO Copyright Treaty. Article 8, Right of Communication to the Public: "Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or 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."

[41] Discussion of different propositions concerning public communication right in the WCT among delegations : Committee of Experts on a Possible Protocol to the Bern Convention Fifth Session, September 1995. WIPO/ BCP/CE/V/9-INR/CE/IV/8. p, 60.

The adoption of a general exception of reproduction right in the Berne Convention: Records of the Intellectual Property Conference of Stockholm 1964, Volume 1, Preparatory Documents, p, 112,

[42] Public Communication Right: WIPO, CRNR/DC/56, 1996.

WIPO, CRNR/DC/12,1996.

Private use exception: Records of the Intellectual Property Conference of Stockholm 1964, Volume 2, Main Committee 1 Report, p, 1145.

[43] Public Communication Right: Guide to the Copyright and Related Rights Treaties Administered by WIPO. World Intellectual Property Organization. p,210, para, CT-8

Private use exception: Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). World Intellectual Property Organization, 1978. para, 9

22. In terms of the third question: how to protect Chinese copyright in the digital environment in the future?

The Chinese existing copyright enforcement in practice would offer some ideas. The construction of Chinese internet has built a digital virtual space. The rampant infringing activities made the digital environment impossible to be exploited by the copyright holders. Thanks to the enforcement actions which Chinese authorities have taken, some living spaces have been left to the legitimate businesses. As the Chinese legitimate businesses thriving in the digital environment, the domestic enterprises would actively seeking the authorizations of the copyright holders to make their works available in the digital environment and would motivate Chinese national and regional authorities to enforce the copyright to protect their commercial interests.

The Chinese copyright enforcement in the digital environment is associated with the development of copyright market since the modernization of Chinese copyright legislations. Copyright enforcement practices protect the legitimate businesses which offer legal contents to the audiences in the digital environment by smashing the illegal transmission of copyrighted contents. In return, the development of the legitimate businesses will stimulate the development of copyright protection in the digital environment for the purpose of maximizing their interests. Consequently, there is a strong motivation to protect copyright in the digital environment.

This domestic motivation has been missing since the enactment of the first Chinese Copyright Law. Now it is gradually formed in the digital environment. In the future, the Chinese Copyright Law will be shaped by the legitimate businesses of the copyright in the digital environment. They will try to maximize their interests by expanding the rights which they own and minimize their responsibilities by expanding the exceptions which they are eligible. The Chinese Copyright Law shall establish the stable, clear and proportional rules in the field of the rights, the exceptions and the enforcement measures.

It will take a practical approach to demonstrate the scale of the Chinese copyright infringing activities, the enforcement actions taken by Chinese copyright authorities and the impacts of the Chinese legitimate businesses on copyright enforcement in the digital environment. These issues will be presented with the Chinese copyright legislations.

23. The digital environment not only has changed how the works would be transmitted, but also will change how the works would be created. Regarding the fact that the individual users' power of distributing, editing and creating contents has been boosted in the digital

environment, users have transformed from the passive content receivers to the interactive and creative participants.

Chinese Copyright Law in the digital environment shall not prohibit this emerging individual creativities. It should be reiterated that the purpose of Chinese Copyright Law is not to protect the copyright holders' sacred rights but to promote the progress of arts and science. The copyright exceptions Chinese Copyright Law maybe have the merits to be enlarged for the users' transformative use of existing works for the purpose of creating new works. Consequently, the copyright enforcement measures should leave back doors for the copyright exceptions for the purpose of safeguard the users' latitude to use the work.

24. As the development of communication technology, a work probably could be created by an artificial intelligence. The supply of the artistic contents would be infinite. The creativities would be boosted.

Copyright law has never considered that the creator of a work would be non-human.[44] Chinese Copyright Law prescribes expressly that the author of a work is a human being.[45] The development of technology in the digital environment would perturb this fundamental concepts under Chinese Copyright Law. Who owns the copyright of this work?

The copyright of existing works is also at stake. The new creation is alway based on the existing works. In digital environment, the copyrighted contents could be used abusively via some non-traditional ways. It would be crucial to stimulate the creativities while protecting the existing works.

25. The emerging new ways of how the works would be created in the digital environment are associated with the Chinese traditional values. The future Chinese copyright protection would not be efficient without respecting its own traditional values.

Influenced by the Chinese traditional values, the Chinese copyright holders or the authors could be more generous to the private use and transformative use of their works. They could also be motivated by the things other than direct economic interests. The future copyright legislations in China should take the traditional values into consideration for the purpose of motivating creators to create more ingenious works and safeguarding the transformative use of works and protecting the interests of copyright holders. The Chinese

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[44] James Grimmelmann, "Copyright for Literate Robots." 101 Iowa L. Rev. 657 2015-2016. p, 681. "The rule is surprising. Robotic readers get a free pass under the copyright laws. Copyright is for humans only."

[45] Chinese Copyright Law 2010 text. Article 11, "The author of a work is the citizen who creates the work." Official translation. Hereinafter, the Chinese Copyright Law 2010 text will use this english version of translation. Available at WIPO. http://www.wipo.int/wipolex/en/text.jsp?file_id=186569

traditional values and the particularity of the digital environment should be properly arranged for the Chinese copyright protection.

III. Structure

It will demonstrate what are the substantial rights and exceptions and how to enforce them in the digital environment.

26. The demonstrations of the author's rights and the copyright exceptions are associated with the historical evolution of Chinese Copyright Law. The modernization of Chinese Copyright Law is pushed behind by the ratification the Berne Convention. For the purpose of reaching the minimum standard of the Berne Convention, the author's rights and the copyright exceptions have been established by the first Chinese Copyright Law.[46] After the ratification, the rules in regard of the author's rights and the copyright exceptions have been revised continuously in response to the both international and domestic pressure.[47]

Therefore, the first part would like to facilitate the understandings of the questions: Where is the Chinese copyright protection come from? How the Chinese author's rights and the copyright exceptions has been constructed? What are the specific right and the exception facing the challenge of the digital environment? (Part I).

27. It will demonstrate both the copyright enforcement legislations and practices.

The copyright enforcement measures in Chinese Copyright Law provide some powerful tools for the copyright holders to enforce their rights in digital environment. They could be demonstrated in a comparative law perspective by comparing the similar rules in the WCT, the US and the EU copyright legislations.

The copyright enforcement practices have been conducted by Chinese copyright

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[46] For instance, the copyright exception prescribed in Article 22 Clause (11) Chinese Copyright Law 1990 "translation of a published work from Han language into minority nationality languages for domestic publication and distribution" was reproached as not comply with the "Three Step Test" of the Berne Convention. Article 43 Chinese Copyright Law 1990 prescribes that "broadcasting station, television station without commercial purpose could broadcast published audio works without the authorization of copyright holders, performers and the producers, and without the payment of remuneration." This clause was protested ferocious by the Chinese authors. But it was adopted under the strong influences of state owned broadcasting interest group. Because the deletion of Article 43 during the elaboration of People's Congress would endanger the enactment of Chinese Copyright Law in 1990.
See, Part 1, Title 1, Chapter 1, Section 1, Preparatory Legislations, § 2. First Chinese Copyright Law.

[47] The first revision of Chinese Copyright Law in 2000 was under the pressure of the Chinese adhesion to WTO.
The second revision of Chinese Copyright Law in 2010 was directly in response to the WTO DSB decision.
The third revision Chinese Copyright Law which is ongoing would be facing the domestic development of copyright industry and the challenges of the digital environment.
See, Part 1, Title 1, Chapter 2. Chinese Implementation of the Berne Convention and the WCT

authorities. They would be a very efficient way of the protection of the copyright holders interests. They protect the interests of the Chinese copyright legitimate businesses in digital environment which offer the legal contents to their audiences. The Chinese legitimate businesses in digital environment motivate the elaboration of the rights, the exceptions and the enforcement measures in Chinese Copyright Law. In the future, how to elaborate the copyright rules in response to the domestic needs would be crucial.

The second part would like to facilitate the understandings of the questions: What is the Chinese copyright enforcement legislations and practices in the digital environment? Why Chinese copyright enforcement in the digital environment has been deemed inefficient? How to protect Chinese copyright in the future? (Part II).

Part I. Building of the Chinese Copyright Law in an International and Digital Context

28. Chinese Copyright Law and its revisions are mainly for the purpose of complying with the international obligations. What are the rights for copyright holders' interests and what are the exceptions for users' legitimate access to works? Do the rights and exception comply with the international obligations? What rights the copyright holders have and what exceptions the users enjoy envisaging the interactive transmission of works in the digital environment?

The general rights and exceptions of Chinese Copyright Law have been constructed under the pressure of ratifying and implementing Berne Convention. The demonstration of the evolution of the general rights and exceptions would provide some understandings about the historical back ground of the modernization of Chinese Copyright Law and the scope of the rights and the exceptions under Chinese Copyright Law.

In the digital environment, the capacity of the reproduction of the copyrighted works by individual users has intimidated the copyright holders to exploit their works. The interactive transmission of works in digital environment has challenged the traditional concept of the reproduction and the distribution. Facing these problematics, the public communication right and the private use exception are the corner stone of protecting the copyright holders' interests and safeguarding the users' latitude.

It will cross examine the rules under the Berne Convention, the WCT, the US and the EU to extract some essential principles and demonstrate the Chinese one in a comparative law perspective. It is for the purpose of concretely demonstrate the Chinese rules and propose some hypotheses for the future revision of Chinese Copyright Law according to the essential and international principles.

It would like to firstly demonstrate the general rights and exceptions elaborated under Chinese Copyright Law for the purpose of complying and implementing the Berne Convention (Title I) and secondly demonstrate the public communication right and private use exceptions under Chinese Copyright Law envisaging the digital environment in comparison with the international conventions and the US, the EU legislations (Title II).

Title I. Author's Rights and Exceptions of Chinese Copyright Law complying with the International Conventions

29. The Chinese ratification of the Berne Convention in 1992 was a mile stone. The Chinese copyright legislations could be distinguished as two periods. First period is before the ratification of the Berne Convention, the legislative efforts and the enactment of the first Chinese Copyright Law were mainly for reaching the minimum standard of the Berne Convention which was the criterion of the ratification. Second period is after the ratification of the Berne Convention, the Chinese Copyright Law has been revised twice mainly for the purpose of complying with the international obligations of the Berne Convention. Notably, WCT was ratified smoothly since the Berne Convention had already paved the way.

Before the ratification of the Berne Convention, the questions could be asked that: Why before 1992 a copyright law did not exist in China. How the copyright law was elaborated to fulfill the minimum requirement of the Berne Convention in regard of author's rights and exceptions. In terms of the ratification of the Berne Convention, China had put this issue on agenda in 1980s, but because of its controversiality, the final decision to join the Berne Convention was made by People's Congress in 1992. Why it took so long for China to join the Berne Convention? How China finally ratified the Berne Convention?

After the ratification of the Berne Convention, the problematic is how to transplant the international rules into Chinese domestic legislations. The first and second revision of Chinese Copyright Law were made in response to the international pressure. The third revision which is currently ongoing will not only comply with the international obligation, but also take the domestic needs into account. It will demonstrate whether the Chinese revisions have properly implemented the international conventions in regard of author's rights and exceptions.

The demonstration of Chinese copyright legislation complying with the Berne Convention and the WCT could be divided into two main issues. First one is the Chinese copyright legislations before the ratification of the Berne Convention and the procedure of

ratification of the Berne Convention and the WCT (Chapter I). The second one is the revisions of Chinese Copyright Law in order to implement the Berne Convention and the WCT (Chapter II).

Chapter I. Chinese ratification of the Berne Convention and the WCT

30. **T**he Berne Convention has shaped Chinese copyright legislations. The promulgations of the first Chinese Copyright Law was for the purpose of joining the Berne Convention. It was the most controversial law in the history of People's Republic of China. It was the reconciliation of the traditional value and the modern copyright system, the socialism policies and capitalism free market. Based on this law, after the international negotiations and domestic discussions, China ratified the Berne Convention and later, for the purpose of facing the challenge of technological development, China smoothly ratified the WCT.

Based on the first Chinese Copyright Law, China took the first step to join the Berne Convention, How this law was passed? How the copyright was protected in China? What were the rights and copyright exceptions prescribed in this law, did it comply with the international conventions?

In terms of the ratification of international copyright conventions, does the first Chinese comply with the Berne Convention? What were the opinions of international society? What were the concerns of domestic right holders?

Firstly, the Chinese copyright legislations before the ratification of copyright conventions will be introduced generally: the old copyright protection regime before the first Chinese Copyright Law and the elaboration of the first Chinese Copyright Law for the ratification of the Berne Convention (Section I).

Secondly, the international negotiations and the domestic discussions concerning the question of whether China should join international copyright conventions or not will be demonstrated (Section II).

Section I. Chinese copyright legislation background for the ratification of the Berne Convention

31. The copyright protection system was very different when People's Republic of China was established in 1949. It imitated the copyright regime of Soviet Union. Later, the copyright legislations has experienced significant changes during the Chinese economic and social transformations.

The modernization and internationalization of Chinese Copyright Law started from the Reforming and Opening Policy in 1980s. The enactment of first Chinese Copyright Law in 1990 could be regarded as a mile stone in this process. Based on this copyright law, China started to prepare the ratification of the Berne Convention.

What was the landscape before the modernization of Chinese copyright law? In what circumstances the first Chinese Copyright Law was adopted? How the author's right and copyright exceptions were prescribed in this law? Why some of them did not comply with the Berne Convention.

This section is divided into two parts: the introduction of Chinese copyright legislations before the enactment of the first copyright law (§1) and the demonstration of the first copyright law in regard of legislative procedures and substantial rules (§2).

§1. Chinese copyright legislations before the first Chinese Copyright Law

32. In regard of the Chinese copyright legislation before the first copyright law, the Reforming and Opening Policy played a key role in terms of the Chinese copyright legislation. At the beginning of the establishment of People's Republic of China, the copyright legislation imitated the Soviet Union copyright law. Later, the copyright protection

system which was gradually built was destroyed by the Cultural Revolution. Then, started from the Reforming and Opening Policy, China gradually recovered the level of copyright protection and started the modernization and internationalization of copyright law.

The demonstration of the history background could offer some clues concerning why the enactment of first Chinese Copyright Law and the ratification of the Berne Convention confronted so many difficulties and why some rules in Chinese Copyright Law could be doubtable as not complying with the Berne Convention.

The followings will demonstrate the copyright legislations before the Reforming and Opening Policy, the copyright regime after the establishment of People's Republic of China (I.) and the copyright legislation after the Reforming and Opening Policy (II).

I. Copyright regime after the establishment of People's Republic of China

33. After the establishment of People's Republic of China, a copyright protection system was gradually built by issuing individual regulations which protect author's rights. However, before a national copyright law could be elaborated, Cultural Revolution destroyed the whole copyright protection system in China.

It will demonstrate the ancient copyright regime which imitated Soviet Union(A) and the collapse of copyright protection during Cultural Revolution (B).

A. Copyright regime imitating Soviet Union

34. When the new government of People's Republic of China was just established in 1949, the problem of pirating was severe and the protection of copyright was only depended on the traditional rules which existed in the publishing industry.

The new government built the copyright protection system by imitating the copyright regime of Soviet Union. Most of works were subject to the authorization of government institutions and most of them were edited and published by the state owned publishing institutions.[48]

35. In 1957, as the development of the market of publication industry, the Cultural

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[48] 冯晓青，中国著作权法研究与立法实践，p14.
Feng Xiaoqing, Chinese Author's Right Law Researchs and Legislative Practices. China University of Political Science and Law Press. 2014. p, 14.

Department which was responsible of governing national publishing industry promulgated "the temporary regulation on the protection of the author's right of publications (preliminary draft)"[49]. The initiation of this regulation is because that the Cultural Department had received many advices suggesting that although the conditions for a completed and detailed author's right law were not met, a simple author's right law which could prescribe general principles was needed to bring legal certainties into publication industry. This regulation was elaborated according to the copyright legislation of Soviet Union[50].

36. During this period of time, the new Chinese government started to try to establish legal principles between the state owned publishing institutions and the authors. The remuneration right of the author was regarded as the most essential issue by the Chinese legislative bodies.[51] General Administration of Press and Publication of State Council established the principle of remuneration in "The Release of The Five Decisions of The First National Publication Congress" in 1950.[52] The national principle of remuneration took the amount of Chinese characters written by author and the amount of work printed by publishing institution into consideration. The ratio was not fixed by state. It would be decided by the negotiation between the authors and the publication institution.

In 1958, for the purpose of safeguarding the remuneration of the works which were not best seller but had scientific value, the Cultural Department promulgated "The temporary regulation on the remuneration of the social and natural science publications." It fixed a minimum remuneration rate for authors.[53]

37. From 1949 to 1958, the copyright regime was very different from the modern copyright law system. The different rules were started to be elaborated by different Chinese authorities at national level. Most of the rules were transitional. But it could be observed that some general principles of copyright protection were established and the remuneration right

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[49]《保障出版物著作权暂行规定》
"The temporary regulation on the protection of the author's right of publications(preliminary draft)"
[50] Feng Xiaoqing. supra note 57. p, 14.
周林，李明山《中国版权史研究文献》。1999，p, 301
Zhou Lin, Li Mingshan, Chinese History of Copyright Law Document Research. China Fang Zheng Press. 1999, p, 301.
[51] Feng Xiaoqing. supra note 57. p, 15.
[52] Feng Xiaoqing. supra note 57. p, 15.
辛广伟：《版权贸易与华文出版社》，重庆出版社2003年版，pp，99-117.
Xin Guangwei, Copyright trading and Hua Wen Press. ChongQing Press 2003 edition, pp, 99-117.
"关于发布第一届全国出版会议五项决议的通知"。新闻出版总署, 1950。
"The Release of The Five Decisions of The First National Publication Congress", General Administration of Press and Publication, 1950.
[53] Feng Xiaoqing. supra note 57. p, 15.
Zhou Lin, Li Mingshan, supra note 60. p, 307.

of author was guaranteed. This could be a good direction of developing the copyright rules, but suddenly, the gradually built copyright protection system started to collapse.

B. Collapse of copyright regime

38. After 1958, the policy of "Great Leap Forward" sabotaged the development of China.[54] In September 1958, Shang Hai Publishing Bureau issued "the notice of reducing the remuneration of published works"[55] which required the publishing institutions in Shang Hai to reduce the remuneration of author to the half of minimum standard fixed by the Cultural Department. In October 1959, the Cultural Department required Shang Hai Publishing Bureau to implement the minimum standard of remuneration. This requirement delayed the destruction of the copyright protection and protected the authors' interests.

It could be observed that the rules were confusing at that time: The national standard established by national authorities was reversed by the regional authority. On the issue of the remuneration of work, Cultural Department and Shang Hai Publishing Bureau disputed against each other.

39. In 1960, the Cultural Department and the Chinese Writers' Association submitted notorious "the report of abolishing the royalty system and reforming the remuneration regime"[56] to the Central Committee of Communist Party. The remuneration was no longer depended on the amount of work printed or sold but was all fixed by the authorities at a significantly lower level than before. It significantly jeopardized the authors' interests and prevented the development of Chinese copyright legislations.

40. The Great Leap Forward from 1958 to 1961 hindered the development of Chinese copyright legislations. The later Cultural Revolution from 1966 to 1976 totally destroyed the

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[54] The Great Leap Forward (Chinese: 大跃进; pinyin: Dà yuè jìn) of the People's Republic of China (PRC) was an economic and social campaign by the Communist Party of China (CPC) from 1958 to 1961. The campaign was led by Mao Zedong and aimed to rapidly transform the country from an agrarian economy into a socialist society through rapid industrialization and collectivization. However it is widely considered to have caused the Great Chinese Famine.
See Wikipedia.

[55] 《关于降低出版物稿酬标准的通知》上海市出版局，1958年9月。
"the notice of reducing the remuneration of published works" Shang Hai Publishing Bureau. September, 1958.

[56] Feng Xiaoqing. supra note 57. p, 16.
《关于废除版税制，彻底改革稿酬制度的报告》，文化部党组，中国作家协会党组。1960。
"the report of abolishing the royalty system and reforming the remuneration regime", Cultural Department and the Chinese Writers' Association. 1960.

Chinese copyright protection system which was gradually built from 1949.[57]

In 1966, "the report of reducing the remuneration of journals and books"[58] submitted by the Cultural Department was approved by the Central Committee of Communist Party. The standard of remuneration was significantly reduced. According to the standard of remuneration established before, the author of a popular book could receive thousands of Yuan[59] depending on the amount of books sold. Meanwhile, the standard published in 1966 prescribed a maximum remuneration which could not exceed 5 Yuan every one thousand words.[60]

As long as the advance of the Cultural Revolution, the remuneration of authors was considered as contrary to the socialism value. The remuneration system was later totally abolished. Influenced by the propaganda "the destruction of the 'Four Olds': old customs, culture, habits, and ideas."[61] Even the literature was considered as "old culture" and should be "revolutionized." During the catastrophe of Cultural Revolution, briefly speaking, the whole Chinese legal system was totally destroyed and the copyright protection regime could not be spared.

41. After the Cultural Revolution ended, in October 1976, Chinese National Publication Bureau was established and it started to recover the copyright protection and the remuneration system. In October 1977, "the report of the temporary regulation on the remuneration and compensation of the press and publications" submitted by Publication Bureau was approved by the State Council.[62] A standard of remuneration for authors was reestablished.[63] From 1976, China started to modernize its copyright law and in this long way of modernization, China started to be significantly influenced by the experiences of

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[57] The Cultural Revolution, formally the Great Proletarian Cultural Revolution, was a sociopolitical movement that took place in the People's Republic of China from 1966 until 1976. Set into motion by Mao Zedong, then Chairman of the Communist Party of China, its stated goal was to preserve 'true' Communist ideology in the country by purging remnants of capitalist and traditional elements from Chinese society, and to re-impose Maoist thought as the dominant ideology within the Party. The Revolution marked the return of Mao Zedong to a position of power after the Great Leap Forward. The movement paralyzed China politically and significantly affected the country's economy and society.
See Wikipedia.

[58] 《关于进一步降低报刊图书稿酬的请示报告》，文化部党组，1966。
"The Report of reducing the remuneration of journals and books", Culture Department, 1966.

[59] CNY

[60] 李雨峰, 枪口下的法律. 知识产权出版社. 2005. p,156.
Li Yufeng, Chinese Historical Research of Copyright. Intellectual Property Right Publication. 2005. p, 156.

[61] See wikipedia Cultural Revolution

[62] 《关于新闻出版稿酬及补贴试行办法的通知》，国家出版局，1977.
"the report of the temporary regulation on the remuneration and compensation of the press and publications", Publication Bureau, 1977.

[63] Feng Xiaoqing. supra note 57. p, 17.

legislations and jurisprudences from the US and the EU member states.

II. Copyright legislation development after Reforming and Opening Policy

42. Reforming and Opening Policy was a mile stone in terms of copyright legislations. After that, China started to recover the copyright protection and modernize its copyright law. China started to modernize its copyright legislations at domestic level (A). At the same time, China signed bilateral agreements with the US concerning the copyright protections (B).

A. Domestic copyright legislations

43. The Reforming and Opening Policy started from 1978. Directed by the reformist Deng Xiao Ping[64], China started the modernization and transformation in multiple fields: agriculture, industry, trade and foreign investment, government structure, legal system, etc.[65]

Theoretically, China is still in the process of "reforming and opening." China is intended to construct precise, modernized economic, social and legal systems which are compatible with its own traditions. As Vogel Ezra demonstrated in his book, the current prosperity of China is the legacy of Deng Xiao Ping's Reforming and Opening.[66]

44. In terms of domestic copyright legislations, at the beginning of 1980s, the legislations was focused on recovering the remuneration system to guarantee author's interests and stimulate creation. At the late 1980s, the legislations was focused on elaborating comprehensive protection of different kinds of works.

In 1980, After consulting interest groups, Chinese Publication Bureau elaborated "the temporary regulation on remuneration of books"[67]. This regulation raised the standard of remuneration established in 1977. Later in 1984, the standard of remuneration was raised again after consulting the interest groups. [68]

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[64] Deng Xiao Ping was a Chinese revolutionary and statesman. He was the paramount leader of China from 1978 until his retirement in 1992. After Mao Zedong's death, Deng led his country through far-reaching market-economy reforms. He studied in France in 1920s with other Chinese leaders like Zhou En Lai, Chen Yi. See Wikipedia.

[65] Vogel, Ezra F. Deng Xiaoping and the Transformation of China. Reprint. Harvard University Press, 2013.

[66] Ibid. p, 394.

[67] 《关于书籍稿酬的暂行规定》国家出版局，1980.

"the temporary regulation on remuneration of books", Chinese Publication Bureau, 1980.

[68] Feng Xiaoqing. supra note 57. p, 17.

After the remuneration right of authors was guaranteed, Chinese legislative bodies started to elaborate comprehensive copyright protection for different kinds of works facing the newly created "Socialist Market Economy"[69].

In 1984, "the proposed regulation of author's right protection of books and journals"[70] was promulgated by Cultural Department. This regulation played important role in terms of solving the copyright disputes of books and journals arising from the Chinese market before the enactment first Chinese Copyright Law.[71] In 1987, in response to the rapid development of broadcasting and filming industries, "the temporary regulation on author's right protection of audio visual works" was promulgated by Chinese Department of Radio, Film and Television[72]. Notably, in 1986, the Chinese General Principles of Civil Law was revised. The Article 118 acknowledged the copyright, patent and trademark generally.[73]

45. In 1985, Chinese Copyright Bureau was created. It was responsible of drafting copyright laws and supervising the copyright law enforcement. The creation of the Copyright Bureau was a sign of the Chinese willingness to reform its old copyright regime into an internationally accepted one. However, it would be a long and gradual process. The Copyright Bureau and the General Administration of Press and Publication (GAPP) which was responsible for the Chinese copyright protection were not clearly separated. The director of Chinese Publication Bureau was also the director of GAPP.

46. At this period of time, the Chinese copyright protection was recovering from the ruins of Cultural Revolution and the domestic legislations paved the way for the enactment first Copyright Law of People's Republic of China. It could be observed that during this period, many different individual regulations were elaborated by different Chinese authorities. This situation was ameliorated after the Chinese Copyright Bureau was created. After that, the copyright legislations shall be initiated by Chinese Copyright Bureau and shall

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[69] The socialist market economy is the economic model employed by the People's Republic of China. It is based on the dominance of the state-owned sector and an open-market economy, and has its origins in the Chinese economic reforms introduced under Deng Xiaoping.
See Wikipedia.

[70] 《图书、期刊著作权保护试行条例》，文化部，1984.
"the proposed regulation of author's right protection of books and journals", Cultural Department.

[71] Feng Xiaoqing. supra note 57. p, 18.
Liu Gao, Liu Gao Publication Collections. China Book Publication Press. 1996. p, 165.

[72] Ibid.

[73] General Principles of the Civil Law, english version available at http://www.wipo.int/wipolex/en/text.jsp?file_id=182628.
Article 118: "If the rights of authorship (copyrights), patent rights, rights to exclusive use of trademarks, rights of discovery, rights of invention or rights for scientific and technological research achievements of citizens or legal persons are infringed upon by such means as plagiarism, alteration or imitation, they shall have the right to demand that the infringement be stopped, its ill effects be eliminated and the damages be compensated for."

be submitted to Chinese Stated Council and finally shall be passed by Chinese People's Congress. This process will be demonstrate by the legislative process of first Chinese Copyright Law.

B. Copyright bilateral agreements with the US

47. After the adoption of Reforming and Opening Policy, China started to open its border. The international cooperation was broaden. In regard of copyright protection, the large gap existed between China and the international standard. It hindered the Chinese willingness of opening its market to the world.

48. In January 1979, Deng Xiaoping led a high ranked Chinese delegation visited the US, signed "the US-China Agreement on High Energy Physics"[74] in Washington. During the negotiation, concerning the clause of copyright protection, the US delegates insisted that the US copyright holders should be protected at the standard of international conventions. Chinese delegates did not refuse to protect the rights of the US copyright holders. Meanwhile, at that time, an unified national copyright law did not even exist in China. Therefore, a reserved clause was added to the agreement stipulating that supplementary negotiations would be done in regard of how to protect copyright in China. This reservation clause is the mile stone of international protection of copyright in China.

49. Half year later, the US and China signed a bilateral trade agreement: "Agreement on Trade Relations Between the United Staes and the People's Republic of China" in Beijing. It contained a copyright protection clause which stipulated that "Both Contracting Parties agree that each Party shall take appropriate measures, under its laws and regulations, and with due regard to international practice to ensure to legal or natural persons of the other Party protection of copyrights equal to the copyright protection correspondingly afforded by the other Party."[75]

These were the first promises which China made to protect copyright in a internationally accepted standard. It facilitated the later ratification of the Berne Convention and the WCT.

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[74] see, "FACT SHEET: U.S.-CHINA SCIENCE AND TECHNOLOGY COOPERATION HIGHLIGHTS: 32 YEARS OF COLLABORATION" https://www.whitehouse.gov.

[75] Agreement on Trade Relations Between the United Staes and the People's Republic of China. Article 6.

§2. First Chinese Copyright Law

50. In order to comply with the international standard, the first Chinese Copyright Law was elaborated. It was one of the most controversial law in the Chinese history. It is the first step took by China to modernize its copyright protection system. Based on this law and its revisions, China entered the Berne Convention.

What were the problematics discussed during the draft? What was the procedure of enactment? What kinds of rights which authors had and what were the copyright exceptions?

It will demonstrate firstly the enactment of first Chinese Copyright Law (I). It will demonstrate secondly the author's rights and copyright exceptions prescribed in this law (II).

I. Enactment of first Chinese Copyright Law

51. The legislation procedure of the first Chinese Copyright Law was full of problematics and lasted several years.

It will demonstrate what were the problematics discussed during the preparatory works for the first Chinese Copyright Law (A) and the procedure of the enactment of the first Chinese Copyright Law (B).

A. Preparatory discussions for the first Chinese Copyright Law

52. In response to the domestic and international needs of a unified Chinese copyright law, in November 1988, State Council approved the propositions of "the report of accelerating the process of drafting copyright law" submitted by Chinese Copyright Bureau. The draft of a Chinese unified copyright law was putting on the agenda of State Council. A drafting group was formed to prepare the draft of copyright law.

53. This law was controversial. First of all, the name of this law provoked intensive discussions. The law was named primarily as the publication law by the drafting group because the Chinese characters of publication and copyright are similar and confusing.[76] For the reason that the concept of copyright was coming from western countries, copyright was

[76] Publication in Chinese "出版 chu ban." Copyright in Chinese "版权 ban quan"

understood as a right of publication. After the explanations of Chinese copyright expert, the deputy director of Chinese Copyright Bureau, Liu Gao[77], the differences between publication and copyright were distinguished by the drafting group and the name of "publication law" was changed.

54. The choices of the name of this law was then between "copyright law" and "author's right law." This issue has provoked fierce debates among Chinese legislators and scholars. This debate has lasted to date.

But the law was named as "Work's Right Law of the People's Republic Of China" if it is translated literarily from Chinese "著作权法"(Zhu Zuo Quan Fa). "著作"(Zhu Zuo) means "work." "权"(Quan) means "Right." "法" (Fa) means "Law." Interestingly, the exact official version of translation was "Copyright Law of the People's Republic Of China"[78]. But probably, the "author's right law" might be more close to the original name in Chinese than "copyright law."

After all, Article 57 of Chinese Copyright Law clarifies that "The term zhuzuoquan(author's right) as used in this Law means banquan(copyright) commonly used in the country. "[79]

55. Regardless of all these confusing facts, the reason why the original Chinese name was fixed as "author's right law" was rather interesting. Deputy director of Chinese Copyright Bureau explained that no matter copyright or author's right, they all mean the basic rights of creators. Therefore, in order to emphasis that the right is inalienable from its authors to creators and the strong connection between works and creators, this law was named as author's right law.[80]

56. From the official explanation, it could be observed that "Chinese author's right law" has been significantly influenced by civil law's author's right value:

The most evident fact of the influence of author's right is the structure of "Chinese author's right law." Similar to the structure of French "Code de la propriété intellectuelle" and the structure of the Berne Convention, the substantial rules of the first "Chinese author's

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[77] 刘杲，时任中国版权局副局长
Liu Gao, Deputy Director of Chinese Copyright Bureau at that time.
[78] See website of WIPO, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=186569
[79] Chinese Copyright Law, Article 57.
[80] 中国版权备忘录，p,165.
Wu Haimin, Road to Berne-Chinese Copyright Memorandum. China Academic Journal Electronic Publishing House. 2006. p, 165.

right law" was sequenced as: the first chapter called general principle was about the subject matter; the second chapter called author's right was about the copyright holders's moral and economic rights, the duration of rights and the exceptions of the rights; the last chapters was about the copyright contract and copyright responsibilities. Moreover, "Chinese author's right law" also protects author's moral right perpetually.

Therefore, "Chinese author's right law" is more similar to the French author's right than the US copyright. But in terms of precise rules, the US legislations have large impact on "Chinese author's right law" because of the bilateral and multilateral treaties.

However, because of the fact that the official translation is Chinese Copyright Law, here, we will use the name Chinese Copyright Law.

57. During the preparatory works for the first Chinese Copyright Law, generally speaking, the Chinese legislators tried to bridge the gaps which existed between the modern copyright value and traditional Chinese value, the socialism's government regulation and the capitalism's free market. Therefore, regarding the situation at that time, a draft of copyright law which contained general principles complying with the Berne Convention was submitted by the drafting group.[81]

B. Procedure of the enactment of the first Chinese Copyright Law

58. In 1986, the Chinese Copyright Bureau submitted the draft of Chinese Copyright Law to the Chinese State Council. In 1987, the draft was accepted by the Chinese State Council after several revisions of Chinese Copyright Bureau. Then the Legal Department of Chinese State Council conducted some researches and revised the draft five time again.

In 1989, the draft of Chinese "author's right" law was submitted by the Chinese State Council to the Standing Committee of People's Congress.

During the 7th People's Congress, the draft was revised repeatedly. But significant amount of problematics were pointed out by the representatives of People's Congress. Although discussed intensively from 11 to 14 sessions by the 7th People's Congress, the copyright law was still not passed. The draft of copyright law was revised again and it tried to reconcile the different opinions of the representatives.[82]

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[81] Ibid. p, 175.
[82] Ibid. p, 175.

During the procedure of enactment, the most salient problematic is the protection of foreigners' copyright. In 1989, some representatives considered that the foreigners' copyright shall not be protected under Chinese Copyright Law while others considered that for the purpose of joining international conventions and obtaining the international copyright protection of Chinese works, the foreigners' copyright shall also be protected under Copyright Law[83]. Other problematics are also provoked intense discussion such as the right of remuneration, the exceptions of scientific and educational utilization of works.[84]

Finally, at 7 September 1990, the Chinese Copyright Law was adopted by the 7th People's Congress 15 session. The first Chinese Copyright Law entered into effect at 1 June 1991.

The legislative procedure of Copyright Law was the first time in the history of People's Republic that was discussed 4 times by the People's Congress and still not passed. This fact reflects the controversy of this law. The substantial rules of this law were the results of difficult reconciliations between the traditional value and the wester implemented concept.[85]

II. Author's rights and exceptions in the first Chinese Copyright Law

59. The first Chinese Copyright Law was the legal basis for China to join international copyright conventions and it was the mile stone of the modernization of Chinese copyright law.

In terms of author's rights and copyright exceptions, what were the progress of this law compared with the ancient copyright regime and what were the shortcomings of this law? did this law comply with the Berne Convention?

It will demonstrate the rights of copyright holders compared with copyright law and author's right law and the Berne Convention (A) and the copyright exceptions susceptible of non-compliance of the Berne Convention (B).

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[83] Ibid. p, 175.
[84] Ibid. p, 172.
[85] Ibid. p, 175.

A. Author's rights compared with the copyright law and the author's right law regimes and complying with the Berne Convention

60. In terms of author's rights, the first Chinese Copyright Law protected both patrimonial rights and moral rights of authors. Notably, Chinese Copyright Law is similar to the author's right law in the field of protecting the inalienable connection between authors and their works.

Article 11 prescribed that the copyright of a work shall belong to its author and the author of a work is the person who creates the work.[86] Article 20 prescribed that "No time limit shall be set on the term of protection for an author's rights of authorship and revision and his right to protect the integrity of his work."[87] These two Articles have never been revised.

61. Moreover, in regard of the transfer of author's rights, although the first Chinese Copyright Law did not specify whether the author's right was transferable or not, Article 26 prescribed that "the period of validity of a copyright contract shall not exceed 10 years and could be subjected to renewal."[88] This rule was for the purpose of protecting the rights of authors who were relatively vulnerable when negotiating with the robust state owned publishing institutions.[89] Article 26 was significantly revised in 2001. It will be demonstrated in the next chapter. [90]

Therefore, regarding these facts, it could be said that the first Chinese Copyright Law which provided strong protection for the authors. In this regard Chinese Copyright Law was more similar to the copyright law of civil law countries than common law countries.

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[86] 中国著作权法，1990年
Copyright Law of People's Republic of China. 1990 Text.
Article 11: "Except where otherwise provided for in this Law, the copyright in a work shall belong to its author.
The author of a work is the citizen who creates the work.
Where a work is created under the auspices and according to the intention of a legal entity or other organization, which bears responsibility for the work, the said legal entity or organization shall be deemed to be the author of the work.
The citizen, legal entity or other organization whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work. "

[87] 中国著作权法，1990年
Copyright Law of People's Republic of China. 1990 Text. Article 20.

[88] 中国著作权法，1990年
Copyright Law of People's Republic of China. 1990 Text. Article 26.

[89] 中国当代版权史, p, 208.
Li Mingshan, Chinese Modern Copyright History. Intellectual Property Right Publication. 2007.

[90] Chapter II. Chinese copyright revisions implementing the Berne Convention and the WCT. Section I. Chinese first and second copyright revisions

62. However, in terms of some precise rules, the first Chinese Copyright Law also was influenced by the copyright law of the common law countries.

For instance, Article 9 of the first Chinese Copyright Law prescribed that "Copyright owners include: (1) authors; and (2)other citizens, legal entities and other organizations enjoying the copyright in accordance with this law."[91] Article 11 Clause 2 of the first Chinese Copyright Law prescribed that "Where a work is created under the auspices and according to the intention of a legal entity or other organization, which bears responsibility for the work, the said legal entity or organization shall be deemed to be the author of the work."[92] In a word, under this law, the legal person could own a copyright and could be "regarded" as "author" if certain conditions were met.

A "work for hire" rule was prescribed in Article 16 of the first Chinese Copyright Law which read:

"A work created by a citizen in the fulfillment of tasks assigned to him by a legal entity or other organization is a work created in the course of employment. Subject to the provisions of the second paragraph of this Article, the copyright in such work shall be enjoyed by the author; however, the legal entity or other organization shall have priority to exploit the work within the scope of its professional activities. Within two years after the completion of the work, the author may not, without the consent of the legal entity or other organization, authorize the exploitation of the work by a third party in the same manner as the legal entity or other organization exploits the work. In any of the following cases, the author of a work created in the course of employment shall enjoy the right of authorship, while the legal entity or other organization shall enjoy the other rights included in the copyright and may reward the author: (1) drawings of engineering designs and product designs, maps, computer software and other works which are created in the course of employment mainly with the material and technical resources of the legal entity or other organization and for which the legal entity or other organization bears responsibility; (2) works created in the course of employment the copyright in which is, in accordance with laws, administrative regulations or contracts, enjoyed by the legal entity or other."[93]

That is to say, under the normal circumstance, the natural person who created the work owns the author's right but the legal person who hired the natural person has an exclusivity to exploit the work. Under the special circumstances listed, the legal person owns

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[91] Chinese Copyright Law 1990 text. Article 9.
[92] Chinese Copyright Law 1990 text. Article 11 Clause 2.
[93] Chinese Copyright Law 1990 text. Article 16.

the patrimonial rights of the work but the moral rights also belongs to the natural person.

In regard of this "work for hire" rule, one Chinese scholar, Hu KangSheng, who participated the legislation procedure of the first Chinese Copyright Law explains that it was considering that when the Chinese employees created the work for the institutions which were often state owned. It means the remunerations and the allowances of the employees were relatively high and the employees were strongly attached to the institutions. For the purpose of balancing the interests between individual creators' interests and the interests of the institutions, the rule of "work for hire" was prescribed in the first Chinese Copyright Law.[94]

63. In regard of the minimum requirement of the Berne Convention:

The term of protection granted by first Chinese Copyright Law was the life of the author and fifty years after his death. Article 21 Clause 1 of first Chinese Copyright Law: "In respect of a work of a citizen, the term of protection for the right of publication and the rights as provided for in Subparagraph (5) through Subparagraph (17) of the first paragraph in Article 10 of this Law shall be the lifetime of the author and fifty years after his death, expiring on December 31 of the fiftieth year after his death. In the case of a work of joint authorship, the term shall expire on December 31 of the fiftieth year after the death of the last surviving author."[95]

First phrase of Article 2 of first Chinese Copyright Law stated that "Chinese citizens, legal entities or other organizations shall, in accordance with this Law, enjoy the copyright in their works, whether published or not."[96]

Second phrase of Article 2 of first Chinese Copyright Law protected foreign copyright reciprocally which stated that "The copyright enjoyed by foreigners or stateless persons in any of their works under an agreement concluded between China and the country to which they belong or in which they have their habitual residences, or under an international treaty to which both countries are parties, shall be protected by this Law."[97]

These Articles prescribes in the first Chinese Copyright Law laid the foundation for China to join the Berne Convention.

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[94] 中国著作权法释义, 2001.
Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001.
[95] Chinese Copyright Law 1990 Text. Article 21.
[96] Ibid. Article 2.
[97] Ibid. Article 2.

B. Copyright exceptions susceptible of non-compliance of the Berne Convention

In terms of copyright exceptions, Article 4, 5, 22 and 43 prescribed limitations and exceptions for copyright. Some of them did not comply with the Berne Convention.

64. Article 4, 5 excluded certain kinds of works from copyright protection. Article 5 excluded laws, news and calendars from copyright protection which totally complied with the Berne Convention. Meanwhile, Article 4 of first Chinese Copyright Law prescribed that "the works which are prohibited from publication and distribution by Law shall not enjoy copyright protection under copyright law."[98]

It did not comply with the Berne Convention. But at the time the first Copyright Law was enacted, it was extremely difficult or even dangerous for some rare Chinese copyright scholars to argue that this clause was unreasonable discrimination for authors.[99] This clause was later complained to the WTO panel by the US and then revised by China. It will discussed in the next Chapter[100].

65. Article 22 of first Chinese Copyright Law prescribed a general formula for copyright exceptions. It listed 12 circumstances which the work could be used without permission of and remuneration to the copyright owner but the moral rights should be respected.

Article 22 of first Chinese Copyright Law prescribed that "In the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are mentioned and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced: (1) use of another person's published work for purposes of the user's own personal study, research or appreciation; (2) appropriate quotation from another person's published work in one's own work for the purpose of introducing or commenting a certain work, or explaining a certain point; (3) inclusion or quotation of a published work in the media, such as in a newspaper, periodical and radio and television program, for the purpose of reporting current events; (4) publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc.; (5) publishing or broadcasting by the media, such as a newspaper, periodical, radio station and television station of a speech delivered at a public gathering, except where the author declares

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[98] Ibid. Article 4.

[99] Wu Haimin supra note 89. pp, 171, 175.

[100] Chapter II. Chinese copyright revisions implementing the Berne Convention and the WCT

that such publishing or broadcasting is not permitted; (6) translation, or reproduction in a small quantity of copies of a published work by teachers or scientific researchers for use in classroom teaching or scientific research, provided that the translation or the reproductions are not published for distribution; (7) use of a published work by a State organ for the purpose of fulfilling its official duties;(8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc. for the purpose of display, or preservation of a copy, of the work; (9) gratuitous live performance of a published work; (10) copying, drawing, photographing or video-recording of a work of art put up or displayed in an outdoor public place; (11) translation of a published work from Han language into minority nationality languages for domestic publication and distribution; (12) transliteration of a published work into braille for publication."[101]

First of all, the words "without…payment of remuneration to copyright owner" was suspicious that it would contrary to the third phrase of Three Step Test of the Berne Convention: "does not unreasonably prejudice the legitimate interests of the author."[102] Because it could be interpreted by Chinese courts as preventing copyright holders from receiving fair compensation.

In regard of 12 listed cases, some of them did not strictly comply with the Berne Convention, but they were generally acceptable. For instance, the seventh prescribed that a "State organ"(sic) could use a published work by for the purpose of fulfilling its official duties. But it did not precise what kind of government institution and for what official duties could use a published work without the authorization of copyright holders.

Meanwhile, the most controversial case could be the eleventh which prescribed that "translation of a published work from Han language into minority nationality languages for domestic publication and distribution."[103] In other words, under this clause of copyright law, all the works in mandarin could be translated into other minority Chinese langue. This clause provoked broad discussion. Obviously, it was a violation of Three Step Test of the Berne Convention.[104] This exception is not "a special case" and it jeopardizes the author's right of translation "unreasonably." However, according to the legislators, this clause was for the purpose of facilitating the creations in minority language regarding the unbalanced

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[101] Chinese Copyright Law 1990 text, Article 22.
[102] the Berne Convention, Article 9 Clause (2).
[103] Chinese Copyright Law 1990 text, Article 22 (11).
[104] the Berne Convention, Article 9 Clause (2). "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

development status in different regions in China.[105]

66. Article 43 of first Chinese Copyright Law was the most problematic issue when the first Chinese Copyright Law was discussed in People's Congress. It read that "broadcasting station, television station without commercial purpose could broadcast published audio works without the authorization of copyright holders, performers and the producers, and without the payment of remuneration."[106]

This clause was obviously a serious discrimination of copyright holders in favor of broadcasting organizations and it apparently could not comply with the Berne Convention. When the draft of first copyright law was discussed in the People's Congress, the strong influences of state owned broadcasting interest group would endanger the enactment of Copyright Law, if the Article 43 was deleted.[107] As a reconciliation of interests, Article 43 was written in the first Copyright Law. Further more, the later revision of Article 43 for the purpose of complying with the Berne Convention also provoked enormous conflicts of interests which will be discussed in the next Chapter.

67. From the demonstrations above, it could be observed that the copyright in the first Chinese Copyright Law was subjected to heavy limitations and exceptions which were not complying with the Berne Convention. It was because that at that time, China just opened its border and started to modernize its copyright law. Later, after the ratification of international copyright conventions, Chinese Copyright Law has been revised gradually to comply with the international standard of copyright protection. The construction of copyright protection which complies with the Berne Convention, the WCT and fits for the Chinese domestic development has been a long process which has lasted to date.

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[105] 中国著作权释义.
Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001. Article 22.
Li Mingshan supra note 98. p, 230.
[106] Chinese Copyright Law 1990 text. Article 43.
[107] Feng Xiaoqing. supra note 57. p, 40.

Section II. Process of Chinese ratification of the Berne Convention and the WCT

68. From the first discussion of whether China should join a international copyright convention to China firstly ratified a international copyright convention, the process had lasted for more than 10 years.

Why China did not want to join the Berne Convention for a long time? For what reasons China decided to join one after the Reforming and Opening Policy? What were the international and domestic problematics in regard of the ratification of the Berne Convention? The ratification of the WCT will also be briefly introduced.

Two parallel processes of negotiation and discussions could be observed: internationally with WIPO and the US(§1) and domestically (§2).

§1. Negotiations with WIPO and the US on the ratification of the Berne Convention

69. International negotiations were the primary impulse for China to join copyright conventions. On the one hand, the dialogues and negotiations have continuously been kept between China and WIPO on the issue of the ratification of the Berne Convention (I). On the other hand, the US required China to join the Berne Convention for the purpose of protecting the interests of the US copyright holders. Intensive negotiations had existed between the US and China in this regard (II).

I. Negotiations with WIPO on the ratification of the Berne Convention

70. The negotiations between China and international organizations could be divided into two phases chronologically. First phase was before the Reforming and Opening Policy, international societies asked Chinese government to join copyright conventions, but no constructive result was achieved. (A). Second phase was after the Reforming and Opening

Policy, China actively opened dialogue with international organizations and tried to join copyright conventions by reconciling the domestic interests and the criteria of international copyright conventions (B).

A. Historical background for the negotiation

71. In the year of 1910, after the promulgation of "Copyright Law of Qing Dynasty", the international society never stopped to try to persuade China to ratify conventions of copyright protection, particularly the Berne Convention.

72. In June, 1913, the US ambassador proposed to Beiyang Government[108] that China should enter the Berne Union and sign bilateral copyright treaty with the US. The US proposition was ferociously protested by the Chinese publication industry for the reason that the ratification of copyright protection conventions would hurt the domestic interests. And it pointed out that the US did not ratify the Berne Convention at that time.[109]

In October 1920, UK, France and other countries demanded Beiyang Government to ratify the Berne Convention. It also did not succeed because of the objection of Education Department of Beiyang Government. However, at this time, some Chinese scholars analyzed the advantages of entering Berne Union. They demonstrated that the ratification of the Berne Convention actually could have some positive impacts on the development of education and publication industry and China would ratify the Berne Convention inevitably for the purpose of integrating into international society.[110]

73. After the establishment of People's Republic of China, Cultural Department issued "Notice of dealing with international copyright problems"[111]. It stipulated that China respects the rules and practices of Soviet Union which deals with international copyright problems, international copyright agreements would not be ratified, the contract normally would not be signed in regard of translation of books for the purpose of avoiding the payment of remuneration to foreign right holders.[112] Before the Reforming and Opening Policy, Chinese government had been influenced by the Soviet Union in regard of the international copyright protection.

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[108] 北洋政府, "Beiyang Government", See Wikipedia,
[109] Li Mingshan supra note 98. p, 250.
[110] Ibid. p, 251.
[111] 《关于我国处理国际著作权问题的通知》，中国当代版权史，p, 251. 中国版权史文献研究，p376.
Li Mingshan supra note 98. p, 251.
Zhou Lin, Li Mingshan, supra note 60. p, 376.
[112] Ibid.

B. Progress of the negotiation with WIPO

74. After the Reforming and Opening Policy, China started to actively keep in touch with international organizations.

In January 1985, Deputy Director of Chinese Copyright Bureau Liu Gao[113] for the first time participated the meeting of the development of copyright and related rights hosted by WIPO SCCR[114] as observer. After introducing the process of drafting Chinese Copyright Law, Liu Gao stated expressly: "after the elaboration of Chinese copyright law, China will actively consider the issue of entering international copyright conventions"[115]

In September 1991, after the promulgation of the first Chinese Copyright Law, a Chinese delegation presided by Liu Gao was sent by Chinese State Council to Geneva and Paris to discuss legal issues in regard of Chinese adherence of the Berne Convention and Universal Copyright Convention. It was the first step China took officially to join international copyright conventions.

75. In Geneva, Liu Gao discussed with the Direct General of WIPO, Doctor Árpád Bogsch. They both agreed that it was necessary for China to join the Berne Convention and it was better to submit the application as soon as possible. Doctor Árpád Bogsch considered that China could join the Berne Convention based on the Chinese Copyright Law which passed at 9 July 1990 for the reason that the general principles and the essential copyright rules of the Chinese Copyright Law were in accordance with the substantial principles of the Berne Convention. Although this law did not absolutely comply with the Berne Convention in certain specific rules, the gaps could be bridged by interpreting the Chinese Copyright Law properly.[116]

At the same time, in Paris, Chinese representative Liu Gao first discussed with UNESCO Assistant Director General Henri Lopès and later negotiated with the director of copyright department in detail. UNESCO agreed that China could join Universal Copyright Convention based on the first copyright law.[117]

Based on the first Chinese Copyright Law, the adherence to the Berne Convention was

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[113] 刘杲(Liu Gao)

[114] World Intellectual Property Organization Standing Committee on Copyright and Related rights

[115]中国加入版权公约，刘杲.

Liu Gao, "Chinese Ratification of Copyright Conventions." Chinese Copyright Bureau. 2009. Available at http://www.ncac.gov.cn/chinacopyright/contents/537/20672.html

[116] Ibid.

[117] Ibid.

admitted by international organizations via friendly cooperations. However, the problematics of copyright protection with the US remained salient, and the negotiations between China and the US were much more intense and hostile at that time.

II. Negotiations with the US on the ratification of the Berne Convention

76. The negotiations with the US played a decisive role in regard of Chinese ratification of the Berne Convention. Why the US obstinately demand China to join the Berne Convention? What were the compromises reached by the negotiations and what were the consequences?

It will introduce the possible trade retaliation caused by Chinese non-ratification of the Berne Convention (A) and demonstrate the agreement reached between the US and China concerning Chinese ratification of the Berne Convention (B).

A. Possible trade retaliation caused by Chinese non-ratification of the Berne Convention

77. The first agreement between the US and China containing copyright protection clause is called "Agreement on Trade Relations Between the United Staes and the People's Republic of China." it was signed in the year of 1979 for the purpose of urging China to protect copyright. Article 6 prescribed that "Both Contracting Parties agree that each Party shall take appropriate measures, under its laws and regulations, and with due regard to international practice to ensure to legal or natural persons of the other Party protection of copyrights equal to the copyright protection correspondingly afforded by the other Party."[118]

However, in 1979, China did not have a copyright law. This clause was poorly enforceable without a domestic copyright law. the US copyright holders were frustrated by the Chinese piracy and were not satisfied with the level of protection provided by Chinese Law.

78. In 1988, the International Intellectual Property Alliance (IIPA) claimed trade losses due to piracy in China were claimed as approximately 418 million dollar. In 1989, the IIPA

[118]"Agreement on Trade Relations Between the United Staes and the People's Republic of China", Article 6.

submitted reports asking that China be named as a major copyright pirate nation. Correspondent to the complaint of the US copyright holders[119], according to the US Trade Act of 1974, Section 301 "actions by united states trade representative."[120], the US Trade Representative placed China on the Priority Watch List in the year of 1989 and 1990.[121]

Although the first Chinese Copyright Law had come into effect, it was already considered inefficient to provide copyright protection. It was regarded as incompatible with the Berne Convention by the US.

79. At 26 April 1991, because of the continuous complaints of the US copyright industry[122], the US trade representative Carla A. Hills named China a "priority foreign country" under Special 301 for the reason of the lack of adequate intellectual property protection in China. A trade sanction could be imposed on China.

Consequently, the US Trade Representative and Chinese officials held talks in Beijing at 11 June 1991, pursuant to the Special 301 investigation. the US Trade Representative required China to join the Berne Convention before the year of 1992 and to revise the copyright law to raise the level protection. Chinese officials expressed the willing to join the Berne Convention and revise copyright law, but insisted that the calendar of adherence to the Berne Convention could only be decided by China itself. Two more rounds of negotiations were held at Washington in August and Beijing in October the same year respectively, but no agreement could be reached.

The China's Special 301 deadline for reaching an agreement was 26 November 1991. At 2 December, the US Trade Representative announced a list of Chinese products that would be subject to higher duties in the US and extended the deadline to January 17 1992.

At 21 December 1991, in Beijing, Chinese officials withdrew all the commitments concerning the adherence of the Berne Convention and the revision of Copyright Law. The negotiation was about to break. the US was ready to impose sanctions on China and China was prepared to retaliate.

B. Reconciled agreement concerning Chinese ratification of the Berne Convention

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[119] In 1989, the IIPA submitted reports asking that China be named as a major copyright pirate nation. The IIPA claimed trade losses due to piracy in China were claimed as approximately 418 million dollar in 1988.

[120] Trade Act of 1974, Title III Relief From Unfair Trade Practices, Chapter 1 Enforcement of United States rights under trade agreements and response to certain foreign trade practices, Section 301. actions by united states trade representative.

[121] Special 301 designates three categories under which countries failing to protect U.S. copyrighted works adequately may be identified: (1) Priority Foreign Countries, (2) Priority Watch List, and (3) Watch List

[122] The IIPA estimated 4.17 billion dollar trade losses due to piracy in 1990.

80. At 4 January 1992, a group of very high ranked Chinese officials were sent to Washington to continue the final round of negotiation to try to avoid the trade retaliation between the US and China. Magically, few hours before the sanctions were about to take effect according to special 301, the US and China reached an agreement. Two women, Chinese representative, Wu Yi[123], the US Trade Representative, Carla A. Hills, signed an agreement which was memorized in a Memorandum of Understanding 1992[124].

81. In regard of copyright, two achievements were made from the perspective of the US, firstly, China agreed to accede to the Berne Convention by 15 October 1992, and it also agree to revise the copyright law which were inconsistent with the Berne Convention and to elaborate new regulations which implements the Berne Convention. Article 3(1) of the Memorandum prescribes that "The Chinese Government will accede to the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) (Paris 1971). The Chinese Government will submit a bill authorizing accession to the Berne Convention to its legislative body by April 1, 1992 and will use its best efforts to have the bill enacted by June 30, 1992. Upon enactment of the authorizing bill, the Chinese Government's instrument of accession to the Berne Convention will be submitted to the World Intellectual Property Organization with accession to be effective by October 15, 1992." Meanwhile, the US was not able to set a specific date by which Chinese copyright law will fully comply with the Berne Convention. China promised to submit an amendment bill and to use its best efforts to enact and implement the legislation within a reasonable period of time.[125]

82. The Memorandum of Understanding states that where any inconsistencies between the Berne Conventions and Chinese domestic law arise, the international conventions will prevail.[126] Article 3(3) of the Memorandum prescribed that "Upon China's accession to the Berne Convention and the Geneva Convention, these Conventions will be international treaties within the meaning of Article 142 of the General Principles of the Civil Code of the People's Republic of China. In accordance with the provisions of that Article, where there is an inconsistency between the provisions of the Berne Convention and the Geneva Convention on the one hand, and Chinese domestic law and regulations on the other hand, the international Conventions will prevail subject to the provisions to which China has declared a

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[123] 吴仪(Wu Yi)

[124] Memorandum of understanding between the government of the People's Republic of China and the government of the United States of America on the protection of intellectual property. 1992. available at http://tcc.export.gov/trade_agreements/all_trade_agreements/exp_005362.asp

[125] Ibid.

[126] Ibid.

reservation, which is permitted by those Conventions."[127]

It guaranteed that the US copyright holders would be protected at a minimum standard of international copyright conventions.

The pressure of the US played an important factor in terms of the Chinese adherence to the Berne Convention.

§2. Chinese domestic discussions and process of the ratification of the Berne Convention and the WCT

83. The domestic discussions for the ratification of the Berne Convention started right after the Reforming and Opening Policy. It was ferociously protested at the beginning by the domestic stake holders. It could be asked: What were the problematics of the ratification? What are the domestic procedures for the ratification of the Berne Convention.

Firstly, two essential problematics discussed for the ratification of the Berne Convention domestically in China will be demonstrated (I). Secondly, the domestic procedure of joining the Berne Convention and the WCT will be demonstrated (II).

I. Two essential problematics discussed for the ratification of the Berne Convention

84. Two salient problematics in regard of joining international copyright conventions were discussed.

The first one was that the ratification of international copyright conventions would result in jeopardizing the domestic publishing industry and scientific research (A).

The second one was that because of the gaps still existed between Chinese Copyright and international copyright conventions, after joining international copyright conventions, the foreign right holders would enjoy better copyright protection than the domestic copyright holder (B).

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[127] Ibid. Article 3(3)

A. Problematic of safeguarding scientific use of works

85. In late 1980s, The ratification of international copyright conventions was opposed by some government departments and institutions, namely, Chinese Academy of Science, Chinese Ministry of Education.[128]

The scientists and researchers pleaded that if the promulgation of the first Chinese Copyright Law was inevitable, the accession to international copyright conventions should be delayed. It was argued that the promulgation of copyright law and the accession to international copyright conventions would prevent Chinese educational and scientific institutions from photocopying foreign materials and purchasing foreign books and journals for scientific and technological researches.[129]

Actually, most of the scientists were extremely supportive for the construction of a copyright protection system, because they were chronically suffered from the infringement of copyright. But they protested ferociously the Chinese accession of international copyright conventions. They considered that the protection of foreigner's copyright would resulted in a aggregated amount of 2.3 billion CNY copyright royalties per year national wide which equaled to 600 million the USD, in order to get the authorization of foreign copyright holders for educational and scientific research. It could prohibit the access to foreign copyrighted materials in terms of science and education.[130]

This issue was discussed for nearly two years. After the negotiation with international organizations and the US, Chinese publication companies and institutions were aware of that the aggregated annual royalties would only cost around 30 million the USD per year significantly less than the exaggerated amount of 600 million the USD.

Therefore, Chinese Copyright Bureau affirmed that the concerns of scientists were unnecessary. On the contrary, the lack of copyright protection domestically and internationally could pose real problem for researchers to get access to foreign books and journals.[131]

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[128] Wu Haimin supra note 89. pp, 171, 175.
[129] Ibid.
[130] Ibid.
[131] Ibid.

B. Problematic of super national treatment

86. Another issue was that according to the Memorandum of Understanding signed between the US and China in 1992, Article 3, after the accession to international copyright conventions, the foreign copyright holders would enjoy the national treatment under Chinese Copyright Law, additionally, the standard of protection provided to foreign copyright holders would not lower than the international copyright conventions.[132]

This principle was implemented by Article 142 of Chinese General Principle of Civil Law which reads "if there are conflicts between Chinese law and international conventions, the international convention prevails."[133]

That is to say, after the ratification of the Berne Convention, regarding that the copyright protection provided by first Chinese Law was lower than the international standard, a two layer system of copyright protection would exist in China, one for domestic works, as prescribed in Chinese Copyright Law, the other for foreign works, at a higher level, as prescribed by the Berne Convention.

87. The domestic copyright right holders obviously did not happy with this rule, because the national treatment normally should be the best copyright protection which foreigner could get. But in China, the copyright law protected foreigner right holders' interests better than its own domestic right holders' interests.

Under this "super national treatment", as the development of copyright industry, the domestic copyright holders would be motivated to lobby Chinese legislative bodies to revise Chinese Copyright Law to comply with the international standard. Because in that way, foreign and domestic right holders will be protected at the same level.

To date, in order to bridge this gap, also in response to the domestic development, the Chinese Copyright Law has been revised twice. The third one is ongoing.

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[132] Memorandum of understanding between the government of the People's Republic of China and the government of the United States of America on the protection of intellectual property. 1992. Article 3(3)
"Upon China's accession to the Berne Convention and the Geneva Convention, these Conventions will be international treaties within the meaning of Article 142 of the General Principles of the Civil Code of the People's Republic of China. In accordance with the provisions of that Article, where there is an inconsistency between the provisions of the Berne Convention and the Geneva Convention on the one hand, and Chinese domestic law and regulations on the other hand, the international Conventions will prevail subject to the provisions to which China has declared a reservation, which is permitted by those Conventions."

[133] Chinese General Principle of Civil Law, Article 142 "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations."

II. Domestic procedures of Chinese ratification of the Berne Convention and the WCT

88. It will demonstrate the decisions which China made for the ratification of international copyright conventions. The preliminary procedure of the ratification of the Berne Convention (A) and the Final procedure of the ratification of the Berne Convention and the WCT (B) will be demonstrated respectively.

A. Procedure of the ratification of the Berne Convention

89. In April 1979, the very first decision to join international copyright conventions was officially made by the government of People's Republic of China. A report concerning the draft of copyright law and the accession to international copyright convention was submitted by Chinese Copyright Bureau to State Council. Hu Yao bang, General Secretary and Gen Biao, Vice Premier Minister accepted the proposition and started the draft of copyright law and put the accession to international copyright conventions on agenda.

In June 1985, General Secretary Hu Yaobang held the meeting of the secretariat of the Central Committee of the Communist Party of China. The decision was formed that China will join international copyright conventions.[134]

However, this decision was reproached later by Chinese scholars. They pointed out that firstly, China could not joint international copyright conventions without a national copyright law; Secondly, the secretariat of one party does not have right to decide that China should joint international copyright convention or not; Thirdly, it did not specify which copyright convention China would like to join.[135] Regardless of the flaws, it demonstrated the willingness of the adherence of international copyright conventions.

In 27 May 1992, State Council filed a bill concerning the Chinese adherence to the Berne Convention to Standing Committee of People's Congress. In 1 July, 1992, 7th session of Standing Committee of People's Congress passed the bill of joining two international conventions simultaneously. Compared with the enactment of first Chinese Copyright Law, the voting procedure was smooth.

Then, Chinese delegations in Geneva and Paris submitted the applications to join the Berne Convention and Universal Copyright Convention. Latter, Direct General of WIPO,

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[134] Wu Haimin supra note 89. p, 177.
[135] Ibid.

Doctor Árpád Bogsch informed Chinese Ministry of Foreign Affaires that the Berne Convention would take effect at 15 October 1992 in China. Finally, after more than 10 years of discussion and preparation, China officially joined the Berne Convention.

To be more specific, China ratified the most recent 1971 Paris Text of the Berne Convention. Moreover, most of the Chinese problematics concerning the ratification and the implementation have been provoked by the Berne Convention.

B. Procedure of the ratification of the WCT

90. After the Berne Convention had paved the way, the ratification of the WCT was not as controversial as the ratification of the Berne Convention.

China participated the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions held by WIPO in 1996 in Geneva.[136] Some proposals were made by Chinese delegations.[137]

the WCT has introduced the public communication right in Article 8 and the obligations concerning technological measures in Article 11. The Regulation on the Protection of the Right of Communication through Information Network was enacted by by Chinese State Council on 18 May 2006. According to the official explanation of Chinese State Council, this regulation was mainly for the purpose of complying with the WCT in the field of public communication right and the obligations concerning technological measures.[138]

This regulations prescribes the specific rules of the Chinese public communication right: “Right of communication through information network”, the legal protection of the circumvention of technological measures and the Notice and Take Down rules in order to face the challenge of the digital environment and prepare the ratification of the WCT.[139] They

[136] Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996.

[137] Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996. CRNR/DC/64. December 13, 1996. p, 162. p, 182. p, 186. etc.

[138] Interpretation of the Regulation on the Protection of the Right of Communication through Information Network. Edited by State Council, Bureau of Legal Affaires, 2006. p, 2.

[139] Xue, Hong. “Les Fleurs Du Mal - A Critique of the Legal Transplant in Chinese Internet Copyright Protection.” Rutgers Computer & Technology Law Journal 34 (2008 2007): 168. p, 170.

will be demonstrated hereinafter.[140] The text of Regulation on the Protection of the Right of Communication through Information Network will use the translated english version deposited on WIPO.[141]

Regulation on the Protection of the Right of Communication through Information Network enacted in May 2006 had prescribed the public communication right and the legal protection of technological measures which were the essential rules newly added into the WCT. In December 2006, 10th session Standing Committee of People's Congress passed the bill of joining WIPO Copyright Treaty. China ratified it at 9 March 2007. WIPO Copyright Treaty took effect in China at 9 June 2007.[142]

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[140] Part I. Chinese author's rights and exceptions in the digital environment. Title II. Public communication right and private use exception.
Part II Chinese copyright enforcement in the digital environment. Title I. Copyright enforcement legislations in the digital environment. Chapter I. Legal protection against circumvention of technological measures. Chapter II. Notice and Take Down

[141] Regulation on the Protection of the Right of Communication. Available at WIPO. http://www.wipo.int/wipolex/en/text.jsp?file_id=182147.

[142] Announcement of Chinese State Intellectual Property Office of PRC. http://www.sipo.gov.cn/zcfg/gjty/201509/t20150910_1173640.html

Conclusion of Chapter I

91. It has demonstrated that the ratification of copyright convention has been the primary impulse of the enactment of the first Chinese Copyright Law and the modernization of Chinese copyright legislation.

92. The first Chinese Copyright Law was elaborated for the purpose of joining the Berne Convention. Regarding that the old copyright regime in China was very different from the international copyright conventions and modern copyright system. The gaps existed between the domestic legislations and international requirements have been continuously bridged.

Therefore, the first Chinese Copyright was elaborated in response to such need. In regard of general principles, it complied with the Berne Convention. However, in terms of specific rules, it did not well elaborated. Or even some specific rules are contrary to the Berne Convention. Therefore, the additional revisions were also necessary.

93. In terms of the international negotiations and domestic discussions of joining international copyright conventions, at international level, the US gave enormous pressure to require China to join the Berne Convention and a memorandum concerning this issue was signed between the US and China. International Organizations kept the dialogues and cooperations with China to motivate it to join the Berne Convention. At domestic level, this issue provoked wide discussions. The interests holders protested that the ratification of international copyright conventions would jeopardize the domestic and gave the foreign right holders more rights than the domestic right holders. However, the accession to the Berne Convention was regarded as a necessary step to open the border of China and to modernize the Chinese copyright law.

Based on the first Chinese Copyright Law, China ratified the Berne Convention. Later, China also ratified the WCT. Thanks to the ratification of the Berne Convention, the WCT was ratified without encountering difficulties. The next question could be how the revisions of Chinese Copyright Law implement the Berne Convention and the WCT.

Chapter II. Revisions of Chinese Copyright Law implementing the Berne Convention and the WCT

94. Based on the first Chinese Copyright Law, China ratified the Berne Convention and later ratified the WCT. However, certain specific rules of the first Chinese Copyright Law did not fully comply with the Berne Convention and the WCT. The first Chinese Copyright Law has been revised twice in 2001 and 2010 respectively mainly for the purpose of implementing the Berne Convention and the WCT. Currently, the third revision of Chinese Copyright Law is ongoing in response to the development of technology and also for the purpose of complying with the Berne Convention and the WCT.

How the three revisions of Chinese Copyright Law have been processed? What were the problematics of each revision? How the author's rights and copyright exceptions were modified and evolved? Did they comply with the Berne Convention and the WCT? In regard of author's rights and copyright exceptions, the demonstration of the three revisions could give a general understanding of how Chinese Copyright Law has been modernized and could also give a perspective of the future development of it.

It will firstly demonstrate that the first and second revisions of Chinese Copyright Law have been done mainly for the purpose of implementing the Berne Convention (Section I). It will demonstrate secondly that the third revision are still ongoing not only for the purpose of implementing the Berne Convention and the WCT but also in response to the domestic social and technological developments (Section II).

Section I. Chinese first and second copyright revisions

95. After the promulgation of first Chinese Copyright Law in 1990, Chinese Copyright Law has been revised twice. Both revisions were mainly for the purpose of implementing the Berne Convention.

In comparison, the first one was a comprehensive revision while the second just revised one individual article to implement the decision of DSB Panel of WTO.

How the two revisions were processed and in respond of what kinds of needs? What were the precise procedure of the revisions? How the author's right and copyright exceptions were revised to comply with the Berne Convention?

To answer the questions, it will demonstrate the first revision (§1) and the second revision (§2) respectively.

§1. First revision of Chinese Copyright Law

96. The first revision of Chinese Copyright Law in 2000 was very comprehensive in regard of author's rights and copyright exceptions. It was mainly for the purpose of complying with international obligations. But the domestic right holders also played an active role to influence the first copyright law revision in order to protect their own interests.

It will firstly demonstrate that how the first revision was processed? Precisely, how the draft was passed and what were the problematics discussed? In other words, the procedures and problematics of the first revision(I).

It will secondly demonstrate what are the author's rights and copyright exceptions modified by the first revision (II).

I. Procedures and problematics of the first revision

97. The process of the first revision had lasted four years. The draft was revised countless times and State Council withdrew the act once after the first deliberation of People's Congress for the reason that the conflicts of interests could not be reconciled.

Firstly, it will demonstrate the impulse of the first revision at international level which pushed Chinese legislative bodies to revise the Chinese Copyright Law (A). Secondly, it will demonstrate the legislative procedures of the first revision at national level (B).

A. Impulse of the first revision at international level

98. The first revision of Chinese Copyright Law was mainly for the purpose of complying with international obligations. In November 1999, "Bilateral Agreement on China's Entry to the WTO Between China and the United States"[143] was reached between the US and China which the US accorded China to join WTO. In order to fulfill the obligations under TRIPS agreement, the first Chinese Copyright Law should be revised in a way that comply with the minimum substantial requirements of the Berne Convention.[144] It was the primary mission which the first revision had to accomplish.

99. Beside the purpose of joining WTO, the domestic right holders also urged Chinese legislative bodied to protect their rights under Copyright Law at the same level as the foreign right holders. Because in China, the copyright of foreign right holders are not only protected as nationals but also at the minimum level required by the international copyright conventions which China ratified according to the Memorandum signed between the US and China in 1992.[145] Meanwhile, the domestic right holders were only protected under national copyright legislations. Consequently, the level of copyright protection for foreigners was higher than the nationals, because of the gaps existed between Chinese Copyright Law and international copyright conventions ratified by China.

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[143] "Bilateral Agreement on China's Entry to the WTO Between China and the United States", November 1999.

[144] Article 9, TRIPS agreement

[145] Memorandum of understanding between the government of the People's Republic of China and the government of the United States of America on the protection of intellectual property. 1992. Article 3(3)
"Upon China's accession to the Berne Convention and the Geneva Convention, these Conventions will be international treaties within the meaning of Article 142 of the General Principles of the Civil Code of the People's Republic of China. In accordance with the provisions of that Article, where there is an inconsistency between the provisions of the Berne Convention and the Geneva Convention on the one hand, and Chinese domestic law and regulations on the other hand, the international Conventions will prevail subject to the provisions to which China has declared a reservation, which is permitted by those Conventions."

Chinese domestic right holders were furious about this phenomena because some excessive exceptions under first Chinese Copyright would apply only to domestic right holders. The first draft discussed by 9th Standing Committee of People's Congress 6th session in November 1998 did not modify the Article 43 of first Chinese Copyright Law which prescribed that "broadcasting station, television station without commercial purpose could broadcast published audio works without the authorization of copyright holders, performers and the producers, and without the payment of remuneration"[146].

Gu Jianfen, member of Standing Committee, Chinese famous musician, insisted that "the notorious Article 43"[147] must be revised to bridge the gap. The interests of the domestic right holders were significantly discriminated by Article 43 of the first Chinese Copyright Law. The application of Article 43 to the foreign copyright holders was expressly excluded by a regulation elaborated by State Council.[148]

Therefore, the first problematic was how to comply with international copyright conventions and also protect the interests of domestic right holders.

100. The next problematic was how to protect copyright holders' interests in the digital environment. On the one hand, around the year of 2000, the new internet media enjoyed a great prosperity in the digital environment thanks to the development of communication technology. On the other hand, the copyright holders were frustrated by the massive copyright infringements by these internet media. Therefore, the Chinese copyright holders actively promoted the copyright protection in the digital environment. In regard of legislation, in Mars 2000, during 9th Standing Committee of People's Congress 4th session, the 35 representatives of He Nan province proposed an act to protect the author's rights on "information networks."

Later, several forums were held by Chinese Copyright Bureau to discuss this issue.[149] In November 2000, when State Council submitted the revised draft to Standing Committee of People's Congress, a new exclusive right of communication to the public was firstly prescribed as "the right of communication through information network" in Chinese Copyright Law, Article 10, Clause 12. It prescribed that "the right of communication through 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

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[146] Chinese Copyright Law 1990 version. Article 43.
[147] Li Mingshan supra note 98. p, 296.
[148] Chinese Provisions on the Implementation of International Copyright Treaties, Article 19.
[149] Li Mingshan supra note 98. p, 305.

individually chosen by them."

101. The creation of "the right of communication through information network" could also be regarded as an implementation of the WCT, Article 8, although at the time when Chinese Copyright Law was first revised, the WCT was not ratified by China.

According to the explanation of legislators, at the time the WCT was passed by WIPO at December 1996, the Chinese legislators were aware of the problematic that the "right of communication to the public" under Article 8 of the WCT was crucial for the copyright protection in the digital environment. Actually, the "the right of communication through information network" prescribed in the revised Chinese Copyright Law was directly taking the definition of "right of communication to the public" in the WCT according to the explanation of Chinese legislators.[150] But the precise rules were not elaborated in Chinese Copyright Law. Article 58 of the first revision Chinese Copyright Law prescribed that "Measures for the protection of computer software and of the right of communication through information network shall be formulated separately by the State Council."[151]

B. Legislative procedures of the first revision at national level

102. The first Chinese Copyright Law took effect in September 1991. After several years of "reforming" and "opening", significant changes had been experienced politically, economically and socially. The first Chinese Copyright Law had the characteristics of guarantee state controls rather than protecting exclusive rights of author. As long as the economical and social development, they were found as impropriate.

Therefore, the first revision of Chinese Copyright Law was undertook by Chinese Copyright Bureau in 1997. The opinions of different interests groups were consulted, many conferences were held before the final draft was decided.[152] Then, Chinese Copyright formed the final draft and submitted it to State Council. In November 1998, after the discussions and the revisions, State Council submitted "the draft revision of Copyright Law of People's Republic of China" to Standing Committee of People's Congress.

103. During December 1998, 9th Standing Committee of People's Congress 6th session had deliberated the draft.[153] It reported that the draft submitted in 1998 was generally

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[150] Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001.
[151] Chinese Copyright Law 2001 text. Article 58.
[152] Li Mingshan supra note 98. p, 292.
[153] Feng Xiaoqing. supra note 57. p, 29.

acceptable, meanwhile the copyright protection in the digital environment should be elaborated and Article 43 concerning the copyright exception of broadcasting organization should be revised.

In June 1999, State Council withdrew the draft. State Council reported to Standing Committee that "during the deliberation, some important disagreements still exists. Although they have been discussed repeatedly, the consent could not be reached. Further researches and elaborations are needed."[154]

104. In September 2000, for the purpose of paving the way to join WTO, the process of copyright revision was restarted by State Council. In November 2000, State Council submitted again the revised draft to the Standing Committee of People's Congress.

The new draft tried to revise the rules which did not comply with the Berne Convention and added one Chinese public communication right for the purpose of protecting the interests of right holders in the digital environment: "the right of communication through information network."[155]

In 27 October 2001, 9th Standing Committee of People's Congress, 24th session passed the new draft proposed by State Council. At the same day, the president of People's Republic of China signed the revised draft into law. The revised Chinese Copyright Law was promulgated and took effect immediately at the same day.[156]

II. Author's rights and copyright exceptions revised by the first revision

105. The author's rights and copyright exceptions were revised comprehensively in the first revision of Chinese Copyright Law for the purpose of complying with international copyright conventions.

How the author's rights and exceptions were modified? Do they comply with the Berne Convention and the WCT?

Patrimonial rights revised by the first revision will be demonstrated firstly (A).

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[154]国务院致函全国人大常委会（［1999］50号文）
State Council Communication to Standing Committee of People's Congress([1999]File Number: 50)
Li Mingshan supra note 98. p, 293.
[155] Li Mingshan supra note 98. p, 294.
[156] Chinese Copyright Law 2001 Revision, The Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China, adopted at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on October 26, 2001.

Copyright exceptions revised by first revision will be demonstrated secondly (B).

A. Patrimonial rights revised by the first revision

106. The first revision concentrated on elaborating the patrimonial rights of authors. The moral rights remained untouched for the reason that Chinese legislators considered that the protection of author's moral rights in first Chinese Copyright Law complied with the Berne Convention.

Article 10 of first Chinese Copyright Law prescribed both author's moral rights and patrimonial rights. the primary 4 rights listed by Article 10 were author's right of divulgation("right of publication" in official translation), right of authorship, right of revision, right of integrity. Precisely, Article 10 of first Chinese Copyright Law read that "Copyright includes the following personal rights (official translation, Moral rights in the context) and property rights (official translation, patrimonial rights or economic rights in the context): (1) the right of publication, that is, the right to decide whether to make a work available to the public; (2) the right of authorship, that is, the right to claim authorship in respect of, and to have the author's name mentioned in connection with, a work; (3) the right of revision, that is, the right to revise or authorize others to revise a work; (4) the right of integrity, that is, the right to protect a work against distortion and mutilation." It could be regarded as a compliance of Article 6bis (1) of the Berne Convention which reads "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[157]

Meanwhile, the patrimonial rights in the first Chinese Copyright Law were not clarified. All the author's patrimonial rights were contained in Article 10 Clause 5 of first Chinese Copyright which read: "the right of utilization and remuneration, that is, the right to reproduce, perform, broadcast, exhibit, publish, film, video tape or adapt, translate, interpret, edit and other means to use a work; and the right to receive remuneration by authorizing the utilization of a work in the above circumstances."[158]

107. The patrimonial rights prescribed in the first Chinese Copyright Law were extremely ambiguous. For the purpose of the protections of author and the implementation of

[157] Chinese Copyright Law 1990 text, Article 10.
[158] Ibid. Article 10, Clause 5.

international copyright conventions, notably, the Berne Convention, the patrimonial rights of authors were elaborated by the first revision.

Nine specific patrimonial rights was added by the first revision. It was derived from the old Article 10 Clause 5 in first Chinese Copyright Law. Three rights were newly created by the first revision.

According to the revised Article 10 of Chinese Copyright Law[159], the 9 specific patrimonial rights are:

"The right of reproduction", the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work, or by other means;

"The right of distribution", the right to provide the original copy or reproductions of a work to the public by selling or donating;

"The right of exhibition", the right to publicly display the original copy or reproductions of a work of the fine arts or of a photographic work;

"The right of performance", the right to publicly perform a work, and to publicly communicate the performance of a work by any means or process;

"The right of presentation", the right to publicly present a work of the fine arts, a photographic work, a cinematographic work, a work created by a process analogous to cinematography, or other works, by projector, slide projector or any other technology or instrument;

"The right of cinematography", the right to fix an adaptation of a work in a medium by cinematography or a process analogous to cinematography;

"The right of adaptation", the right to change a work into a new one with originality;

"The right of translation", the right to change the language in which the work is written into another language;

"The right of compilation", the right to compile by selection or arrangement

preexisting works or passages therefrom into a new work

Three rights were newly created by the first revision:

"The right of broadcasting", the right to broadcast a work or disseminate it to the public by any wireless means, to communicate the broadcast of a work to the public by wire or by rebroadcasting, and to publicly communicate the broadcast of a work by loudspeaker or

[159] Chinese Copyright Law 2001 text, Article 10.

any other analogous instrument transmitting signs, sounds or images;

"The right of rental", the right to authorize others to use temporarily a cinematographic work or a work created by a process analogous to cinematography, or computer software, except where the software itself is not the essential object of the rental.

"The right of communication through information network", 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.

108. Interestingly, for the purpose of implementing international copyright conventions, the patrimonial rights elaborated by the first revision could correspond to the patrimonial rights prescribed in the Berne Convention and the WCT.

"The right of reproduction" of the first revision corresponds to Article 9 (1) of the Berne Convention[160].

"The right of translation" corresponds to Article 8 of the Berne Convention.[161]

"The right of adaptation" and "the right of compilation"corresponds to Article 12 of the Berne Convention.[162]

"The right of performance" corresponds to Article 11(1), 11ter (1) of the Berne Convention.[163]

"The right of presentation" and "the right of cinematography" correspond to Article 14 (1) (i)(ii) of the Berne Convention.[164]

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[160] the Berne Convention Article 9 (1) "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."

[161] the Berne Convention Article 8 "Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works."

[162] the Berne Convention Article 12 "Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works."

[163] the Berne Convention

Article 11(1): "(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works."

Article 11ter (1): "(1) Authors of literary works shall enjoy the exclusive right of authorizing:

(i) the public recitation of their works, including such public recitation by any means or process;

(ii) any communication to the public of the recitation of their works."

[164] the Berne Convention Article 14 (1) Authors of literary or artistic works shall have the exclusive right of authorizing:

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;

(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.

"The right of broadcasting" corresponds to Article 11bis(1) of the Berne Convention.[165]

"The right of rental" corresponds to Article 7 (1) of WIPO Copyright Treaty.[166]

"The right of communication through information network" corresponds to Article 8 second phrase of WIPO Copyright Treaty.[167]

It could be observed that in terms of the author's rights, on the one hand, the first revision tried to comply with the Berne Convention; on the other hand, the "new" author's rights were also elaborated by the first revision envisaging the challenges of the digital environment and tried to comply with the WCT, although the WCT was not ratified by China at that time.

B. Copyright exceptions revised by first revision

109. In terms of copyright exceptions, the first revision also tried to comply with international copyright conventions. The first Chinese Copyright Law, Article 22 listed in an exhausted way that in 12 special circumstances, the published works could be subjected to certain uses without the authorization of copyright holders and without the payment of remuneration.

Article 22 of first Chinese Copyright Law prescribed that "In the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are mentioned

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[165] the Berne Convention Article 11bis: (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

[166] WIPO Copyright Treaty Article 7 Right of Rental (1) Authors of
(i)computer programs;
(ii) cinematographic works; and
(iii) works embodied in phonograms as as determined in the national law of Contracting Parties,
shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.

[167] WIPO Copyright Treaty Article 7 Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or 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.

and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced: (1) use of another person's published work for purposes of the user's own personal study, research or appreciation; (2) appropriate quotation from another person's published work in one's own work for the purpose of introducing or commenting a certain work, or explaining a certain point; (3) inclusion or quotation of a published work in the media, such as in a newspaper, periodical and radio and television program, for the purpose of reporting current events; (4) publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc.; (5) publishing or broadcasting by the media, such as a newspaper, periodical, radio station and television station of a speech delivered at a public gathering, except where the author declares that such publishing or broadcasting is not permitted; (6) translation, or reproduction in a small quantity of copies of a published work by teachers or scientific researchers for use in classroom teaching or scientific research, provided that the translation or the reproductions are not published for distribution; (7) use of a published work by a State organ; (8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc. for the purpose of display, or preservation of a copy, of the work; (9) gratuitous live performance of a published work; (10) copying, drawing, photographing or video-recording of a work of art put up or displayed in an outdoor public place; (11) translation of a published work from Han language into minority nationality languages for publication and distribution in the country; and (12) transliteration of a published work into braille for publication."[168]

110. The first revision modified 5 listed cases of Article 22 in first Chinese Copyright Law to better comply with the Berne Convention:

Clause 3 was modified as "unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical and radio and television program, for the purpose of reporting current events."[169] The word "unavoidable" was added.

Clause 4 was modified as "publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc. on current political, economic or religious topics, except where the author declares that such

[168] Chinese Copyright Law 1990 text. Article 22.
[169] Chinese Copyright Law, 2001 text. Article 22.

publishing or rebroadcasting is not permitted."[170] The last phrase: "on current political, economic or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted" was added.

Clause 7 was modified as "use of a published work by a State organ to a justifiable extent for the purpose of fulfilling its official duties."[171] "a justifiable extent for the purpose of fulfilling its official duties" was added

Clause 9 was modified as "gratuitous live performance of a published work, for which no fees are charged to the public, nor payments are made to the performers."[172] "for which no fees are charged to the public, nor payments are made to the performers" was added

Clause 11 was modified as "translation of a published work of a Chinese citizen, legal entity or other organization from Han language into minority nationality languages for publication and distribution in the country."[173] One criteria was added that the copyright holder should be a Chinese citizen.

According to the presentation above, we could observe that the revised Article 22 was more prudent than before. Since several criteria were added, the Article 22 became more proportional.

111. However, the general stipulation of Article 22: "a work may be used without permission from, and without payment of remuneration to, the copyright owner…"[174] could be regarded as unreasonable prejudice the legitimate interests of the author for the reason that the fair compensation has the possibility to be excluded by Article 22. But this phrase was not revised neither in the first revision nor in the second.

Moreover, Three Step Test of the Berne Convention is not integrated into Article 22 of Chinese Copyright Law. The authors' rights are not safeguarded as in France[175] or in the

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[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] Chinese Copyright Law, 1990 text. Article 22.
[175] Code de la propriété intellectuel, Article L122-5. "Les exceptions énumérées par le présent article ne peuvent porter atteinte à l'exploitation normale de l'oeuvre ni causer un préjudice injustifié aux intérêts légitimes de l'auteur"

US[176]. Whether this phrase complies the Berne Convention or not and how to interpret it, these issues will be discussed in detail later in regard of the interpretation of private use exception.[177]

112. We could also observe that for the purpose of complying with international standard, the first revision again choose to discriminate its national copyright holders. As the revised Clause 11 stipulated, compared with foreign works, only the Chinese nationals' works was subjected to additional copyright exceptions. As declared by legislators, it was a painful sacrifice regarding the development status of China and this gap which must be bridged.[178]

113. Two new compulsory licenses were added into the revised Article 23 and Article 43 of Chinese Copyright Law.[179]

Article 23 prescribed that "Except where the author declares in advance that use of his work is not permitted, passages from a work, a short written work, musical work, a single work of the fine arts or photographic work which has been published may, without permission from the copyright owner, be compiled in textbooks for the purpose of compiling and publishing textbooks for the nine-year compulsory education and for national education planning, provided that remuneration is paid, the name of the author and the title of the work are mentioned, and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced."[180]

That is to say, the works could be used in the textbooks of the "nine year compulsory education" without the authorization but the remuneration must be paid to copyright holders. And certain criteria must be respected: first is that author does not expressly prohibited such use; second is that in terms of the work used, it must be published and the compilation and citation must be proportional; third is that the remuneration right, moral right and other rights under copyright law should not be undermined.

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[176] Copyright Law of the United States
§107. limitations on exclusive rights: Fair use
"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non profit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as whole; and
(4)the effect of the use upon the potential market for or value of the copyrighted work."

[177] Title II. Public communication right and private use exception. Chapter II. Private Use Exception. Section II. Chinese private use exception.

[178] 中国著作权法释义，Article 22.
Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001.

[179] Article 23, 43, Chinese Copyright Law 2001 text.

[180] Chinese Copyright Law 2001 text. Article 23.

Regarding these criteria, it could be argued that Article 23 could comply with Three Step Test of the Berne Convention. Consequently, it might be applicable to both foreign and domestic right holders.

114. Article 43 in the first Chinese Copyright Law was a copyright exception which stipulated that "broadcasting station, television station without commercial purpose could broadcast published audio works without the authorization of copyright holders, performers and the producers, and without the payment of remuneration."[181]

During the first revision, in regard of Article 43, on the one hand, domestic musicians ferociously required the abolishment of this clause, not only because this clause significantly jeopardized their interests, but also it discriminated the domestic musicians' interests. Because foreign musicians' rights in China were protected by the standard of international copyright conventions. One Chinese regulation elaborated by Chinese State Council, "Provisions on the Implementation of International Copyright Treaties", expressly stipulated that the Article 43 of first Chinese Copyright Law did not applicable to foreign copyright holders.[182] Article 16 of this regulation stipulated that "presenting, recording, broadcasting foreign works, the rules of the Berne Convention shall be applied…"[183]. On the other hand, state owned broadcasting organizations strongly objected to the abolishment of this copyright exception to protect their interests.

Finally, a compromise was reached, the Article 43 was revised as a compulsory license: "A radio station or television station that broadcasts a published sound recording may do without permission from, but shall pay remuneration to, the copyright owner, unless the parties have agreed otherwise. Specific measures in this regard shall be formulated by the State Council."[184]

We could observe that under the revised Article 43, the copyright holders' remuneration was not excluded by law, "…shall pay remuneration to, the copyright owner…." But the remuneration could be still waived by a contract according to the phrase: "unless the parties have agreed otherwise." As a result, a radio station or television station could still broadcasts a published sound recording without the authorization of copyright holders. The right of remuneration was still not perfectly safeguarded.

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[181] Chinese Copyright Law, 1990 text. Article 43.

[182] 《实施国际著作权条约的规定》
Provisions on the Implementation of International Copyright Treaties. Chinese State Council, 1992.

[183] Ibid.

[184] Chinese Copyright Law, 2001 text. Article 43.

115. The questions could be asked "does the revised Article 43 applicable to foreign copyright holders?" "does it comply with the Berne Convention?"

It is not expressly stipulated by law that the revised Article 43 could not apply to foreign copyright holders. However, according to the rules that international copyright convention prevails,[185] if Article 43 does not comply with the Berne Convention, it does not apply to foreign copyright holders.

Under Article 11bis (2) "Compulsory licenses of Broadcasting and related rights" of the Berne Convention which prescribes that "It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.", compulsory licenses of broadcasting and related rights are allowed under the condition that the moral rights of the author and the right of obtaining equitable remuneration should not be prejudiced.[186]

Therefore, the revised Article 43 could be applicable to foreign copyright holders, if the right of equitable remuneration or the moral rights are respected.

§2. Second revision of Chinese Copyright Law

116. The second revision of Chinese Copyright Law in 2010 was very simple compared with the first one. the US brought China before the WTO DSB complaining that Article 4 of Chinese Copyright Law did not comply with international obligations. This complaint was then supported by the WTO DSB. Consequently, the second revision was processed for the purpose of implementing the decision of WTO DSB.

Two parallel process could be demonstrated: first one is the process of the decision of WTO DSB as an international obligation which directly caused the second revision (I). Second one is the procedure of the domestic legislation and the substantial rules revised (II).

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[185] Chinese General Principle of Civil Law, Article 142.

[186] the Berne Convention Article 11 (2).

I. International obligation on Chinese Copyright Law

117. It was because of the violation of international obligation, the second revision of Chinese Copyright Law was undertaken. What was the international obligation? Why Chinese Copyright Law was inconsistent with it?

It will demonstrate the US complaints of Chinese Copyright Law before WTO Dispute Settlement Body (A) and Decision of WTO Dispute Settlement Body which obliged the revision of Chinese Copyright Law (B).

A. US complaints of Chinese Copyright Law before WTO Dispute Settlement Body

118. China has been a member of World Trade Organization (WTO) since December 2001. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an agreement which is binding to all the member states of WTO. Article 9.1 of TRIPS agreement which stipulates that "Members shall comply with Articles 1 through 21 of the Berne Convention (1971)…." Chinese Copyright Law has to comply with the Berne Convention Article 1 to 21 under the obligation of WTO.

In 2007, the US brought several complaints to WTO Dispute Settlement Body in regard of Chinese protection and enforcement of intellectual property rights. Namely, there are three complaints of the US: first one was the lack of criminal sanctions for the infringements of trade mark law and copyright law; second one was the disposal of goods infringing intellectual property rights; the last one was the denial of copyright protection to prohibited works.

The last one concerning copyright protection was later supported by the panel of Dispute Settlement Body. It directly caused the second revision of Chinese Copyright law.

119. In terms of the complaint concerning copyright protection, the US considered in essence that Article 4 of Chinese Copyright Law 2001 text did not comply with the Berne Convention. Article 4 of Chinese Copyright Law 2001 text prescribed that "Works the publication or distribution of which is prohibited by law shall not be protected by this Law."[187]

Therefore, Article 4 of Chinese Copyright Law 2001 text violated Article 9.1 of

[187] China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights. Report of the Panel. World Trade Organization. WT/DS362/R, 26 January 2009. p, 9.

TRIPS.

The complain of the US reasoned that "the copyright rights of authors of works whose publication or distribution is required to undergo pre-publication or pre-distribution review appear to be subject to the formality of successful conclusion of such review."[188] According to this argument, Article 4 of Chinese Copyright Law 2001 text was the violation of no formality requirement of the Berne Convention Article 5 (2) which prescribes "The enjoyment and the exercise of these rights shall not be subject to any formality…."[189]

In addition, the US complained that Article 4 of Chinese Copyright Law 2001 text could also create different level of protection between national and foreign copyright holders: "It appears that the measures at issue establish different pre-distribution and pre-authorization review processes for Chinese nationals' works, performances (or their fixations) and sound recordings than for foreign nationals' works, performances (or their fixations) and sound recordings. These different processes, taken together with Article 4 of the Copyright Law, appear to result in earlier and otherwise more favorable protection and enforcement of copyright rights for Chinese authors' works than for foreign authors' works."[190] It violated the Berne Convention Article 5 (1) "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."[191]

The US held consultations with China on 7 and 8 June 2007 regarding the issues. After that those consultation failed to resolve the dispute. A panel of DSB was established at the request of the US to resolve the dispute.[192]

B. Decision of WTO Dispute Settlement Body

120. On 20 March 2009, the Dispute Settlement Body adopted the Panel report.[193] The Panel Report found that "notwithstanding China's rights recognized in Article 17 of the Berne Convention (1971), the Copyright Law, specifically Article 4(1), is inconsistent with Article

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[188] WT/DS362/7, 21 August 2007. p, 5.
WT/DS362/1, 16 April 2007. p, 5.
[189] the Berne Convention. Article 5 (2).
[190] WT/DS362/7, 21 August 2007. p, 5.
[191] the Berne Convention. Article 5 (1).
[192] China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights. Constitution of the Panel Established at the Request of the United States. WT/DS362/8. 13 December 2007.
[193] China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights. Panel Report. Action by the Dispute Settlement Body. WT/DS362/10, IP/D/26/Add.1. 27 March 2009.

5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement."[194] It summarized that "while China has the right to prohibit the circulation and exhibition of works, as acknowledged in Article 17 of the Berne Convention, this does not justify the denial of all copyright protection in any work. China's failure to protect copyright in prohibited works is therefore inconsistent with Article 5(1) of the Berne Convention as incorporated in Article 9.1 of the TRIPS agreement."[195]

Briefly, DSB Panel decided that Article 4 of Chinese Copyright Law did not comply with the Berne Convention and TRIPS agreement. Consequently, China had to comply this decision by revising its copyright law.

121. However, whether Article 4 of Chinese Copyright Law indeed violated the international obligation prescribed in the Berne Convention and TRIPS was not clear.

As it was noted by the report of Panel: "China does not argue that any international treaty prevails over the terms of the Copyright Law with respect to foreign works in case of any deviation from the obligations in an international treaty."[196]

Chinese General Principle of Civil Law Article 142 prescribes that: "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations."[197]

In regard of copyright legislations, Article 2 of Chinese Copyright Law 2001 text prescribes that "The copyright enjoyed by foreigners or stateless persons in any of their works under an agreement concluded between China and the country to which they belong or in which they have their habitual residences, or under an international treaty to which both countries are parties, shall be protected by this Law."[198] Article 19 of the Provisions on the Implementation of International Copyright Treaties expressly states that "the international copyright treaties should prevail over domestic copyright laws in regard of the protection of foreign copyright holders."[199] In other words, under Chinese copyright legislations, the foreign copyright holders could be protected directly by the Berne Convention.

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[194] China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights. Report of the Panel. World Trade Organization. WT/DS362/R, 26 January 2009. paras, 7.138. 7.191.
[195] Summary of DS362.
[196] WT/DS362/R 26 January 2009, Report of the Panel, pp, 20, 21. para, 7.70.
[197] Chinese General Principle of Civil Law
[198] Chinese Copyright Law 2001 text, Article 2.
[199] Provisions on the Implementation of International Copyright Treaties. Article 6. Chinese State Council, 1992.

Although Article 4 of Chinese Copyright Law did not comply with international copyright conventions, the foreign copyright holders could be directly protected under the Berne Convention according to Chinese General Principle of Civil Law and the Provisions on the Implementation of International Copyright Treaties. But China did not make this argument and had to revise its copyright law to implement the decision of the Panel's Report.[200]

122. Nevertheless, the Article 4 (1) under Chinese Copyright Law 2001 text shall be revised sooner or later. It stipulated that "Works the publication or distribution of which is prohibited by law shall not be protected by this Law."[201] The scope of the term "prohibited by law" was not clear. The laws enacted by Chinese State Council could be included as "law." But could the regulations of Chinese Copyright Bureau or the laws enacted by regional legislative bodies or the regulations adopted by regional copyright authorities be qualified as "law" under the meaning of Article 4 (1)? It is not clear.[202]

This ambiguity could significantly jeopardize the copyright holders' interests together with the content censorship of Chinese authorities, mentioned as the "pre-publication or pre-distribution review" by the complaint of the US.[203]

The film called "Farewell My Concubine" which had won the Palme d'Or at the Cannes Film Festival in 1993 would be a good example to demonstrate the copyright holders' interests discriminated by Article 4 of Chinese Copyright Law.[204] Despite its success at international level, this film has been prohibited by the Chinese authorities. Therefore, it could be "work the publication or distribution of which is prohibited by law…."[205] The Chinese Copyright Law does not protect the rights of the copyright holders. The copyright holders of this film do not dispose the enforcement measures under Chinese copyright

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[200] WT/DS362/R, 26 January 2009. Report of the Panel, Findings.

[201] China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights. Report of the Panel. World Trade Organization. WT/DS362/R, 26 January 2009. p, 9.

[202] Dong, Hao, and Minkang Gu. "Copyrightable or Not: A Review of the Chinese Provision on 'Illegal Works' Targeted by WTO DS362 and Suggestions for Legal Reform." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, February 19, 2009. https://papers.ssrn.com/abstract=1346325. p, 340. "the wording of Article 4(1) is not 'prohibited by Laws' but 'prohibited by law'. As for the 'law', any legislation made by State Council, Ministries and provincial legislatures can be included. Moreover, in Chinese legal system, there is no clear definition to what extent a provision would belong to the regulation of 'basic civil system'. Under a regime without the system of judicial review, it is hard to be certain whether a regulation prohibiting the publication of some sorts of works belongs to the 'basic civil system'."

[203] WT/DS362/7, 21 August 2007. p, 5.
WT/DS362/1, 16 April 2007. p, 5.

[204] Wikipedia, 霸王别姬, Farewell My Concubine, https://en.wikipedia.org/wiki/Farewell_My_Concubine_(film).

[205] Chinese Copyright Law. 2001 text.

legislations.[206] Chinese copyright authorities would not protect the rights of this film during the copyright enforcement actions.[207]

Possibly, it was why the US brought Article 4 of Chinese Copyright Law to the WTO Dispute Settlement Body. If the US films and musics were prohibited by Chinese authorities, their copyright have the risk to be not protected under Chinese Copyright Law. Article 4 could jeopardize the interests of the US film or music industries in China.

II. Domestic revision of Chinese Copyright Law

123. China was obliged to proceed the legislative procedures to revise copyright law to implement DSB's decision. Article 4 of Chinese Copyright Law was revised to comply with the Berne Convention.

Firstly, the legislative procedure of the second revision will be demonstrated (A). Secondly, the substantial rules revised by the second revision will be demonstrated (B).

A. Procedure of second revision

124. On 15 April 2009, China informed the Dispute Settlement Body that it intended to implement the Dispute Settlement Body recommendations and rulings and that it would need a reasonable period of time to do so.

On 29 June 2009, China and the United States informed the Dispute Settlement Body that they had agreed that the reasonable period of time for China to implement the Dispute Settlement Body recommendations and rulings shall be 12 months from the adoption of the DSB report. Accordingly, the reasonable period of time expired on 20 March 2010.

On 7 January 2010, China submitted the Status Report to DSB which stated that the legislative proposals relating to the revision of Chinese Copyright Law was submitted to the State Council for examination.[208]

On 26 February 2010, the Standing Committee of the 11th National People's

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[206] Part II Chinese copyright enforcement in the digital environment Title I. Copyright enforcement legislations in the digital environment.

[207] Part II Chinese copyright enforcement in the digital environment Title II. Chinese copyright enforcement practices in the digital environment.

[208] WT/DS362/14, 8 January 2010
WT/DS362/14/Add.1, 8 February 2010.

Congress adopted the second revision of Chinese Copyright Law[209]. It could be observed that the second revision of Chinese Copyright Law took only 1 month to go through all the legislative procedure. It could be said that this revision was mainly for the purpose of implementing the Dispute Settlement Body's decision.

Based on the second revision adopted in February 2010, China informed DSB that China has implemented the recommendations and rulings of the DSB with respect to the Copyright Law.[210]

B. Substantial rules changed by second revision

125. Only two changes were made by the second revision of Chinese Copyright Law: Article 4 concerning illegal works was revised in order to fulfill the obligation of WTO. Article 26 concerning copyright contract was added.

Article 4 of Chinese Copyright Law 2001 text prescribed that "Works the publication or distribution of which is prohibited by law shall not be protected by this Law."[211]

Article 4 of Chinese Copyright Law 2010 text was revised by the second revision as "Copyright holders shall not violate the Constitution or laws or jeopardize public interests when exercising their copyright. The State shall supervise and administrate the publication and dissemination of works in accordance with the law."[212]

126. Could the revised Article 4 be regarded as complying with Article 5 of the Berne Convention which has been integrated by Article 9 of TRIPS?[213]

The differences are that the old Article 4 denied absolutely the copyright protection of the works prohibited by law, meanwhile the revised one only allow competent authorities to control the "publication" and "dissemination" of the works prohibited by law: "The State shall supervise and administrate the publication and dissemination of works in accordance with the law."

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[209] Chinese Copyright Law 2010 Revision The Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China, adopted at the 13th Meeting of the Standing Committee of the Eleventh National People's Congress on February 26, 2010.

[210] WT/DS362/14/Add.2, 9 March 2010

[211] China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights. Report of the Panel. World Trade Organization. WT/DS362/R, 26 January 2009. p, 9.

[212] Chinese Copyright Law 2010 text. Article 4.

[213] Article 9 Clause 1 of TRIPS. "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom. "

After the revision, the author's rights of the prohibited works are protected passively under Chinese Copyright Law. In other words, the authors of the illegal works enjoys the copyright. Their authorship and other moral rights shall be respected and The unauthorized reproduction and dissemination are prohibited. But the exercise of the copyright could not violate "the Constitution or laws or jeopardize public interests" as prescribed by the revised Article 4.

Article 17 of the Berne Convention allows the government of the member states the right to control the circulation, presentation and exhibition of works. It stipulates that "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right."[214] The revised Article 4 of Chinese Copyright Law stipulates that "The State shall supervise and administrate the publication and dissemination of works in accordance with the law." It could be considered as complying with Article 17 of the Berne Convention.

127. Article 26 was added by the second revision as "Where a copyright is pledged, both the pledger and pledgee shall undergo the formalities for registration with the copyright administration department under the State Council."[215] Article 26 did not concern the author's rights and copyright exceptions, it was a specific rule of copyright contract. Adding this clause was not for the purpose of fulfilling the international obligations.

Section II. Ongoing revision of Chinese Copyright Law

128. In regard of the social and economic development of China and the development of technology, the discussion of the revision of Chinese Copyright Law started from 2007. In 2011, Chinese Copyright Bureau officially started the third revision of Chinese Copyright Law. To date, the final draft of Chinese Copyright Bureau has been submitted to State

[214] the Berne Convention. Article 17.
[215] Chinese Copyright Law 2010 text. Article 6.

Council.

How the final draft was processed by Chinese Copyright Bureau? What were the problematics which were discussed? In terms of the final draft, how the author's right and copyright exception are revised to comply with the Berne Convention and the WCT and to envisage the domestic development simultaneously?

It will firstly demonstrate the procedures and problematics during the third ongoing revision of Chinese Copyright Law (§1). It will secondly demonstrate concretely the patrimonial rights and the copyright exceptions revised by the final draft drafted by Chinese Copyright Bureau (§2).

§1. Preparation of the ongoing revision

129. After the first revision of Chinese Copyright Law in 2001, China had experienced significant economical political and social mutations and developments. Started from 2007, Chinese Copyright Bureau commenced the revision envisaging the problematics of the mutations and developments. After several conferences which discussed the problematics and the consultation of public opinions, a draft of revision has been submitted by Chinese Copyright Bureau to State Council.

In terms of the procedure of the revision, how the procedure of the revision started? how the final draft was processed by Chinese Copyright Bureau? In terms of problematics of the revision, how should Chinese Copyright Law be revised in response to the development of "socialism market", the internationalization? how to elaborate author's rights and copyright exceptions envisaging the technological development, precisely, the digital transmission of works.

It will demonstrated the method of the ongoing revision (I) and Problematics of the ongoing revision (II)

I. Method of the ongoing revision

130. In terms of the procedure, from 2007 to 2012, Chinese Copyright Bureau took a

period of time to undertake the preparatory works and then formed a Committee of Expertise to draft the revision for public consultation. In 2012, Chinese Copyright Bureau submitted the final draft to State Council. To date, State Council is deliberating the final draft.

Two phase could be observed: First phase was from 2007 to 2011, the preparatory researches and surveys were undertaken by Chinese Copyright Bureau (A). Second one was in 2012, Chinese Copyright Bureau conducted the public consultation and accomplished the final draft and submitted to State Council (B).

A. Preparative procedure of the ongoing revision

131. From 2007 to 2011, since Chinese Copyright Bureau started the researches and surveys for another comprehensive copyright revision, nearly every year, the issue of revising Chinese copyright law had been discussed by the representatives of the People's Congress.[216]

Chinese copyright scholars has actively promoted the revision of copyright law. In 5 December 2010, in the annual meeting of Intellectual Property Law Research Group of Chinese Law Association, during the discussion of pertinent issues, some advices concerning the copyright revision were given by scholars. In 24 February 2011, in the forum held by Chinese People's University and Chinese Copyright Protection Association concerning the copyright law revision, Chinese scholars discussed the issues concerned and signed a declaration to appeal to Chinese Copyright Bureau to revise the copyright law promptly.

In July 2011, Chinese Copyright Bureau officially started the third revision of Chinese Copyright Law. It consigned the responsibility of drafting the reports of expertise to three institutions respectively: Chinese People's University Faculty of Intellectual Property Law; Chinese Academy of Social Sciences Intellectual Property Law Centre and Zhongnan University of Economics and Law Intellectual Property Law Centre.

Beside the reports of expertise, Chinese Copyright Bureau formed a Committee of Expertise of Copyright Law Revision. In January 2012, the Committee of Expertise in its first meeting discussed the reports of expertise submitted by the three institutions, fixed the basic

[216] Feng Xiaoqing. supra note 57. p, 54.

principles of copyright law revision and then started the procedure of public consultation.[217]

B. Procedure of the Chinese Copyright Bureau's final draft

132. In Mars 2012, the Committee of Expertise in its second meeting discussed and revised the first draft and submitted it to Chinese Copyright Bureau.[218] Then, in the same month, Chinese Copyright Bureau promulgated the first draft for the public consultation. One thousand six hundred different advices were received. They came from various sources both domestic and international government institutions copyright related industries, notably, some of them came from the US. [219]

In May 2012, the Committee of Expertise in its third meeting discussed the advices received and elaborated the second draft for the public consultation. In July 2012, Chinese Copyright Bureau again promulgated the second draft for the public consultation, two hundred advices were received. At the same time, Chinese Copyright Bureau also actively demanded the advices of certain institutions and scholars.[220]

In regard of the procedure of public consultation, the principal of Chinese Copyright Bureau was "Every general consensus which has been reached by different interests groups should be absorbed; every theory which has basis and every practice which is necessary should be considered comprehensively; every issue which is still controversial should not be decided by sacrificing one single party's interests."[221]

In October 2012, the final draft was drafted by the Committee of Expertise, but this draft did not consult the public opinions.[222] In the same month, the final draft was submitted

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[217] 王自强，"开门立法体现科学民主精神-国家版权局《著作权法》第三次修订工作回顾" 《中国新闻出版报》 2012年11月6日第5版。
王自强 (Wang ZiQiang) Secretary General of the working group of third revision of Copyright Law of Chinese Copyright Bureau.
Wang ZiQiang, "Memorandum of Chinese Copyright Bureau in regard of Third Revision of Copyright Law", Chinese Press and Publication Journal, 5 December 2012.
[218] 著作权法征求意见稿.
The Draft of Copyright Law for Public Consultation.
[219] JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF INTELLECTUAL PROPERTY LAW AND SECTION OF INTERNATIONAL LAW ON THE DRAFT AMENDMENTS TO CHINA'S COPYRIGHT LAW, June, 2012.
[220] Wang ZiQiang supra note 226.
[221] Ibid.
[222] Ibid.

to State Council by Chinese Copyright Bureau.[223] To date, the draft is examined by the legal department of State Council. After the deliberation of State Council, the final step of copyright revision will be the voting procedure of the People's Congress.

II. Problematics of the ongoing revision

133. The current copyright revision is envisaging two main problematics: one is the social development and another one is technological development according to Chinese Copyright Bureau.

In terms of social development, the problematics are at the international level, how to comply with international obligation? At domestic level, how to elaborate copyright law which could promote the prosperity of the copyright industry and the creations?

In terms of technological development, how to balance between the author's rights and user's latitude in the digital environment.

It will firstly demonstrate the problematics envisaging social development (A). It will secondly demonstrate the problematics envisaging technological development (B).

A. Problematics envisaging social development

134. Chinese Copyright Bureau has explained after submitting the final draft to State Council that one of the reasons why Chinese Copyright Law has to be revised is because of the social transformation of China after Reforming and Opening Policy.[224] Precisely, three problematics for revising Chinese Copyright Law were demonstrated by Chinese Copyright Bureau:

First one is that, after more than twenty years of Reforming and Opening, a socialist market has been established. Diversified interests group exists in this market.[225] Therefore, copyright law should be elaborated to establish the rules which suit the new market and to solve the disputes arising from the market.

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[223] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012.
[224] 著作权法修改草案说明
Explanation of Copyright Law of People's Republic of China(Final Draft), published by Chinese Copyright Bureau.
[225] Ibid. p, 2.

Second one is that because the internationalization and globalization of economy, copyright has become one of the most important factors of international trade. As a member state of WTO, copyright protection in China has become an inevitable and essential problematic in terms of the relation of international trade.[226] Therefore, copyright law should be elaborated to comply with international obligations and to deal with international copyright issues.

Third one is that after Reforming and Opening, especially after the 21st century, the concept of development of China has been fundamentally changed. The protection of copyright has become the key policy of China in order to boost the cultural prosperity and to promote the sustainable development of economy. Therefore, copyright law should be elaborated to achieve the goals.

135. Chinese Copyright Bureau has concluded that the level of copyright protection was not sufficient to deter the infringing activities and to stimulate the author's intention of creation. Therefore, the final draft would like to raise the level of copyright protection. For instance, it protected the computer software as literary work[227]; the "droit de suite" was added as an inalienable right of author[228]. The Article 43 concerning the copyright exception of audio work was revised again[229]. The concrete rules revised will be discussed later.[230]

B. Problematics envisaging technological development

136. Another problematic identified by Chinese Copyright Bureau was that the rapid development of technology, the democratization and the commercialization of internet have changed the way which works are created and disseminated. The traditional copyright protection system has been challenged by new technologies.

Facing the challenge of the digital transmission of works, on the one hand, the author's rights, the copyright holder's interests should be properly protected; on the other hand, copyright rules should facilitate the user to get the authorization and to get access to work legally and conveniently.

The author's right should be properly established and such right should be well

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[226] Ibid. p, 2.

[227] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 5 Clause 15.

[228] Ibid. Article 14.

[229] Ibid. Article 49, 50.

[230] §2. Patrimonial rights and copyright exceptions revised by the final draft

organized with other similar rights. For instance, the Chinese public communication right "the right of communication through information network" should be distinguished from the broadcasting right and the right of performance. Similarly, the copyright exception should be adapted to the digital environment in order to guarantee that author's interests do not suffer unreasonable prejudice on the one hand and to safeguard that uses's normal utilization of work should not be subjected to onerous responsibility. The concrete rights revised will be discussed later.[231]

137. Moreover, Chinese Copyright Bureau was planned to integrate the rules of the protection of technological measures[232] and the secondary liability of internet service providers[233] into the Chinese Copyright Law. They are prescribed in Regulation on the Protection of the Right of Communication through Information Network by State Council.[234]

§2. Patrimonial rights and copyright exceptions revised by the final draft

138. The current copyright revision has revised author's rights and copyright exceptions comprehensively envisaging the problematics provoked by the social and technological developments.

Generally, both author's rights and copyright exceptions are revised to comply with international copyright conventions and to correspondent to the domestic developments. Specifically, certain author's rights and copyright exceptions are elaborated to adapt the digital environment. The right of communication to the public and the private use exception have been subjected to intense discussion in regard of the revision. But the final draft had not constructively revised neither the right of communication to the public nor the private use exception. The two will remain as the main problematics in the future.

It will demonstrate the author's patrimonial rights revised by the final draft (I) and the copyright exceptions revised by the final draft (II).

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[231] Ibid.

[232] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 68.

[233] Ibid. Article 73.

[234] 信息网络传播保护条例
Regulation on the Protection of the Right of Communication through Information Network.

I. Author's patrimonial rights revised by the final draft

139. Author's rights has been significantly broadened by the final draft. They also are adjusted to fully comply with international copyright conventions. New kinds of protected works and new exclusive rights are added. For the purpose of facing the challenges of digital transmission of works, "the right of performance", "the right of presentation" and "the right of broadcasting" are revised. However, "the right of communication through information network" which corresponds to the right of communication to the public in Chinese Copyright Law is not elaborated by the final draft.

It will demonstrated firstly the general revisions of patrimonial rights which broadens the author's rights (A). It will demonstrate secondly the specific revisions of patrimonial rights which envisages the challenges of digital transmission of works (B).

A. General revisions of patrimonial rights

140. First of all, four kinds of protected works have been newly added by the final draft, namely "works of applied art"[235], "audio visual works"[236], "three dimensional works"[237] and "computer programs"[238].

the Berne Convention Article 2 (1) prescribes that "The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression…dramatic or dramatico- musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography…works of applied art…three-dimensional works relative to geography."[239] The first three kinds of protected works: "works of applied art", "audio visual works", "three dimensional works" could be regarded as the implementation of Article 2 (1) of the Berne Convention.

141. The copyright protection of "computer program" could be regarded as the

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[235] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 5 Clause 9
[236] Ibid. Article 5 Clause 12
[237] Ibid. Article 5 Clause 14
[238] Ibid. Article 5 Clause 15
[239] the Berne Convention. Article 2

implementation of Article 4 of the WCT. Article 4 of the WCT prescribes that "Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention." In other words, the computer program will enjoy full copyright protection as other literature and artistic works according to the final draft.[240] Meanwhile, to date, the computer program is protected by a special regulation enacted in 2001 by Chinese Stat Council.[241]

142. In terms of patrimonial rights, "the right of presentation" has been integrated into "the right of performance" in the final draft.[242] "The right of broadcasting" has been broadened and its name has been changed as "the right of playing."[243] The revision of both the right of performance and the right of playing was for the purpose of implementing Article 8 of the WCT and protecting author's right facing digital transmission of works. This issue will be discussed in (B).[244]

The right of adaptation has been significantly broadened by the final draft. It has included the right of cinematography in Chinese Copyright Law and the final draft has expressly prescribed that this right is applicable to the computer program.[245]

At last, in Article 14 of the final draft has provided an inalienable exclusive right of "droit de suite" to authors. It prescribes that "subsequent to the first transfer of original works of art or photograph and original manuscripts of writers and composers by the author, the author enjoy the right to share the interests in the auction of the original work or manuscript. The right shall be inalienable to the author. The specific rules of protection shall be elaborated by State Council".[246]

143. Chinese Copyright Bureau has explained that the number of the patrimonial rights has been reduced by the final draft, but the scope of rights enjoyed by copyright holders has been broadened.[247] Further more, the notion of the rights has been redefined in order to

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[240] 著作权法修改草案说明, p, 3.
Explanation of Copyright Law of People's Republic of China(Final Draft), published by Chinese Copyright Bureau. p, 3.
[241] Regulation on the protection of computer program, 20 December 2001, State Council of PRC
[242] Final Draft of Copyright Law Revision of People's Republic of China. Prepared by State Council Chinese Copyright Bureau, October 2012. Article 13, Clause 5.
[243] Ibid. Article 13, Clause 6.
[244] B. Revisions of patrimonial rights facing digital transmission of works
[245] Final Draft of Copyright Law Revision of People's Republic of China. Prepared by State Council Chinese Copyright Bureau. Article 13, Clause 8.
[246] Ibid. Article 13. (Translated by author)
[247] 著作权法修改草案说明 p, 3.
Explanation of Copyright Law of People's Republic of China(Final Draft), published by Chinese Copyright Bureau. p, 3.

correspondent to the Berne Convention and the WCT.

B. Revisions of patrimonial rights facing digital transmission of works

144. In terms of the author's rights in the digital environment, "the right of performance", "the right of presentation" and "the right of broadcasting" are revised in response to the digital transmission of works.

The right of performance is prescribed in Article 10 (9) of Chinese Copyright Law as "the right to publicly perform a work, and to publicly communicate the performance of a work by any means or process."[248]

The right of presentation is prescribed in Chinese Copyright Law as "the right of presentation, that is, the right to publicly present a work of the fine arts, a photographic work, a cinematographic work, a work created by a process analogous to cinematography, or other works, by projector, slide projector or any other technology or instrument."[249]

In the final draft, the right of performance is revised as "the right of performance, that is, the right to sing, render, dance, recite or other means to perform a work publicly, including the distribution of the work or the performance of a work to the public via technological apparatus."[250]

145. The performance right proposed in final draft has integrated the right of presentation and the right of performance in the current Chinese Copyright Law. It could cover the non-interactive transmission of works via digital devices. It complies with Article 11 (1), Article 11ter (1) (ii) and Article 14 (1)(ii) of the Berne Convention which prescribes that "(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; (ii) any communication to the public of the performance of their works", "Authors of literary works shall enjoy the exclusive right of authorizing…(ii) any communication to the public of the recitation of their works", "(1) Authors of literary or artistic works shall have the exclusive right of authorizing: … (ii) the public performance and

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[248] Chinese Copyright Law, 2010 text. Article 10 (9) 表演权. Official translation, available at WIPO, http://www.wipo.int/wipolex/en/details.jsp?id=6062

[249] Ibid. Article 10 (10) 放映权.

[250] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 13 (5) 表演权. Translated by author.

communication to the public by wire of the works thus adapted or reproduced."[251]

146. The right of broadcasting is revised as "the right of playing" by the final draft. The right of broadcasting is prescribed in Chinese Copyright Law as "the right to broadcast a work or disseminate it to the public by any wireless means, to communicate the broadcast of a work to the public by wire or by rebroadcasting, and to publicly communicate the broadcast of a work by loudspeaker or any other analogous instrument transmitting signs, sounds or images."[252]

The right of playing is defined in final draft as "the right of playing, that is, the right to broadcast or rebroadcast of a work to the public by wire or wireless means, including the right to disseminate the broadcasting of a work to public via technological apparatus."[253]

The right of playing could comply with the Berne Convention Article 11 bis which stipulates that "(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."[254]

147. "The right of playing" is not the official translation. In current Chinese Copyright Law 2010 text, "the right of broadcasting" is officially translated from "Guang Bo Quan" (广播权). The final draft has changed the name as "Bo Fang Quan" (播放权). "Quan" means right in Chinese. "Guang Bo" means broadcasting in Chinese. But "Bo Fang" in Chinese is a very vast term. It could mean watching a TV program, playing a CD, streaming a video, etc. Any simultaneous transmission and appreciation of the contents could be regarded as "Bo Fang."

Therefore, the new "right of playing" is defined in a general way that could encompass the online simultaneous broadcasting and rebroadcasting of copyrighted works. In comparison, "the right of communication through information network" only regulates the interactive transmission of works while "the right of performance" and "the right of playing"

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[251] the Berne Convention. Article 11 (1). Article 14 (1)(ii).
[252] Chinese Copyright Law, 2010 text. Article 10 (11).
[253] Final Draft. Article 13 (6). Translated by author.
[254] the Berne Convention. Article 11 bis.

in final draft regulate the simultaneous transmission of the work in the digital environment.[255]

148. Because "the right of communication through information network" is prescribed as "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." That is to say, "the right of communication through information network" implements the second phrase of Article 8 of the WCT which stipulates that "…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", while "The right of performance" and "the right of playing" implements the first phrase of Article 8 the WCT which stipulates that "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means…."

The traditional right of communication to the public prescribed in the Berne Convention Article 11, Article 11 bis, Article 11ter and Article 14 has been implemented by the right of performance and the right of playing in Article 13 (5) (6) of the final draft.[256] The public communication right facing the interactive transmission of works under the second phrase of Article 8 of the WCT is implement by "the right of communication through information network" under Chinese Copyright Law.

149. The most controversial copyright issue in regard of the digital transmission of works in China is the right of communication to the public by information network. Although this right has been subjected to intense discussion, it remains untouched by the third revision of Chinese Copyright Law. In regard of this right, the terms of "public", "communication" and "information network" are not clearly defined by the current Chinese Copyright Law. Consequently they are left to the further interpretation by the courts and by the regulations elaborated by Chinese State Council. How to interpret the public communication in a way that corresponds to the domestic needs and at the same time complies with the international obligations will be an essential problematic. It will be discussed later.[257]

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[255] 关于《中华人民共和国著作权法》（修订草案送审稿）的说明. p, 4.
Explanation of Copyright Law of People's Republic of China (Final Draft), published by Chinese Copyright Bureau. p, 4.

[256] Final Draft. Article 13 (5) (6).

[257] Title II. Public communication right and private use exception

II. Copyright exceptions revised by the final draft

150. Certain principles of copyright exception are established to fully comply with the international copyright conventions by the final draft, and the concrete rules are revised to be more proportionate, more specific and more prudent for the purpose of the protection of author's interests.

Regarding the challenge of digital transmission of works, several compulsory licenses are prescribed in the final draft in order to protect author's interests while guarantee certain latitude of user. Although the private use exception in the digital environment has been discussed during the third revision, the specific rules of private use exception is not elaborated by the final draft.

It will demonstrate firstly the general revisions of copyright exceptions for the purpose of complying with the international copyright conventions and protecting author's interests (A). It will demonstrate secondly the revisions facing the digital transmission of works for the purpose of balancing the interests between the copyright holders and the users (B).

A. General revision of copyright exception

151. For the first time, "ideas, procedures, methods of operation and mathematical concepts" are expressly excluded from copyright protection by the final draft.[258] It is the implementation of Article 2 of the WCT which prescribes that "Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."[259]

Specifically, Article 5 of current Chinese Copyright Law prescribes that "This Law shall not be applicable to: (1) laws and regulations, resolutions, decisions and orders of State organs, other documents of a legislative, administrative or judicial nature and their official translations; (2) news on current affairs; and (3) calendars, numerical tables and forms of general use, and formulas."

Article 9 of the final draft adds that "Copyright protection extends to expressions, not

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[258] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 9.

[259] the WCT. Article 2.

to ideas, procedures, methodology, mathematical concepts, methods of operation, etc. This Law shall not be applicable to (1) laws and regulations, resolutions, decisions and orders of State organs, other documents of a legislative, administrative or judicial nature and their official translations; (2) simple information of facts reported by newspapers, journals, broadcasting station, television station, internet and other medias; and (3) calendars, numerical tables and forms of general use, and formulas."

In comparison, the Article 9 (2) in final draft is also more precise than the Article 5 (2) in current Chinese Copyright Law. Only "simple information of facts reported by newspapers, journals, broadcasting station, television station, internet and other medias" are excluded from copyright protection rather than all the "news on current affairs."

152. Article 43 Final Draft of Copyright Law Revision of People's Republic of China prescribes that "In the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are mentioned and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced:

(1) use of the fraction of another person's published work for purposes of the user's own personal study, research or appreciation;

(2) appropriate quotation from another person's published work in one's own work for the purpose of introducing or commenting a certain work, or explaining a certain point which the quotation shall not constitute the substantial or essential part of the cited work;

(3) unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical and radio and television program, for the purpose of reporting current events;

(4) publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station, television station, internet, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc. on current political, economic or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted;

(5) publishing or broadcasting by the media, such as a newspaper, periodical, radio station, television station, internet of a speech delivered at a public gathering, except where the author declares that such publishing or broadcasting is not permitted;

(6) translation, or reproduction in a small quantity of copies of a published work by teachers or scientific researchers for use in classroom teaching or scientific research, provided that the

translation or the reproductions are not published for distribution;

(7) use of a published work by a State organ to a justifiable extent for the purpose of fulfilling its official duties;

(8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc. for the purpose of display, or preservation of a copy, of the work;

(9) gratuitous live performance of a published work, for which no fees are charged to the public, nor payments are made to the performers and no other commercial interests received;

(10) copying, drawing, photographing or video-recording of a work of art put up or displayed in an outdoor public place;

(11) translation of a published work of a Chinese citizen, legal entity or other organization

(12) transliteration of a published work into braille for publication.

(13) other cases

The utilization of the work prescribed above, shall not conflict with the normal exploitation of the work and shall not unreasonably prejudice the legitimate interest of the author. The last phrase stipulates that "the utilization of the work prescribed above, shall not conflict with the normal exploitation of the work and shall not unreasonably prejudice the legitimate interest of the author".[260]

153. The final draft has integrated "Three Step Test" of the Berne Convention into Article 43. Article 43 of final draft non-exhaustively listed thirteen cases that the work could be used without the authorization of author and without the payment of remuneration. The last phrase which integrated "Three Step Test" plays as a safe valve for the protection of author's rights.

In the thirteen cases listed in Article 43, the principle of proportionality has again been reinforced.[261] For instance, in the first case, only the fraction of work could be used "for purposes of the user's own personal study, research"; in the 9th case, concerning gratuitous live performance of a published work, not only direct but also indirect commercial interests shall not be received.

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[260] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 43.

[261] The proportionality has been introduced by the first revision in regard of the cases which works could be "fairly used"
See, Section 1 Chinese First and Second Copyright Revisions, § 1. first revision II. Authors' rights and Copyright Exceptions B. Copyright Exceptions.

B. Revision of copyright exception facing digital transmission of works

154. Envisaging the digital transmission of works, two kinds compulsory licenses are revised by the final draft.

The first one is concerning the compulsory license of broadcasting and television station. The Article 43 Clause 2 of Chinese Copyright Law prescribes that "A radio station or television station that broadcasts a published work created by another person may do without permission from, but shall pay remuneration to, the copyright owner."[262]

This rule has been revised and elaborated by the final draft. Article 49 of the final draft reads that "Broadcasting station and television station could broadcast the published work without the permission of copyright holders under the conditions prescribed in Article 50; but the broadcast of audio visual work shall be authorized by copyright holder. This Article shall apply to Chinese copyright holders and the foreign copyright holder whose work is created in China."[263]

Compared with the Article 43 of current Chinese Copyright Law, Article 49 of the final draft expressly excluded the audio visual work from the compulsory license. The compensation is obligatory under Article 49 of final draft. Further more, all the compulsory licenses prescribed in Article 47, 48, 49 are subjected to further conditions specified in Article 50. Article 50 guarantees author's interest in regard of compulsory license.

155. Article 50 prescribes 3 general conditions of the compulsory licenses: first is that "apply for the record to the correspondent copyright collective management organization before the first utilization of work"; second is that the moral rights should be respected; third is that remuneration should be paid within one month directly to copyright holder or via copyright collective management organization according to the standard elaborated by State Council.

In a word, in regard of the compulsory license of broadcasting and television station, the scope has been strictly defined and the conditions has been specified by the final draft. Under the new Article 49 and 50, the copyright holders interests are guarantied.

156. The second compulsory license is concerning the digital utilization of works. Article

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[262] Official translation of Chinese Copyright Law.
Concerning the discussion of Article 43 during first revision, See, Section 1 Chinese first and second copyright revisions § 1. first revision II. Authors' rights and Copyright Exceptions B. Copyright Exceptions

[263] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 9. Translated by author.

51 of the final draft prescribes that "in regard of the published work which the term of protection is not expired, user fails to find copyright holders after applying his best effort, under one of the following conditions, the work could be used in digital form after paying a deposit of utilization fee to an institution indicated by State Council: (1) the identity of copyright holder could not be identified (2) the copyright holder could be identified but could not be contacted."[264]

In regard of Article 51, Chinese Copyright Bureau explained that it is "for the need of massive utilization of works in the digital environment."[265] It also guarantees that the copyright holder could receive the fair compensation. But it is a complicated issue which need to be further considered.[266]

Regarding the demonstration of the two compulsory license, it could be observed that on the one hand, the final draft tries to remove onerous responsibilities of the users in the digital environment, on the other hand it tries to guarantee copyright holder's interests,

157. The most controversial issue of copyright exception during the third revision of Chinese Copyright Law is the private use exception clause in the digital environment. But the rule of private use exception remains untouched by the final draft, because of the large gaps of opinions among different interests group.

The opinions concerning this issue could be mainly divided into two extremes. Some consider that the private use in the digital environment has the possibilities to conflict with the normal exploitation of work and unreasonably prejudice the legitimate interests of the author, it should not automatically fall into the scope of copyright exception, additional criteria should be added.

Others consider that private use is an essential way of how knowledge and information are communicated and shared in the digital environment, the private use exception should be carefully safeguarded and expanded for the user's normal utilization of work.

158. The private use exception in the final draft is more proportional. Article 22 (1) of Chinese Copyright Law 2010 text prescribes private use exception as "use of another person's published work for purposes of the user's own personal study, research or

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[264] Ibid. Article 51.

[265] 著作权法草案说明 p, 6.

Explanation of Copyright Law of People's Republic of China(Final Draft), published by Chinese Copyright Bureau. p, 6.

[266] EU Directive 2012/28/EU on certain permitted uses of orphan works. Article 6.

appreciation." One criterion is added by final draft: the private use of works could not be a entire work, but the fragment of works. The "personal appreciation" is deleted. In final draft, the private use exception reads that "use of the fragment of published work for purposes of the user's own personal study, research." In other words, the private use exception shall only be made for the purpose of "personal study and research" and could not copy or transmit the entire work.

However, the phrase "without payment of remuneration" has not be revised by the final draft. It could be deemed as "conflict with the normal exploitation of the work" or "unreasonably prejudice the legitimate interest of the author." Particularly, in the digital environment, "without payment of remuneration", the private use exception under Article 43 (1) of final draft would be suspicious to not comply with the criteria of "Three Step Test."

Therefore, the problematic of the private use exception in the digital environment is left to the further interpretation by Chinese courts or by regulations which are later elaborated by Chinese State Council. How to interpret the private use exception envisaging digital transmission of work in a way that complies with the "three step test" in the Berne Convention? This issue would be discussed later.[267]

[267] Title II. Public communication right and private use exception. Chapter II. Private Use Exception.

Conclusion of Chapter II

159. In terms of the first two revisions which have been accomplished, the first revision of Chinese Copyright Law was mainly for the purpose of the fulfillment of international obligations prescribed in the Berne Convention and to pave the way to join World Trade Organization. The essential copyright principles of international conventions were respected in this revision. However, the specific rules were too general to guarantee the enforcement. It has remained as an important copyright problematic to date. The bright side was that the foundation of China's own copyright legislation have been laid down.

The second revision was mainly for the purpose of implementing the decision of WTO DSB Panel. Precisely, the US brought the plaint before the Panel of DSB pleading that Article 4 of Chinese Copyright Law was inconsistent with the substantial rules of the Berne Convention which has been integrated by TRIPS agreement. China failed to defend its arguments. DSB Panel made the decision in favor of the US. Consequently, Article 4 of Chinese Copyright Law had to be revised to comply with the Berne Convention.

In a word, the first revision was a comprehensive copyright revision meanwhile the second revision contained only one amendment of the specific Articles in regard of author's right. The similarity is that regarding the circumstances at that time, the two revisions are all passive revisions in response to the international obligations.

160. The third revision which is ongoing to date is full of problematics. It not only has to comply with the Berne Convention and the WCT but also has to be pragmatic to solve the soaring numbers of disputes arising from the gradually built copyright industry. In the final draft prepared by Chinese Copyright Bureau, the rules of author's rights and copyright exceptions are elaborated to be specific enough to bring legal certainties and at the same time to balance the interests between authors and users.

Envisaging the challenge of digital transmission of work, although some rules concerning author's rights and copyright exceptions have been set by the final draft, the most problematic issues in this regard, namely the right of communication to the public and private use exception have remained almost untouched. What is the right of communication to the public in China? How to elaborate this right to give author the right to properly control the transmission of works in the digital environment? Does the private use exception in Chinese Copyright Law fail to comply with the "Three Step Test"? How to elaborate private use

exception to guarantee author's interests on the one hand and to safeguard user's latitude on the other?

These questions are particularly pertinent to the future development copyright legislation. Consequently, they will also shape the copyright enforcement facing digital transmission of work.

Conclusion of Title I

161. After the establishment of People's republic of China, for a long time, copyright law did not exist. China imitated the regime of Soviet Union to protect author's interests. After the Reforming and Opening Policy, the first Chinese Copyright Law was elaborated after the reconciliation of different interest group. It could be regarded as the first step of Chinese modernization of copyright legislation. Based on this law, China ratified the Berne Convention and the WCT. But some author's rights and copyright exceptions in the first Chinese Copyright Law still had the emblem of state control rather than "private property."

162. Concerning the ratification of international copyright conventions, internationally, the US urged China to join the Berne Convention as soon as possible. An agreement was reached between the US and China which fixed a deadline for China to join the Berne Convention. The cooperation between WIPO and China also facilitated the ratification of the Berne Convention and the WCT. Domestically, should China join international copyright conventions or not has provoked intensive discussions for the reason that after the ratification, the foreigners would enjoy more copyright rights than the Chinese nationals according to the agreement between the US and China and Chinese domestic legislations. But finally, China officially decided to join international copyright convention in 1992. After the international and domestic discussions and the reconciliation of interests, the Berne Convention and the WCT have been ratified by China.

163. After the ratification, China has started to revised its copyright law to fully comply with the Berne Convention and the WCT and also envisage the domestic development. In 2001 and 2010 respectively, first and second revision of Chinese copyright law were adopted. The first one was to revise the obsolete rules left by old copyright regime and to fully comply with the Berne Convention.The second one was mainly to implement the decision of the DSB Panel of WTO which initiated by the US. Currently, the third copyright revision is ongoing. It is a comprehensive revision for the purpose of not only complying with the Berne Convention and the WCT, but also elaborating proper author's rights and copyright exceptions for the development of Chinese market and the development of technology.

164. The demonstration of the problematic of the author's rights and copyright exceptions complying with international copyright conventions could lead to an other problematic. In terms of the author's right and copyright exception envisaging digital transmission of work:

What are the specific rules of the public communication right and private use exception in China? Do the legislations and interpretations of Chinese courts comply with the Berne Convention and the WCT? Regarding the experiences of the US and the EU legislations, how could Chinese rules be ameliorated in this regard?

Title II. Certain Author's Right and Exception of the Chinese Copyright Law in the Digital Environment

165. The author's rights and exceptions are the two side of one coin. Among these different types of patrimonial rights and copyright exceptions, the public communication right is the most pertinent one. Because it has been elaborated by the WCT as an international obligation facing the challenge of digital interactive transmission.[268] Meanwhile the private use exception is the most problematic exception for the reason that in the digital environment, every user could easily make massive high quality copies rapidly and could also disseminate the copy to every corner of world without significant costs. Therefore, some activities which were qualified as private use exception such as the sharing of works among friends would be more suspicious in the digital environment.

Public communication right is a new right created by Article 8 of the WCT at international level. It gives copyright holder a right to control the interactive transmission of works. Public communication right protect the copyright holders' interests in the digital environment.

Private use exception has been the most common copyright exception in national laws, meanwhile, it has become increasingly controversial because of the interactive transmission of works. On the one hand, users need latitude to use the works normally; on the other hand, copyright holders' interests should also be safeguarded.

166. Public communication right and private use exception in Chinese laws are even more problematic: The public communication right in China has been prescribed as "the right of communication through information network" by Chinese Copyright Law which seems different from the WCT. Meanwhile, the private use exception has been reproached as too general to protect author's interests in the digital environment.

What are the prerogatives authors enjoy and what latitude users have in China? Do the

[268] WIPO Copyright Treaty. Article 8, Right of Communication to the Public.

legislations in this regard comply with international conventions? What are the differences and similarities compared with the WCT, the US and the EU? How will Chinese copyright legislations evolve in the future?

It will take a perspective of international comparative law to examine whether Chinese public communication right and private use exception fully comply with international conventions and what Chinese legislations could learn from the US and the EU experiences.

Firstly, it will demonstrate the public communication right in Chinese copyright legislations in comparison with the international convention, the US and the EU legislations (Chapter I). Secondly, it will demonstrate the private exception in the same way (Chapter II).

Chapter I. Public Communication Right in the Digital Environment

167. Public communication right is created as international obligation by Article 8 of the WCT. It is for the purpose of facing the challenges of digital interactive transmission of works. The public communication right provide copyright holders the essential right to control their works in the digital environment.

Regarding the international obligation of the WCT, the US, the EU and China have their own different ways to implement Article 8 of the WCT. Chinese public communication right is named as "the right of communication through information network." What is the scope of this right in China? Does it comply with the international obligation?

It would compare the legislations and jurisprudences between the US and the EU, because although the specific rules are largely different between the US and the EU, the principles are similar.

Particularly, since the EU would like to harmonize the public communication right, it has to primarily elaborate some basic principles regarding the differences existed among the EU member states. Regarding China is a developing country, the legislations and jurisprudences of public communication right are still constructing according to the development of the digital environment and copyright industry, Chinese legislative bodies also have to primarily establish some basic principles. Therefore, in regard of public communication right, the EU legislations and jurisprudences could provide important guidance for China.

Firstly, it will demonstrate the public communication in the WCT, the US and the EU (Section I) Secondly, it will demonstrate Chinese "right of communication through information network" at domestic level (Section II).

Section I. Public communication right in the WCT, the US and the EU

168. Right of public performance and of communication to the public of a performance and right of public communication of broadcast by wire or rebroadcast have been prescribed in the Berne Convention.

Facing the challenges of digital transmission of work, a unified public communication right is prescribed in Article 8 of the WCT as an obligation of the member states in a flexible way. the US and the EU have implemented this obligation in different ways.

What are the international obligations in the WCT exactly? How to implement them? What are the definitions and interpretations of public communication right in the US and the EU? The demonstration of these questions could help to examine the Chinese public communication right.

It will demonstrate the public communication right in the WCT (§1) and the public communication rights in the US and the EU (§2).

§1. Public communication right in the WCT

169. Public communication right was discussed intensively by the Committee of Expertise and the Diplomatic Conference. Various versions of public communication right were proposed. Regarding the gaps between national laws, the open ended "umbrella solution" was adopted.

How the unified public communication right was adopted by the WCT? What are the requirements of "umbrella solution"? Specifically, how to understand the rules of public communication right prescribed in Article 8 of the WCT?

It will firstly demonstrate the necessities of an unified public communication right and the different versions of public communication right proposed during the preparatory works

of the WCT (I). Secondly, it will demonstrate the requirements of "umbrella solution" and the specific rules of public communication right of Article 8 (II) of the WCT.

I. Public communication right in the preparatory works of the WCT

170. The traditional public communication rights prescribed in the Berne Convention could not fully protect copyright holder's interests facing the challenges of the digital transmission of works. An unified and comprehensive public communication right was discussed in preparatory works of the WCT.

It will demonstrate firstly the traditional public communication rights prescribed in the Berne Convention which would not be efficient facing the challenge of digital interactive transmission of works (A). Secondly, It will demonstrate the proposition of an unified public communication right in the preparatory works of the WCT (B).

A. Extension of the public communication rights in the Berne Convention

171. Facing the challenge of the digital interactive transmission, the Berne Convention does not contain a rule which could effectively regulate this new way of how works could be "communicated."

The interactive transmissions are described by the Guide to the WCT as : "Digital interactive transmissions have confused the border between these two groups of rights in two ways. First, commercial dissemination of protected material in interactive networks may and certainly will take place with the application of technological measures which allow access and use only if certain conditions are met by the members of the public. Thus, the actual extent of the use is not necessarily determined at the moment of making available of a work or object of related rights and by the person or entity alone who or which carries out the act of 'making available'. It is the given member of the public, who, through a virtual negotiation with the system, may obtain access and the possibility to use the protected material, and who, through this system, chooses whether the use will be 'deferred' (on the basis of obtaining a more than transient copy) or direct (such as online studying of a database, online watching of moving images, online listening to music). Second, with digital transmissions, some hybrid forms of making available of works and objects of related rights emerge which do not respect the pre-established border between copy-related and non-copy-related rights (when a copy is

obtained, it is also through the transmission of electronic impulses, and, when protected material is used online, even in 'real time,' it also involves the making of at least temporary copies)."[269]

172. The reproduction right prescribed in Article 9 of the Berne Convention probably could cover the new transmission and communication of works by interpreting Article 9 in a very broad way by saying that the interactive transmission and communication is also a kind of reproduction. However, it would be unstable for copyright holders to "rely merely on the ambiguous interpretation of reproduction right, because it could be rebutted that there is no reproduction where the result is not a permanent and tangible copy."[270]

173. Traditional public communication rights are also prescribed in the Berne Convention. Articles 11, 11*bis*, 11*ter* ,14 and 14*bis* provide a range of public communication, public performance right. Article 11(1)(ii) of the Berne Convention grants authors of dramatic, dramatico-musical works the exclusive right of authorizing any communication to the public of the performance of their works. Article 14 (1) (ii) grants authors the right of authorizing the communication to the public by wire of their works adapted or reproduced by means of cinematography. Article 11*bis* (1) grants authors of literary and artistic works the right in various forms of communication to the public such as the right of broadcasting, the right of communication to the public by wire and the right of rebroadcasting of a broadcast, the right of public communication of the broadcast by loudspeaker and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images.[271]

174. However, these exclusive rights are not established in a unified way and are not adequate in response to the development of technology: Firstly, in the case of works other than cinematographic works, the right does not extend to the communication to the public by wire of a work its self as opposed to performances, recitations, broadcasts and films of the work. Secondly, under Article 11*bis,* broadcasts of literary and artistic works and retransmissions of broad casts of those works are subject to a compulsory license. This is not the case in regard to the communication to the public by wire of cinematographic adaptations or reproductions of works prescribed in Article 14 and 14*bis* which is not subject to any form of compulsory license.[272] Thirdly, the right of communication does not presently extend to literary works exception in the case of recitations thereof. Consequently, other affected

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[269] Guide to the Copyright and Related Rights Treaties Administered by WIPO. p, 207. para,CT-8.3.

[270] Second Session of the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works. Copyright 1992, March. p, 74, para 113.

[271] the Berne Convention. Articles 11, 11*bis*, 11*ter* ,14 and 14*bis*.

[272] Australia proposal to the Committee of Experts, Industrial Property and Copyright, 1995. p,313. para 29.

categories of works are also not covered by the right of communication, significant examples being photographic works, works of pictorial art and graphic works.[273]

In response to the development of technology, for the purpose of the better protection of copyright in the digital environment, the Committee of Experts concluded that the Berne Convention need to be supplemented by extending the field of application of the right of communication to the public to cover all categories of works.[274]

B. Discussion of an unified public communication right in the WCT

175. At the second session of Committee of Experts, a general definitions of "public display", "public performance" and "communication to public" was proposed: "It is proposed that the following definitions should be included in the possible Protocol: (a) 'Public display' is any display of a work (i) at a place where the public is or can be present, or (ii) at a place not open to the public, but where a substantial number of persons outside the normal circle of a family and its close social acquaintances is present, and where the display can be perceived without the need for communication thereof to the public according to point (c), below. (b) 'Public performance' is any performance (including any recitation) of a work or of a sound recording (i) at a place where the public is or can be present, or (ii) at a place not open to the public, but where a substantial number of persons outside the normal circle of a family and its close social acquaintances is present and where the performance can be perceived without the need for communication to the public according to point (c) below. (c) Communication to the public is the transmission by electronic, electric or similar means (either by wire or without wire) of the image or sound or both of a work or the sound of a sound recording (including the display of a work and the performance or broadcast of a work or a sound recording) in a way that the said image or sound can be perceived by any person on the same conditions at a place or places whose distance from the place where the transmission is started is such that without the electronic, electric or similar means the images or sound would not be perceivable at the said place or places."[275]

The precise definitions of public display, public performance and communication to the public provoked discussion among delegations. The opinions of the delegations are

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[273] Basic proposals WIPO/CRNR/DC/4. p,51. para 10.06.
[274] Ibid. para 10.05.
[275] Preparatory Document for the Second Session of the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works. Geneva. February 10 to 17, 1992. Copyright 1992. p, 80.

divers. Although there was broad agreement that the notion of qualified public acts should be clarified, some delegation considered that it was more appropriate to leave this question to national laws, some preferred the further interpretation of the terms of public and communication.[276] In regard of this fact, Chairman of the Committee of Experts concluded that "In the future work, the various proposals concerning certain details, and the wording, of the definitions should be taken into account, and it should be considered whether a simpler definition, concentrating on the notion of 'public', would not be more appropriate." Later, in this regard, the name of the issue to be discussed was changed to "communication to the public by satellite broadcasting."[277]

176. The right of communication to the public was discussed intensively during the fifth session of Committee of Experts on a Possible Protocol to the Berne Convention[278], the so-called digital agenda. Although most of delegations recognized the necessity to grant an exclusive right to copyright holders and authors to authorize or prohibit the digital interactive transmission of works, the opinions of national delegations concerning the details were divided. For instance, the delegation of Australia proposed a "transmission right" which extend the right of copyright holders to control all kinds of transmission in respect of all categories of works; the delegation of Japan proposed a more general transmission right which does not limit to digital transmission; meanwhile the delegation of the US proposed a distribution right by transmission which would assure to copyright holders the ability to control all aspects of exploitation of their works in digital realm.[279] Briefly, all national delegations try to shape a public communication right of the new treaty which is more compatible to their national legislations. Several options were emerged.

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[276] Copyright. Monthly Review of the World Intellectual Property Organization. 1992. p 106, 107.
para 137. "Some delegations and observers from non- governmental organizations opposed the inclusion of definitions on qualified public acts in a possible protocol. They considered that it was more appropriate to leave this question to national laws. However, one of those delegations suggested that a few of the particular cases which should be deemed to be instances of public use of works, could be specified non-exhaustively in the possible protocol"
para 144. "the definition of 'communication to the public' in item (c) should include communications that could be received "at the same or different places, and at the same or different times."
para 145. "An observer from a non-governmental organization suggested that the reference to transmission 'by electronic, electric or similar means' in item (c) be replaced by reference to transmission by any method, manner or form now known or later developed, and from which the work can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device."
[277] Copyright Monthly Review of the World Intellectual Property Organization. 1993. p,73, para 5.
[278] Ibid. p,73, two committee was established: Committee of Experts on a Possible Protocol to the Berne Convention. Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms.
[279] Committee of Experts on a Possible Protocol to the Bern Convention Fifth Session, September 1995. WIPO/ BCP/CE/V/9-INR/CE/IV/8. p, 59.

177. Regarding the gaps between national legislations and the need to establish a right in respond to the digital interactive transmission, "the umbrella solution" was mentioned by the Committee of Experts as a possibility.[280]

The Basic Proposal discussed by Diplomatic Conference took entirely the proposal made by European Union and its Member States which received a positive reaction from national delegations.[281]

178. The wording of the proposal was "Without prejudice to the rights provided for in Articles 11, 11*bis*, 11*ter*, 14 and 14*bis* of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, including the making available to the public of their works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them."[282]

The definition of "communication to the public" in Article 10 of the Basic Proposal is less extensive than the original one proposed by the second session of Committee of Experts. It excluded private communication and distributing copies in tangible forms. It focused on the interactive on-demand acts of communication.[283]

II. Umbrella solution

179. The "Umbrella Solution" provides the member states an open-ended formula of the public communication right envisaging digital transmission of work. Article 8 of the WCT has both safeguarded the traditional communication rights prescribed in the Berne Convention and protected author's "making available right" in regard of interactive transmission of works.

What is the "Umbrella solution"? What are the obligations for the member states specified in Article 8 of the WCT?

It will demonstrate the criteria of umbrella solution (A) and the application of umbrella solution in Article 8 of the WCT (B).

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[280] Ibid. p, 68. para, 350

[281] Basic Proposal for the substantive provisions of the treaty on certain questions concerning the protection of literary and artistic works to be considered by the diplomatic conference. December 1996. WIPO/CRNR/DC/4.

[282] Basic Proposal, 1996, WIPO/CRNR/DC/4. p, 51, para,10.07.

[283] Ibid. p, 51, para,10.11, 12, 13, 14.

A. Criteria of umbrella solution

180. A compromise solution was needed for two purposes:

First, the Berne Convention fails to provide adequate protection envisaging the digital interactive transmission of works. The right of communication to the public does not extend to all categories of works. The rights of communication to public granted to literary works, musical works and cinematographic works are significantly divided. Therefore, the gaps in the Berne Convention need to be bridged.

Second, the national legislations concerning the interactive digital transmission of works are varied. It is very difficult to fix a precise definition of the right of communication to the public. Some countries prefer a digital distribution right[284], some countries consider a digital transmission right.[285]

181. In view of these problems, a compromise solution was worked out which contained the following elements: "(i) the act of interactive transmission should be described in a neutral way, free from specific legal characterization (for example, as making available a work to the public by wire or by wireless means, for access by members of the public); (ii)such a description should not be technology-specific and, at the same time, it should express the interactive nature of digital transmissions in the sense that it should go along with a clarification that a work or an object of related right is considered to be made available "to the public" also when the members of the public may access it at a time and at a place freely chosen by them; (iii) in respect of the legal characterization of the exclusive right that is, in respect of the actual choice of the right or rights to be applied."[286]

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[284] Committee of Experts on a Possible Protocol to the Bern Convention Fifth Session, September 1995. WIPO/ BCP/CE/V/9-INR/CE/IV/8. p, 60.
Delegation of the US noted that "in the delegation's view, a right of distribution by transmission would assure to owners of copyright the ability to control all aspects of exploitation of their works in the digital realm."
Summary Minutes of Main Committee I, Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996, Volume 2. para,301.
Delegation of the US expressed in Diplomatic Conference that "those rights might be implemented in national legislation through application of any particular exclusive right, also other than the right of communication to the public or the right of making available to the public, or combination of exclusive rights, as long as the acts described in those Articles were covered by such rights"

[285] Ibid. p, 60.
"Delegation of Australia proposed that it was intended to extend the right of copyright owners to control all kinds of transmissions in respect of all categories of works…"

[286] Guide to the Copyright and Related Rights Treaties Administered by WIPO. p 208, CT-8.9.

B. Application of umbrella solution in Article 8 of the WCT

182. In Article 8 of the WCT, the umbrella solution is applied in a specific way. It prescribes that "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or 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."[287]

The Agreed statement concerning Article 8 clarifies that it is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2).

183. The Article 8 of the WCT could be divided into two parts. The fist part grants authors a general right of communication to the public. The second part grants authors a extensive right to authorize the digital interactive transmission of works.

In the first part, it safeguards the existing rights prescribed in the Berne Convention which cover the traditional, non-interactive communication to the public. Notably, since Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention mentioned by Article 8 of the WCT do not cover the public performance of works, Article 8 of the WCT should be understood as that it only covers the public communication of works in distance and excludes the direct public performance of works.[288]

Then, the first part of Article 8 extends the right of public communication to all categories of works. The term of "communication" prescribed in this article is quite extensive regarding the exact wordings are "any communication to the public…by wire or wireless

[287] WIPO Copyright Treaty. Article 8.

[288] Reinbothe, Jörg, and Silke von Lewinski. The WIPO treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. London, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord: Butterworths, 2002. Chapter 2 para 11.

means."[289]

Through this extension, the right of communication to the public by wire has become generally applicable also in respect of "traditional," non-interactive transmissions and also for those categories of works which are not covered by the Berne Convention.[290]

184. In the second part, it clarifies that the interactive transmission of works is covered by the right of public communication. When this provision was discussed in Main Committee I, it was stated – and no delegation opposed the statement – that Contracting Parties are free to implement the obligation to grant exclusive right to authorize such "making available to the public" also through the application of a right other than the right of communication to the public or through the combination of different rights as long as the acts of such "making available" are fully covered by an exclusive right.[291] The description of "making available to the public of works" could be distinct from the right of distribution and right of rental prescribed in Article 6 and Article 7 of the WCT which only apply to tangible copies.[292]

Notably, the interactive transmission of works prescribed in the second part of Article 8 of the WCT do not qualify as broadcasting, since public may access the works "from a place and at a time individually chosen by them." That is to say, not only the traditional broadcasting but also the new kinds such as webcasting, internet radio, certain kind of streaming could not qualify as "making available to the public" prescribed in the second part.[293]

185. In terms of the Agree Statements of Article 8 of the WCT, the two phrases are independent.

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[289] Guide to the Copyright and Related Rights Treaties Administered by WIPO. p,210, para, CT-8.16 "Under the first part of Article 8, it is implicitly recognized that broadcasting is a specific form of communication to the public (rather than a mere "emission"). Thus, the new provision seems to confirm that, of the various "theories" referred to above, in connection with direct broadcasting by satellites, (in the commentary to Article 11bis of the Berne Convention), the "communication theory" is the more appropriate one."
see also Reinbothe, Jörg, and Silke von Lewinski. The WIPO treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. London, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord: Butterworths, 2002. Chapter 2 para 10, 11.

[290] Guide to the Copyright and Related Rights Treaties Administered by WIPO. p, 210, para, BC-8.15.
"such as musical works in the form of sheet music; literary works in any form other than in their recitals, including computer programs; graphic works; photographic works; and so on"

[291] Summary Minutes of Main Committee I, Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996, Volume 2. para,301. Statement of Delegation of the US.

[292] Article 6,Article 7 of the WCT and the Agreed Statement."as used in these Articles, the expressions 'copies' and 'original and copies' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects"

[293] Guide to the Copyright and Related Rights Treaties Administered by WIPO. p211, para CT-8.18.
Internet Chapter 2, para 20.

The first phrase clarifies that "the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this treaty or the Berne Convention. In other words, if somebody carries out an act other than an act directly covered by a right provided for in the Conventions, he has no direct liability for the act covered by such a right.

The first phrase of Agreed Statement was adopted by the Diplomatic Conference in response to the amendment proposals from the delegations of Singapore and African Countries.[294]

It is also a result of an intensive lobbying campaign of non governmental organizations of internet service providers and telecommunication companies. They want to include in the text of the two treaties or, at least in agreed statements, some guarantees concerning the limitation of their liability for infringements committed by the users of their services. However, the first phrase of the Agreed Statement does dot address the issue of liability, it could not be interpreted as an exemption of secondary liability of internet service providers.[295]

186. The second phrase clarifies that "nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2)." Article 11*bis*(2) refers to the Article 11*bis*(2) of the Berne Convention which allows the Member States to adopt compulsory license concerning broadcasting. The adoption of the second phrase of the Agreed Statement was in respond to the proposals made by the delegation of Australia who concerned that the right prescribed in Article 10 of the WCT would prejudice the possibility of adopting statutory license for retransmission of broadcasts.[296] Accordingly, this phrase reiterates that the compulsory license prescribed in the Berne Convention could apply to Article 8 of the WCT.

Article 8 of the WCT prescribes a general right of communication to the public. It bridges the gaps in international convention in regard of the different types of the public

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[294] WIPO, CRNR/DC/56, 1996. "Renumber the current draft Article 10 as paragraph (1) and insert the following text as paragraph (2): For the purposes of this Article, the phrase "communication to the public," in respect of any communication, means the initial act of making the work available to the public and does not include merely providing facilities or the means for enabling or making such communication."
WIPO, CRNR/DC/12,1996. "The provision is amended by numbering the existing text as paragraph (1) and by inserting the following as a new paragraph (2): '(2): The mere provision of facilities for enabling or making any such communication shall not constitute an infringement'."

[295] Guide to the Copyright and Related Rights Treaties Administered by WIPO. p 211, CT-8.20

[296] Summary Minutes of Main Committee I, Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996, Volume 2. para,307.
"He also proposed deletion of the words 'the rights provided for in' immediately preceding the references to Articles of the Berne Convention, to ensure that the possibility of statutory licenses for retransmission of broadcasts was not prejudiced by the new right."

communication right. It also expressly addresses the problematic of digital interactive transmission of works. The umbrella solution gives Member State wide latitude to comply with the minimum requirements of the WCT in their national law, the terms of "communication" and "public" are not strictly defined in the WCT which leaves to the interpretation of national laws.

§2. Public communication right in the EU and the US legislations

187. the US and the EU legislations have implemented the Article 8 of the WCT in different ways. Their judicial interpretations of the specific rules are consequently diversified. The developed countries legislations and judicial interpretations in regard of public communication right could provide important references for China.

What are the definitions and interpretations of the act of "communication"? and what are the definitions and interpretations of "public"?

It will demonstrate the legislations and jurisprudences of the public communication right in the US and in the EU: the right of public performance & display in the US (I) and the right of communication to the public in the EU (II).

I. Right of Public Performance & Display in the US

188. The US Copyright Law has implemented Article 8 of the WCT by providing copyright holder the rights of public performance and display.

What are the definitions and interpretations of the act of "perform and display"? What is the definition and interpretation of "public"?

It will demonstrate the Definition of the terms of "Perform & Display" (A) and Definition of the term of "Public" (B).

A. Definition of the terms of "Perform & Display"

189. Since the WCT gives the latitude to national legislation to confer exclusive rights on copyright holders to authorize the digital interactive transmission, the Article 106 (4) (5) (6) in the US Copyright Law prescribes the right of public performance and display to implement the WCT obligations as follows:

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[297]

190. Two criteria should be applied accumulatively in order to determine whether an act is a copyright infringement or not: "Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a 'performance or 'display' under the bill, it would not be actionable as an infringement unless it were done 'publicly'."[298]

191. The terms of perform and display are defined in Article 101 of the US Copyright Law: "to 'display' a woks means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."[299]

"to 'perform' a works means to recite, render, play, dance, or act it, either directly or by mean of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."[300]

192. The notions of "perform and display" are different from the notion of "communication" which prescribed in the WCT. "Perform and display" could be more confined than "communication." It is a problematic whether the "perform and display" could cover the digital interactive transmission required by the WCT. Therefore, it is necessary to

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[297] the US Copyright Law. Article 106 (4) (5) (6).

[298] Ginsburg, Jane C., and R. Anthony Reese. Copyright: cases and materials. New York, NY, Etats-Unis d'Amérique: Foundation Press, 2013. p, 562.
H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 64(1976).

[299] the US Copyright Law. Article 101.

[300] Ibid.

examine whether the interpretation of "perform and display" covers the interactive transmission as required by the WCT.

The online "streaming" could be interpreted as "perform and display" under the definition of the US Copyright Law, because "streaming" like a television or radio broadcast, there is a playing of the audiovisual work that is perceived simultaneously with transmission.[301]

Meanwhile, the download of copyrighted works is not quite appropriate to be interpreted as "perform and display" because download is simply transferring the electronic file from a server to a local hard drive. It does not generate sounds or images simultaneously as "streaming."

193. The US court construed in *American Society of Composers case (2010)* that: "The Internet Companies' streaming transmissions, which all parties agree constitute public performances, illustrate why a download is not a public performance. A stream is an electronic transmission that renders the musical work audible as it is received by the client-computer's temporary memory. This transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is perceived simultaneously with transmission. In contrast, downloads do not immediately produce sound; only after a file has been downloaded on a user's hard drive can be perceive a performance by playing the downloaded song. Unlike musical works played during radio broadcasts and stream transmissions, downloaded musical works are transmitted at one point in time and performed at another. Transmittal without a performance does not constitute a 'public performance'…"[302]

Therefore, certain kinds of digital interactive transmission of copyrighted works could not be covered by the right of public performance and display. But the download process could be subjected to the right of reproduction under the US Copyright Law. It will not be a violation of international obligation, since all kinds of digital interactive transmissions are covered by different kinds of exclusive right which complies with the WCT.

194. However, one act is covered by the right of performance and display while another similar act is covered by the right of reproduction. It could make the copyright issue even more complicated regarding that in the digital environment, for the reason that the distinction

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[301] US v American Society of Composers, 627 F. 3d 64 (2d cir. 2010)
Ginsburg, Jane C., and Edouard Treppoz. International Copyright Law U.S. and E.U. Perspectives: Text and Cases. Cheltenham, UK: Edward Elgar Pub, 2015. p, 320.
[302] Ibid.

between “reproduction” and “communication” is gradually diminished. Moreover, the legal predictability and certainty could be jeopardized.

In comparison, the EU Information Society Directive prescribes a formula of the right of communication to the public which is similar to the Article 8 of the WCT providing copyright holders an broad exclusive right to cover the digital interactive transmission both “streaming” and “downloading”[303]. It will be demonstrated later.[304]

195. The US Supreme Court interpreted the terms of “perform and display” in *American Broadcasting v. Aereo case (2014)*.[305]

The defendant argued that the retransmission of television signals on internet was not “perform” nor “display” but merely providing equipment. The defendant reasoned that he only provided a very small antenna to each subscribers rather than “performing” the television programming.

the US Supreme Court did not support these arguments. The majority of the US Supreme Court found that the argument makes too much out of too little: “given Aereo’s overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference… Here the signals pursue their ordinary course of travel through the universe until today’s ‘turn of the knob’- a click on a website activates machinery that intercepts and reroutes them to Aero’s subscribers over the internet. But the difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into ‘a copy shop that provides its patrons with a library card’.” Therefore, the US supreme Court concluded that Aereo is not just an equipment supplier, Aereo “performs.”

The definition of “perform and display” in the US Copyright Law and the interpretation by the US courts try to cover the act of digital interactive transmission of works.

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[303] CJEU, 26 April 2017, Stichting Brein v Jack Frederik Wullems, Case C-527/15. EU:C:2017:300. Case about “streaming”
Opinion of Advocate General SZPUNAR, 8 February 2017, Stichting Brein v Ziggo BV, XS4ALL Internet BV, Case C-610/15. EU:C:2017:99. Case about “P2P downloading”

[304] II. Right of communication to public in the EU

[305] American Broadcasting Cos., v. Aereo, Inc., 134 S. Ct. 2498, 2014.

B. Definition of the term of "Public"

196. Article 10 of the US Copyright Law prescribes that "to perform or display a work 'publicly' means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."[306]

197. This definition of "public" could be understood as two layers.

First layer is that Clause (1) defines public as a place outside of a normal circle of a family and social acquaintances. In other words, the performances in "semipublic" places such as clubs lodges factories, summer camps, and schools are "public performance." The term 'a family' in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private.[307]

The second layer is that Clause (2) extends the public performance to distant transmission by clarifying that the concepts of public performance and public display include not only performances and displays that occur in a public place, but also acts that transmit or other wise communicate a performance or display of the work to the public by means of any device or process.

198. Accordingly, the definition of "public" in the US Copyright Law is applicable to the digital interactive transmission of copyrighted works.[308]

In the US *American Broadcasting v. Aereo* case *(2014)*, the defendant argued that the performance was received by one and only one subscriber, the defendant transmits the signal privately, not publicly.[309] the US Supreme Court reasoned that when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a

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[306] the US Copyright Law. Article 10.

[307] House Report, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 64-65 (1976)
Ginsburg, Jane C., and R. Anthony Reese. Copyright: cases and materials. New York, NY, Etats-Unis d'Amérique: Foundation Press, 2013. p, 563.

[308] Ginsburg, Jane C., and Edouard Treppoz. International Copyright Law: U.S. and E.U. Perspectives: Text and Cases. Cheltenham, UK: Edward Elgar Publishing Ltd, 2015. p, 318. "As you review the US public performance right in this section and distribution right in the following section…consider whether their approaches fully implement their international obligations."

[309] American Broadcasting Cos., v. Aereo, Inc., 134 S. Ct. 2498, 2014.

performance to them regardless of the number of discrete communications it makes.

The US Supreme Court explained that the subscribers to whom Aereo transmits television programs constitute "the public" because it communicates the signals to a large number of people who are unrelated and unknown to each other which are obviously outside of a normal circle of a family and its social acquaintances.

Moreover, the US Supreme Court explained that when an entity performs to a set of people, whether they constitute "the public" often depends upon their relationship to the underlying work. In other words, an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to "the public"

II. Right of communication to the public in the EU

199. The EU Information Society Directive (Directive 2001/29/EC) has implemented the Article 8 of the WCT by prescribing an unified right of communication to the public. In the EU Information Society Directive, "the act of communication" and the communication of that work to a "public" are prescribed as two cumulative criteria.

What are the definitions and the interpretations of the act of "communication"? What are the definitions and the interpretations of "public"?

It will demonstrate the definition of the term of "communication" (A) and the definition of the term of "Public" (B).

A. Definition of the term of "Communication"

200. Article 3 of EU Information Society Directive gives the right of communication to the public and the right of making available to the public to copyright holders. It is an implementation of Article 8 of the WCT and also a harmonization of public communication right among the EU member states.

Article 3 prescribes that "1. Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by

them."[310]

It was reasoned by the CJEU in *Svensson case (2014)* that the concept of communication to the public includes two cumulative criteria, namely, "act of communication" of a work and the communication of that works to a "public".[311]

201. The act of communication is explained by Information Society Directive as:

Recital (23) of Information Society Directive reads that "This directive should harmonies further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means including broadcasting."[312]

Recital (27) reads that "The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive."[313]

In comparison with the "performing and display" in the US Copyright Law, the term applied in the EU Information Society Directive is "communication" and the EU Information Society Directive expressly explains that "communication" should be interpreted in a broad sense covering all communication to the public. Consequently, under the EU regime of "communication", "streaming" and "downloading" both could be covered by the right of communication to the public which is not the case under the "perform and display"[314]. The P2P download of copyrighted works has been complained to CJEU as an infringement of the right of communication to the public.[315]

202. The term of "communication" has been interpreted broadly by CJEU. In *ITV broadcasting case (2013)*[316], The digital retransmission of copyrighted works on internet is deemed as "communication" by CJEU.

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[310] Directive 2001/29/EC. Article 3.
[311] CJEU, 13 February 2014, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, Case C-466/12. EU:C:2014:76. para 16.
[312] Directive 2001/29/EC, Recital (23).
[313] Ibid. Recital (27).
[314] see, the US case: US v American Society of Composers, 627 F. 3d 64 (2d cir. 2010)
Ginsburg, Jane C., and Edouard Treppoz. International Copyright Law U.S. and E.U. Perspectives: Text and Cases. Cheltenham, UK: Edward Elgar Pub, 2015. p, 320.
[315] Opinion of Advocate General SZPUNAR, 8 February 2017, Stichting Brein v Ziggo BV, XS4ALL Internet BV, Case C-610/15. EU:C:2017:99.
[316] CJEU, 7 March 2013, ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd, Case C-607/11. EU:C:2013:147.

In *ITV broadcasting case (2013)*[317], first of all, CJEU construed that "communication to the public" must be interpreted broadly according to the recital 23 of Information Society Directive.[318] This interpretation is also confirmed by *SGAE case (2006)*[319] and *Football Association Premier League case (2011)*.[320]

203. In *ITV broadcasting case (2013)*[321], CJEU noted that the Information Society Directive does not defined the concept of the act of communication exhaustively. Moreover, it underlined that according to recital 23 of Information Society Directive, "the author's right of communication to the public covers any transmission or retransmission of a work to public not present at the place where the communication originates"[322] and according to Article 3(3) of Information Society Directive, "the inclusion of protected works in a communication to the public does not exhaust the right to authorize or prohibit other communications of those works to the public."[323] Therefore, CJEU ruled that "the European Union legislature intended that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question."[324]. Thus, the retransmission of copyrighted works on internet is within the scope of "communication" and subjected to the authorization of copyright holders.

This decision has been confirmed by *SBS Belgium case (2015)*: "every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work."[325] *And Reha Training case (2016)*: "the concept of 'communication to the public' must be interpreted broadly"[326], "every transmission or retransmission of a work which uses a specific technical means must, as a

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[317] Ibid.

[318] Ibid. para, 20.

Directive 2001/29/the EU, Recital (23) "This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates."

[319] C-403/08. para 36.

[320] CJEU, 4 October 2011, Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen (C-403/08), Karen Murphy v Media Protection Services Ltd (C-429/08), Joined cases, C-403/08 and C-429/08. EU:C:2011:631. para, 186.

[321] Ibid.

[322] CJEU, 7 March 2013, ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd, Case C-607/11. EU:C:2013:147. para, 23.

[323] Ibid. para, 23.

[324] Ibid. para, 24.

[325] CJEU, 19 November 2015, SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM), Case C-325/14. EU:C:2015:764. para, 17.

[326] CJEU, 31 May 2016, Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA), Case C-117/15. EU:C:2016:379. para, 36.

rule, be individually authorised by the author of the work."[327]

204. Notably, the decision of *ITV broadcasting case (2013)* is similar to the US *American Broadcasting v. Aereo* case *(2014)*.[328] The defendant in *ITV broadcasting case (2013)* argued that "the retransmission is merely a technical means to ensure or improve reception of the terrestrial television broadcast in its catchment area."[329] According to the decision of *Football Association Premier League case (2011)*[330] and *Airfield and Canal Digital case (2011)*[331], a mere technical means to ensure or improve reception of the original transmission in its catchment area does not constitute a "communication" within the meaning of Article 3 (1) of Information Society Directive.[332]

However, regarding the objection of defendant, in *ITV broadcasting case (2013)*, CJEU offered a more succinct and efficient reason than the US Supreme Court in the US *American Broadcasting v. Aereo case (2014)*[333]: "the intervention of such a technical means must be limited to maintaining or improving the quality of the reception of a pre-existing transmission and cannot be used for any other transmission."[334] The defendant did not fulfill the criteria.

205. In comparison with the US *American Broadcasting v. Aereo case (2014)*, both the US and the EU defendants tried to argue that their behaviors are the mere provision of equipment or a technical means to improve the reception of signal. Similarly, both the US Supreme Court and CJEU interpreted the act of communication broadly. They both determined that the

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[327] Ibid. para, 39.

[328] CJEU, 7 March 2013, ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd, Case C-607/11. EU:C:2013:147.

American Broadcasting Cos., v. Aereo, Inc., 134 S. Ct. 2498, 2014.

[329] CJEU, 7 March 2013, ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd, Case C-607/11. EU:C:2013:147. para, 27.

[330] CJEU, 4 October 2011, Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen (C-403/08), Karen Murphy v Media Protection Services Ltd (C-429/08), Joined cases, C-403/08 and C-429/08. EU:C:2011:631. para, 194.

[331] CJEU, 13 October 2011, Airfield NV, Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) (C-431/09), Airfield NV v Agicoa Belgium BVBA (C-432/09), Joined Cases C-431/09 and C-432/09. EU:C:2011:648. paras, 74, 79.

[332] CJEU, 7 March 2013, ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd, Case C-607/11. EU:C:2013:147. para, 28.

[333] American Broadcasting Cos., v. Aereo, Inc., 134 S. Ct. 2498, 2014.

[334] CJEU, 7 March 2013, ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd, Case C-607/11. EU:C:2013:147. para, 29.

behavior of internet broadcasting is an act of communication.

206. The act of communication was again interpreted broadly in *Svensson case (2014)*: the provision of clickable link was ruled as an "act of communication" by CJEU.[335] CJEU found that according to Article 3 (1) of Information Society Directive[336], "it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity."[337] Therefore, the provision of clickable links to protected works was considered to be "making available" and, therefore, an "act of communication."

This decision was supported by *SGAE case (2006)*. In *SGAE case (2006)*, CJEU found that according to Article 3 (1) of Information Society Directive and Article 8 of the WCT, "for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it."[338]

The defendant did not infringe the right of communication to the public, because of that the "public" criterion was not fulfilled in *Svensson case (2014)*. But CJEU ruled that the provision of clickable link is an "act of communication" under the right of public communication.[339] This decision could enhance the protection of copyright holder's interests in the digital environment by bringing enormous online file sharing activities under the term of "communication." Thus, it is necessary in the next step to examine the criterion of "Public."

B. Definition of the term of "Public"

207. In regard of the term of "Public", the definition could not be found in the Information Society Directive. However, "New Public" was established by CJEU in *SGAE case (2006)*.[340]

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[335] CJEU, 13 February 2014, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, Case C-466/12. EU:C:2014:76.

[336] Directive 2001/29/EC, Article 3(1): "Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."

[337] CJEU, 13 February 2014, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, Case C-466/12. EU:C:2014:76. para, 19.

[338] CJEU, 7 December 2006, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, Case C-306/05. EU:C:2006:764. para, 43.

[339] CJEU, 13 February 2014, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, Case C-466/12. EU:C:2014:76. para, 19.

[340] CJEU, 7 December 2006, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, Case C-306/05. EU:C:2006:764.

First of all, in *SGAE case (2006)*, CJEU pointed out again that "It follows from the 23rd recital in the preamble to Directive 2001/29 that 'communication to the public' must be interpreted broadly."[341]

In *SGAE case (2006)*, CJEU found that the term of "public" refers to "an indeterminate number of potential television viewers"[342] according to the precedent *Multikabel case (2005)* which ruled that "a limited circle of persons who can receive the signals from the satellite only if they use professional equipment cannot be regarded as part of public."[343] Therefore, CJEU construed that the hotel customers could be considered as "public" for the reason that "usually, hotel customers quickly succeed each other. As a general rule, a fairly large number of persons are involved, so that they may be considered to be a public."[344]

208. In *SGAE case (2006)*, CJEU explained the term of "new public" which was firstly interpreted by the Guide to the Berne Convention that "if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public."[345]

The Guide to the Berne Convention interpreted "the right of broadcasting" in Article 11 bis(iii) "the public communication by loudspeaker" as "Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work."[346]

209. Finally, CJEU found that "the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that

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[341] Ibid. para 36.
[342] Ibid. para 37.
[343] CJEU, 2 June 2005, Mediakabel BV v Commissariaat voor de Media, Case C-89/04. EU:C:2005:348, para 30.
[344] CJEU, 7 December 2006, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, Case C-306/05. EU:C:2006:764. para 38.
[345] Ibid. para 41.
[346] "Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act,1971)." published by World Intellectual Property Organization. Geneva, 1978. p, 69.

area, would not, in principle, be able to enjoy the broadcast work"[347], "a transmission is made to a public different from the public at which the original act of communication the work is directed, that is, to a new public."[348] Therefore, "The clientele of a hotel forms such a new public."

210. The "New Public" rule was confirmed by the *Football Association Premier League case (2011)*:

The "New Public" rules was confirmed as : "in order for there to be a 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive in circumstances such as those of the main proceedings, it is also necessary for the work broadcast to be transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public."[349]

211. The "New Public" rule was applied in the two cases:

In *ITV broadcasting case (2013)*, the defendant argued that the recipient retransmission does not constitute a "new public" for the reason that they are entitled to follow the televised broadcast using their own television sets.[350] CJEU overruled the objection by reasoning that the internet transmission is to a new public which was not considered by the authors concerned when they authorized the broadcast in question.[351] This reasoning is consistent with the interpretation of "communication" saying that "each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorized by the author."[352]

In the *Svensson Case (2014)*, after considering the situation, CJEU ruled that the recipients of clickable link are "part of the public taken into account by the copyright holders when they authorized the initial communication"[353] The provision of clickable link to

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[347] CJEU, 7 December 2006, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, Case C-306/05. EU:C:2006:764. para 42.
[348] Ibid. para 40.
[349] CJEU, 4 October 2011, Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen (C-403/08), Karen Murphy v Media Protection Services Ltd (C-429/08), Joined cases, C-403/08 and C-429/08. EU:C:2011:631. para, 197.
[350] CJEU, 7 March 2013, ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd, Case C-607/11. EU:C:2013:147. para, 37.
[351] Ibid. para, 38.
[352] Ibid. para, 24.
[353] CJEU, 13 February 2014, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, Case C-466/12. EU:C:2014:76. para, 24, 25, 26, 27, 28.

copyrighted works which are freely accessible for all internet users was not consider as a communication to "new public."

212. The "New Public" was developed by the two cases:

In the *SCF case (2012)*, CJEU further elaborated that "the public which is the subject of the communication is both targeted by the user and receptive, in one way or another, to that communication, and not merely 'caught' by chance."[354]

In *Reha Training case (2016)*, it stated clearly that "the public which is the subject of the communication in these establishments is not merely 'caught' by chance, but is targeted by their operators."[355]

213. In comparison with the US in regard of the term "public", it could be observed that in the US *Aereo case (2014)*[356], the US Supreme Court found that the defendant violated the US Copyright Law based on the fact that the defendant transmits television programs to "the public" because it communicates the signals to a large number of people who are unrelated and unknown to each other which are obviously outside of a normal circle of a family and its social acquaintances.

Meanwhile, it could be observed that in *SGAE case (2006)*, CJEU firstly reasoned that the defendant communicated the work to "the public" under the meaning of jurisprudences; secondly, reasoned that the public constituted "new public" which outside the authorization of copyright holder.[357]

Article 8 of the WCT prescribes that "authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works…." In other words, "any" communication to the "public" shall be authorized by the authors.[358]

However, CJEU added another factor of "new public." In *SGAE case (2006)*, indeed,

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[354] CJEU, 15 March 2012, Società Consortile Fonografici (SCF) v Marco Del Corso, Case C-135/10. EU:C: 2012:140. para, 91.

[355] CJEU, 31 May 2016, Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA), Case C-117/15. EU:C: 2016:379. para,48.

BENABOU Valérie Laure, "Droit de communication au public : harmonie, vous avez dit harmonie?", Dalloz IP/ IT, 2016. p, 420.

[356] American Broadcasting Cos., v. Aereo, Inc., 134 S. Ct. 2498, 2014.

[357] CJEU, 7 December 2006, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, Case C-306/05. EU:C:2006:764. para 38.

[358] Ginsburg, Jane C., and Edouard Treppoz. International Copyright Law: U.S. and E.U. Perspectives: Text and Cases. Cheltenham, UK: Edward Elgar Publishing Ltd, 2015. p, 331. "query whether a 'new public' condition is consistent with the international norms that underpin the directive."

CJEU was intended to broadly interpret the public communication right.[359] But this "new public" rule could be interpreted as an additional burden for the protection of copyright holder's interests. For instance, In the *Svensson Case (2014)*, the defendant was free of copyright liability because it did not communicate the works to "new public."[360]

Regardless of the differences existed in the US and the EU, the intention of both legislations and jurisprudences in the US and the EU is similar. It could be observed from the demonstration above that both the US and the EU try to broadly interpret the public communication right to cover the new form of communication in order to protect author's right in the digital environment.

Section II. Chinese "right of communication through information network"

214. Chinese "right of communication through information network" provides copyright holders several prerogatives envisaging the digital transmission of work. This right is a corner stone for the copyright holders to control their work in the digital environment in China.

However, the right prescribed in Chinese Copyright Law is not exactly the same with the public communication right prescribed in the WCT nor in the US, the EU legislations. What is this right in China? Does it provide copyright holders proper protection in the digital environment? Does it comply with international conventions?

This Chinese "right of communication through information network" will be demonstrated in a comparative law perspective. The Chinese legislations and interpretations will be firstly introduced and analyzed and then they will be compared with international conventions and the US, the EU legislations.

It will demonstrate the Chinese copyright legislations concerning the "right of communication through information network" and its exception (§1). It will then demonstrate

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[359] CJEU, 7 December 2006, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, Case C-306/05. EU:C:2006:764. para 36.

[360] CJEU, 13 February 2014, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, Case C-466/12. EU:C:2014:76. para, 24, 25, 26, 27, 28.

the interpretations of “communication” and “public” (§2.).

§1. Scope and exception of “right of communication through information network”

215. Chinese “Right of communication through information network” corresponds with the public communication right in the WCT. It could be found in both Chinese Copyright Law and The “Regulation on the Protection of the Right of Communication through Information Network.” Chinese Copyright Law defines this right and the special regulation elaborates the detail rules of this right.

It will firstly demonstrate the prerogatives authors enjoy in regard of the “right of communication through information network” (I). Secondly, It will demonstrate the exception of “right of communication through information network” (II).

I. Scope of “right of communication through information network”

216. The scope of “right of communication through information network” in Chinese legislations is not clear. Does this right include traditional communication right prescribed in the Berne Convention? or it only regulate the interactive transmission of works, in other words, the “making available right” prescribed in the WCT?

The problematics will be demonstrated by analyzing both the Chinese legislations of “right of communication through information network” (A) and comparing “right of communication through information network” with the WCT, the US and the EU legislations (B).

A. Scope of “right of communication through information network” in Chinese legislations

217. In 2001, for the first time, “right of communication through information network” was recognized as the patrimonial right of author by the first revision of Chinese Copyright

Law.[361]

218. Before the first revision of Chinese Copyright Law, several cases concerning the digital transmission and distribution of works were brought before the Chinese courts. The Chinese court had already expanded the copyright protection into the digital environment by broadly interpreting the patrimonial rights of copyright holders.

For instance, in the year of 1999, a famous Chinese writer's novel was uploaded on internet by a website without the writer's authorization. Beijing Handian district court reasoned that the digitalization of the work would not change the fact that the writer owns the right of his work; the communication of the work via internet is indeed different from the traditional right of reproduction, distribution, publication or performance, however, in essence, they are all for the purpose of the utilization of works by public and the distribution of works to public and making the content of works accessible for the audiences. Therefore, the copyright holder's right of controlling the exploitation of works should be equally protected among the different means of distribution. In this regard, the court ruled that the website had infringed the copyright holder's right of exploitation of works and the right of receiving remuneration.[362]

219. In the year of 2000, Chinese Supreme Court issued an official interpretation which prescribed as "the communication of works to public via internet is within the scope of 'other rights' prescribed in Article 10 Clause 17 of Chinese Copyright Law."[363] This interpretation paved the way for the adoption of "the right of communication through information network" in the first revision of Chinese Copyright Law.

220. Regarding the technological development, a public communication right which enables author to control his work in the digital environment was strongly requested by the domestic interests group during the first revision.[364]

In response to the domestic needs, the first revision of Chinese Copyright Law prescribed in Article 10 Clause (12) that "the right of communication through information network, that is, the right to make a work available to the public by wire or by wireless

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[361] Chinese Copyright Law, Article 10, Clause 12.

[362] 王蒙 v. 世纪互联通讯技术有限公司， 1999 海知初字第57号。

Wang Meng v. Centurial Communication Technology Ltd, Chinese Pekin Haidian District Court, 1999.

[363] 最高人民法院在《关于审理涉及计算机网络著作权纠纷案件适用法律若干问题的解释》2000，第2条第3款。

Chinese Supreme Court, "interpretation concerning the problematics of applying law in regard of computer internet copyright disputes and cases", 2000, Article 2, Clause 3.

[364] See Infra text, Part 1, Chapter 2, Section 1, § 1. first revision,

means, so that people may have access to the work from a place and at a time individually chosen by them."[365]

221. However, the further rules "The right of communication through information network" was not elaborated by Chinese Copyright Law 2001 text. Article 58 of Chinese Copyright Law 2001 text only prescribes as "the specific rules of copyright protection of computer software, the right of communication through information network shall be further elaborated by State Council."[366] Accordingly, in the year of 2006, "Regulation on the Protection of the Right of Communication through Information Network" was enacted by the Chinese State Council in order to elaborate the rules concerning "the right of communication through information network."

222. Article 2 of "Regulation on the Protection of the Right of Communication through Information Network" prescribes that "The right of communication through information network enjoyed by right owners is protected by the Copyright Law and these Regulations. Any organization or individual that makes another person's work, performance, or sound or video recording available to the public through information network shall obtain permission from, and pay remuneration to, the right owner, except as otherwise provided for by laws or administrative regulations."[367]

In other words, Article 2 of the regulation clarifies that the making available to the public of works via "information network" shall be authorized by the copyright owners and the remuneration shall be paid.

The enforcement measures and secondary liability of internet service providers are also elaborated for the purpose of copyright protection of "the right of communication through information network." These issues will be discussed in the next Part.[368]

223. In a word, Article 10 Clause (12) of Chinese Copyright Law prescribes as "the right of communication through 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."[369]

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[365] Chinese Copyright Law 2001 text. Article 10.
[366] Ibid.
[367] "Regulation on the Protection of the Right of Communication through Information Network", Article 2, Official translation. Hereinafter, all the text of this regulation will use this english version of translation. Available at WIPO. http://www.wipo.int/wipolex/zh/text.jsp?file_id=182147.
[368] Part II Chinese copyright enforcement in the digital environment Title I. Copyright enforcement legislations in the digital environment.
[369] Chinese Copyright Law 2010 text. Article 10.

It is similar with Article 8 of the WCT: "the exclusive right of authorizing any communication to the public of their works, by wire or 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."[370]

224. The word "people" in Article 10 Clause (12) of Chinese Copyright Law is poorly translated. The original word in Chinese is "公众" (Gong Zhong)[371]. It should be translated as "Public may have access" rather than "People may have access." Article 10 Clause (12) of Chinese Copyright Law could be retranslated as "…the right to make a work available to the public by wire or by wireless means, so that public may have access to the work from a place and at a time individually chosen by them." It could be observed that it is almost identical with Article 8 of the WCT.

Therefore, it would be necessary to compare the "right of communication through information network" in Chinese legislation with the WCT, the US and the EU.

B. Scope of "right of communication through information network" compared with the WCT, the US and the EU

225. Article 8 of the WCT prescribes that "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or 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."[372]

It could be divided into two part: first part safeguards the existing public communication rights prescribed in the Berne Convention and extend to all categories of works; second part prescribes a right of making available.

By examining the text of Article 8 of the WCT and Article 10 Clause (12) of Chinese Copyright Law, it could be observed that "the right of communication through information

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[370] the WCT, Article 8.

[371] Chinese Copyright Law 2001 text, Article 10 Clause 12: in Chinese: "信息网络传播权,即以有线或者无线方式向公众提供作品,使公众可以在其个人选定的时间和地点获得作品的权利." Official translation in English: "the right of communication through 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"

[372] the WCT, Article 8.

network" in Chinese Copyright Law corresponds only the second phrase of Article 8.

226. The scope of this right are significantly influenced by the opinions of the EU delegation in the WCT diplomatic conference. The term of "making available" in Chinese Copyright Law is understood as a accessible status at distance, it does not matter whether the public has actually accessed to the work[373] and the realtime webcasting is considered outside the scope of the right of communication though information network, because the public could not choose the place and time.[374]

227. The right prescribed in the first phrase of Article 8 of the WCT "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works"[375] is implemented by Article 10. (9). (10). (11) of Chinese Copyright Law.

Article 10 of Chinese Copyright Law "Copyright includes the following personal rights and property rights" stipulates that "(9) the right of performance, that is, the right to publicly perform a work, and to publicly communicate the performance of a work by any means or process; (10) the right of presentation, that is, the right to publicly present a work of the fine arts, a photographic work, a cinematographic work, a work created by a process analogous to cinematography, or other works, by projector, slide projector or any other technology or instrument; (11) the right of broadcasting, that is, the right to broadcast a work or disseminate it to the public by any wireless means, to communicate the broadcast of a work to the public by wire or by rebroadcasting, and to publicly communicate the broadcast of a work by loudspeaker or any other analogous instrument transmitting signs, sounds or images."[376]

228. Compared with the US and the EU legislations, it is different from the US legislation. The right of public performance and display in the US Copyright Law implement directly Article 8 of the WCT.[377] The right of communication to the public in the EU Information

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[373] Reinbothe, Jörg, and Silke von Lewinski. The WIPO treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. London, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord: Butterworths, 2002. Chapter 2, Article 8, para 17.

[374] Ibid. Chapter 2, Article 8, para 20.

[375] the WCT, Article 8. "Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or 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."

[376] Chinese Copyright Law Article 10. (9). (10). (11). Official translation.

[377] the US Copyright Law, Article 106, (4)(5)(6).

Society Directive is also more comprehensive than the Chinese one. It prescribes both "the right of communication to the public of works" and "the right of making available to the public."[378]

Chinese Copyright Law implements the first phrase of Article 8 of the WCT by three existing rights. It is similar to the approach of the US. Then it creates a new right of "communication through information network" which is similar to the right of making available to public in Article 3 of the EU Information Society Directive.[379]

229. Notably, among the Chinese copyright legislations, the scope of "the right of communication through information network" is independent from the other existing performance, present and broadcasting rights. It gives copyright holders the control of the interactive transmission of works. According to Article 2 of "Regulation on the Protection of the Right of Communication through Information Network" which prescribes that "Any organization or individual that makes another person's work, performance, or sound or video recording available to the public through information network shall obtain permission from, and pay remuneration to, the right owner, except as otherwise provided for by laws or administrative regulations."[380], this right not only enjoys the protection of Chinese Copyright Law but also enjoys the special copyright protection provided in the regulation.

230. In comparison, the traditional broadcasting right, namely, the rights of broadcasting, display and performance do not enjoy the copyright protection provided in "Regulation on the Protection of the Right of Communication through Information Network." Because Article 1 of the regulation clearly indicates that the regulation is for the purpose of the protection of the right of communication through information network. It prescribes that "These Regulations are formulated in accordance with the Copyright Law of the People's Republic of China (hereinafter referred to as the Copyright Law) for the purpose of protecting the right of communication through information network enjoyed by copyright owners, performers, and producers of sound and video recordings (hereinafter collectively referred to as right owners), and encouraging the creation and communication of works conducive to the building of a socialist society which is advanced ethically and materially."[381]

In Chinese copyright legislations, the making available right is protected in both Chinese Copyright Law and the special regulation. Continuing with the logic demonstrated

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[378] Directive 2001/29/EC, Article 3.
[379] Ibid.
[380] "Regulation on the Protection of the Right of Communication through Information Network", Article 2, Official translation by Chinese Copyright Bureau.
[381] Regulations on Protection of the Right of Communication through Information Network. Article 1.

above, the traditional public communication rights, namely the right of broadcasting, display, performance could not be protected by this special regulation.

231. This different treatment of two different kinds of rights in Chinese legislations could still be considered as a compliance with Article 8 of the WCT, because as a member state of the WCT, China are free to implement the obligation to grant exclusive right to authorize such "making available to the public" also through the application of a right other than the right of communication to the public or through the combination of different rights as long as the acts of such "making available" are fully covered by an exclusive right.[382]

However, it does create certain problematic in terms of the copyright enforcement. One could argue that the legal protection of technological measure and the secondary liability of internet service providers are only applicable to the right of communication through information network for the reason that such rules could only be found in "Regulation on the Protection of the Right of Communication through Information Network."[383] This issue of Chinese copyright enforcement will be discussed in Part 2.[384]

II. Exceptions of "right of communication through information network"

232. The exception of the right of communication through information network in special regulation and the general copyright exception in Chinese legislations have co-existed.

Is the exception in special regulation more prudent for the purpose of better protection of copyright holders' interests in the digital environment?

It will be demonstrated firstly the exceptions of "right of communication through information network" in Chinese legislations in a domestic perspective (A). Secondly, it will demonstrate the exceptions of "right of communication through information network" compared with the WCT, the US and the EU (B).

A. Exceptions of "right of communication through information network" in Chinese legislations

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[382] Summary Minutes of Main Committee I, Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996, Volume 2. para,301. Statement of Delegation of the US.

[383] Regulation on the Protection of the Right of Communication through Information Network. Article 4, Article 14-17.

[384] Part II Chinese copyright enforcement in the digital environment Title I. Copyright enforcement legislations in the digital environment

233. Article 22 of Chinese Copyright Law provides a formula of general copyright exceptions. It prescribes that "Article 22 In the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are mentioned and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced: "(1) use of another person's published work for purposes of the user's own personal study, research or appreciation; (2) appropriate quotation from another person's published work in one's own work for the purpose of introducing or commenting a certain work, or explaining a certain point; (3) unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical and radio and television program, for the purpose of reporting current events; (4) publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc. on current political, economic or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted; (5) publishing or broadcasting by the media, such as a newspaper, periodical, radio station and television station of a speech delivered at a public gathering, except where the author declares that such publishing or broadcasting is not permitted; (6) translation, or reproduction in a small quantity of copies of a published work by teachers or scientific researchers for use in classroom teaching or scientific research, provided that the translation or the reproductions are not published for distribution; (7) use of a published work by a State organ to a justifiable extent for the purpose of fulfilling its official duties; (8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc. for the purpose of display, or preservation of a copy, of the work; (9) gratuitous live performance of a published work, for which no fees are charged to the public, nor payments are made to the performers; (10) copying, drawing, photographing or video-recording of a work of art put up or displayed in an outdoor public place; (11) translation of a published work of a Chinese citizen, legal entity or other organization from Han language into minority nationality languages for publication and distribution in the country; and (12) transliteration of a published work into braille for publication. The provisions of the preceding paragraph shall be applicable also to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations."[385]

234. In comparison, Article 6 of "Regulation on the Protection of the Right of Communication through Information Network" prescribes a formula of exceptions only for

[385] Chinese Copyright Law 2001 text, Article 22. Official Translation.

"the right of communication through information network." It prescribes that "In any of the following cases, another person's work may be made available through information network without permission from, and without payment of remuneration to, the copyright owner:

(1) when a published work is appropriately quoted, for the purpose of introducing or commenting a certain work or explaining a certain point, in one's own work made available to the public;

(2) when a published work is unavoidably included or quoted, for the purpose of reporting current events, in one's own work made available to the public;

(3) when a small quantity of copies of a published work are made available to a small number of teachers or scientific researchers for the purpose of classroom teaching or scientific research;

(4) when a published work is made available to the public by a State organ to a justifiable extent for the purpose of fulfilling its official duties;

(5) when a translation of a published work of a Chinese citizen, legal entity or any other organization from Han language into a national minority language is made available to the people of the national minority in the territory of China;

(6) when a published written work is made available to blind persons for a non-profit purpose in such particular way that it is perceptible to them;

(7) when an article published over information network on current political or economic topics is made available to the public; or

(8) when a speech delivered at a public gathering is made available to the public."[386]

235. Regarding the two legislations, the problematic is whether the two kinds of exceptions could apply accumulatively.

Chinese Copyright Law non-exhaustively lists the twelve cases of exceptions in Article 22: "Article 22 in the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are mentioned and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced."[387]

According to the phrase "a work may be used…", the exceptions in Article 22 do not

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[386] "Regulation on the Protection of the Right of Communication through Information Network." Official Translation.

[387] Chinese Copyright Law. Official translation.

distinguish the exceptions of reproduction right and the exceptions of other rights.[388] In other words, the text of Article 22 is applicable to "the right of communication through information network."

To be more concretely, in the first case of Article 22: "use of another person's published work for purposes of the user's own personal study, research or appreciation", by directly interpreting the law, users could transmit the work in the digital environment for the purpose of "personal study, research or appreciation."[389]

236. However, in Article 6 of "Regulation on the Protection of the Right of Communication through Information Network", only 8 cases of exceptions could be found.[390]

In comparison, four cases of copyright exception under Chinese Copyright Law could not be found in the special regulation: Namely, first case "use of another person's published work for purposes of the user's own personal study, research or appreciation"; eighth case "reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc. for the purpose of display, or preservation of a copy, of the work"; ninth case "gratuitous live performance of a published work, for which no fees are charged to the public, nor payments are made to the performers"; tenth case "copying, drawing, photographing or video-recording of a work of art put up or displayed in an outdoor public place."

In regard of the four exceptions excluded, it could be observed that Chinese legislators are afraid that these traditional copyright exceptions in Chinese Copyright Law would jeopardize copyright holders' interests in the field of the interactive transmission of works. Consequently, if all the twelve exceptions could be applied to "the right of communication through information network", the legislators' intention of protecting copyright strictly in regard of the interactive transmission of works would be undermined. It is one reason that the exceptions of "the right of communication through information network" should be independent from Chinese Copyright Law.

237. Another reason could be that according to Article 58 of Chinese Copyright Law 2001 text, the protection rules of "the right of communication through information network" shall be elaborated by State Council. Since the regulation provides the more strict exceptions for the purpose of better protection of this right, this special rule of copyright exceptions should prevail.

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[388] Chinese Copyright Law at this point is similaire to the French Law: Code de la propriété intellectuelle Article L 122-5: "Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire:"

[389] Chinese Copyright Law 2010 text. Article 22.

[390] "Regulation on the Protection of the Right of Communication through Information Network" Article 6.

Regarding that the ongoing Chinese Copyright Law revision would integrate "Regulation on the Protection of the Right of Communication through Information Network", it would be better to distinguish between the general exceptions and the exceptions only for "the right of communication through information network."

B. Exceptions of "right of communication through information network" compared with the WCT, the US and the EU

238. In terms of the exceptions of "right of communication through information network", it could be noted that some rules prescribed in the "Regulation on the Protection of the Right of Communication through Information Network" could be considered as inconsistent with international conventions.

Precisely, Article 3 of "Regulation on the Protection of the Right of Communication through Information Network" could be argued as inconsistent with the WCT and the Berne Convention. First phrase of Article 3 prescribes that "works, performances, and sound and video recordings as are prohibited from being made available in accordance with law are not protected by these Regulations."[391] Second phrase prescribes that "Right owners, in exercising their right of communication through information network, shall neither violate the Constitution, laws and administrative regulations nor impair public interests."[392]

The similar wording existed in Article 4 of Chinese Copyright Law 2001 text: "Works prohibited from publication and dissemination by law shall not be protected under Copyright Law."[393] But it has been ruled as a violation of the Berne Convention by WTO Dispute Settlement Body.[394] Consequently, Article 4 has been revised as "Copyright holders shall not violate the Constitution or laws or jeopardize public interests when exercising their copyright…" which is similar to the second phrase of Article 3 in the regulation.

According to the reasoning of WTO Dispute Settlement Body[395], the legal text of Article 3 first phrase itself in the regulation could also be considered as inconsistent with

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[391] Ibid. Article 3, first phrase : "依法禁止提供的作品、表演、录音录像制品，不受本条例保护。" Official translation.

[392] Ibid. Article 3 , second phrase: "权利人行使信息网络传播权，不得违反宪法和法律、行政法规，不得损害公共利益。"

[393] Chinese Copyright Law 2001 text. Article 4.

[394] Part 1 Title 1 Chapter 2 Section 1 §2. Second Revision I. International Obligation B. DSB Panel Decision. Summary of DS362.

[395] WT/DS362/R 26 January 2009, Report of the Panel. p, 17. para 7.50: "The Panel finds that the Copyright Law is sufficiently clear, on its face, to show that Article 4(1) denies the protection of Article 10 to certain works, including those of WTO Member nationals, as the United States claims."

Article 5(1) of the Berne Convention[396]. Consequently, it could be considered as inconsistent with Article 1 and Article 8 of the WCT.[397]

Regardless of Article 3 of this regulation, the foreign copyright holders could enjoy full copyright protection of their "right of communication through information network" in China, because Article 19 of the Provisions on the Implementation of International Copyright Treaties expressly stipulates that the international copyright treaties should prevail over domestic copyright laws in regard of the protection of foreign copyright holders.[398]

239. This issue will be resolved, since the ongoing Chinese Copyright Law revision is planing to integrate "Regulation on the Protection of the Right of Communication through Information Network." The revised Article 4 of Chinese Copyright Law will govern "the right of communication through information network" after the integration. It means that the prohibited works could also be protected by Chinese Copyright Law in the field of "right of communication through information network."

240. It will compare the exceptions of "right of communication through information network" with the US and the EU legislations.

Regarding that the ongoing Chinese Copyright Law revision will integrate "Regulation on the Protection of the Right of Communication through Information Network", it is important to arrange the general exceptions in Chinese Copyright Law and the specific exceptions of "the right of communication through information network" in this regulation.

the US and the EU provide two totally different approaches. In the US Copyright Law, under the doctrine of "fair use", the copyright exceptions of the public communication right are examined case by case by interpreting "fair use." In the EU Information Society Directive, Article 5 (2) prescribes the possible copyright exceptions of the reproduction right while Article 5 (3) prescribes the possible copyright exception of the both reproduction right and the public communication right.

241. The ongoing Chinese Copyright Law revision has the possibility to take two different approaches. The Chinese copyright exception clause in the final draft of the third revision has

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[396] the Berne Convention. Article 5(1): "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."

[397] WIPO Copyright Treaty (the WCT): Article 1 Relation to the Berne Convention, Article 8 Right of Communication to the Public.

[398] 实施著作权公约的规定, 中国版权局, 1992.
Provisions on the Implementation of International Copyright Treaties. Chinese Copyright Bureau. 1992. Article 19.

integrated the "Three Step Test." Article 43 of the final draft of the ongoing Chinese copyright revision, the last phrase stipulates that "the utilization of the work prescribed above, shall not conflict with the normal exploitation of the work and shall not unreasonably prejudice the legitimate interest of the author."[399] The exceptions of "the right of communication through information network" would be constrained by this safe valve.

Meanwhile, the ongoing revision of Chinese Copyright Law also directly absorbs the copyright exceptions prescribed in Article 6 of "Regulation on the Protection of the Right of Communication through Information Network." These exceptions are only for Chinese "the right of communication through information network." It would create two parallel listed copyright exceptions: one for "the right of communication through information network" and one for the other rights. It are similar to the EU Information Society Directive. Article 5. 2 of the EU Information Society Directive prescribes the exceptions for the reproduction right, while Article 5. 3 prescribes the exceptions for both the reproduction right and the public communication right.[400]

§2. Interpretations of the right of communication through information network

242. In regard of the right of communication through information network, the terms of "communication" and "public" are not clearly defined neither by Chinese Copyright Law nor by the "Regulation on the Protection of the Right of Communication through Information Network." Consequently, they are left to the interpretations by Chinese courts.

What are the act of communication? What is "public"? Are the two criteria applied cumulatively in China?

The interpretations of the terms will be compared the Chinese jurisprudences with the EU one. Because they are similar and the jurisprudences of CJEU influenced Chinese one significantly.

The essential issues under Chinese copyright legislations are: what are the interpretation of "communication"(I) and what are interpretation of the "public"(II).

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[399] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 43.

[400] Directive 2001/29/EC. Article 5.

I. Interpretation of the notion of the "communication"

243. The word "communication" is expressly stipulated in Chinese Copyright Law similar to the WCT, the US and the EU legislations. However, "information network" is unique in China.

What is the notion of "information network" and what is the act of "communication"? Does the Chinese interpretation comply with the WCT? What differences and similarities could be observed among China, the US and the EU?

Firstly, the interpretation of the term "information network" will be demonstrated (A); Secondly, the interpretation of the act of communication by Chinese courts will be compared with the interpretation of CJEU (B).

A. Interpretation of the notion of the "information network"

244. In Chinese Copyright Law, Article 10 (12) prescribes that "the right of communication through information network, that is, the right to make a work available to the public …"[401]

The term of "communication"[402], "make a work available"[403] in Chinese Copyright Law could also be found in the text of the WCT, the US and the EU legislations.

Interestingly, the term of "information network"[404] is unfamiliar compared with the public communication right in the WCT and the US, the EU legislations. Furthermore, the definitions of "information network" has not been clearly defined by Chinese Copyright Law.

245. However, the term of "information network" is interpreted by Chinese Supreme Court as "information networks, includes computer networks, broadcasting television networks, mobile networks, etc, which are based on computers, televisions, telephones and other electronic apparatus; and local networks which are accessible to public."[405] It is a relatively

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[401] Chinese Copyright Law 2010 text, Official translation of Chinese Copyright Bureau.

[402] The term of "communication" is translated from "传播" in Chinese Copyright Law Article 10 (12) by official translation of Chinese Copyright Bureau.

[403] The term of "make a work available" is translated from "提供作品" in Chinese Copyright Law Article 10 (12). Official translation.

[404] The term of "information network" is translated from "信息网络" in Chinese Copyright Law Article 10 (12). Official translation.

[405] 最高人民法院《关于审理侵害信息网络传播权民事纠纷案件适用法律若干规定》（2012）第2条
Chinese Supreme Court "stipulations of the application of law concerning elaborating civil cases in regard of infringements of the right of communication through information network ", 2012, Article 2.

broad interpretation of "information network." But this interpretation is binding for all the Chinese courts unless the written law stipulates otherwise. Chinese Supreme Court then defines the act of communication though information net works as "works are made the available to the public in the information network" and "the public could get access to the works from a place and at a time individually chosen by them."

According to definition of Chinese Supreme Court, the term of communication through "information network" is similar to "making available to the public" in Article 3 of the EU Information Society Directive. Article 3 of the EU Information Society Directive prescribes "any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them"[406]. In comparison, Chinese Copyright Law prescribes "… through information network" while the EU Information Society Directive prescribes "… by wire or wireless means."

246. Moreover, in regard of the interpretation of this term, Chinese courts is significantly influenced by the opinions of the EU delegation in the WCT diplomatic conference. Specifically, the term of "information network" is understood as a platform of interactive transmission of work.[407] Precisely, as Chinese Supreme Court interpreted "the public could get access to the works from a place and at a time individually chosen by them."[408]

According to the analyze above, the realtime webcasting is considered outside the scope of the term of communication though "information network", because the public could not choose the place and time.[409]

B. Interpretation of the notion of the "act of communication"

247. In term of the act of communication, whether the provision of clickable link is an act of "communication" has also been considered by the Chinese courts. The decisions of the Chinese courts are quite different from the CJEU decision in Svensson Case *(2014)* which

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[406] Directive 2001/29/EC.

[407] Reinbothe, Jörg, and Silke von Lewinski. The WIPO treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. London, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord: Butterworths, 2002. Chapter 2, Article 8, para 17.

[408] 最高人民法院《关于审理侵害信息网络传播权民事纠纷案件适用法律若干规定》（2012）第2条
Chinese Supreme Court "stipulations of the application of law concerning elaborating civil cases in regard of infringements of the right of communication through information network ", 2012, Article 2.

[409] Reinbothe, Jörg, and Silke von Lewinski. The WIPO treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. London, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord: Butterworths, 2002. Chapter 2, Article 8, para 20.

ruled that the provision of clickable link is an act of communication.[410]

Similarly, in the year of 2005, the biggest search engine in China, Baidu, was brought before the Beijing Intermediate Court for the infringement of the right of communication through information network by multiple copyright holders.[411] Baidu provided searchable clickable links which leads to the websites of third party on which various musics could be streamed or downloaded without the copyright holders' authorization. The court reasoned that the stream and download were happened directly between the third party and the users, it was extremely onerous for Baidu to examine whether all the searchable links would lead to the copyright infringing contents. The provision of clickable links by internet service providers were exempted from direct copyright liability in terms of "the right of communication through information network" by the Chinese court. Moreover, the provision of hyperlink was not recognized as an act of communication. However, notably, it was already generally acknowledged by Chinese courts at the year of 2005 that Baidu should bear the secondary liability, if it failed to comply with the "safe harbor rules" prescribed in Chinese copyright law.

248. In the year of 2010, the Beijing Superior Court published "a guidance of judging the case concerning the right of communication through information network" which reads that "…If internet service provider could provide evidence which proves that it only provides automatic connecting, automatic transmission, information storage, searching, hyperlink, P2P, and other services, the act of internet service providers could not constitute as 'communication' in terms of the right of communication through information network."[412]

In other words, according to the Beijing Superior Court, the provision of clickable links by Baidu "does not constitute as an act of "communication."

249. This interpretation was confirmed by the district court of Wuhan ruled in the year of 2012 that "the access to the works which are already made available in a freely accessible public internet servers by using searching and hyperlink technology, although it enables

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[410] CJEU, 13 February 2014, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, Case C-466/12. EU:C:2014:76. para, 20 "It follws that, in circumstances such as those in the case in the main proceedings, the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication', within the meaning of that provision."

[411] 正东唱片有限公司 v. 北京百度网讯科技有限公司，北京一中院（2005）一中民初字第7978号。

Dongzheng Disc Ltd v. Beijing Baidu Internet Technology Ltd, Chinese Pekin First Intermediate Court, 2005.

[412] 北京市高院《关于审理涉及网络环境下著作权纠纷案件若干问题的指导意见（一）（试行）》（2010）第4条第2款。

Chinese Pekin High Court "guidance of the elaboration of copyright cases in regard of internet environment"(provisional). 2010, Article 4, Clause 2.

public to get access to works more efficiently and accelerates the circulation of works on the internet, the act itself does not constitute an act of communication directly."[413]

In this case, one important element was observed by Chinese courts: "the works should be already freely accessible to the public." That is to say, the provision of a hyperlink which leads to the content which is not freely accessible to the public could have the chance to be deemed as an infringement of the right of communication through network.

250. Although both the Chinese *Baidu case* and the *CJEU Svensson case (2014)* exempted the liability of the provision of hyperlink, Chinese court considered that the provision of clickable links by Baidu "does not constitute as an act of communication" while CJEU considered the provision of clickable links is an act of communication but not to a "public"[414]

It could be dangerous in the digital environment that the Chinese courts deny the provision of hyperlink as an act of communication if certain conditions were met. Consequently, the internet service providers who provide hyperlinks could only be liable to the secondary liability which subject to the "safe harbor" clause.

It could be problematic, because recently, in China, some websites do not host any contents. They only provide various searchable hyperlinks which lead to infringing contents. Under Chinese laws, copyright holders have to seek the secondary liabilities of these website under the Chinese "notice and take down rules." However, under the EU law, it could be possible for copyright holders to directly resort to the public communication right, since the provision of hyperlink is an act of communication.

In a word, Chinese courts not recognize that the provision of hyperlink is an act of communication. It could be problematic for the copyright protection of right holders. But, regarding the case ruled by the WuHan district court, the interpretation of the rule of the provision of hyperlink seems to become gradually strict for the protection of the interests of copyright holders.

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[413] 上海激动网络股份有限公司 v. 武汉市广播影视局，湖北省武汉市中院（2012）鄂武汉中知初字第00003号。

Shanghai Jidong Internet Inc v Broadcasting and Audiovisuel Bureau of Wuhan City, HuBei Wuhan City Intermediate Court, 2012.

[414] CJEU, 13 February 2014, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, Case C-466/12. EU:C:2014:76. para, 19.

II. Interpretation of the notion of the "public"

251. In regard of public communication right, it plays an essential role. The interpretation of "public" in this regard is not universal.

What are the criteria of "public" in Chinese judicial interpretation? What differences and similarities could be observed between the interpretation of Chinese courts and CJEU?

It will firstly demonstrate the domestic judicial interpretation of the criteria of "public" (A) and secondly, compare the interpretations of Chinese courts with CJEU (B).

A. Notion of the "public" in Chinese Case

252. One kind of cases is often brought before the Chinese district courts by copyright holders. The plaintiffs complain that their works are made available within the local networks by the cyber cafés or tea bars.[415] The copyright holders complain that this kind of behavior is an infringement of the right of communication through information network.

It would be more concrete to present the case directly: Pekin Wangshang Cultural Communication is the copyright holder of a TV series. Since January 2009, it found that Nanning City Yiwangtong Cyber Café made this TV series accessible to its customers via its own local network within the cyber café. Nan Intermediate Court ruled that the cyber café made the TV series available to public for commercial interests without the authorization of copyright holders, according to Article 2 of "Regulation on the Protection of the Right of Communication through Information Network": "The owners' rights to network dissemination of information shall subject to the protection by the Copyright Law and the present Ordinance. Unless it is otherwise prescribed by any law or administrative regulation, an organization or individual that provides the general public with any other person's works, performance or audio-visual products through the information network shall obtain the owner's permission and pay the relevant remunerations." Consequently, the cyber café violated "the right of communication through information network" and shall bear the

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[415] 北京网尚文化传播有限公司 v. 南宁市一网通网吧，南宁中院, 2009。
Pekin Wangshang Cultural Communication Ltd v Nanning City Yiwangtong Cyber Café, Nanning City Intermediate Court, 2009.
广东中凯文化发展有限公司v. 广州市白云区清水居网络咖啡厅案，广州白云区法院（2007）。
Canton Zhongkai Cultural Development Ltd v Guangzhou City Baiyun District Qingshui Ju Cyber Café, Guangzhou City Baiyun District Court, 2007.

responsibility.[416]

253. However, it is a problematic that whether the communication of works to the local networks of cyber cafés or tea bars constitute the communication of works to a "public"?

the term of "public" defined in Article 10 (12) of Chinese Copyright Law as "…make a work available to the public by wire or by wireless means, so that 'people' may have access to…." But Chinese Copyright Law does not give a definition of "public" in regard of this right, it leaves the term of public to be interpreted by Chinese courts.

Chinese Supreme Court has interpreted in "stipulations of the application of law concerning elaborating civil cases in regard of infringements of the right of communication through information network" that "a act of communication through information should constitute the following criteria: the information network which the work situates should be open to the public, the public could download, surfing or other means to get access to the work."[417]

254. In both Chinese Copyright Law and the interpretation of Chinese Supreme Court, "public" is regarded as a fact and also as a indispensable criteria of "the right of communication through information network." It is similar to the EU Information Society Directive that the term of public is also regarded as a fact and left to the interpretation of jurisprudences.[418]

B. Chinese interpretations compared with the interpretations of CJEU

255. The *Chinese cyber café cases* is similar to the *SGAE case (2006)* of CJEU. CJEU ruled that the transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.[419]

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[416] Ibid.

[417] 最高人民法院《关于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定》（2012）第3条第2款

Chinese Supreme Court "stipulations of the application of law concerning elaborating civil cases in regard of infringements of the right of communication through information network", 2012, Article 3, Clause 2.

[418] Although the distinction between "public" and "private" communication was discussed in the Green Paper of Information Directive, "public" is not defined in Information DirectiveGreen Paper on Copyright and Related Rights in the Information Society.

Reply to the Green paper on Copyright of 20 Nov. 1996 of the LAB.

Eechound, M. Van, P. B. Hugenholtz, Lucie M. C. R. Guibault, S. Van Gompel, and Natali Helberger. Harmonizing European copyright Law: The Challenges of Better Lawmaking. Austin Tex.: Alphen aan den Rijn, The Netherlands: Frederick, MD: Kluwer Law International, 2009., p 92.

[419] CJEU, 7 December 2006, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, Case C-306/05. EU:C:2006:764.

In the Chinese case, a cyber café retransmitted the TV series which are broadcasted via television sets to its local computer network and provided its consumers on-demand services of watching the TV series. The copyright holders of the TV series sued the cyber café before the NanNing Intermediate Court. The court ruled that "the local network of the cyber café which is opened to undetermined social members constitutes the 'information network' defined in Article 10 (12) of Chinese Copyright Law, the retransmission of TV series is an infringement of the right of communication through information network."[420]

The Chinese case is the retransmission of TV series to cyber café's local network, the EU case is the transmission of TV signal to hotels' television sets. But the reasonings of Chinese court and CJEU are different. In essence, CJEU reasoned that the customers of the hotel constituted a "new public" to whom the copyright holders did not authorized to communicate. While the Chinese Court reasoned that the local network of a cyber café is an "public" information network, therefore, the communication of works through such local networks need the authorization of copyright holders.

256. Chinese Court reasoned that a public accessible local networks was within the meaning of "information network" rather than directly interpret the term of "public" like CJEU. By examining the Chinese cases concerning the public communication right, the two cumulative criteria under the right of communication through information network could also be found: the "act of communication" and the communication through "information network." It is different from the two criteria of public communication right in the EU Information Directive which are the "act of communication" and the communication to the "public". However, the information network under Chinese Copyright Law contains the factor of "public". The judicial interpretation of Chinese Supreme Court defines the criteria of "information network" as "the information network which the work resides must be accessible to public, public could 'download, watching or obtain the work by other means'."[421]

Briefly, the "public" criteria in the EU public communication right could also be found in the interpretation of "information network" by Chinese courts. The interpretation of the term of "public" by Chinese courts is relatively strict in regard of the public

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[420] 北京网尚文化传播有限公司v.南宁市一网通网吧，南宁中院2009。
Pekin Wangshang Cultural Communication Ltd v Nanning City Yiwangtong Cyber Café, Nanning City Intermediate Court, 2009.

[421] 最高人民法院《关于审理侵害信息网络传播权民事纠纷案件适用法律若干规定》（2012）第3条第2款
Chinese Supreme Court "stipulations of the application of law concerning elaborating civil cases in regard of infringements of the right of communication through information network", 2012, Article 3, Clause 2.

communication right in the digital environment.

Conclusion of Chapter I

257. Facing interactive transmission of works in the digital environment, in the second phrase of Article 8 of the WCT, the Member states are free to implement the obligation to grant exclusive right to authorize such "making available to the public" also through the application of a right other than the right of communication to the public or through the combination of different rights as long as the acts of such "making available" are fully covered by an exclusive right.

the US and the EU has elaborated their own public communication right differently. the US gives copyright holders the right of perform and display to control the digital transmission of work. While the EU Information Society Directive prescribes a right of communication to the public. In terms of the interpretation of the "act of communication" and "public", regardless of the differences existed between the US and the EU, both the US courts and CJEU are trying to provide copyright holders the power to exploit the potential market in the digital environment.

258. In terms of the Chinese public communication right, by the first sight, it would appear that the Chinese one is very different from the WCT, the US and the EU legislations. However, it could be observed that some problems are created by the translation of the terms. By analyzing the terms of "act of communication" and "public" in both Chinese legislations and jurisprudences, it could be observed that the Chinese one is significantly influenced by the EU. In essence, the Chinese public communication right covers all the interactive on-demand transmission of works. The copyright holders have the right to control the new forms of transmission in the digital environment.

259. In the future, regarding the public communication right, during the revision of Chinese Copyright Law, firstly, it would be necessary to translate the Chinese Copyright Law in accordance with the terms used by the WCT. It would facilitate the understanding at international level. Secondly, it would be necessary to integrate the Chinese public communication right in "Regulation on the Protection of the Right of Communication through Information Network" into the new version of Chinese Copyright Law. Thirdly, in regard of the interpretation of public communication right, it would be better to interpret the act of communication in a more broad sense similar to the EU. For instance, the provision of hyper link was not qualified as an act of communication in China. It would unreasonably

harm the interests of copyright holders.

Chapter II. Private Use Exception in the Digital Environment

260. Private use exception has been the most controversial copyright exception in the digital environment regarding that the individual capacities of reproducing and disseminating copyrighted works have been significantly enlarged by the internet.

At international level, the a flexible copyright exception of reproduction under Article 9 of the Berne Convention known as "Three Step Test" seems suitable for the private use exception in the digital environment. Furthermore, it is an international obligation which China has to respect as a member state.

At national level, the US, the EU and China has elaborated their own rules envisaging the problematic caused by the private use exception in the digital environment. It would be interesting to demonstrate: What are the scope of private use exception? How to guarantee copyright holders interests facing the private use exception in the digital environment? Firstly, it will demonstrate that the US and the EU legislations and jurisprudences in regard of private use exception. Some principles of private use exception elaborated in the US and the EU facing the challenges of the digital environment would be found. Secondly it would necessary to compare them with the Chinese interpretations and jurisprudences. It would facilitate the understandings of Chinese rule of private use exception.

This Chapter will be divided into two sections. First section will demonstrate the private use exception in the Berne Convention, the US and the EU (Section I). Second section will demonstrate the private use exception in China, precisely, the Chinese legislations, jurisprudences and the development of private use exception. (Section II).

Section I. Private use exception in the Berne Convention, the US and the EU legislations

261. Private use exception has been the most common copyright exception among national laws. But all the private use exception in national laws are subjected to "Three Step Test" in the Berne Convention. Notably, in the digital environment, private use could be suspicious to still be qualified as copyright exception under "Three Step Test." Facing the digital transmission of work, different rules of private use exception have been elaborated by the US and the EU legislations and jurisprudences which comply with the Berne Convention.

What are the criteria of "Three Step Test" in the Berne Convention in regard of private use exception? Could private use in the digital environment still be qualified as copyright exception? What are the rules elaborated by the US and the EU in regard of private use exception in the digital environment? The demonstration of these questions could help to examine the Chinese private use exception.

It will demonstrate: the private use exception in the Berne Convention (§1) and the private use exception in the US and the EU (§2).

§1. Private use exception in the Berne Convention

262. the Berne Convention does not expressly prescribed the private use as copyright exception. It provided an open-ended formula for the member states known as "Three Step Test."

What are the requirements of "Three Step Test" in the Berne Convention in regard of private use? Could private use in the digital environment still comply with "Three Step Test"? To examine the private use exception under the Berne Convention could help to understand whether Chinese private use exception complies with international obligation or not.

It will demonstrate the private use exception implied in the Berne Convention (I) and the Private use exception facing digital transmission of work (II).

I. Private use exception implied in the Berne Convention

263. The private use exception was expressly listed during the preparatory works of Stockholm Conference. But it was replaced by a general open-ended formula known as "Three Step Test."

What were the interests to prescribe a flexible principle rather than directly list the exceptions exhaustively in Stockholm Conference of the Berne Convention?

The private use exception listed in the preparatory work of Stockholm Conference will be demonstrated (A). Then, adoption of "Three Step Test" in the Berne Convention will be demonstrated (B).

A. private use exception in the preparatory work of Stockholm Conference

264. At international level, the legislation concerning private copy could be traced back to the Berne Convention. Before Stockholm Conference, the most basic author's right, the right of reproduction, had not been distinctively recognized in the Berne Convention, although in the former texts, some aspects of the author's right of reproduction were separately prescribed.[422] Therefore, the most important tasks of the Stockholm Revision Conference is to incorporate rules in the Convention on the right of reproduction. After deliberation, the Study Group[423] reached the conclusion that the right of reproduction should be proposed, meanwhile a satisfactory formula would have to be found for the "inevitable exceptions to this right."[424]

The next question is how to draft a clause of exception for the reproduction right which could be recognized by national delegations regarding the wide gap between national

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[422] Brussel act of the Berne Convention, Article 9, 10 and 10bis.

[423] In accordance with the provisions of Article 24 (2) of the Berne Convention, the Swedish Government prepared, with the assistance of BIRPI, the Program of the Conference. This Program is based on the preliminary drafts prepared by a Study Group composed of representatives of the Swedish Government and BIRPI.
BIRPI, Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle, was established by the Berne Convention as administrative organization which is the predecessor of the WIPO, World Intellectual Property Organization

[424] Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967. WIPO. Geneva. 1971. Volume 1. p,111.

copyright legislations.

265. Taking into consideration that "on the one hand, all the forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable. On the other hand, it should not be forgotten that domestic laws already contained a series of exceptions in favor of various public and cultural interests and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent."[425] After careful deliberation, Private copy was explicitly written in the drafted proposal, Article 9 (2), as a copyright exception of reproduction right: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works: (a) for private use; (b) for judicial or administrative purposes; (c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author."[426] However, the Study Group did not precise the definition of private use. But in the later official report, private use was interpreted as "do not cover any collective use and assume that the reproduction is not done for profit."[427]

In the preparatory documents, the original proposed Article 9 (2) expressly stipulated the exception for private use. But for what reasons this clause were later deleted by Main Conference?

B. Adoption of "three step test" clause

266. According to the report of Main Committee 1 of Stockholm Conference, the opinions concerning Article 9 (2) among national delegations were largely divided. Developed countries want to restrain the exceptions of reproduction right in order to guarantee the right of author while developing countries want to expand the exceptions of reproduction right. For instance, in terms of private copy exception, French delegates suggested that the words "private use" should be replaced by: individual and family use[428]; meanwhile, India proposed a general compulsory license for reproduction right, with the right for author to obtain remuneration[429]. Regarding the gaps between different countries, an open ended exception

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[425] Ibid, p, 111,112.
[426] Ibid, p,113
[427] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). World Intellectual Property Organization, Geneva: 1978. p, 56.
[428] Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967. WIPO. Geneva. 1971. Volume 1, Conference Documents, S/70, p,690.
[429] Ibid, S/86, p,692.

proposed by the United Kingdom was preferred[430]. It was adopted by Main Committee 1 with some slight alterations. This clause is the later "three step test" which lays the foundation of exceptions of reproduction right and the Article 9 (2) (a) and (b) in the original proposal were deleted.

267. Briefly, in the Berne Convention, the reason why private copy is not expressly stipulated in the Article 9 (2) is because the gaps between national legislations are quite large and the preference of strictly protecting the reproduction right of the author. Expressly stipulating that private use is a copyright exception could have the possibility to undermine authors' rights. The Main Committee and Study Group were afraid that a clear list of exceptions of reproduction will undermine the reproduction right of author.[431] In fact, the deletion of private copy represents the copyright dilemma: On the one hand, Main Committee is trying to guarantee that "all the forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors"[432]; on the other hand, Main Committee realize that the exception of author's right is "inevitable." After the balance of interest, a general, open ended, common law style copyright exception of reproduction right was adopted. Consequently, since the private copy is not necessarily considered as copyright exception in the context of the Berne Convention, it should be subject to the examination of the three step test principle.

Although private copy is the most popular copyright exception in national legislations[433], the Berne Convention deliberately did not expressly prescribe private copy as the exception of reproduction right for the purpose of guarantee author's rights.

II. Private use exception facing digital transmission of work

268. Facing digital transmission of work, private use exception could be susceptible to be copyright exception within the meaning of the "Three Step Test" for the reason that the copyright holder's interests could be undermined.

What are the criteria required by "Three Step Test" of the Berne Convention? What

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[430] Ibid, S/42, p,687.

[431] Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967. WIPO. Geneva. 1971. Volume 1, Preparatory Documents, p, 112, foot notes 1 and 2.
"there is every reason to fear that the introduction of a list of this kind would encourage the adoption of all the exceptions allowed and abolish the right of remuneration."

[432] Ibid, p,111.

[433] Ibid. p 112, foot notes 1.

kinds of private use could be qualified as copyright exception in the digital environment?

It will demonstrate the private use exception examined by three step test (A) and the private use exception challenged by the digital environment (B).

A. Private use exception in consideration of the three step test

269. First of all, the three step test gives the member states a power to elaborate the exception of reproduction right "in certain special cases."[434] The adjectives "certain" and "special" suggest that there must be limits to the exception of the reproduction right. "Certain" means that "an exception or limitation in national law must be clearly defined… This guarantees a sufficient degree of legal certainty." "Special" means that "a clear definition in order to meet the standard of the first condition…an exception or limitation should be narrow in quantitative as well as in a qualitative sense."[435]

The definition of private copy was not detailed in the Stockholm Conference and the definition of private copy varies largely in national legislations. However, a simple and general definition is provided by "Guide to the Berne Convention": copies made by individuals for non-profit purposes.[436] This definition of private copy provides a guidance to national legislations concerning the definition of private copy. Whether the definition of private copy complies with the requirement, "in certain special cases", depends on the national legislations.

270. Moreover, the private copy exception should be examined accumulatively by the other two requirements: "does not conflict with a normal exploitation of the work"; "does not unreasonably prejudice the legitimate interests of the author."[437]

"Does not conflict with a normal exploitation of works" is the first requirement private copy exception should fulfill. If private copy conflicts with the normal exploitation of works, it would not be permitted at all.[438] The Main Committee 1 Report gave a practical example of how this criteria could be applied to photocopying: "If it consists of producing a

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[434] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). World Intellectual Property Organization, Geneva, 1978. p, 55, para, 9.6.

[435] Sam Ricketson. "WIPO Study on Limitations and Exceptions of Copyright and Related Rights in Digital Environment." WORLD INTELLECTUAL PROPERTY ORGANIZATION, 2003. p, 21. statement of WTO Panel.

[436] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). World Intellectual Property Organization, Geneva. 1978. p, 56, para 9.10.

[437] the Berne Convention. Article 9.

[438] Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967. WIPO. Geneva. 1971. Volume 2, Main Committee 1 Report, p, 1145. para 85.

very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. Briefly, the two requirements are applied accumulatively, "does not conflict with a normal exploitation of works" has to be fulfilled in order to move to the next step.[439]

If the first condition is met, private use exception could be examined by the second step: "does not unreasonably prejudice the legitimate interests of the author." Notably, the requirement of this step is not the prejudice exists or not. "all copying is damaging in some degree, a single photocopy may mean one copy of the journal remaining unsold and if the author had a share in the proceeds of publication he lost it."[440] The requirement of this step is that the prejudice should not be "unreasonable." The Main Committee 1 Report gave a practical example: "If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."[441] This step safeguards the interests of copyright holders. In cases where there would be serious loss of profit for the copyright holders, the national laws is obligatory to provide copyright holders some compensation so that the prejudice would not be unreasonable.

According to the three step test, the private use exception could be a copyright exception of reproduction right in national laws, on the conditions that the private use is "certainly" and "specially" defined; the private use would not compete with the way which copyright holders exploit their works and if the quantity of private use is large, compensation should be paid to copyright holders.

B. Private use exception challenged by the digital environment

271. "It is a little more than child's play…" to make high quality and large quantity of

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[439] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). World Intellectual Property Organization, Geneva. 1978. p 55. para 9.6. "It consists of two phrases which apply cumulatively: the reproduction much not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author."

[440] Ibid. p 56. para 9.8.

[441] Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967. WIPO. Geneva. 1971. Volume 2, Main Committee 1 Report, pp, 1145,1146.

copies.[442] In the digital environment, the capability of individual users to reproduce and dissemination of copyrighted works has been boosted thanks to the development of technologies.

The large quantity of private use in the digital environment, if does not conflict with the normal exploitation of works, is clearly an unreasonable prejudice to the copyright holders. Therefore, regarding the facts above, the private copy exception should be elaborated in a way which could guarantee that the copyright holders will receive compensations for the large quantity of private use.[443]

However, in the digital environment, since copyright holders are entitled to apply technological measures to control the access to works, the way of exploitation of copyrighted works is shifted to access model. It exists a possibility that the private use in the digital environment could conflict with the normal exploitation of works. The three step test in the Berne Convention sets up a minimum standard for the copyright exception of reproduction right, how to define private use exception precisely in the digital environment is left to the national legislations.

272. Another problematic is recognized by Guide to the Berne Convention: whether the copy for the purpose of scientific and education should be treated differently? The copy certainly makes a large contribution to the diffusion of knowledge, but it is less certain that copying on a large scale seriously damages the interests of copyright holders. These interests must therefore be reconciled with the needs of users.[444] In the digital environment, in terms of private use exception, this issue becomes increasingly accurate. Private use exception absolutely should take the interests of users and copyright holders into consideration. But to what extent the leeway should be left to private use for the purpose of scientific and education in the digital environment, it is a question for national laws.

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[442] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). World Intellectual Property Organization, Geneva. 1978. p 56. para 9.11.

[443] Ibid. p 56. para 9.11. "If practical considerations do not offer copyright owners and their successors in title a chance to exercise their exclusive right of reproduction, it has been suggested that a global compensation might be provided for them…"

[444] Ibid. p 56. para 9.12.

§2. Private use exception in the US and the EU legislations

273. The US and the EU legislations have to respect "Three Step Test" of the Berne Convention. The rules of private use exception in the legislation and jurisprudences of the US and the EU are diversified.

What are the rules of fair use under the US Copyright Law? What are the jurisprudences of private use exception facing digital transmission of works? What are the rules of private use exception in the EU Information Society Directive? What is the obligatory fair compensation in the EU Information Society Directive and CJEU cases?

It will demonstrate the legislation and judicial interpretations of private use exception under Faire Use clause in the US (I) and in the legislation and judicial interpretations of private use exception the EU Information Society Directive (II).

I. Private use exception under Faire Use in the US legislation

274. In the US Copyright Law, the private use exception is not expressly listed. It will be examined case by case under the "fair use" rule.

What is the rule of the US "fair use"? What are the jurisprudences in regard of private use exceptions? The legislation and judicial interpretation of private use exception rules could provided important references for China.

It will firstly demonstrate the interpretation of Fair Use in the US (A) and secondly, demonstrate the jurisprudences of Time shifting & Space shifting private use (B).

A. Interpretation of Fair Use Clause

275. In the US, a common law country, an open ended and a flexible copyright exception known as "fair use" seems suitable in this rapidly changing world, but it also brings legal uncertainty to the private use exception. Private use is not statutory exception in the US Copyright Law. It means that private use shall be examined by "fair use" case by case under the US Copyright Law. Therefore, it is necessary to demonstrate a "faire use" in this regard.

The US Copyright Law, Section 107 prescribes a formula of fair use: "fair use of a

copyrighted work… is not an infringement of copyright."[445] It is hard to tell that "not an infringement of copyright" means a users' affirmative right[446] or a limitation of copyright[447], but it is sure that if fair use applies, the use of work does not need the permission of copyright holders or to pay a license fee[448].

276. Four factors of fair use are listed in Section 107 the US Copyright Law, namely: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; the effect of the use upon the potential market or the value of copyrighted work[449]. They are originated from Justice Story's statement of *Folsom v Marsh* case *(1841)* more than 100 years ago: "look to the nature and the objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[450]

The first factor plays a major role in determining whether a use is fair use. "non-profit educational" use is favorable as fair use. On the contrary, commercial use will be presumed as unfair. In *Sony case (1984)*, the US Supreme Court stated "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter."[451]. It is not saying that non-profit educational use is fair use. It is just express that "the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions."[452]

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[445] the US Copyright Law. Section 107.

[446] Gordon, Wendy J. "Keynote: Fair Use: Threat or Threatened." Case Western Reserve Law Review 55 (2005 2004): 903. p. 904. "fair use is a liberty right. Like the right of self defense in the common law…"

[447] Lehman, Bruce A. Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights. Diane Publishing, 1995. Note 227. "Although sometimes referred to as 'rights' of the users of copyrighted works, 'fair use' and other exemptions from infringement liability are actually limitations on the rights of the copyright owners."

[448] Ibid. Note 227.

[449] Copyright Law of the United States, Section 107.

…In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

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[450] Folsom v. Marsh, 9 F. Cas. 342, 348 (1841).

[451] Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417, 104 S.Ct. 774 (1984). p. 451.

[452] Ibid. p, 450.

The fourth factor is the most important one.[453] This factor not only prevent users from undermining the existing market, but also a potential market could be exploited by right holders.[454] If the use of work causes harm in either market, fair use will not apply in such case.

The other two factors are less important. The nature of work means, for instance, the fact that a work is unpublished will weigh against users. The amount and substantiality of the portion used in relation to the copyrighted work as a whole means that small amount and reasonable proportion of use is preferred as fair use, but the use or copy of an entire work will hardly be deemed fair.

277. Regarding the legislation of the US copyright law, it is safe to depict private use exception as small proportion of works for non-commercial and personal use. However, because the development of technology enables right holders to exploit their works in the digital environment in a way that is very different in real world, the US courts and congress gradually incline to protect the interests of copyright holders in respect of digital private use even for personal and non commercial use.

B. Time shifting & Space shifting

278. More than thirty years ago, in 1984, the famous "time shifting" rule was established as a defense of private home taping in *Sony case (1984)*.[455] Time shifting is a practice that users record a program and watch it later.[456] Supreme Court found that even unauthorized time shifting is not a copyright infringement, based on the fact that time shifting is non-commercial and "a preponderance of the evidence that some meaningful likelihood of future harm"[457] can not be demonstrated, and according to the District Court, time shifting also even enlarged the television viewing audience.[458] Therefore, Supreme Court reasoned that "the prohibition of such non commercial use would merely inhibit access to ideas without any

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[453] Stewart v. Abend, 495 U.S. 207, 110 S.Ct. 1750 (1990). p. 238.
See also. 3 Nimmer on Copyright § 13.05[A], p. 13–81

[454] American Geophysical Union v. Texaco Inc. 60 F. 3d 913 (1994). p. 927. "Specifically, though there is a traditional market for, and hence a clearly defined value of, journal issues and volumes, in the form of per-issue purchases and journal subscriptions, there is neither a traditional market for, nor a clearly defined value of, individual journal articles. As a result, analysis of the fourth factor cannot proceed as simply as would have been the case if Texaco had copied a work that carries a stated or negotiated selling price in the market."

[455] Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417, 104 S.Ct. 774 (1984)

[456] Ibid. p. 421.

[457] Ibid p. 452.

[458] Ibid p. 443.

countervailing benefit."[459] and it overruled the Ninth Circuit's decision which reasoned that only "productive private copy" could be fair use.

279. About ten years later, in response to the advent of the digital audiotape recorder which enabled individual users to make unlimited perfect copies, the Audio Home Recording Act (AHRA) was signed into law in October 1992.[460] After the compromise between copyright owners and manufactures, the Act required "the Serial Copy Management System"(SCMS) in all digital audio equipment and a copyright levy for blank digital audiotapes was introduced.[461] In return for these royalties and for the SCMS, AHRA reads "no action may be brought under this title alleging infringement of copyright… based on the noncommercial use by a consumer…."[462] The exact phrasing of such sentence reflects that this law is reluctant to say that private use of audiotape is legitimate fair use. It only admit that private use is just an exemption of copyright liability after the application of statutory levy and SCMS.

280. Not surprisingly, in 1999, based on the AHRA, "space-shift" private copy was reasoned as exemption of copyright liability by Ninth Circuit Court in *Recording Industry Association of America v Diamond Multimedia Systems Inc (1999)*.[463] It ruled that: "In fact, the Rio's operation is entirely consistent with the Act's main purpose—the facilitation of personal use. As the Senate Report explains, '[t]he purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.' The Act (Audio Home Recording Act) does so through its home taping exemption which 'protects all noncommercial copying by consumers of digital and analog musical recordings,' The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act."[464]

281. It could be observed that outside the digital environment created by internet, on the one hand, both congress and courts are unwilling to regulate private use by sacrificing the market of new technological equipments; On the other hand, they are also reluctant to jeopardize the interests of copyright holders by unconditionally admitting that private use is

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[459] Ibid p. 450.
[460] Goldstein, Paul. Copyright's Highway: From Gutenberg to the Celestial Jukebox. Revised edition. Stanford, Calif: Stanford Law and Politics, 2003. Chapter 4, p. 129.
[461] the US Copyright Law, Section 1002,1003.
[462] the US Copyright Law, Section 1008.
[463] Recording Industry Association of America v Diamond Multimedia Systems Inc. 180 F. 3d.1072. (9th Cir. 1999)
[464] Ibid. p, 1079

fair use of copyright.

282. Therefore, under the all or nothing the US style copyright exception regime, Audio Home Recording Act represented the great compromise between copyright content industry and manufacture industry. It implemented both copyright levy and the exemption of private use liability for both stake holders.

It could be concluded from the demonstration of the US cases that private use for the strict personal use is allowed by time shifting and space shifting for the reason that it does not have negative impact on the established or potential market of copyright holders. However, regarding the fact that private use has been shifting into the digital environment, the time shifting and space shifting fair use probably will be reconsidered because of the negative impact on the market or potential market in the digital environment since the copyright holders would have the capacity of exploiting the market in the digital environment thanks to the development of technology.

UMG Recordings. Inc v MP3.com Inc case (2000) is a very controversial case which the District Court refused to apply both "shifting" rules in the digital environment.[465] Defendant MP3.com provided a service enabled subscribers to get online access to the music on the condition that subscribers must prove that they have already owned the authentic version. It seems that defendant only help end users to make non-commercial private copy for the purpose of "shifting." But District Court find that, first of all, the copies made by MP3.com are commercial, and the most important is that "defendant's activities invade plaintiffs' statutory right to license their copyrighted sound recordings to others for reproduction."[466] The defendant's "space shift" and other fair use defense was therefore denied.

The famous *Napster case (2001)* is another example of "shifting" defense is denied in respect of cyberspace private use[467], because the court found that Napster was engaged in dissemination of copies to the public. The 9th Circuit Court concluded that "the district court did not err when it refused to apply the "shifting" analyses of *Sony case (1984)* and *Diamond case (1999).*[468] Both cases are inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copy- righted material exposed the material only to the original

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[465] UMG Recordings. Inc v MP3.com Inc. 92 F.Supp. 2d 349. (2000)
[466] Ibid. p. 352.
[467] A&M Records, Inc v Napster, Inc, 239 F. 3d 1004. (2001).
[468] Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417, 104 S.Ct. 774 (1984).
Recording Industry Association of America v Diamond Multimedia Systems Inc. 180 F. 3d (1999)

user."[469] Moreover, it found that the Napster harmed the established and potential market, "Having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads."[470] This case is regarded as a mile stone that online peer to peer reproduction and dissemination of copyrighted works is an infringement of copyright.

From the demonstration of the US legislations and jurisprudences, it could be observed that in real space, the proportional private use for the educational non-commercial and the equipments which enable this kinds of use were allowed by the US courts. Meanwhile, in the digital environment, the private use by individual user and the softwares which enable such utilization are susceptible as copyright infringements.

II. Private use exception in the EU legislation

283. In the EU Information Society directive, the private use exception is expressly listed. But it is subjected to some expressly prescribed additional criteria compared with the US Copyright Law.

What is the private use exception prescribed in the EU Information Society Directive? What is the additional criteria? What are the CJEU's interpretations?

It will firstly demonstrate the Principles of private use exception in the EU Information Society Directive (A) and secondly demonstrate problematics of the fair compensation in the EU legislations and jurisprudences (B).

A. Principles of private use exception in the EU Information Society Directive

284. The rule of private use in Information Society Directive is the minimum requirement for the national legislations of the Member States. Precisely, the Member States "may", but is not obliged to, provide for exceptions or limitations to private use. Therefore, the private use exception is optional to the Member States, but further exception or limitation of copyright would not be allowed.

Concretely, private use exception is prescribed in Article 5 (2) (b) Information Society Directive that "in respect of reproductions on any medium made by a natural person for

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[469] A&M Records, Inc v Napster, Inc, 239 F. 3d 1004. (2001).
[470] Ibid. p.1017.

private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned."[471]

Specific criteria could be found in Article 5 (2) (b) Information Society Directive: the use should be made by "natural person"; the use should not be "neither directly nor indirectly commercial"; "fair compensation" is not an option but obligatory for the national of the Member States.

285. The goal of Information Society Directive is to create a harmonized legal framework on copyright and related rights in accordance with technical development[472] to "ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large."[473] In order to achieve this goal, authors and performer have to receive an appropriate reward for the use of their work to continue their creation.[474] Meanwhile, the exceptions of copyright are also indispensable in order to introduce a fair balance of rights and interests between right holders and users.[475] In other words, the interests of copyright holders and users have to be reconciled.

286. According to the original proposal of Information Society Directive, the scope of private use was more strictly constrained, it allowed only reproduce "audio, visual or audio-visual recording media"[476], but later, it was rephrased as "any medium." The scope of the private use exception was enlarged. It could be observed that private use exception clause is also regarded as an important limitation of reproduction right in the EU Information Society Directive.[477]

In terms of private use exception, large gaps still exist in European Union, particularly between common law system and civil law system. "The common law systems (UK and Ireland) permit private copies made of broadcasts and of performances for strictly private purposes, which fundamentally deviates from the droit d'auteur systems that the purpose is specifically restricted to time shifting."[478] Moreover, some specific issues in terms of private

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[471] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.
[472] Ibid. Recital (4) (5).
[473] Ibid. Recital (9).
[474] Ibid. Recital (10).
[475] Ibid. Recital (31) (38)
[476] Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society (98/C 108/03). Article 5 (2) (b)
[477] Ibid. Article 5 (2) (b).
[478] Ibid. Part 2, p. 17.

use remain unharmonized at national level: should private use enabled by third party still a exception? should the source of private use be legal too?

287. Therefore, for the purpose of bringing legal certainty into the EU Internal Market and prevent national legislation from further deviation[479], an unified, general rule of mandatory fair compensation is prescribed in the Information Directive.[480] Moreover, CJEU reasoned that the notion of "fair compensation" in this directive should be interpreted uniformly among the EU member states.[481] As a unified rule, Information Society Directive requires that private use should also be guaranteed to promote the public welfare, at the same time it should be also fairly compensated in order to protect the author's right. It is a balance of interests between right holders and users: On the one hand, private use is indispensable copyright exception. On the other hand, the authors and performers need "appropriate reward to continue their creation." This principle of balance of interests was also reinforced by CJEU. It elaborated the fair compensation of private use exception in *Padawan case (2010)*: "a 'fair balance' between the rights and interests of the right holders, who are to receive the fair compensation, on one hand, and those of the users of protected works on the other."[482]

How to exactly compensate authors for their loss of private use exception are not specified in Information Society Directive.[483] It leaves certain discretion to national legislations in terms of fair compensation.

B. Fair compensation of private use exception in the EU

288. The introduction of "fair compensation" is to compensate for the loss of authors caused by private use exception.[484]

The Three Step Tests in the Berne Convention is also incorporated in Article 5. 5 of

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[479] Green Paper, Copyright and Related Rights in the Information Society. COM (95) 382 final. p.4. para. 3.

[480] CASTETS-RENARD Céline, "Encore une avancée en droit d'auteur européen : la compensation équitable pour copie privée selon la Cour de justice", Recueil Dalloz 2013. p, 2209. "le fait que la notion de « compensation équitable » ait été qualifiée de « notion autonome » du droit de l'Union dans l'arrêt Padawan implique son interprétation uniforme…"

[481] CJEU, 21 October 2010, Padawan SL v Sociedad General de Autores y Editores de España (SGAE), Case C-467/08. EU:C:2010:620., Paras 31, 32, 33.

[482] Ibid. Paras 43.

[483] Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the information society' (C 407/06). para, 3.7.2.4. "the issue of private copying is correctly left to the Member States: the Committee is reluctant to restrict people's activity in the purely private sphere."

[484] Directive 2001/29/EC Recital (35).

CJEU, 21 October 2010, Padawan SL v Sociedad General de Autores y Editores de España (SGAE), Case C-467/08. EU:C:2010:620. Paras 39, 40.

the EU Information Society Directive.[485] According to the first step test "do not conflict with the normal exploitation of works", "fair compensation" is a compromise between authors' rights and users' interests because the works are reproduced without the authorization of right holders. To comply with the second step test "do not unreasonably prejudice the interests of authors", "fair compensation" should be paid to right holders to mitigate the prejudice suffered by right holders.

289. According to the EU Information Directive and the further interpretations of CJEU, "fair compensation" should be applied according to the harm or possible harm of private use exception caused to the right holders.[486] Similarly, CJEU stated in *Padawan case (2010)* that "the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction for private use of his protected work without his authorization" and "it is the person who has caused harm to the holders of the exclusive reproduction right is the person who, for his private use, reproduces a protected work without seeking prior authorization from the right holder. Therefore, in principle it is for that person to make good the harm related to that copying by financing the compensation which will be paid to the right holder."[487]

290. Briefly, fair compensation is to compensate the prejudice to right holders caused by private use exception. It is not the right holders who are willing to choose to leave their works to be used without authorization. It is a statutory compromise between user and right holders in order to on the one hand, guarantee the private use of works which is an essential way of the consummation of works by users; on the other hand, protect the right holders' reproduction right from "unreasonable prejudice." Therefore, the legal term "fair compensation" in the EU Information Directive could not be regarded as a normal way of the exploitation of works by right holders.

In comparison, the "equitable remuneration" is prescribed in the EU Rental and Lending Rights Directive[488]. It is to guarantee the author and performer's revenue to continue the creation in.[489] It prescribes that in contract or in other form of consent, the author and

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[485] Directive 2001/29/EC. Article 5 5. "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder."
[486] Ibid. Recital (35) (38).
[487] CJEU, 21 October 2010, Padawan SL v Sociedad General de Autores y Editores de España (SGAE), Case C-467/08. EU:C:2010:620. Paras 40, 45.
[488] Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property. Article 5, unwaivable right to equitable remuneration.
[489] Ibid, Recital, (13)

performer's "equitable remuneration" is unwaivable. In this regard, "equitable remuneration" is a way of how works are normally exploited via right holders' consent.

In a word, fair compensation is a compromise of the possible harm to right holders made by private use while "equitable remuneration" is not possible.[490]

291. Private use levy system is implemented by most of the Member States on recording equipment and blank media as a fair compensation[491]. In these Member States, Private copy levies are collected by collecting societies or copyright administrative bodies. However, other kind of fair compensation also exist. For instance, Norway provides fair compensation by state-run fund.[492]

Some other principles concerning the private use levy and fair compensation are introduced by the Information Society Directive, : firstly, there are possible harm to right holders; secondly, right holders have not already received payment in some other form; thirdly, if the prejudice is minimal, there should be no payment.[493] These principles are also reinforced and elaborated by CJEU in case laws.[494]

292. In terms of these criteria of private use levy, certain problems are arising. According to the Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules, private use levy is the most controversy issue among stake holders.

On the one hand, end users and Internet Service Providers hold the opinion that private use levy is obsolete and inappropriate. On the other hand, right holders and collective management organization regard private use levy constitute an important source of revenue for them and they consider it as a virtuous system.[495]

The development of copyright content industry in the digital environment has made

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[490] Background Document "Fair Compensation for Acts of private Compensation." 2008. p.4. http://ec.europa.eu/internal_market/copyright/docs/levy_reform/background_en.pdf

[491] Ibid. p, 3: "22 out of the 27 Member States applied private copying levy." "Five Member States(Ireland, UK, Malta, Cyprus and Luxembourg) currently have no private copying levies in place."

[492] In Norway, fair compensation is not collected by private copy levy. In order to fulfill its obligations under the Directive, the Norwegian Parliament has allocated a subsidy to rights holders via the state budget.

[493] Directive 2001/29/EC. Recital (35).

[494] CJEU, 21 October 2010, Padawan SL v Sociedad General de Autores y Editores de España (SGAE), Case C-467/08. EU:C:2010:620.

CJEU, 20 January 2011, CLECE SA v María Socorro Martín Valor, Ayuntamiento de Cobisa, Case C−463/09. EU:C:2011:24.

CJEU, 11 July 2013, Amazon.com International Sales Inc., Amazon the EU Sàrl, Amazon.de GmbH, Amazon.com GmbH, in liquidation, Amazon Logistik GmbH v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH, Case C-521/11. EU:C:2013:515.

CJEU, 5 March 2015, Copydan Båndkopi v Nokia Danmark A/S, Case C-463/12. EU:C:2015:144.

[495] Report on the responses to the Public Consultation on the Review of the EU Copyright Rules. prepared by the Directorate General for Internal Market and Services of the European Commission, July 2014, pp. 72, 73.

the confrontation even more intense. Nowadays, the copyright content business model has shifted to "access based model." The end users do not possess any copyrighted works but get access to the work via the platform provided by Internet Service Providers. Any private use in that platform could be directly licensed by the agreement between Internet Service Providers and Copyright holders. Although this kind of new business model could not be guaranteed as the future development direction of copyright industry in cyberspace, the point is that since private use could be directly licensed by copyright holder, fair compensation has no merit. Moreover, if the private use could be directly licensed by right holders, the fair compensation or private use levy paid to right holders could be unjustified, because the right holders have been remunerated directly by licensing private use.[496]

293. Further more, the fair compensation of the private use implied in the Berne Convention is that the amount of private use is relatively large, and do not conflict with normal exploitation of works, in order to compensate the prejudice to author's interests, the fair compensation is introduced.[497] The intention of the fair compensation stipulated in the EU Information Society Directive is to harmonize the legal frame work of copyright law and bring legal certainty into the EU Internal Market and to guarantee that authors and performers receive an appropriate reward for the use of their work to continue their creation.[498] Therefore, regarding the facts that the private use in the digital environment is enormous and the private use could be directly licensed by right holders which means there exist a market for right holders to "normally" exploit private copy. It is possible that private use conflicts with the normal exploitation of work.[499] Consequently, the private use in the digital environment which could be directly exploited by copyright holders could become incompatible with Three Steps Test of the Berne Convention and the EU Information Society Directive.[500] Moreover, because authors and performer could get "equitable renumeration" via directly licensing private use, the fair compensation system should also be a double tax for users.

The case laws of Court of Justice has reiterated the above reasoning: Fair

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[496] Directive 2001/29/EC. Recital (35): "In cases where right holders have already received payment in some other form, for instance as part of a license fee, no specific or separate payment may be due."

[497] World Intellectual Property Organization. Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). Geneva: World Intellectual Property Organization, 1978. p, 56.

[498] Directive 2001/29/EC. Recital (10).

[499] Ibid. Recital (38) "Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them."

[500] the Berne Convention. Article 9 (2)
Directive 2001/29/EC. Article 5 (5)

compensation paid to right holders should take into consideration that the harm or possible harm of private use to the right holders[501] and the fact that right holder has consent to the private use will relive the fair compensation of private use[502]; if the fair compensation has been paid, it is reimbursable.[503] Just as Mr António Vitorino, former Commissioner for Justice and Home Affairs, recommended in his report: "it would be best for right holders to fully embrace the new direct licensing opportunities in the digital environment." "licensed copies should not trigger the application of levies."[504]

Section II. Private use exception in Chinese legislations

294. The private use exception in Chinese Copyright Law has been criticized too general during the third revision. Envisaging digital transmission of works, this copyright exception has become increasingly susceptible as copyright infringement. Meanwhile, the Chinese traditional value of creation could be an excuse of a very general private use exception, because it is culturally acceptable.

Regarding this controversial issue, what factors have justified the private use exception? What factors have been changed by the technological development which render the private use exception as an infringement? Envisaging the digital transmission of works, how China would adapt its private use exception respecting both traditional value and modern copyright.

It will firstly analyze Chinese legislations and interpretations private use exception (§1) and secondly demonstrate justification of Chinese private use exception (§2).

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[501] CJEU, 21 October 2010, Padawan SL v Sociedad General de Autores y Editores de España (SGAE), Case C-467/08. EU:C:2010:620.

[502] CJEU, 5 March 2015, Copydan Båndkopi v Nokia Danmark A/S, Case C-463/12. EU:C:2015:144.

[503] CJEU, 11 July 2013, Amazon.com International Sales Inc., Amazon the EU Sàrl, Amazon.de GmbH, Amazon.com GmbH, in liquidation, Amazon Logistik GmbH v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH, Case C-521/11. EU:C:2013:515.

[504] Recommendations resulting from the Mediation on Private Copying and Reprography Levis. Prepared by Mr António Vitorino, 2013. pp, 4-7. Available at http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

§1. Chinese legislations and interpretations of the private use exception

295. Private use exception is expressly listed by Chinese Copyright Law. It is similar to the EU information society directive. But the scope of Chinese private use exception is larger than the EU one . Some criteria of the EU could not be found in Chinese Copyright Law.

Consequently, the questions could be asked: what is the private use exception in China? does it comply with international conventions? what the specific rules could be found and what differences and similarities could be observed between China and the EU in this regard?

Firstly, it will demonstrated the private use exception in Chinese legislations envisaging digital transmission of works (I). Secondly, it will demonstrate the interpretation of "personal" "remuneration" by Chinese courts compared with CJEU (II).

I. Legislations of the private use exception

296. The private use exception clause in Chinese Copyright Law is very simple and broad. Consequently, facing the digital transmission of works, some special regulation and Chinese Supreme Court have established some additional rules for the purpose of the protection of copyright holders' interests.

It will first demonstrate the private use exception in Chinese Copyright Law and its development (A); Secondly, it will demonstrate the private use exception facing digital transmission of work (B).

A. Private use exception clause in Chinese Copyright Law

297. The private use exception prescribed in Article 22 Clause 1 has never been revised since the adoption of first Chinese Copyright Law in the year of 1990[505]. It prescribes as "use of another person's published work for purposes of the user's own personal study, research or appreciation."[506] Meanwhile, other clauses concerning copyright exception of news, utilization of works by government and political speeches, were significantly changed by the

[505] Chinese Copyright Law 1990 text. Article 22. Official translation.
[506] Ibid.

first revision of Chinese Copyright Law in the year of 2001.[507]

The reason why private use exception in Chinese Copyright Law remains basically untouched is that private use is considered as an indispensable balance of interest between copyright holders and users.[508]

298. During the third revision of Chinese Copyright Law, the discussion of private use exception was provoked: The wording of the private copy exception in the Article 22 Clause 1 is too general and too wide, the author's right could be undermined by this private copy exception particularly in digital age. Meanwhile internet users need private copy exception to enjoy the benefits of rapid circulation of knowledge and information enabled by the technology of internet.[509]

The final draft of Chinese Copyright Law during third revision submitted by Chinese Copyright Bureau to Chinese State Council proposed a more restricted private use exception.[510] It proposed that the Article 22 Clause 1 should be revised as "use of the part of another person's published work for purposes of the user's own personal study, research."[511]

It could be observed that firstly, the revised private use exception excludes the use for the purpose of "personal appreciation of works." In other words, private use is allowed only for the purpose of "personal study and research." Secondly, the principle of the proportionality is introduced to private use exception, only the use of "part of the work" is allowed according to the revised Article 22 of Chinese Copyright Law. That is to say, the reproduction of a entire work could no longer be deemed as private use exception.

299. In comparison with the US legislations, similar to the US "fair use" doctrine, the final

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[507] Ibid. Article 22, Clause 3 was revised as "unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical and radio and television program, for the purpose of reporting current events;"
"Documentary of News" was deleted.
Article 22 Clause 4 was revised as "publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc. on current political, economic or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted; "
"except where the author declares that such publishing or rebroadcasting is not permitted" was added.
Article 22 Clause 7 was revised as "use of a published work by a State organ to a justifiable extent for the purpose of fulfilling its official duties;"
"to a justifiable extent" was added.

[508] Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001. Article 22 (1).

[509] Feng Xiaoqing. supra note 57. p, 160.

[510] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 43.

[511] Ibid.

draft of Chinese Copyright Law third revision introduce a principle to examine the purpose of the use. Precisely, the private use for the purpose of "personal study and research" has the possibility to be qualified as copyright exception. It is similar to one of the four factors of fair use listed in Section 107 the US Copyright Law, namely: the purpose and character of the use.[512]

In comparison with the EU, Article 5 of the Information Society Directive requires that the purpose of the private use shall "neither directly nor indirectly commercial." This requirement could not be found in neither current Chinese Copyright Law nor the final draft proposed by Chinese Copyright Bureau. Maybe, the third revision could consider to introduce the non-commercial purpose into the private use exception as a safe valve for the protection of copyright holders' interests.

The final draft proposed by Chinese Copyright Bureau also introduce certain proportionality into the private use exception by prescribing that only "part" of the work would be allowed. It is similar to the US "fair use" in Section 107 the US Copyright Law: one of the principle is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[513]

300. The wording of private use exception in existing Chinese Copyright Law is very broad. However, envisaging the challenge in digital era, regarding that on the one hand, too broad private copy could undermine the author's right, on the other hand, private use exception is also indispensable for users' consummation of works. Therefore, the third revision of Chinese Copyright Law is planning to constrain the private use exception in order to balance the interests between copyright holders and users according to the final draft proposed by Chinese Copyright Bureau.[514]

However, in regard of the two principles introduced by the final draft proposed by Chinese Copyright Bureau, namely, the "personal study and research" and "the use of the part

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[512] Copyright Law of the United States, Section 107.
…In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.
…

[513] Copyright Law of the United States, Section 107.

[514] Final Draft of Copyright Law Revision of People's Republic of China, Article 43.

of the work", it is necessary for Chinese legislative bodies to elaborate what is the scope of "personal", what utilization could be qualified as "study and research" and what exactly the proportion of work could be used.[515] All the definitions of these key terms could not be found neither in the current Chinese Copyright Law nor in the final draft. Consequently, it is the Chinese courts who have to interpret and elaborate the key terms of private use exception in current Chinese Copyright Law and maybe will interpret the new principles introduced by the revision.

B. Private use exception facing digital transmission of work

301. Regarding the ambiguous wording of the private use exception in Article 22 Clause 1 of Chinese Copyright Law, the Chinese courts have to interpret the private use exception for the purpose of protecting author's right from being undermined by the broad private use exception, particularly in the digital environment. Because according the opinion of Chinese scholar Cui GuoBing: "any non-commercial utilization of works has the possibility to be deemed as 'for the purposes of the user's own personal study, research or appreciation'."[516]

302. However, the interpretations which strictly constrain the private use exception probably does not comply with the intention of legislation. Because when the first copyright law and the later revisions were elaborated, the legislators have been fully aware of the fact that the wording of private use exception clause is very broad. But they have not yet revised this clause. Therefore, "maybe the legislators considered that the 'personal' use of works is generally accepted according to the Chinese traditional social protocol, they deliberately used the ambiguous wording in order to widen the private copy exception. After all, the courts should only interpret the private copy clause based on the law made by legislators rather than create their own law."[517]

303. In the Chinese case, *Yin Zhiqiang v Jingling Library*,[518] Jingling Library bought a journal database made by Qinghua Tongfang corporation and provided readers services of access on an internal network of the library. The readers could also print the accessible

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[515] Xue, Hong. "A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, April 17, 2012. https://papers.ssrn.com/abstract=2041736. p, 351.

[516] 著作权法，崔国斌，p 582

Cui GuoBing, Copyright Law: Principles and Cases, Beijing University Publication, 2014. p, 582.

[517] Ibid.

[518] Ibid. p, 583.

殷志强 v 金陵图书馆，江苏省高院（2005）苏民三终字第0096号

Ying Zhiqiang v JingLing Library, JangSu Province High Court, 2005.

journals by using the printers owned by the library with the help of library staffs after paying a sum of fees. Yin Zhiqiang is the author and right holder of a series of journals which are accessible and printable on the network of Jingling Library. Yin Zhiqiang brought suit against the Jingling Library for the copyright infringement of reproduction right and the right of remuneration.

The Chinese district court ruled that the reproductions of journals in the library could be deemed as "for purposes of the user's own personal study, research or appreciation", in other words, the reproductions of journals could be exempted by private use exception under Article 22 of Chinese Copyright Law.

The court reasoned that firstly, although library provided the printers and the services of the staffs, the reproductions of journals were initiated and accomplished by individual readers rather than the library; secondly, the charge of a sum of printing fees could not prove that the reproductions of journals were for the commercial purpose, because the Jingling library is a public service institution and the printing fees were for the compensation of maintenance of printers and the consummation of papers rather than making profits.

The district court refused the claim of Yin Zhiqiang by interpreting the private use exception. The district court broadened the term "personal" by reasoning that the reproduction enabled by library could still be deemed "personal." It also introduced another criteria of private use exception that the reproduction should not be for the purpose of commercial profits.

304. Notably, it seems that the Chinese private use clause was not interpreted by Chinese court in a prudent way. But a similar and controversial case could also be found in the US: *Williams & Wilkins Company v United States (1973)*.[519] The photocopying of medical journal by nonprofit institutions were considered as fair use for the balance of interests between copyright holders and public welfare.[520]

305. However, in the digital environment, the private use exception could be interpreted strictly. The copyright holders often brings the case before the court alleging the infringement of public communication right rather than the reproduction right, claiming that the reproduction and dissemination of works on internet are not authorized by the copyright

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[519] Williams & Wilkins Co. v. United States, 487 F.2d 1345 (1973).

[520] 殷志强 v 金陵图书馆，江苏省高院（2005）苏民三终字第0096号
Ying Zhiqiang v JingLing Library, JangSu Province High Court, 2005.

holders. In the case *Zhou Daxin v Chaoxin technology corporation*[521], the copyright holder Zhou Daxin claimed that the Chaoxin digital library making the work of Zhou Daxin downloadable for subscribers of Chaoxin digital library was the infringement of public communication right. The claim is supported by the Beijing Handian district court.

By comparing both cases, it is interesting to note that in real space, the library makes the work available for users to copy enabled by a printing machine offered by the library, it is qualified as "private use exception"; meanwhile, in the digital environment, the library makes the work available to download is a violation of public communication right.

306. In a hypothetic scenario, if Zhou Daxin has authorized the Chaoxin digital library to make the work available on internet only for online reading, but not for downloading, the screen shot of Zhou Daxin's work by individual users and the later utilization of this private copy, such as sharing within a small limited group of people, for the purpose of education, or for the purpose of criticizing and parody, could or could not be qualified as private use exception under Chinese law? This question is not clear based on the current legislations and case laws.

In the digital environment, since the copyright holders have changed how the works could be exploited, the copyright exceptions could not hinder such exploitation. However, in another perspective, since the creators have changed how the works are created, maybe copyright exceptions could consider how to leave some latitude for the creativity which derives from existing works. In a word, the third revision of Chinese Copyright Law has a lot of interests at stake in regard of the private use exception.

II. Interpretation of the notions of the "personal" and the "remuneration"

307. Similar to the EU Information Directive and the CJEU cases, Chinese courts also have interpreted the terms of "personal" and "remuneration" according to the rules established by copyright legislations. Did Chinese courts interpret the terms similar as CJEU? did the interpretations comply with international obligations?

It will be demonstrated: the interpretation of "personal" (A.) and the interpretation of

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[521] 周大新v. 北京世纪超星信息技术发展有限责任公司等。北京海淀法院（2008）海民初字第15898号。Zhou Daxin v. Pekin Centurial Information Technology Development Ltd, Chinese Pekin Haidian District Court, 2008.

"remuneration" (B.)

A. Interpretation of the notion of the "personal"

308. In the Tunis Model Law on Copyright for developing countries[522], Section 7, (i), (a) prescribes the private use exception as "for the user's own personal and private use."[523] The commentary of Tunis Model Law explains that the expression "personal and private use" could be interpreted with varying degrees of restrictiveness, but as a rule this concept is the reverse of collective use and presupposes that no profit making purpose is pursued. This minimum requirement of the terms of "personal" and "private" is also accorded by the Guide to the Berne Convention.[524]

In the EU Information Society Directive, it prescribes the notion of "personal" and "private" as "by a natural person for private use and for ends that are neither directly nor indirectly commercial."[525] The wording of the EU Information Society Directive is more precise and strict than the Chinese one. Three criteria of "personal" and "private" could be identified: first one is "natural person" which is contrary to "legal person", second one is "private use" which is contrary to "collective use", third one is "neither directly nor indirectly commercial."

309. Pursuant to the obligations of international legislations, regarding the existing Chinese judicial cases demonstrated above[526], two minimum requirements implied in the term of "personal" in Article 22 Chinese Copyright Law: "for purposes of the user's own personal study, research or appreciation."[527]

Firstly, the notion of "personal" means that the use of works should not be commercial. The word "personal" is the antonym of "commercial" in this context. Secondly, "personal" means that the use of works should be limited to private life not in public. In the

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[522] UNESCO & WIPO Tunis Model Law on Copyright for developing countries (1976)

[523] Ibid. Section 7, (i), (a): "Notwithstanding Section 4, the following uses of a protected work, either in the original language or in translation, are permissible without the author's consent: (i)in the case of any work that has been lawfully published: (a) the reproduction, translation, adaptation arrangement or other transformation of such work exclusive for the user's own personal and private use."

[524] See also, World Intellectual Property Organization. Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). Geneva: World Intellectual Property Organization, 1978. p, 56. para, 9.10

[525] Directive 2001/29/EC Article 5 (2) (b).

[526] See supra text, Section I. Private use exception in the Berne Convention, the US and the EU §1. Private use exception in the Berne Convention. and Section II. Chinese private use exception §1. Chinese legislations and interpretations private use exception.

[527] Chinese Copyright Law Article 22. Official translation.

context, the "personal" is the antonym of "public".

However, how to define whether a use of works is "commercial" is not clear and the scope of "private" is difficult to be defined, particularly in the digital environment.

310. A concrete Chinese example could be presented: A group of users translated the foreign film into Chinese only for the purpose of language studying, it could fall into the "personal use." But later they made the translated subtitles independently available on the internet among a small group of foreign language learners, it was not clear that it could still be qualified as "personal." Then, the subtitles were downloadable for all the internet users on the website created by the group of users, they declared that the subtitles are only for the purpose of langue studying and after downloading, they should be deleted within 24 hours. In this case, it is absolutely an infringement of copyright.

Furthermore: user sings a song while showering is absolutely private use of work. Singing the song to his family on his birth day party or even singing that song to his friends or colleagues in a bar could also be deemed as private use under Chinese Law. If the user records the song and makes it available to the public on the internet, it is an infringement of copyright under Chinese Law. Whereas, if he uploaded the song to the internet but only available for himself or available for certain group of people, like families, friends or colleagues, it is not clear that it is a copyright infringement or a copyright exception under Chinese Copyright Law. To what extend the social group is too big to be qualified as "personal" or "private" is not clear in digital era.

Although the definition of "personal" is not clear in the digital environment in regard of Chinese private use exception clause, the minimum requirement is that the Chinese private use exception clause should be interpreted to comply with the Three Step Test. The implied criteria of "personal" of Chinese private use exception, namely, non commercial, non public should be interpreted in a restricted way.

B. Interpretation of the notion of the "remuneration"

311. Article 22 of Chinese Copyright Law stipulates that "in the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner." It expressly exempts the private use exception from the obligation to pay "remuneration" to copyright holders.

However, in the Berne Convention, the Three Step Test requires member state that the

national copyright exception could not "unreasonably prejudice the legitimate interests of the author."

According to the Guide to the Berne Convention, unreasonable prejudice means that "in cases where there would be serious loss of profit for the copyright owner, the law should provide him with some compensation"[528]. It also observes that "Most countries allow a few photocopies to be made without payment especially for personal or scientific use, but expression of this sort leave a lot of latitude to legislators and courts."[529]

Therefore, if the private use is massif or it jeopardizes the interests of copyright holders significantly, the compensation is indispensable in order to fulfill the requirement of not "unreasonably" prejudicing the legitimate interests of the author. Does Article 22 which stipulates that private use could be made without the payment to copyright holders unreasonably prejudice the legitimate interest of the author?

312. In the EU Information Society Directive, the fair compensation is obligatory.[530] But according to the Directive[531] and the *CJEU Padawan case (2010)*[532], "fair compensation" is associated with the exception of copyright in certain case has caused harm or possible harm to the copyright holders, and if copyright holders have already received payment in some other form, the level of fair compensation should take full account of this circumstances. In other words, "fair compensation" is to compensate the damage caused by the reproduction of work allowed by private use exception without copyright holder's permission. Meanwhile, if copyright holder has received remuneration and permitted the private use, or the damage caused by private use is minimal, no fair compensation should be paid. More precisely, CJEU reasoned in *Padawan case (2010)*: "it is the person who has caused harm to the holders of the exclusive reproduction right is the person who, for his private use, reproduces a protected work without seeking prior authorization from the right holder. Therefore, in principle it is for that person to make good the harm related to that copying by financing the compensation which will be paid to the right holder."[533]

Comparing the EU Information Society Directive with Chinese Article 22, Chinese Article 22 depicts the private use exception from the user's point of view, the EU Information

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[528] World Intellectual Property Organization. Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). Geneva: World Intellectual Property Organization, 1978. p, 56. para, 9.8
[529] Ibid. p, 56. para, 9.9
[530] Directive 2001/29/EC Article 5, 2. (b)
[531] Ibid. Recital (35)(38)
[532] CJEU, 21 October 2010, Padawan SL v Sociedad General de Autores y Editores de España (SGAE), Case C-467/08. EU:C:2010:620.
[533] Ibid. Paragraphs 40, 45.

Society Directive depicts the private use exception from the copyright point of view. the EU Directive is saying that copyright holders should receive the fair compensation because of the damages cause by private use exception. While Chinese Article 22 is saying that users could use the work for personal purpose without the obligation to get the license from copyright holder, consequently, license fee or "remuneration" could not be paid to copyright holders.

313. But the EU Information Society Directive also guarantees the user's interest by prescribing that the fair compensation should be in accordance with the actual damage, the remuneration already received by copyright holders, the application of technological protection measures, etc. In comparison, Article 22 of Chinese Copyright Law does not mention that if the damage has caused by private use exception, whether copyright holder should have the right to receive the fair compensation.

Nevertheless, Chinese Civil Law stipulates that if a conflict between international rules and domestic law occurs, the former should prevail.[534] Under this rule, it is not possible to interpret the term "without payment of remuneration to the copyright owner" in Article 22 of Chinese Copyright Law in a way to prevent copyright holder from receiving the fair compensation if the damage has been caused by private use exception, in order to fulfill one of the Three Step Test criteria: "does not unreasonably prejudice the legitimate interests of the author."

314. In theory, the interpretation of private use exception supports the opinion that the copyright holders should receive the fair compensation, but in practice, there does not exist private copy levy system or other system to guarantee the copyright holder to receive the fair compensation. And the compulsory license rules prescribed in Chinese Copyright Law does not mention private use exception neither.[535]

However, the reason why Chinese Copyright Law does not expressly provide the fair compensation for private use is that in Chinese tradition, the private use of work is regarded as an essential way of how the work could be passed down generation by generation and how the existing work could stimulate the creation of new works. In other words, the private use

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[534] General Principles of the Civil Law, Chapter 8 Article 142 "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations."

[535] Chinese Copyright Law, Article 23, Compulsory License for the utilization of work "for the purpose of compiling and publishing textbooks for the nine-year compulsory education and for national education planning."

Article 33, Compulsory License for the reprinting and excerpting of news and periodical articles.

Article 40, Compulsory License for sound recordings.

Article 43 Article 44, Compulsory License for radio and television station.

of work is tacitly allowed by Chinese authors. As for foreign copyright holders, it is indeed problematic to enforce their rights of receiving the fair compensation from private use exception, but for the reasons demonstrated before, the interpretation of Article 22 of Chinese Copyright Law does not preclude foreign right holders from receiving the fair compensation.

§2. Justification of Chinese private use exception

315. This justification comes from the US economic analysis of copyright law. It could also apply to China because China took the US practical point of view which fits the concept of socialism in China: the purpose of copyright law is for maximizing social welfare.

It will firstly analyzed the private use exception by economic theory (I). Secondly, it demonstrate that the private use could be justified as exception because of the market failure, meanwhile, the development of technology could change the situation in the future (II).

I. Private use exception analyzed by economic theory

316. The justification of private use exception could be influenced by the ultimate purpose of copyright law. In other words, the purpose of copyright law is for the protection of author's nature rights or the promotion of maximum public welfare.

The purpose of Chinese Copyright Law is significantly influenced by the US Copyright Law. Consequently, the justification of private use exception could apply the US economic analyze.

It will firstly demonstrate the purpose of Chinese Copyright Law in view of the economic theory (A) . Secondly, it will analyze the private use exception by the purpose of Chinese Copyright Law (B).

A. Purpose of copyright analyzed by economic theory

317. In China, regarding the continuously increased individual copying and disseminating ability, copyright holders have been trying to strictly control private use for decades. But in

practice, the private use exception in terms of digital transmission of works is always problematic.

In China, similar to the US, but different from European continent[536], to grant the exclusive rights of works to the author is a means to create the incentives of innovation and creation, the ultimate goal of the US copyright law is not protecting the author's labor invested in the work, but "to promote the progress of science and useful arts."[537]

318. Chinese copyright has been influenced by the US practical point of view, private use exception could be explained as an excuse of the excessively high transaction cost[538]. This theory is originated and developed in the US where economics is in accordance with the philosophy of the US copyright law[539]: In light of the primary purpose of the US copyright law is stimulating the innovation[540] and maximizing the social welfare[541], unreasonably high transaction cost is a good reason why private use remains untouched[542]. This justification could also apply in Chinese Copyright Law.

319. From the economic analyze of copyright law, copyright law is a legal tool to cure one

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[536] Lewinski, Silke von. International Copyright Law and Policy. 1 edition. Oxford; New York: Oxford University Press, 2008. Part 1, 3.21.

[537] Chinese Copyright Law 2010 text, Article 1: "…encouraging the creation and dissemination of works conducive to the building of a socialist society that is advanced ethically and materially, and promoting the progress and flourishing of socialist culture and sciences."
United States Constitution, Article 1, Section 8. The Congress shall have power… to promote the progress of science and useful arts, by securing for the limited times to authors and inventors the exclusive right to their respective writings and discoveries.

[538] A transaction cost is an economic terms. Generally, it means a cost incurred in making an economic exchange. In the context, it means the cost incurred by copyright licensing.

[539] William M. LANDES and RICHARD A. POSNER, An Economic Analysis of Copyright Law. 18 J. Legal Stud. 325 1989. p, 325. "Intellectual property is a natural field for economic analysis of law and copyright is an important form of intellectual property."

[540] United States Constitution, Article 1, Section 8.

[541] Ginsburg, Jane C., and R. Anthony Reese. Copyright: cases and materials. New York, NY, Etats-Unis d'Amérique: Foundation Press, 2013.

[542] Gordon, Wendy J. "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors." Journal of the Copyright Society of the U.S.A. 30 (1983 1982): 253.
p, 276. "prohibitively high transaction costs obtain in a particular area of use, so that copyright owners and potential users find that the costs of locating and bargaining with each other exceed whatever profit they might expect to gain from the transaction. Under such circumstances, no transactions will occur. Therefore, enforcement of market entitlements would not benefit the copyright owner, and would certainly harm the potential copyright user who is denied access, as well as those who might benefit from the use. Given the presence of a complete market failure here, judicial refusal to enforce the owner's right of control may be the only way to allow use of the work."

kind of market failure called "public goods"[543]: "the cost of expression"[544] is much higher than "the cost of reproduction"[545], in order to prevent the "free rider" from discouraging the incentives of producing creative works, copyright law trades off the costs of limiting access to a work agains the benefits of providing incentives to create the work.[546]

Therefore, the private use exception should be guided by the US copyright philosophy. It is impossible to calculate exactly, but hypothetically speaking, if the private use exception do not benefit the society by stimulating creations more than the damage it caused, then the private use exception does not have the reason to exist. Hereinafter, the issue, high transaction cost of private use as an excuse, will be analyzed in the perspective of economics and copyright law.

B. Private use analyzed by the purpose of copyright law

320. In the view of classic economic theory, the market is the efficient tool of the allocation of social resources.[547] The limited social resources will be distributed to the person who offers the highest bid. It means that the resources in the hand of that person could generate the maximum benefits, otherwise the rational and economical person would not offer the highest price for that resource. Consequently, driving by the invisible hand[548], the transactions in the market between individuals will maximize both the individual interests

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[543] William M. LANDES and RICHARD A. POSNER, An Economic Analysis of Copyright Law. 18 J. Legal Stud. 325 1989. p 326, "A distinguishing characteristic of intellectual property is its public goods aspect."

[544] Ibid. p, 327, "since it consists primarily of the author's time and effort plus the cost to the publisher of soliciting and editing the manuscript and setting it in type. Consistent with copyright usage we call the sum of these costs the "cost of expression."

[545] Ibid. p, 327, "The second component of the cost of producing a work increases with the number of copies produced, for it is the cost of printing, binding, and distributing individual copies."

[546] Ibid. p, 326 "For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection."

[547] Smith, Adam. The Wealth of Nations. CreateSpace Independent Publishing Platform, 2015.
See also Wikipedia Classical economics.
The general idea is when two parties freely agree to exchange things of value, because both see a profit in the exchange, total wealth increases.

[548] Ibid, Adam Smith referred the metaphor "invisible hand" to that the markets will regulate themselves by reaching their natural equilibrium.

and the social welfare.[549]

321. The copyright law creates an artificial market of works by granting author an exclusive right to exploit the work he created.[550] Copyright as an intangible property is slightly different from other tangible goods, but the economic theory and market mechanism could also generally apply. The exclusive right of work will be allocated by the invisible hand to maximize the interests of authors and social welfare.[551] The copyright market serves the goal of the US copyright law well and it could also fit the Chinese copyright law: on the one hand, the author will receive the maximum renumeration from his works which creates strong incentives of creation, on the other hand, the one who obtains the right will maximize the benefits by making the work accessible to the widest public.

However, the copyright market does not always function well.[552] In terms of private use of work, the market of private use would not exist if the transaction cost is too high: to license individual private use and collect the license fees could be excessively onerous[553], if copyright holders could not expect the profit of licensing private use even higher than the cost of bargaining and collecting, the market of license of private copy between copyright holders and users would not exist. In other words, the transaction cost of private use license is higher than the benefit copyright holders could expect. There will be no license of private use and the legal status of private use remains unclear.

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[549] Posner, Richard A. Economic Analysis of Law. 8th edition. Aspen Casebook Series. Austin (Tex.) Boston Chicago [etc.]: Wolters Kluwer Law & Business, 2011.
p, 17. A concrete example is given by Posner:
"Suppose A sells a wood carving to B for 100$, both parties have full information, and the transaction has no effect on anyone els. Then the allocation of resources that is brought about by the transaction is said to be Pareto superior transaction is one that makes at least one person better off and no one worse off."
"In the less austere concept of efficiency mainly used in this book called Kaldor- Hicks concept of efficiency, or wealth maximization, if A values the wood carving at 50$ and B at 120$, so that at any price between 50$ and 120$ the transaction creates a total benefit of 70$ (at a price of 100$, for example, Considers himself 50$ better off and Considers himself 20$ off), it is an efficient transaction provided that the harm (if any) done to third parties (minus any benefit to them) does not exceed 70$."

[550] William M. LANDES and RICHARD A. POSNER, An Economic Analysis of Copyright Law. 18 J. Legal Stud. 325 1989. p 326.

[551] Gordon, Wendy J. "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors." Journal of the Copyright Society of the U.S.A. 30 (1983 1982): 253. p,272 "If the work is socially more valuable in the buyer's hands, then the economic model has suggested that he will be able to raise sufficient funds to purchase permission from the owner."

[552] Generally speaking, the market failure could be caused by information asymmetry, non-perfect competition and externalities. Under such circumstances, the allocation of social resources by market is no longer efficient.

[553] Goldstein, Paul. Copyright's Highway: From Gutenberg to the Celestial Jukebox. Revised edition. Stanford, Calif: Stanford Law and Politics, 2003. Chapter 3, the effort to prohibit individual private copy in Williams & Wilkins Co. case is summarize as "Fifty Dollars to Collect Ten"

In such circumstances, on the one hand, the users' need for private use still exist[554], on the other hand, copyright holders would prohibit the private use in order to pursue maximum benefit from the work. For instance, in *Williams & Wilkins Co case*, if private use of the articles of medical magazine is forbidden, the researchers then have to buy the medical magazine which is surely beneficial for *Williams & Wilkins Co*, the publisher.[555] In *Sony Corp. of America v. Universal City Studios, Inc case (1984)*, for the same reason, the revenue of Universal would certainly increase if the private use of TV program is forbidden by court.[556]

II. Private use as copyright exception and market failure

322. According to the economic analyze of the copyright law, private use exception could be justified by the market failure as a compromise to promote the maximum public welfare. It will demonstrate firstly the private use exception justified by market failure (A).

According to the same logic, if the market failure could be cured in the digital environment, how the private use exception would be adapted to the new situation. It will demonstrate secondly the private use exception unjustified by the cured market failure in the digital environment (B).

A. Private use exception justified by market failure

323. The question is how to decide in whose hands the value of private use could be maximized in the circumstance that the market does not exist. The invisible hand does not work well.

If the market functions well, the users and copyright holders would bargain the price of private use license and the market will decide whether in copyright holders' hand or in users' hand the private copy license values most and at what price. But regarding that the market does not exit, it is the copyright law to decide whether the use's right of private use or

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[554] Private copy was regarded as common utilization of works before and it is also the most popular copyright exception in national legislations.
Records of the Intellectual Property Conference of Stockholm 1964, Volume 2, Main Committee 1 Report, pp, 1145,1146. Foot note 1.

[555] Williams & Wilkins Co. v. United States, 487 F.2d 1345 (1973).

[556] Sony Corp. of America. v. Universal City Studios. 464 U.S. 417, 104 (1984).

the copyright holders' strict control of private use would maximize the social welfare.

The interests of users and copyright holders are at stake, the choice of interests have to be made. Therefore, following the philosophy of the US and Chinese copyright law, the question is that to what degree the users' right of private use would jeopardize the copyright holders' incentive of creation and to what degree the private use exception would facilitate the public use of work. Professor Wendy Gordon offered an excellent idea: suppose that the market is perfect, the right of private use will be transferred to the party who values it most. In such case, the both individual interests and the social welfare are maximized.[557]

324. It is impossible to measure exactly how much users will lose and how much copyright holders will gain if private use exception is prohibited or vice versa. But we can suppose a perfect situation that if there exists a private use license market where the transaction cost is zero, what is the maximum price users would offer for the right of private copy and what is the minimum price copyright holders would ask for the license of private use. If the maximum price users would offer is higher than the minimum price copyright holders would demand, it means that the value of private use in users' hand is higher than in the copyright holders' hand. The transfer of the right of private copy to users would maximize the individual interests and social welfare.[558] In such case, following the economic analyze of copyright law[559], since the harm of the interdiction of private use to users is deeper than the harm of private use exception to copyright holders, the private use exception would benefit the social welfare as a whole which the US and Chinese copyright law is aimed at. Consequently, the private use exception should exist. If the maximum price users would offer is lower than the minimum price copyright holders would demand, then the private use exception should not be limited for the same reason.

The minimum price which copyright holders would demand in a perfect market is hard to calculate. But classic economic theory offers some clues to reckon generally: the price

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[557] Gordon, Wendy J. "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors." Journal of the Copyright Society of the U.S.A. 30 (1983 1982): 253. p,272: "If market failure is present, the court should determine if the use is more valuable in the defendant's hands or in the hands of the copyright owner." "One way of accomplishing that goal is to simulate the market inquiry. If, when the "market failure" were cured, the price that the owner would demand is lower than the price that the user would offer, a transfer to the user will increase social value."

[558] William M. LANDES and RICHARD A. POSNER, An Economic Analysis of Copyright Law. 18 J. Legal Stud. 325 1989. p 326, "A distinguishing characteristic of intellectual property is its public goods aspect."

[559] United States Constitution, Article 1, Section 8. The Congress shall have power… to promote the progress of science and useful arts, by securing for the limited times to authors and inventors the exclusive right to their respective writings and discoveries.

is determined by the sum of the cost of the resources.[560] In perfect market, the cost of a copyrighted work is a sum of royalties which copyright holder have paid to the author and the cost of reproduction.[561] In terms of private use, since the cost of reproduction if covered by individual users, the royalties is the only cost. Therefore, the minimum price of each private use which copyright holders would demand is the royalties which have been paid to author minus the profits exploited from other sectors then divide the aggregate amount of private use. That is to say, the minimum license fee of individual private use which copyright holders would demand is minuscule.

The maximum price which users would offer is easier to speculate. If the private use is strictly forbidden, the price of getting a substitution for such private use is the maximum price users would offer. Regarding that the copyright works are often unique, the price of getting substitution is often buying the entire work. For instance, if a researcher should get a license to copy an article in a scientific magazine, the maximum price he would pay for the license is the price of the whole magazine.

325. It is evident that under the circumstances of the current development of technology and copyright industry, the price of buying the entire work is higher than the royalties minus the profits of other sectors and then divide the aggregate amount of private copy.[562] On the condition that the high transaction costs make the license of private copy impossible, although the efficient allocation of the right of private copy is to the hand of users, the exchange would not happen. So if the copyright law strictly prohibits the private copy, the social welfare will suffer the loss of approximately the difference between the maximum price and the minimum price.[563]

In a word, because of the prohibitively high transaction cost, the copyright holders would not license the private use, meanwhile the socially desirable choice is in the favor of users, therefore, the private use should remain as a copyright exception based on the economic theory and the purpose of Chinese copyright law.

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[560] Smith, Adam. The Wealth of Nations. CreateSpace Independent Publishing Platform, 2015.
In Adam Smith's theory, the natural prices of commodities are the sum of the natural rates of wages, profits, and rent that must be paid for inputs into production. See also Wikipedia Price and Classic Economic Theory.

[561] Perfect market in economics mainly has following conditions: perfect market information, perfect competition, non intervention by governments and no externality. In the context, the cost of copyright work in perfect market do not contain any transaction cost or taxation. It purely reflect the labor author invested in the work.

[562] But in cyberspace, since copyright holders' way of exploiting works is changed to "access to work", the difference between two prices could be diminished. This issue will be elaborated after.

[563] Gordon, Wendy J. "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors." Journal of the Copyright Society of the U.S.A. 30 (1983 1982): 253.

B. Private use exception unjustified by the cured market failure in the digital environment

326. However, this economic logic would be unfair to copyright holders when certain factors are changed.

Based on the analysis above, it can not be ignored that every time private use is made, copyright holders are suffering from a loss of potential benefits.[564] Private use could serve as a substitution of copyrighted works for some users. It is becoming increasingly realistic threat to copyright holders when the digital environment enables the individual users to make massive and high quality copies. Moreover, before the invention of wireless communication technology, the private copy was only for personal use or circulated among limited community. However, as the development of communication technology enables users to share the work with increasingly wide range of people, the private use exception should be more and more strictly interpreted.[565] For instance, lending a novel to friends sounds like innocent. But reading this novel via radio without copyright holders consent is not that innocent, even if it is free and among limited social network.

Therefore, regarding the development of copying technology, every individual damage of private use is very small, but the cumulative damage of individual private use could be too significant to undermine the incentive of creation.[566] The dilemma is that on the one hand, the private use exception could benefit the users and the social welfare. On the

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[564] It is an argument from the copyright holders. Particularly, in the US, the music industry complains that the online reproduction and dissemination of private copy hurts the legitimate market. Although some arguments could be questionable, it is true that private copy has negative impact on CD sale.
See:
Rob, Rafael, and Joel Waldfogel. "Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students." Journal of Law and Economics 49, no. 1 (2006): 29–62. Abstract: "We provide new estimates of sales displacement induced by downloading using both OLS and an instrumental variables approach using access to broadband as a source of exogenous variation in downloading. Each album download reduces purchases by about 0.2 in our sample, although possibly much more."
Peitz, Martin, and Patrick Waelbroeck. "The Effect of Internet Piracy on CD Sales: Cross-Section Evidence." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, January 1, 2004. 2.4 Estimating Results: "the implied loss of CD sales due to MP3 downloads is 11% worldwide between 2000 and 2001 and is 12% in the U.S."

[565] the US Copyright Law Revision Senate Report. S. Rep. No. 473, 94TH Cong., 1ST Sess. 1975.
p,60. "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented."

[566]Gordon, Wendy J. "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors." Journal of the Copyright Society of the U.S.A. 30 (1983 1982): 253. p, 278. "The narrow inquiry reveals whether transferring the use to the defendant gives rise to a net social benefit. In order to prevent substantial injury to incentives, however, the court should also inquire into the extent of the losses likely to follow in the market as a whole from a grant of fair use, both from this defendant and from other similarly situated persons"

other hand, the aggregate damages caused by private use could discourage the incentive of creation which in return harms the social welfare.[567] How the Chinese private use exception legislations and jurisprudences would handle this dilemma?

[567] Ibid. p, 277. "Both enforcement and non enforcement have dangers. The danger from enforcement is that desirable transfers may be prevented. The danger from giving fair use is that incentives may be undermined. "

Conclusion of Chapter II

327. In both the Three Step Test of the Berne Convention and the national legislations in the US, the EU and China, the private use is similarly considered as a copyright exception, although it is subjected to different conditions under different copyright legislations.

The rules in the Berne Convention, the US, the EU and China in regard of private use exception are all struggled on the one hand, to prevent the copyright holders' interests from unreasonable prejudice caused by massive, non-proportional private use. On the other hand, to safeguard the necessary latitude for private use which is essential for educational and scientific uses.

The US adopted an open-ended "fair use" to examine the private use case by case while the CJEU adopted the obligatory "fair compensation" and constructed private use levy system to recompense the copyright holders.

328. However, the private use exception has become increasing susceptible in the digital environment for the reason that the internet enables copyright holders to exploit the individual access of works. In other words, the private use could be licensed directly by copyright holders. According to the demonstration above, whether the private use could still be qualified as copyright exception or how to redefine the scope of private use exception would be the essential question in the future. The Chinese future development of copyright legislation concerning the private use exception would focus on this issue.

Both legislations and jurisprudences in the US and the EU similarly confine the scope of private use exception in the digital environment. For the protection of the interests of copyright holders, since copyright holders have the ability to license the private use, it would be better to construct the copyright market to regulate the private use with "invisible hand" rather than try to solve the problem with copyright exceptions. In regard of the interests of users, the private use for the educational and scientific purpose would still have the merit to be copyright exception. It would be crucial for Chinese Copyright Law to balance the interests between public welfare and copyright holders in terms of the private use.

In regard of the US and the EU experiences demonstrated, Chinese Copyright Law in future would establish some criteria to constrain the broad private use exception in order to guarantee the copyright holders' remunerations in the digital environment and protect the development of the access based legitimate copyright business from the abuse of the private

use exception.

Conclusion of Title II

329. In the field of the author's rights and copyright exceptions, the public communication right and private use exception have been the most controversial issues particularly in the digital environment.

Article 8 of the WCT has prescribed a flexible formula for member state to protect copyright holders interests challenged by interactive transmission of works. The Berne Convention also provided "Three Step Test" for the copyright exceptions of member state.

In the perspective of international conventions, Chinese public communication right and private use exceptions could be regarded as principally complying with the WCT. Copyright holders have the right to control digital transmission of works. In order to comply with the Three Step Test of the Berne Convention, the phrase "without payment of remuneration" in Article 22 of Chinese Copyright Law should be changed by the third revision.

In regard of the interpretation of the public communication right and private use exception, the US and the EU have taken different approaches. Comparing them with Chinese one, Chinese public communication right should be interpreted more broadly to encompass different activities in the digital environment and Chinese private use exception should be interpreted more prudently to safeguard the copyright holder's fair compensation facing the massive private use in the digital environment.

330. This title has analyzed one specific author's right and one specific copyright exception which are the most pertinent to the digital transmission of works. It has examined to what degree copyright holders have right to control the works and to what degree users have the right to use the works in the digital environment.

Therefore, the next problematic could be how to enforce the rights copyright holders own and how to safeguard the latitude users enjoy in the digital environment.

Conclusion of Part I

331. The enactment of the first Chinese Copyright Law and the later revisions are all motivated by the ratification and the implementation of the Berne Convention. The author's rights and exceptions were elaborated and revised mainly for the purpose of complying with the Berne Convention.

Therefore, most of the rules concerning the author's rights and exceptions in Chinese Copyright Law are as general as the Berne Convention. Without specific rules, the interpretations and the enforcement are problematic. It is necessary for the ongoing revision of Chinese Copyright Law to specify the author's rights and exceptions.

332. Precisely, in the digital environment, in terms of the Chinese public communication right, regardless that the name is different, it covers all the interactive on-demand transmission of works and give copyright holders the right to control the new forms of transmission in the digital environment. Notably, the wordings of the Chinese public communication right is very similar to the EU Information Directive. The interpretation of Chinese Beijing Superior Court excluded the provision of the hyperlink outside the scope of "the act of communication". For protecting the copyright holders interests, the ongoing revision of Chinese Copyright Law should clarify that "the act of communication" shall cover all the interactive transmission and retransmission of the works in digital environment.

In terms of the private use exception, the one under Chinese Copyright Law could be too broad in the digital environment. Regarding the US and the EU legislations of the private use exception, it would be necessary for the ongoing revision of Chinese Copyright Law to add two additional conditions to the private use exception. One condition is that the private use exception shall not prevent the copyright holders from receiving the equitable remuneration. Another is that the private use exception shall not prohibit the copyright holders from exploiting the copyright market in the digital environment.

333. From the demonstration of the author's rights and exceptions under Chinese Copyright Law both generally and specifically, it could be observed that the Chinese Copyright Law is during a changing period from merely complying the Berne Convention in legislation to facing the challenges of the domestic development and the digital environment. It would be necessary to elaborate the specific rules of public communication right and

private use exception in order to protect the copyright holders interests. It will encourage the copyright holders make the copyrighted contents available in digital environment and exploit the online copyright market.

After the demonstration of Chinese substantial rights and exceptions envisaging the digital environment, it would be logic to demonstrate the how they could be enforced accordingly. The next part will demonstrate the Chinese copyright enforcement both in legislations and in practices.

Part II Chinese Copyright Enforcement in the Digital Environment

334. Chinese copyright enforcement in the digital environment has alway been a salient problematic regardless of a high standard of substantial rights established in Chinese Copyright Law for the purpose of complying with international obligations.

It would like to ask: How the copyright holders' rights could be strictly enforced in the digital environment? What the obstacles are the Chinese copyright enforcement in the digital environment envisaging? How the Chinese copyright enforcement in the digital environment will evolve in the future?

Under Chinese legislations of the copyright enforcement, copyright holders dispose two critical measures to protect their rights in the digital environment: the legal protection of the circumvention of technological measures and the "Notice and Take Down". Both enforcement measures in Chinese copyright legislations are influenced by the WCT, US and EU legislations. What are the real differences and similarities?

In Chinese practices of the copyright enforcement, what copyright enforcement actions Chinese copyright authorities have taken to protect the copyright holders' interests in the digital environment? How the Chinese legal offering of contents by online audiovisual media have developed thanks to the enforcement actions? And in return, how Chinese online audiovisual media could facilitate the copyright enforcement in the future? The creativities in digital environment have also been significantly increased thanks to the development of the technology of the communication. How to protect the different creativities in the digital environment? Precisely, how to protect the copyright holders' rights while leave some latitude to facilitate the new ways of creations based on the existing works in digital environment.

Therefore, it will firstly demonstrate the copyright enforcement legislations in a

comparative law perspective, precisely comparing Chinese the legal protection of the circumvention of technological measures and the "Notice and Take Down" with the international, the US and the EU rules (Title I). Secondly, it will demonstrate the copyright enforcement practices in a domestic perspective, precisely, the existing copyright enforcement actions, the legal offering of contents and the future possibilities (Title II).

Title I. Chinese Copyright Enforcement Legislations in the Digital Environment compared with the WCT, the US and the EU legislations

335. Chinese copyright legislations have given copyright holders two essential means to enforce their copyright envisaging the massive pirating materials in the digital environment: the legal protection of the circumvention of technological measures and the Notice and Take Down.

The legal protection of technological measures have in fact enabled copyright holders not only to control the reproduction of copyrighted contents but also to control the access. Meanwhile, the rules of Notice and Take Down motivate the eligible internet service providers to remove the infringing materials after receiving the notice from copyright holders in order to profit the exemption of secondary liability. It has been prescribed as an international obligation in the WCT.

Meanwhile, although the Notice and Take Down rule has not been prescribed in international conventions, the discussions at international level have inspired China to elaborate such rules in its copyright legislations. Therefore, it is necessary to examine primarily whether the international obligations have been respected in national legislations. Although the Notice and Take Down rule is not an international obligation, it is also interesting to compare the Chinese rules with the international discussions.

Both rules could be found in the copyright legislations of the US and the EU. However, the specific stipulations have both differences and similarities among the US, the EU and China. Therefore, it will firstly demonstrate the legislations and the jurisprudences in the US and the EU and secondly compare them with the Chinese legislations and jurisprudences to concretely demonstrate how the two rules function in China and how they would evolve in the future.

It will demonstrate the two kinds of copyright enforcement measures respectively. First chapter will demonstrate the legal protection against the circumvention of technological

measures (Chapter I). Second chapter will demonstrate the Notice and Take Down rules (Chapter II).

Chapter I. Legal Protection against the Circumvention of the Technological Measures in Chinese Copyright Legislation compared with the WCT, the US and the EU Legislations

336. Legal protection against circumvention of technological measures provide a weapon for copyright holders to protect their rights in the digital environment. This rule has been harmonized at international level by the WCT. It is necessary to examine the Chinese legislations and jurisprudences according to the international obligations prescribes under the WCT. If there exist some international obligations which China has not fulfilled, it is obligatory to change Chinese rules during the third revision of Chinese Copyright Law.

The fundamental rules prescribed in the US Copyright Law and the EU Directives and the US, the EU cases would be good references for China. Because in the US, the rules are specific and have been interpreted by the US courts. The demonstration of the US legislations and jurisprudences could provide the experiences of how to establish some specific rules of the legal protection against circumvention of technological measures in the third revision of Chinese Copyright Law. In the EU, the rules are often principal and general for the purpose of bridging the gaps among the EU Member States. Therefore, if Chinese legislators are hesitating to establish an unified national rule because of the different development status of different region, the EU rules could provide some good examples.

Accordingly, it will firstly demonstrate the basic rules of the legal protection against circumvention of technological measures in the WCT, in the US and the EU (Section I). Secondly, it will demonstrate the Chinese rule by comparing with the WCT, the US and the EU rules (Section II).

Section I. Legal protection against the Circumvention of the Technological Measures in the WCT, the US and the EU Legislations

337. The rules of the legal protection against circumvention of technological measures are harmonized by the WCT.

Because of the large gaps among national legislations, only basic principles are prescribed under Article 11 of the WCT as international obligations. Some additional requirements could also be found in the official interpretations of Article 11 of the WCT. It is necessary to examine what are the international obligations under Article 11 of the WCT.

In the US Copyright Law, these rules are prescribed in detail. It will analyzed the rules by demonstrate the legislative interpretations and the judicial cases and then compare the US rules with the requirements under the WCT.

In the EU, for the purpose of harmonizing the national legislations of the Member States, several principles are established. CJEU also established new principles by interpreting the EU Information Society Directive. It is interesting to compared the EU Information Society Directive and jurisprudences with the US. Certain similarities and differences could be observed. It is also interesting to examine them according to the international obligations under the WCT.

It will demonstrate the fundamental aspects of the legal protection against circumvention of technological measures under the WCT, the US Copyright Law and the EU Information Society Directive. The objective is to compare the rules among the WCT and the US, the EU legislations in order to extract the fundamental essential principles of the rules and lay the foundation for the demonstration and the comparison of Chinese rules.

This section will first demonstrate the legal protection against circumvention of technological measures in the WCT (§1). Secondly, it will demonstrate the legal protection against circumvention of technological measures in the US and the EU (§2).

§1. Legal protection against circumvention of technological measures in the WCT

338. Article 11 of the WCT laid the foundation for the national laws of the member states in regard of the legal protection against circumvention of technological measures.

The questions could be asked: Why at international level the rules are needed? How the compromises are made among the member states regarding the large gaps among national laws? What are the international obligations national law should comply with? How to interpret the essential terms prescribed in Article 11 of the WCT?

Firstly, the notion of legal protection against circumvention of technological measures in the WCT will be analyzed (I). Secondly, the interpretations of the terms of legal protection against circumvention of technological measures will be analyzed (II).

I. Notion of legal protection against circumvention of technological measures in the WCT

339. The circumvention of technological measures is firstly prohibited at international level by Article 11 of the WCT.

Why the legal protection against circumvention of technological measures is considered as indispensable by copyright holders? How the notions in the WCT in this regard are elaborated by national delegation facing the gaps of divers development status and divers national laws?

It will demonstrate the advent of the notion in the WCT (A) and the evolution of the notion in the WCT (B).

A. Advent of the notion in the WCT

340. the WCT introduced the legal protection against circumvention of technological measures as an international obligation.

Because of the development of technology, the copyright infringements in the digital environment could be easily conducted by the users. It is necessary for copyright holders to depend on technological measures to protect the rights themselves, as the famous expression

presented: “the answer to the machine is in the machine.”[568]

However, the technological measures adopted by copyright holders could also be undermined by other technologies. It is necessary to provide technological measures adequate legal protection for the purpose of facilitating the copyright holders’ control of works in the digital environment.[569]

If copyright holders do not feel safe to make their works available in the digital environment, the public would not benefit of getting access to varieties of works in the digital environment. That is to say, copyright holders’ control access of works facilitated by technological measures could in return facilitate the public access to works.[570]

341. But the adoption of technological measures could also have the possibility to jeopardize the legitimate interests of users. This problematic was identified at the beginning of the discussions of WIPO.[571] The users’ interests are also at stake. The rules need to be elaborated to balance the interests of both parties at both international level and national level.

The diplomatic conferences of the WCT have discussed and adopted the legal protection against circumvention of technological measures.[572]

B. Evolution of the notion in the WCT

342. In the WCT, the notion of the legal protection against circumvention of technological measures has experienced three phases.

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[568] Document BCP/CE/IV/2.
Charles Clark, “The Answer to the Machine is in the Machine”, Kluwer academic publishers, 1995.

[569] Ficsor, Mihály. The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation. 1 edition. Oxford; New York: Oxford University Press, 2002. para, 6.42.

[570] WCT-WPPT/IMP/3, December 3, 1999. In the introduction, it posed a question that: “how can works be protected in a world where: (i) duplication is easy and inexpensive, (ii) every copy made (whether from the original or another copy) is perfect, and (iii) distribution to users around the world can be accomplished virtually cost-free and immediately over the Internet?”

[571] Document CE/MPC/II/3 P 12-13.

[572] WCT-WPPT/IMP/3, December 3, 1999, p, 2: “Developments in technology often prove to be a double-edged sword to creators and content owners. On the one hand, they provide more sophisticated tools for the creation and legitimate dissemination of works. On the other hand, these same technologies often facilitate unauthorized reproduction and distribution of works in violation of content owners’ rights. This dilemma is not new; it began with the introduction of the printing press. In recent years, however, certain advances in technology have added a dramatic new dimension to this dilemma.”

The Committee of Expertise[573] prepared a Basic Proposal[574] for the discussion of Diplomatic Conference in terms of the legal protection against circumvention of technological measures: "Obligations concerning Technological Measures: (1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the right holder or the law. (2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph(1). (3) As used in this Article, 'protection-defeating device' means any device, product or component in corporate into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty."[575]

The notes of the Basic Proposal pointed out that in terms of the paragraph (1), the most important condition is that the person performing the act knows or has reasonable grounds to know that the device or service will be used for or in the course of the unauthorized exercise of any of the rights provided for under the proposed Treaty. "This knowledge requirement therefore focuses on the purpose for which the device or service will be used."[576] In terms of the paragraph (3), it reiterated that "the definition of a 'protection-defeating device', it describes that characteristics of devices falling within the scope of the obligations under paragraph (1). To achieve the necessary coverage, the phrase 'primary purpose or primary effect of which is to circumvent' has been used rather than 'specifically designed or adapted to circumvent'."[577]

343. During the Diplomatic Conference, the delegations of Ghana[578], South Africa[579] and Senegal[580] held the opinion that because of the difficulties with the wording of Article 13 in

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[573] the Committees of Experts on a Possible Protocol to the Berne Convention and on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms

[574] Basic Proposal for the Substantive Provision of the Treaty on Certain Questions concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference. WIPO/CRNR/DC/4.

[575] Ibid. Article 13.

Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, World Intellectual Property Organization, 1996. p, 217.

[576] Ibid. Note of Article 13.

[577] Ibid.

[578] Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. WIPO. Geneva 1996. Volume 2. Summary Minutes of Main Committee I, p, 710, para 516.

[579] Ibid. p, 710, para 519.

[580] Ibid. p, 711, para 522.

Basic Proposal.[581]

It would be troublesome for developing countries to implement such provisions and consequently, there would be a risk that such provision would not be adopted. But as the US delegation reiterated that "those provisions were critical if the internet were to develop into a fully mature and truly global market place for information and entertainment products for consumers in countries around the world."[582]

To reconcile the conflict of interests among delegations, the EU delegation underlined that "when seeking the right balance in those provisions, the elements of primary purpose and primary effect needed to be carefully assessed, and the provisions should possibly be simplified, without undermining their efficiency."[583]

344. The proposition of the delegation of South Africa was accepted as a compromise. It laid the base of the later adopted Article 11 of the WCT[584]. Three fundamental elements were distinguished: "first, they should be effective technological measures; second, they should be used by right holders in connection with the exercise of their rights under the Treaties; and third, they should restrict acts which were not authorized by the right holders or not permitted by law."[585]

Finally, the adopted Article 11 of the WCT stipulates: "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their

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[581] Basic Proposal for the Substantive Provision of the Treaty on Certain Questions concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference. WIPO/CRNR/DC/4. Article 13.

[582] Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. WIPO. Geneva 1996. Volume 2. Summary Minutes of Main Committee I, p, 712, para 525.

[583] Ibid. p, 713, para 529.

[584] Ficsor, Mihály. The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation. 1 edition. Oxford; New York: Oxford University Press, 2002. para, 6.73.

[585] Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. WIPO. Geneva 1996. Volume 2. Summary Minutes of Main Committee I, p, 710, para 519. "Mr. Visser (South Africa) recalled that his country's problems with Article 13 and 22 had been raised on a number of occasions in the Committees of Experts and other meetings. He associated himself with the remarks made by the Delegation of Ghana, and added that, because of the difficulties with the current wording of Articles 13 and 22, there was a danger that no provision could be adopted relating to technological measures, and he strongly believed that those Articles addressed a real problem. He said that, for that reason, he would propose in writing that the obligation should simply be that Contracting parties must provide adequate legal protection and effective remedies against the circumvention of certain technological measures, which should have three characteristics; first, they should be effective technological measures; second, they should be used by right holders in connection with the exercise of their rights under the Treaties; and third, they should restrict acts which were not authorized by the right holders or not permitted by law."

works, which are not authorized by the authors concerned or permitted by law."[586]

Regarding the evolution of the notion of legal protection against circumvention of technological measures in the WCT, the manufacture, distribution of devices and the provision of services were considered as illegal acts in the preparative works of the WCT. Moreover, the condition and the definition were precisely elaborated. However, in order to adopt an acceptable rule in this regard for developing countries to implement in the national laws, the current Article 11 of the WCT is the simplified and compromised version.

II. Interpretations of the terms of legal protection against circumvention of technological measures

345. By reading the text of Article 11 of the WCT, two essential terms need the further interpretations: "effective technological measures" and "adequate legal protection and effective legal remedies."

What is the definition of "effective"? Why the technological measures should be "effective" in order to be protected within the WCT? What is the frontier of the "legal protection" and "legal remedies"; in other words, which activities should be prohibited and which of them should be deem as the exceptions within the meaning of Article 11 of the WCT?

It will demonstrate the interpretation of effective technological measures (A) and the interpretation of "adequate legal protection and effective legal remedies" (B).

A. Interpretation of "effective technological measures"

346. In regard of the scope of the term "effective technological measures" in Article 11 of the WCT, three criteria could be distinguished: it should be "effective"; it should be "in connection with the exercise of their rights"; it should "restrict acts."

It is clear that not all technological measures are protected under the WCT. First of all, they should be "effective." The term of "effective" has been interpreted at international level and national level. It is unanimity that the term of "effective" would not be understood as

[586] the WCT, Article 11.

"impossible to circumvent." If technological measures could be impossible to circumvent, the legal protection would not be needed.

In the context of the WCT, it is sufficient that in the ordinary course of its operation, some specific information, process or treatment is necessary for gaining access to the work protected by it, and for carrying out an act covered by copyright protection, and that such information, process or treatment may only be available with the authority of the copyright owner.[587]

347. By directly reading the text of the WCT, the last two criteria could be distinguished that the protected effective technological measures could be categorized into two types by their objectives: first one is to protect the rights which copyright holders enjoy; second one is to restrict the acts which are not authorized by copyright holders or "not permitted by law." The words "not permitted by law" at the end of Article 11 of the WCT could be understand as a limitation for the second category of technological measure.[588] That is to say, if certain acts are permitted by law, copyright holders could not recourse to this rule.

One further problematic could be provoked. Normally, the legal protection against circumvention of technological measures in nature is the enforcement measures of the copyrights which copyright holders enjoy.

348. But the WCT expressly provides legal protections to not only the technological measures which protect the rights of copyright holders, but also the technological measures which restrict the acts not authorized by copyright holders.

The prohibitions of acts not authorized by the copyright holders or not permitted by law by effective technological measures could be regarded as a creation of a new *de facto* right in the digital environment. "In granting copyright owners a right to prevent circumvention of technological controls on 'access', Congress may in effect have extended

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[587] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.14.
It also clarifies that "if a definition (of 'technological measure') is still offered, it must be of a functional nature, rather than "technology-specific", in order to avoid, probably very early, obsolescence."

[588] Ibid. Article 11, CT-11.13:
"First, it should be noted that the law of a Contracting Party may only permit any act if such permission – in the form of exceptions or limitations – is allowed under the Treaty (under the relevant provisions of the Berne Convention incorporated, by reference, into the Treaty and under Article 10 of the Treaty). Second, this phrase indicates that there is no obligation under Article 11 of the Treaty to provide "adequate legal protection and effective remedies" against acts of circumvention which concern acts permitted by law in the sense just mentioned."

copyright to cover 'use'."[589] It gives copyright holders a right to control "access" of works.

However, regarding the rapid development of reproduction and communication technology, it is probably not excessive to broaden the scope of the legal protection for technological measures in this regard for the purpose of guarantee copyright holders' principal interests.[590]

B. Interpretation of "adequate legal protection and effective legal remedies"

349. The text of Article 11 of the WCT only expressly stipulates that the act of circumvention of effective technological measures is under the legal protection. It does not expressly stipulate that whether the preparative acts of circumvention, namely, the manufacture and distribution of circumvention devices and services, is within the scope of Article 11.[591]

Regarding that the acts of circumvention may only be conducted by individual users after the necessary circumvention devices and services are available for them, it is reasonable that the term "the adequate legal protection and effective legal remedies" would be understood as including the prohibition of the manufacture and distribution of circumvention devices and services.

It has been identified as "preparatory activities" by the explanation of WIPO. "Their acquisition normally takes place outside the private sphere in the special market place of these kinds of devices and services. Thus, the possible way of providing protection and remedies as required by the Treaty is stopping unauthorized acts of circumvention by cutting the supply line of illicit circumvention devices and services through prohibiting the manufacture, importation and distribution of such devices and the offering of such services (the so-called 'preparatory activities')."[592]

WIPO suggested that "Contracting Parties may only be sure that they are able to fulfill their obligations under Article 11 of the Treaty if they provide the required protection and

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[589] Ginsburg, Jane C., and R. Anthony Reese. Copyright: cases and materials. New York, NY, Etats-Unis d'Amérique: Foundation Press, 2013. Chapter 8. Enforcement of Copyright, G. Technological Protection Measures. What is "Access."

[590] Ibid. Chapter 8. Enforcement of Copyright, G. Technological Protection Measures. What is "Access" :
"Does this result in overprotection, or is it a necessary adaptation to the digital world? That is, do traditional categories of rights under copyright fail to respond to the way works are exploited in digital media, so that new rights are needed?"

[591] the WCT-WPPT/IMP/2, Workshop on implementation issues of the WCT and WPPT, 1999. p, 7

[592] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.15.

remedies."[593] One of them is "against both unauthorized acts of circumvention, and the so-called 'preparatory activities' rendering such acts possible (that is, against the manufacture, importation and distribution of circumvention tools and the offering of services for circumvention)."[594]

In a word, the legal protection of technological measures would not be "adequate", if the "preparatory activities" are not prohibited.

350. As a matter of fact, the US[595] and the EU[596] legislations provide legal protections and remedies for both the act of circumvention of effective technological measures and the manufacture and distribution of circumvention devices and services.

The exceptions of the prohibition of the circumvention of technological measures to safeguard both the users' and the public's interests should also be elaborated next to "the adequate legal protection and effective legal remedies." After all, the balance of interests is one essential principle of modern copyright law.[597]

Article 11 of the WCT prescribes that "restrict act in respect of their works, which are not authorized by the authors concerned or permitted by law."[598] Therefore, the copyright exceptions permitted by law would be outside the scope of the international obligations in

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[593] Ibid. Article 11, CT-11.16:
four suggestions have been made: "(i) against both unauthorized acts of circumvention, and the so-called "preparatory activities" rendering such acts possible (that is, against the manufacture, importation and distribution of circumvention tools and the offering of services for circumvention); (ii) against all such acts in respect of both technological measures used for "access control" and those used for the control of exercise of rights, such as "copy-control" devices (it should be noted from this viewpoint that access control may have a double effect extending also to copy-control); (iii) not only against those devices whose only – sole – purpose is circumvention, but also against those which are primarily designed and produced for such purposes, which only have a limited, commercially significant objective or use other than circumvention, or about which its is obvious that they are meant for circumvention since they are marketed (advertised, etc.) as such; and (iv) not only against an entire device which is of the nature just described, but also against individual components or built-in special functions that correspond to the criteria indicated concerning entire devices."
[594] Ibid. Article 11, CT-11.16.
[595] the US Copyright Law §1201 Circumvention copyright protection systems, (a)(2) "No person shall manufacture, import, offer to the public provide or other wise traffic in any technology, product, service, device, component or part thereof that…"
[596] the EU Directive 2001/29/EC, Information Society Directive, Article 6 Obligations as to technological measures, 2. "Member states shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services…"
[597] Chinese Copyright Law Article 1: "This law is enacted…for the purpose of protecting the copyright of authors… encouraging the creation and dissemination of works… promoting the progress of science…"
the US Constitution, Article 1, section 8: "to promote the progress of science and useful arts, by securing…the exclusive right to their respective writings and discoveries."
[598] the WCT, Article 11.

regard of Article 11 of the WCT.[599]

351. The balance of interests between copyright holders and users is a key factor of copyright law. In the WCT, the legal protection against circumvention of technological measures has given copyright holders a powerful tool to control the distribution of works in the digital environment.[600] Consequently, there should be a safe valve to control that this tool would not be abused.

Therefore, the exceptions to the prohibition of the circumvention of technological measures in order to guarantee the applicability of copyright exceptions are indispensable. The essential purpose of the exceptions is to make the works accessible to users. This kind of exceptions of circumvention is called "substantive exceptions" by the Guide to the WCT interpreted by WIPO.[601]

352. The balance of interests between copyright holders and public is also a key factor in regard of the conflict of interests among copyright law and other laws. In other words, the exercises of copyright should not jeopardize the other fundamental rights and interests, namely, freedom of speech, development of science, public security, etc.

Therefore, the exceptions to the prohibition of the circumvention of technological measures in order to guarantee the public interests are also indispensable. This kind of exceptions is for certain specific purposes such as the development of encryption researches, the protection of children against certain material, etc. This kind of exceptions of circumvention is called "non-substantive exceptions" by the Guide to the WCT interpreted by WIPO.[602]

353. Special attention should be paid that both categories of the exceptions of the prohibition of the circumvention of technological measures would be subjected to the examination of "Three Step Test" of the Berne Convention which is integrated by Article 1 of the Berne Convention.

Therefore, "adequate legal protection and effective legal remedies" not only means the protection of copyright holders' interests, but also means the balance of the interests of

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[599] Reinbothe, Jörg, and Silke von Lewinski. The WIPO treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. London, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord: Butterworths, 2002. p, 146.

[600] Ficsor, Mihály. The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation. 1 edition. Oxford; New York: Oxford University Press, 2002. Chapter 6, Digital Agenda, Para, 6.36-6.39.

[601] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.19.

[602] Ibid. Article 11, CT-11.19.

the users and the public.

§2. Legal protection against circumvention of technological measures in the US and the EU

354. The national legislations in regard of legal protection against circumvention of technological measures will be demonstrated, namely, in the US and the EU. It will compare the differences and the similarities of the legislations and jurisprudences in the US and the EU in this regard.

Consequently, it will demonstrate the legal protection against circumvention of technological measures in the US (I) and the legal protection against circumvention of technological measures in the EU (II).

I. Legal protection against circumvention of technological measures in the US

355. The legal protection against circumvention of technological measures has been prescribed in the Digital Millennium Copyright Act (DMCA) under the US Copyright Law.

Firstly, it will demonstrate the legislations and interpretations of legal protection against circumvention of technological measures under the US Copyright Law which protect the interest of copyright holders (A). Secondly, it will demonstrate the legislations and interpretations of the exceptions of the legal protection against circumvention of technological measures under the US Copyright Law which safeguard the interest of users (B).

A. Legal protection for the interests of copyright holders

356. During the preparatory works of Digital Millennium Copyright Act (DMCA), the problematic in regard of the legal protection of technological measures has been distinguished: In the report Intellectual Property and the National Information

Infrastructure[603], it observes that "without providing a secure environment where copyright holders can be assured that will be some degree of control over who may access, retrieve and use a work, and, perhaps most importantly, how to effectuate limits on subsequent dissemination of that work without the copyright owner's consent, copyright holders will not make those works available in the digital environment."[604]

Technological measures could provide copyright holders the security of their content in the digital environment. For example "technological solutions can be used to prevent or restrict access to a work; limit or control access to the source of a work; limit reproduction, adaptation, distribution, performance or display of the work; identify attribution and ownership of a work; and manage or facilitate copyright licensing."[605]

357. This report suggested a legal protection against the circumvention copyright protection systems in Section 1201 of the US Copyright Law which prescribes as:

"No person shall import, manufacture or distribute any device, product, or component incorporated into a device or product, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without the authority of the copyright owner or the law, any process, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights of the copyright owner under section 106."[606]

358. Section 1201 (a) of the US Copyright Law stipulates: "Violations Regarding Circumvention of Technological Measures. (1)(A) No person shall circumvent a technological measures that effectively controls access to a work protected under this title……(2) No person shall manufacture, import, offer to the public, provide, or other wise traffic in any technology, product, service, device, component, or part thereof, that (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected

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[603] Intellectual Property and the National Information Infrastructure. United States. Information Infrastructure Task Force. Working Group on Intellectual Property Rights. Bruce A. Lehman. 1995.
[604] Ibid. p, 178.
[605] Ibid. p, 178.
[606] the US Copyright Law. Section 1201.

under this title."[607]

Section 1201 (b) stipulates: "Additional Violations (1) No person shall manufacture, import, offer to the public, provide, or other wise traffic in any technology, product, service, device, component, or part thereof, that— (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; (B) has only limited commercial significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of copyright owner under this title in a work or a portion thereof."[608]

359. Therefore, §1201 of the US Copyright Law distinguishes two different kinds of protection. §1201 (a) prohibits the circumvention of the technological measures and the preparatory activities which "effectively controls access to work" and §1201 (b) prohibits the preparatory activities which compromise the technological measures which "effectively protects a right of a copyright owner." In other words, §1201 (a) and §1201 (b) distinguish the "effective access control" technological measures from the "effective right control" technological measures; and distinguish the "circumvention of the technological measures" from "preparatory activities."

Hereinafter, it firstly will demonstrate the protected technological measures: effective access & right control (1). Secondly, it will demonstrate the prohibited activities: direct circumvention & preparatory activities (2).

1. Protected technological measures: effective control of access and right

360. The legal protection of "effective control of access and right" in §1201 (a) seems to be outside the scope of traditional copyright scope of the US Copyright Law, for instance, if a user has bought a book, in real world, under the traditional copyright regime, this book could be read at unlimited times at the place choose by the user and it could be borrowed to other users. Meanwhile, in the digital environment, under the legal protection of "access control", the copyright holders could decide how many times, where (on which IP address) and how

[607] Ibid.
[608] Ibid.

(on what devices) the book could be accessed.[609]

As remarked by Professor Jane Ginsburg: "In granting copyright owners a right to prevent circumvention of technological controls on 'access', Congress may in effect have extended copyright to cover 'use' of works of authorship. But in theory, copyright does not reach 'use'; it prohibits unauthorized reproduction, adaptation, distribution, and public performance or display. Not all 'uses' correspond to these acts. But because 'access' is a prerequisite to 'use', by controlling the former, the copyright owner may well end up preventing or conditioning the latter."[610] "As a general matter, one should recognize that, in granting copyright owners a right to prevent circumvention of effective technological controls on "access." Congress may in effect have extended copyright to cover 'use' of works of authorship."[611]

In this regard, the legal protection of the technological measures "effectively controls access to work" and "effectively protects a right of a copyright owner" in the US Copyright Law is broader and more precise than the WCT, since the WCT only stipulates that "adequate legal protection and effective legal remedies…" "that are used by authors in connection with the exercise of their rights" should be provided.

361. The interpretations of the US Courts could give some more profound understandings. Section 1201 (a) (3) of the US Copyright Law defines that : "(A) to 'circumvent a technological measure' means to descramble a scrambled work, to decrypt an encrypted work, or other wise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and (B) a technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner to gain access to the work.

362. The US courts have construed that the term of "effective" in regard of technological measures in the US Copyright Law could not mean that the technological protection is especially difficult to circumvent.

In the case of *Universal City Studios, Inc. v. Reimerdes (2000)*, the US New York

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[609] Ginsburg, Jane C. and R. Anthony Reese. Copyright: cases and materials. New York, NY, Etats-Unis d'Amérique: Foundation Press, 2013. Chapter 8. Enforcement of Copyright, G. Technological Protection Measures. What is "Access"

[610] Ibid. What is "Access"

[611] Ibid. p, 143

Kamiel J. Koelman, A Hard Nut to Crack: The Protection of Technological Measures. European Intellectual Property Review (2000)

district court concluded that "One cannot lawfully gain access to the keys except by entering into a license with the DVD CCA under authority granted by the copyright owners or by purchasing a DVD player or drive containing the keys pursuant to such a license. In consequence, under the express terms of the statute, CSS 'effectively controls access' to copyrighted DVD movies. it does so, within the meaning of the statute, whether or not it is a strong means of protection."[612]

The US Second Circuit court reiterated in the *Universal City Studios, Inc. v. Corley case (2001)* that CSS could not be deemed as not "effectively" for the reason that it was so easily penetrated by a teenager Johansen.[613]

Normally, if a technological measures could be easily circumvented, the words "not effective" could be used to this technological measures. However, under the meaning of the US Copyright Law, "it would limit the application of the statute to access control measures that thwart circumvention, but withhold protection for those measures that can be circumvented. In other words, defendants would have the Court construe the statute to offer protection where none is needed but to withhold protection precisely where protection is essential."[614]

363. Meanwhile, in *Lexmark v. Static Controls Corp. case (2004)*, the US Sixth Circuit Court reasoned that the technological measure would not be qualified as "effective" if the work protected could be accessed by other alternative ways by using the metaphor of the back door of the house: "Just as one would not say that a lock on the back door of a house "controls access" to a house whose front door does not contain a lock and just as one would not say that a lock on any door of a house "controls access" to the house after its purchaser receives the key to the lock…."[615]

364. In *Realnetworks, Inc. v. Streambox, Inc. case (2000)*, the defendant has already argued that the Copy Switch would not be "effective" for the reason that an enterprising end-user could potentially use other means to record streaming audio content as it is played by the end-user's computer speakers. In other words, defendant claim that the work protected by the technological measure has an alternative access which has no control. In consequence, the applied technological measure is not "effective."[616]

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[612] Universal City Studios, Inc. v. Reimerdes. 111F. Supp. 2d 294 (2000). p, 317, 318.
[613] Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2001). p, 442.
[614] Universal City Studios, Inc. v. Reimerdes. 111F. Supp. 2d 294 (2000). p, 317, 318.
[615] Lexmark Intern.,Inc. v. Static Control Components, Inc., 387 F. 3d 522(2004). p, 547.
[616] RealNetworks, Inc. v. Streambox, Inc., F. Supp. 2d (2000). p, 9.

This argument was rejected by the Court because "the Copy Switch, in the ordinary course of its operation when it is on, restricts and limits the ability of people to make perfect digital copies of a copyrighted work. The Copy Switch therefore constitutes a technological measure that effectively protects a copyright owner's rights…."[617]

The door lock metaphor made by the US Courts is quite pertinent in regard of the interpretation of "effective."[618] The technological measures which protect the access to a work are similar to door lockers which protect the access to a house. The door lock would be considered as an "effective" control of the access even though it could be easily cracked by some professionals or could be easily opened by the devices which are specially designed for such purpose.

365. The question could be asked that how to determine in which circumstances the access is not effective because of the alternative way to access to the work in *Lexmark Intern.,Inc. v. Static Control Components, Inc. case (2004)*[619] and in which circumstances it is deemed as "effective" like the "Copy Switch" in *RealNetworks, Inc. v. Streambox, Inc (2000)*. Could the copyright holders have the right to control only a specific way to get access to the copyrighted contents? For instance, the access to contents via webpages is open to users while the access via smartphone is controlled by a technological measure such as a registration system. Is this technological measure "effective"?

the US Congress grants copyright holders a prerogative to control "access" of their works in the digital environment in Section 1201 of the US Copyright Law. This legislation may have enlarged the traditional scope of copyright for the reason that it extends copyright to control the use of a work.[620]

366. In *Chamberlain Group, Inc. v. Skylink Technologies, Inc. (2004)*, first of all, the copyright holders' "access control" was clarified as a "new grounds for liability in the context of the unauthorized access of copyrighted material" rather than a new property right.[621]

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[617] Ibid.

[618] Lexmark Intern.,Inc. v. Static Control Components, Inc., 387 F. 3d 522(2004).
321 Studios v. MGM, 307 F.Supp. 2d 1085 (N.D. Cal. 2004).

[619] Ibid.

[620] Ginsburg, Jane C. and R. Anthony Reese. Copyright: cases and materials. New York, NY, Etats-Unis d'Amérique: Foundation Press, 2013. Chapter 8. Enforcement of Copyright, G. Technological Protection Measures. What is "Access." "In granting copyright owners a right to prevent circumvention of technological controls on 'access', Congress may in effect have extended copyright to cover 'use' of works of authorship. But in theory, copyright does not reach 'use'; it prohibits unauthorized reproduction, adaptation, distribution, and public performance or display. Not all 'uses' correspond to these acts. But because 'access' is a prerequisite to 'use', by controlling the former, the copyright owner may well end up preventing or conditioning the latter."

[621] Chamberlain, Inc. v. Skylink Technologies, Inc., 381 F.3d. (2004). p, 1193.

Then, the relationship between "access" and "copyright" is demonstrated as "disabling a burglar alarm to gain "access" to a home containing copyrighted books, music, art, and periodicals would (not) violate the DMCA."[622]

Finally, the US Court concluded that: "U.S.C. Section 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners."[623]

367. In a word, the "access" controlled by technological measures should have the purpose of protecting legitimate right of copyright holders and should not affect the fair use.

However, as admitted by the US Court,[624] the term of "access" in regard of legal protection of technological measures is still ambiguous. To break a digital lock for the purpose of getting access to a house of books would still be liable under Section 1201 of the US Copyright Law, Meanwhile, filling a product with copyrighted contents and locking it up with a technological measures for the purpose of preventing reverse engineering or competition is outside the scope of protection of Section 1201 of the US Copyright Law. The boundaries are not clear to find.

2. Prohibited activities: direct circumvention & preparatory activities.

368. Section 1201 (a) and Section 1201 (b) distinguish the legal protection against the "direct" circumvention which stipulated in Section 1201 (a)(1)(A) "No person shall circumvent a technological measures that effectively controls access to a work protected under this title…"[625] from the legal protection against the "manufacture, import, offer to the public provided or other traffic in any technology, product, service, devices, component…"[626] which is identified as "preparatory activities" by WIPO's guide of the WCT.[627]

Three criteria of the preparatory activities in Section 1201 (a) (2) and Section 1201 (b) (1) are identical: "primarily designed or produced for the purpose of circumventing protection

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[622] Ibid. p, 1201.
[623] Ibid. p, 1202.
[624] Idbi. p, 1203. "While such a rule of reason may create some uncertainty and consume some judicial resources, it is the only meaningful reading of the statute."
[625] the US Copyright Law. Section 1201.
[626] Ibid.
[627] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.15.
"Their acquisition normally takes place outside the private sphere in the special market place of these kinds of devices and services. Thus, the possible way of providing protection and remedies as required by the Treaty is stopping unauthorized acts of circumvention by cutting the supply line of illicit circumvention devices and services through prohibiting the manufacture, importation and distribution of such devices and the offering of such services (the so-called "preparatory activities")"

afforded by a technological measures" or "has only limited commercial significant purpose or use other than to circumvention protection afforded by a technological measure" or "is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure."[628]

369. Notably, the "direct circumvention" of right control technological measures is not prohibited under Section 1201 (b) of the US Copyright Law.

One reason is that since without the manufacture, distribution of circumvention devices, the individual direct circumvention would not be possible as already recognized by the interpretation of the WCT.[629] The prohibition of preparative activities is more preferable.

370. However, the essential reason is that the individual direct circumvention of right control technological measures could also be remedied directly by Chapter 5 of the US Copyright Law as a direct copyright infringement. the US Senate Report explained that "The prohibition in 1201(a)(1) [was] necessary because prior to [the DMCA], the conduct of circumvention was never before made unlawful. The device limitation in 1201(a)(2) enforces this new prohibition in conduct. The copyright law has long forbidden copyright infringements, so no new prohibition was necessary. The device limitation in 1201(b) enforces the longstanding prohibitions on infringements."[630]

The US Scholar Jane Ginsburg explained that "It does not prohibit the act of circumventing a rights control, in part because the results of that act will be directly infringing (or will qualify for an exception), and in part because the most economically significant act is the distribution of the device that will allow the end-user to circumvent. By contrast, circumvention of an access control does not directly result in an infringement. If circumvention of an access control is not unlawful, then, arguably, dissemination of a device that enables circumvention of an access control would not be wrongful either. By making the act of access circumvention unlawful, the DMCA lay a stronger foundation for prohibiting

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[628] the US Copyright Law, §1201 (a)Violations Regarding Circumvention of Technological Measures (2), (b) Additional Violations.

[629] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.15:

"Their acquisition normally takes place outside the private sphere in the special market place of these kinds of devices and services. Thus, the possible way of providing protection and remedies as required by the Treaty is stopping unauthorized acts of circumvention by cutting the supply line of illicit circumvention devices and services through prohibiting the manufacture, importation and distribution of such devices and the offering of such services (the so-called "preparatory activities")"

[630] S.Rep. No. 105–90 (1998). p, 12.

the dissemination of enabling devices as well."[631]

371. Section 1201 (a) (3) of the US Copyright Law defines "circumvention" as: "(A) to 'circumvent a technological measure' means to descramble a scrambled work, to decrypt an encrypted work, or other wise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner."[632]

The definition of "to circumvent" in the US Copyright Law is quite precise. However, the interpretation of this term also has posed some problematics to the US Court. In *321 Studios v. Metro Goldwyn Mayer Studios, Inc. case (2004)*, the defendant 321 Studios claimed that the technological measure was not "circumvented" for the reason that "its software does not avoid, bypass, remove, deactivate, or otherwise impair a technological measure, but that it simply uses the authorized key to unlock the encryption"[633]. This argument was rejected by the US Court. It construed that while 321 Studios' software does use the authorized key to access the DVD, it does not have authority to use this key, as licensed DVD players do, and it therefore avoids and bypasses CSS.[634]

It could be observed that the US Courts would prefer to give legal protection to the technological measures applied by copyright holders, meanwhile the US Courts do not want to give copyright holders a too powerful tool to eliminate competition.

372. Based on the demonstration above, in regard of the international obligations under Article 11 of the WCT, it provides legal protections to not only the technological measures which protect the rights of copyright holders, but also the technological measures which restrict the acts not authorized by copyright holders[635]. Section 1201 of the US Copyright Law protects not only the technological measures which effectively protects the rights of copyright holders, but also the technological measures which effectively control the access to the works. Section 1201 of the US Copyright Law complies with the obligations under Article 11 the WCT.

Moreover, Article 11 of the WCT also implies in WIPO's guide of the WCT that

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[631] the US Copyright Law, Chapter 5, Copyright Infringement and Remedies.
Ginsburg, Jane C. "Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience" Columbia Journal of Law & The Artes 2005. p, 27 "It does not prohibit the act of circumventing a rights control, in part because the results of that act will be directly infringing (or will qualify for an exception), and in part because the most economically significant act is the distribution of the device that will allow the end-user to circumvent"

[632] the US Copyright Law Section 1201 (a) (3).

[633] 321 Studios v. MGM, 307 F.Supp. 2d 1085 (N.D. Cal. 2004). p, 1098.

[634] Ibid.

[635] the WCT Article 11 "restrict act in respect of their works, which are not authorized by the authors concerned or permitted by law"

"Contracting Parties may only be sure that they are able to fulfill their obligations under Article 11 of the Treaty if they provide the required protection and remedies" "against both unauthorized acts of circumvention, and the so-called 'preparatory activities' rendering such acts possible (that is, against the manufacture, importation and distribution of circumvention tools and the offering of services for circumvention)."[636] Section 1201 of the US Copyright Law not only prohibited the circumvention of the technological measures but also prohibited the "manufacture, import, offer to the public provided or other traffic in any technology, product, service, devices, component…" which is identified as "preparatory activities" by WIPO's guide of the WCT[637]. In this regard, Section 1201 of the US Copyright Law also complies with the obligations implied under the WCT.

B. Exceptions for the interests of users

373. Generally speaking, the exceptions of the legal protection against circumvention of technological measures under the US Copyright Law could be divided into two groups: the exceptions in regard of copyright and the exceptions in regard of other rights.

In regard of copyright, Section1201 (c) stipulates that the "fair use" doctrine shall be respected[638] and other fundamental rights shall not be affected.[639] In regard of other rights, some additional rules are set by Section 1201.

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[636] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.16:
four suggestions have been made: "(i) against both unauthorized acts of circumvention, and the so-called "preparatory activities" rendering such acts possible (that is, against the manufacture, importation and distribution of circumvention tools and the offering of services for circumvention); (ii) against all such acts in respect of both technological measures used for "access control" and those used for the control of exercise of rights, such as "copy-control" devices (it should be noted from this viewpoint that access control may have a double effect extending also to copy-control); (iii) not only against those devices whose only – sole – purpose is circumvention, but also against those which are primarily designed and produced for such purposes, which only have a limited, commercially significant objective or use other than circumvention, or about which its is obvious that they are meant for circumvention since they are marketed (advertised, etc.) as such; and (iv) not only against an entire device which is of the nature just described, but also against individual components or built-in special functions that correspond to the criteria indicated concerning entire devices."

[637] Ibid. Article 11, CT-11.15.
"Their acquisition normally takes place outside the private sphere in the special market place of these kinds of devices and services. Thus, the possible way of providing protection and remedies as required by the Treaty is stopping unauthorized acts of circumvention by cutting the supply line of illicit circumvention devices and services through prohibiting the manufacture, importation and distribution of such devices and the offering of such services (the so-called "preparatory activities")"

[638] the US Copyright Law Section 1201 (c) (1): "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."

[639] the US Copyright Law Section 1201 (c) (4): "Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications or computing products."

374. First of all, in regard of direct circumvention against a access control technological measures, Section 1201 (a) (1) prescribes an exception of "rule making" in response to the rapid development of technologies: the Librarian of Congress, in consultation with the Register of Copyrights, makes the exceptions every three years. The rule making has been processed recently.[640]

Secondly, Section 1201 (d), (f), (e), (g), (j) prescribes the exceptions of circumvention of technological measures for the interests which outside the scope of copyright law, namely, archives, reverse engineering, encryption research, and security testing. This kind of exceptions are subjected to further conditions. For instance, in terms of encryption research, the encrypted work shall be lawfully obtained, the act shall be necessary to conduct encryption research, the authorization shall be obtained by a good faith effort, the act shall not constituted infringement.

375. In regard of legal protection of technological measures, the defendants' most common defense is the "fair use"

Section 1201 (c) (1) of the US Copyright Law prescribes "Nothing in this section shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use, under this title."[641]

Section 1201 (c) (4) of the US Copyright Law prescribes "nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products."[642]

First of all, the US Court considered that "fair" use would be more susceptible in the digital environment under DMCA. It is because: "The fact that the resulting copy will not be as perfect or as manipulable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use."[643]

Meanwhile, notably, the individual circumvention of technological measures for the purpose of "fair use" would not be liable under Section 1201 the US Copyright Law. The US Court pointed out that "Congress did not ban the act of circumventing the use restrictions. Instead, Congress banned only the trafficking in and marketing of devices primarily designed

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[640] Section 1201 Rule making: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention. Recommendation of the Register of Copyrights. October 2015.
[641] the US Copyright Law. Section 1201.
[642] Ibid.
[643] Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001). p 459.

to circumvent the use restriction protective technologies. Congress did not prohibit the act of circumvention because it sought to preserve the fair use rights of persons who had lawfully acquired a work."[644]

Nevertheless, the fair use defense for the manufacture, distribution of circumvention devices and services has been rejected constantly by the US Courts. For instance, in *RealNetworks, Inc. v. Streambox, Inc. case (2000)*[645]; in *321 Studios v. MGM case (2004)*[646]; etc.

In a word, a balance of interests full of problematics is tried to be established by the US courts. On the one hand, the technological measures control digital reproduction and access should be protected; on the other hand, the users and the public need to reproduce or access to the work for the purposes of "fair use" or other purposes justified by law.

376. However, the boundary of this balance may be ambiguous:

In *Universal City Studios, Inc. v. Corley case (2001)*, the court explicitly rejected the defendant's claim that Section 1201 (c) (1) "can be read to allow the circumvention of encryption technology protecting copyrighted material when the material will be put to "fair uses" exempt from copyright liability" by stating that "it simply clarifies that the DMCA targets the circumvention of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the use of those materials after circumvention has occurred." "Subsection 1201(c)(1) ensures that the DMCA is not read to prohibit the "fair use" of information just because that information was obtained in a manner made illegal by the DMCA."[647]

That is to say, the circumvention itself without the authorization of copyright holders for the purpose of "fair use" is prohibited by Section 1201 the US Copyright Law. Section 1201 (c) (1) concerns the later use of copyright content.

377. In comparison, in *Chamberlain Group, Inc. v. Skylink Technologies, Inc. case (2004)*, the court concluded that "A copyright owner seeking to impose liability on an accused circumventor must demonstrate a reasonable relationship between the circumvention at issue and a use relating to a property right for which the Copyright Act permits the copyright owner to withhold authorization."[648]

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[644] Elcom, 203 F.Supp.2d. (2002). p, 1120.
[645] RealNetworks, Inc. v. Streambox, Inc., F. Supp. 2d (2000).
[646] 321 Studios v. MGM, 307 F.Supp. 2d 1085 (2004).
[647] Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2001). p 443.
[648] Chamberlain, Inc. v. Skylink Technologies, Inc., 381 F.3d. (2004). p, 1203.

That is to say, the technological measures applied should be for the purpose of the protection of a copyright.

378. The two decisions of the US courts provoke a hypothesis that could it be considered that "fair use" is a legitimate right of users?

In *Universal City Studios, Inc. v. Corley case (2001)*, the court ruled that the fair use could not be interpreted as a legitimate cause to circumvent technological measures.[649] Meanwhile, in *Chamberlain Group, Inc. v. Skylink Technologies, Inc. case (2004)*, the court required that the copyright holder must demonstrate a reasonable relationship between the circumvention and a use of legitimate right.[650] Consequently, if a technological measure is circumvented for the purpose of "fair use", according to the former case, the circumvention is still illegal under DMCA. But according to the latter case, since the copyright holder does not have right to restrict access to works using technological measures in the field of "fair use", the circumvention is legal under DMCA.

379. In regard of the US Copyright Law, the "fair use" does not need the authorization of copyright holders. What right does copyright holders have in regard of "fair use"? According to *Universal City Studios, Inc. v. Corley case (2001)*, how to guarantee that "fair use" would still possible under the impossibility of circumventing technological measures?

The question could be asked: If the circumvention of technological measures no mater right control or access control is not for the purpose of getting access to work nor conducting activities in the realm of copyright, but for the sole purpose of conducting scientific, such as reverse engineering and encryption research, aren't such activities completely outside the scope of copyright law since they have nothing to do with the work but only the technology itself? Why these activities have to comply with a bunch of conditions to be qualified as exceptions of circumvention of technological measures which are for the purpose of the protection of copyright?

380. Regardless of the problematics provoked by the exceptions under Section 1201 of the US Copyright Law, they could be considered as a compliance with the WCT. Section 1201 of the US Copyright Law prescribes two kinds of exceptions of the legal protections of technological measures: first one is that the "fair use" exceptions shall not be affected[651]; second one is that "archives, reverse engineering, encryption research, and security testing"

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[649] *Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2001).*
[650] Chamberlain, Inc. v. Skylink Technologies, Inc., 381 F.3d. (2004).
[651] the US Copyright Law Section 1201 (c) (1)

shall not be affected[652] and an exception of "rule making" in response to the rapid development of technologies is stipulated under Section 1201 (a) (1)[653]. Under Article 11 of the WCT, similarly, it implies "substantive exceptions" which guarantee the applicability of copyright exceptions[654] and "non-substantive exceptions" which guarantee the public interests such as the development of encryption researches, the protection of children against certain material, etc[655]. In a word, in regard of the exceptions of legal protection of technological measures, Section 1201 of the US Copyright Law complies with the requirements implied under the WCT.

II. Legal protection against circumvention of technological measures in the EU

381. In terms of the EU, the legal protection against circumvention of technological measures has been prescribed mainly in the Information Directive in terms of copyright law.

Firstly, it will demonstrate the legislations and the interpretations of the legal protection against circumvention of technological measures for the protection of the interests of copyright holders in comparison with the US legislations and interpretations (A). Secondly, it will demonstrate the legislations and the interpretations of the exceptions of the legal protection against circumvention of technological measures for the purpose of safeguarding the interests of users in comparison with the US legislations and interpretations (B).

A. Legal protection for the interests of copyright holders

382. It will firstly demonstrate the legislations in the EU compared with the US Copyright Law (1) and secondly, demonstrate the interpretations of CJEU compared with the interpretations made by the US courts (2).

1. the EU legislations compared with the US Copyright Law

383. In 1991, the Directive on the legal protection of computer programs 91/250/EEC has prescribed a rule of legal protection agains circumvention of technological measures for

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[652] the US Copyright Law Section 1201 (d), (f), (e), (g), (j)
[653] the US Copyright Law Section 1201 (a) (1)
[654] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.19.
[655] Ibid. Article 11, CT-11.19.

computer software in Article 7: "1.Without prejudice to the provisions of Articles 4, 5 and 6, Member States shall provide, in accordance with their national legislation, appropriate remedies against a person committing any of the acts listed in subparagraphs (a), (b) and (c) below: …… (c)any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program."[656]

Two conditions of protection could be observed in this Directive: First one is that it only focuses on the preparative activities in commercial scale. Precisely, it prohibits the manufacture, distributions of devices and services of circumvention for commercial purposes. Second one is that it only prohibits the means of which the unique purpose is the illegal circumvention. Although it is not detailed, this Directive is the first to harmonize the national in this regard.[657]

384. According to Information Society Directive[658], the two protection system of technological measures function in parallel.

In 1995, the Green Paper of copyright and related rights in information society posed the question of expanding the legal protection of the technological measures to all copyrighted works on a harmonized basis.[659]

After the long process of legislation[660], Article 6 of Information Directive, "Obligations as to technological measures" was adopted as :

"1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

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[656] Council Directive of 14 May 1991, on the legal protection of computer programs, 91/250/EEC.

[657] Michel VIVANT, Le programme d'ordinateur au Pays des Muses. - Observation sur la directive du 14 mai 1991. La Semaine Juridique Entreprise et Affaires n° 47, 21 Novembre 1991, 94. p, 486.

[658] 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.

[659] Green Paper, copyright and related rights in information society, 19, July, 1995, COM(95) final. p, 82.

[660] 1. Conclusion of the hearing of 8and 9 January 1996 on technical systems of identification and protection and acquisition and management of rights

2. Communication de la commission, suivi du livre vert sur le droit d'auteur et les droits voisins dans la société de l'information, 20 novembre 1996, COM(06) 568 final p,15-17.

3. Directive 2001/29/EC du parlement européen et du conseil du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information. JOCE, journal officiel des communautés européennes, L 167, du 22 juin 2001, p 10.

4. entre la proposition de directive (10 décembre 1997, COM(97) 628 final, JOCE, C/108, du 7 avril 1998, p.6) et l'adoption définitive du texte, trois ans et demi se sont écoulés.

2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which: (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.

3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject- matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject- matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply "mutatis mutandis."[661]

385. Article 6 Clause 1 and 2 in Information Society Directive distinguish two different types of legal protection which are similar to the US Copyright Law: Clause 1 prohibits the circumvention conducted by individuals[662]; Clause 2 prohibits the preparative activities of circumvention.[663]

Three non-cumulative criteria of preparative activities are stipulated in Article 6 Clause 2 of EU Information Society Directive which are almost identical to the US one: "(a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures."[664]

"(a)" correspond to the third criterion in Section 1201 (a) (2) (C), (b) (1) (C) of the US Copyright Law, "is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure…"[665]; "(b)" correspond to the second criterion in Section 1201 (a) (2) (B), (b) (1) (B) of the US Copyright Law, "has only limited commercial significant purpose or use other than to circumvent a technological measure…"[666] and "(c)" correspond to the first criterion in Section 1201 (a) (2) (A), (b) (1) (A) of the US Copyright Law, "is primarily designed or produced for the purpose of circumventing a technological measure…"[667].

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[661] Ibid.

[662] Ibid. Article 6, 1: "Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective."

[663] Ibid. Article 6, 2: "Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:…"

[664] Ibid.

[665] the US Copyright Law Section 1201 (a) (2) (C), (b) (1) (C), "is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure…"

[666] the US Copyright Law Section 1201 (a) (2) (B), (b) (1) (B), "has only limited commercial significant purpose or use other than to circumvent a technological measure…"

[667] the US Copyright Law Section 1201 (a) (2) (A), (b) (1) (A), "is primarily designed or produced for the purpose of circumventing a technological measure…"

386. Regardless of similarities, some additional requirements could be found in the EU Information Society Directive compared with the US Copyright Law:

First one is that in regard of the circumvention conducted by individuals in Clause 1 of Information Society Directive, a moral control has been prescribed: "which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective."[668]

Second one that in regard of preparative activities in Clause 2 of Information Society Directive, a condition of "for commercial purpose" has been added to all the preparative activities. Namely, the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services.

However, in terms of the second requirements, preamble 49 of Information Society Directive expressly stipulates that "any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures."[669]

Compared with the US Copyright Law in this regard, the general structure of protection in the EU Information Society Directive is similar. But two additional conditions are prescribed for both individual circumvention and preparative activities.

Notably, the access control and right control distinction exists in Section 1201 (a) (b) of the US Copyright Law: "No person shall circumvent a technological measure that effectively controls access…" and "…a technological measure that effectively protects a right of a copyright owner". The similar distinction could not be found in Article 6 of EU Information Society Directive.[670]

2. Interpretations of CJEU compared with the interpretation of the US courts

387. After the demonstration of the EU legislations, it is also interesting to demonstrate the interpretations of CJEU. In the *Nintendo v PC Box Case (2014)* of CJEU, some principles in this regard have been established by CJEU.

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[668] Directive 2001/29/EC. Article 6. Clause 1.

[669] Directive 2001/29/EC, Preamble 49.

[670] Dusollier, Séverine, Jane-C. Ginsburg, André Lucas, Alain Strowel, and P.-Bernt Hugenholtz. Le droit d'auteur, un contrôle de l'accès aux oeuvres?: Copyright, a right to control access to works? Namur: Emile Bruylant, 2001. p, 43. "Le texte de la position commune a abandonné le terme d'accessibilité…il est en tout cas clair que les technologies d'accès sont visées également par la protection. En outre, la définition des mesures techniques n'évoque plus la violation du droit d'auteur…"

First of all, the term of "effective technological measures" under Information Directive has been defined broadly by CJEU in the *Nintendo v PC Box Case (2014)* that covers "application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism."[671]

This interpretation is in accordance with the purpose of the Information Directive that "Any harmonization of copyright and related rights must take as a basis a high level of protection…"[672]

388. CJEU also construed in the *Nintendo v PC Box case (2014)* that the "effective technological measures" applies only in the light of protecting that copyright holder against acts which require his authorization. These acts include: "from Articles 2 to 4 of Directive 2001/29, the reproduction, the communication to the public of works and making them available to the public, and the distribution of the original or copies of works."[673]

389. The rule of "proportionality" is another criteria established in the case of *Nintendo v PC Box (2014)*.[674] CJEU construed that "As the Advocate General noted in points 53 to 63 of her Opinion, the examination of that question requires that account be taken of the fact that legal protection against acts not authorised by the rightholder of any copyright must respect the principle of proportionality, in accordance with Article 6(2) of Directive 2001/29, interpreted in the light of recital 48 thereof, and should not prohibit devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection." In a word, the "proportionality" is that the technological measures should not exceed the purpose of the protection of copyright holder's rights.

According to the interpretation of CJEU, "proportionality" could be examined with the term of "effective": "it is necessary to examine whether other measures or measures which are not installed in consoles could have caused less interference with the activities of third parties not requiring authorisation by the rightholder of copyright or fewer limitations to those activities, while still providing comparable protection of that rightholder's rights."[675] "Accordingly, it is relevant to take account, inter alia, of the relative costs of different types of technological measures, of technological and practical aspects of their implementation, and

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[671] CJEU, 23 January 2014, Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v PC Box Srl, 9Net Srl, Case C-355/12. EU:C:2014:25. para 27.
[672] Directive 2001/29/EC, Preamble 9.
[673] CJEU, 23 January 2014, Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v PC Box Srl, 9Net Srl, Case C-355/12. EU:C:2014:25. para 25.
[674] Ibid. para 30.
[675] Ibid. para, 32.

of a comparison of the effectiveness of those different types of technological measures as regards the protection of rightholder's rights, that effectiveness however not having to be absolute."[676]

In other words, the "effective technological measures" not only could protect copyright holders' right, control access to the copyrighted contents, but also could not affect the other legitimate interests, for instance, in the *Nintendo v PC Box case (2014)*, the interoperability and compatibility among the games.

390. As the Advocate General's Opinion of the *Nintendo v PC Box case (2014)* agreed that if technological measures prevent also acts which do not require authorization, then, if they could have been designed so as to prevent only acts which require authorization, they are disproportionate and do not qualify for protection. [677]

391. The rule of "proportionality" established by CJEU has the similar purpose of the interpretation made by the US Court in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.* case (2004).

In the case of *Chamberlain, Inc. v. Skylink Technologies, Inc. (2004)*, the US Court concluded that: "U.S.C. § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners."[678] Similarly, in the *Nintendo v PC Box case (2014)*, CJEU construed that the "effective technological measure" applied by Nintendo has the right to control the access to the copyrighted contents, for instance, the video games and the graphic and sound elements of the video games; meanwhile, it has no right under the Information Directive, Article 6 to control the access to the devices, namely, the portable systems, "DS" consoles and fixed console video game systems, "Wii" consoles.

That is to said, in a word, the US Court and CJEU both considered that technological measures could be applied by copyright holders for the purpose of exercising their rights and controlling the access under the US Copyright Law or Information Directive. Accordingly, it could be observed that the term of "effective technological measures" under Information Society Directive in Europe certainly contain not only the "right control" technological

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[676] Ibid. para, 33.

[677] Dr Gemma Minero, "Videogames, consoles and technological measures: the Nintendo v PC Box and (net Case", European Intellectual Property Review, E.I.P.R. 2014, 36(5), 335-339.
Opinion of Advocate General Sharpston delivered on 19 September 2013. CJEU, 23 January 2014, Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v PC Box Srl, 9Net Srl, Case C-355/12. EU:C: 2014:25.

[678] Chamberlain, Inc. v. Skylink Technologies, Inc., 381 F.3d. *(2004)*. p, 1202.

measures but also the "access control" technological measures.

B. Exceptions for the interests of users

392. The exceptions of legal protection against the circumvention of technological measures in Article 6 (4) of the EU Information Society Directive prescribes as:

"Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply mutatis mutandis."[679]

393. The exceptions could be divided into two categories:

First category is prescribed in Article 6 (4) subparagraph 1 of Information Society

[679] Directive 2001/29/EC, Article 6 (4).

Directive. It safeguards certain copyright exceptions for the interests of copyright beneficiaries. Concretely, it reads that "Member States shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5 (2) (a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e)…"[680]

Notably, certain copyright exceptions are not mentioned by this subparagraph, for instance, the quotation, the reproduction by press, etc. It would be controversial whether national laws "shall" or "shall not" "take appropriate measures to ensure" the interests of the copyright beneficiaries in regard of the copyright exceptions outside the scope of Article 6 (4) subparagraph 1 of the Information Society Directive.

According to the wording of the preamble (51) of the Information Society Directive: "Member States should promote voluntary measures taken by rights holders… to accommodate achieving the objectives of certain exceptions or limitations provided for in national law 'in accordance with this Directive'."[681] "Member States should take appropriate measures to ensure that right holders provide beneficiaries of 'such exceptions or limitations' with appropriate means of benefiting from them."[682]

It could be understood that outside the scope of copyright exceptions confined by Article 6 (4) subparagraph 1 of the Information Society Directive, the interests of beneficiaries of copyright exceptions of the quotation, the reproduction by press, would not be guaranteed at national and European level in regard of legal protection of technological measures.

394. Second category is prescribed in Article 6 (4) subparagraph 2 of the Information Society Directive. It safeguards the beneficiaries of private use exception. Interestingly, the wordings are different from the first one: "Member States 'may' also take such measures." In first subparagraph, it is "Member States 'should' take appropriate measures." Consequently, Member States are not obliged to implement this rule. Moreover, the voluntary measures for the purpose of guaranteeing the beneficiaries of private use exception by national laws of Member States should not preventing right holders from adopting adequate measures regarding the number of reproductions in accordance with Article 5 (2) (b) private use exception and (5) three step test integrated in the Directive.

According to Article 6 (4) subparagraph 4 of the Information Society Directive, the

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[680] Ibid.
[681] Ibid. Preamble 51.
[682] Ibid. Preamble 51.

exceptions of technological measures excludes on-demand services which are described as "works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them."[683] It is for the reason that the protection of technological measures should ensure a secure environment for the provision of interactive on-demand services which are governed by contractual arrangements.[684]

395. Compared with the US Copyright Law in this regard, the EU Information Society Directive is more prudent. It could be observed in two main points:

First one is that the US Copyright Law safeguards the entire doctrine of "fair use" while the EU Information Directive only safeguards a part of copyright exceptions and the on-demand services are completely outside the scope of the exceptions of technological measures.

Second one is that the US Copyright Law also protects the interests of encryption researches and revers engineering while the EU Information Directive does not harmonize national law in this regard. Nevertheless, the EU Information Directive mentions in preamble 48 that "such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography."[685]

396. In regard of the CJEU's interpretations of technological measures, the problematic exists between the voluntary technological measures applied by copyright holders and the voluntary private use exception applied by the EU Member State.

In *VG Wort case (2013)*, CJEU stated that "Accordingly, the technological measures that rightholders have the possibility of using should be understood as technologies, devices or components which are capable of ensuring that the objective pursued by the private copying exception is achieved or capable of preventing or limiting reproductions which are not authorised by the Member States within the framework of that exception."[686]

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[683] Ibid. Article 6 (4): "The provisions of the first and second subparagraphs shall not apply to works or other subject matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them."

[684] Ibid. Preamble 53.

[685] Ibid. Preamble 48.

[686] CJEU, 27 June 2013, Verwertungsgesellschaft Wort (VG Wort) v Kyocera, formerly Kyocera Mita Deutschland GmbH, Epson Deutschland GmbH, Xerox GmbH (C−457/11), Canon Deutschland GmbH (C−458/11), Fujitsu Technology Solutions GmbH (C−459/11), Hewlett-Packard GmbH (C−460/11), v Verwertungsgesellschaft Wort (VG Wort), Joined Cases C−457/11 to C−460/11. EU:C:2013:426. para 56.

Similarly, preamble 52 of Information Society Directive reads "When implementing an exception or limitation for private copying in accordance with Article 5 (2) (b), Member States should like wise promote the use of voluntary measures to accommodate achieving the objective of such exception or limitation."

In a word, CJEU reiterated that the legal protection of technological measures shall not eliminate the possibilities of the voluntary private use exception applied by Member States.

397. In addition, CJEU construed in *VG Wort case (2013)* that "having regard to the voluntary nature of those technological measures, even where such a possibility exists, the non-application of those measures cannot have the effect that no fair compensation is due."[687]

This interpretation has been later confirmed by other cased: In *the ACI ADAM case (2014)*[688], CJEU stated that "it is, consequently, for the Member State which, by the establishment of that exception, has authorised the making of the private copy to ensure the proper application of that exception, and thus to restrict acts which are not authorised by the rightholders." In *CopyDan case (2015)*, CJEU stated that "Moreover, in so far as it is Member States and not rightholders which establish the private copying exception and which authorise, for the purposes of the making of such a copy, such use of protected works or other subject-matter, it is for the Member State which, by the establishment of that exception, has authorised the making of copies for private use to ensure the proper application of that exception, and thus to restrict acts which are not authorised by rightholders." "Having regard to the voluntary nature of the technological measures referred to in Article 6 of Information Society Directive, the Court has held that, even where such a possibility exists, the non-application of those measures cannot have the effect that no fair compensation is due."[689]

398. This interpretation made by CJEU and the rule prescribed in Information Directive is very different from the US one. Precisely, in the EU, according to CJEU, the applied technological measures should leave a back door open for the private use exception. Meanwhile, in the US, the logical is inverse: according to Section 1201 (c) (1) of the US Copyright Law which prescribes that "Nothing in this section shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use, under this title."[690] the

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[687] Ibid. para 57.

[688] CJEU, 10 April 2014, ACI Adam BV and Others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding, Case C-435/12. EU:C:2014:254. para 43, 44.

[689] CJEU, 5 March 2015, Copydan Båndkopi v Nokia Danmark A/S, Case C-463/12. EU:C:2015:144. para, 69-73.

[690] the US Copyright Law. Section 1201 (c) (1).

copyright exception, "fair use", plays as a defense after the circumvention of technological measures.

In regard of the international obligations, the WCT only implied that "substantive exceptions" which guarantee the applicability of copyright exceptions and "non-substantive exceptions" which guarantee the public interests shall be established as a safe valve to control that the legal protection against circumvention of technological measures would not be abused.[691] It did not elaborate a specific way of how the "safe valve" shall be elaborated. Therefore, both the US and the EU approaches could be considered as acceptable under the WCT.

Section II. Legal protection against circumvention of technological measures in China

399. In this section, in terms of the protections of technological measures, it will demonstrate the Chinese legislations of the legal protection against circumvention of technological measures in China, namely, in Chinese Copyright Law and in special regulations. Then it will examine that whether the Chinese Copyright Law and regulations are compatible with the WCT globally and what are the differences and similarities among Chinese legislations and the US, the EU in regard of specific rules.

In terms of the exceptions of the legal protection of technological measures, it will also firstly demonstrate the Chinese legislations and the specific rules. It will also compare them with the rules in the WCT, the US and the US laws. Then an interesting Chinese case will be presented and analyzed to concretely demonstrate the interpretation of exceptions in Chinese legislations. This case will be compared with the US and the US cases.

It will demonstrate Chinese legal protection against circumvention of technological measures for copyright holders' interests (§1) and Chinese exceptions of the legal protection of circumvention of technological measures (§2).

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[691] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.19.

§1. Chinese legal protection against circumvention of technological measures for copyright holders' interests

400. It will introduce the Chinese legislations in regard of the legal protection against the circumvention of technological measures to give a global view of the Chinese laws. Then it will demonstrate the specific rules in Chinese legislations and compare them with the WCT, the US and the EU laws.

It will demonstrate the legal protection against circumvention of technological measures in Chinese copyright legislations (I) and the specific rules of Chinese legal protection against circumvention of technological measures (II).

I. Legal protection against circumvention of technological measures in Chinese copyright legislations

401. Chinese legislations in regard of the protection against circumvention of technological measures contain mainly in Chinese Copyright Law and Regulation on the Protection of the Right of Communication through Information Network. Chinese Copyright Law declares that the circumvention of technological measures is an infringement of copyright. The regulation develops the further rules in this regard.

Two legislations will be demonstrated respectively: the legal protection against circumvention of technological measures in Chinese Copyright Law (A) and the legal protection against circumvention of technological measures in Chinese regulation (B).

A. Legal protection against circumvention of technological measures in Chinese Copyright Law

402. The legal protection against circumvention of technological measures was firstly prescribed in 2001 by the first revision of Chinese Copyright Law. Article 47 Clause 6 of Chinese Copyright Law 2001 text[692] stipulates that "intentionally circumventing or

[692] Chinese Copyright Law 2010 text. Article 48, Clause 6. Official translation by Chinese Copyright Bureau.

sabotaging the technological measures adopted by a copyright owner or an owner of the rights related to the copyright to protect the copyright or the rights related to the copyright in the work or the products sound recording or video recording, without permission of the owner, except where otherwise provided for in laws or administrative regulations" is an act of copyright infringement.[693]

403. Although China did not ratify the WCT in 2001, this rule has been considered as an implementation of the WCT by Chinese legislators and scholars:

Standing Committee of People's Congress explained that for the purpose of protecting the interests of copyright holders, "the recent copyright conventions has regulated the circumvention of technological measures" "to control the unauthorized activities of the circumvention of technological measures, this rule was elaborated."[694] Chinese scholar Li MingShan expressly pointed out that "this rule was added according to the WCT."[695]

404. Strangely, regardless that the Chinese Copyright Law, Article 47, 2001 text clearly pointed out the protection against circumvention of technological measures is "to protect the copyright or the rights related to the copyright in the work", this rule still has been understood by Chinese Scholars as mainly for the protection of "the right of communication through information network" which corresponds to the public communication right in the WCT.[696]

For instance, Chinese scholar Feng XiaoQing considers that "regarding that these activities (circumvention of technological measures) undermines the right of communication through information network, in order to protect the copyright and related right in the digital environment, they should be categorized as copyright infringements."[697] The protection of the right of communication through information network and the protection of the copyright in the digital environment in regard of the technological measures are not distinguished by him.

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[693] Chinese Copyright Law 2001 text Article 47, Article 48 : "Anyone who commits any of the following acts of infringement shall, depending on the circumstances, bear civil liabilities such as ceasing the infringement, eliminating the bad effects of the act, making an apology or paying compensation for damages; where public rights and interests are impaired, the administrative department for copyright may order the person to discontinue the infringement, confiscate his unlawful gains, confiscate or destroy the copies produced through infringement, and may also impose a fine; where the circumstances are serious, the said department may, in addition, confiscate the material, tools and instruments mainly used to produce copies through infringement; and where a crime is constituted, criminal liabilities shall be investigated in accordance with law" (Official translation by Chinese Copyright Bureau.)

[694] Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001. Article 47 (6).
This opinion is not binding to the Chinese courts.

[695] Li Mingshan supra note 98. p, 318.

[696] see, Part 1 Title 2.

[697] Feng Xiaoqing. supra note 57. p, 43.

405. According to the WCT, to provide technological measures adequate legal protection is for the purpose of facilitating the copyright holders' control of works in the digital environment.[698] The copyright holders' control of works in the digital environment is much more larger than "the right of communication through information network" which corresponds to the public communication right in China.

In comparison, the WCT provides the protection for two aspects: "in connection with the exercise of their rights under this Treaty or the Berne Convention" and "that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."[699] Therefore, the legal protection of circumvention of technological measures in Chinese Copyright Law should be understood broadly.

B. Legal protection against circumvention of technological measures in Chinese regulations

406. The rule in regard of the legal protection of technological measures in Chinese Copyright Law is not detailed. Regulation on the Protection of the Right of Communication through Information Network which was adopted in 2013 established some specific rules in this regard.

The reason why the legal protection against circumvention of technological measures is only elaborated in a regulation in regard of public communication right is because of the confusion that the legal protection against circumvention of technological measures are mainly for the purpose of protecting "the right of communication through information network." This issue is demonstrated above.[700]

In Article 4 of this regulation, it prescribes that: "For the purpose of protecting the right of communication through information network, right owners may apply technological measures. No person shall intentionally circumvent or sabotage technological measures, no person shall intentionally manufacture, import, offer to the public, provide, or otherwise traffic any devices or components which are mainly for the purpose of circumventing and sabotaging technological measures, no person shall intentionally provide services to the public for the purpose of circumventing or sabotaging technological measures. Unless the

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[698] Ficsor, Mihály. The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation. 1 edition. Oxford; New York: Oxford University Press, 2002. para, 6.42.
[699] the WCT, Article 11.
[700] Feng Xiaoqing. supra note 57. p, 43.

law, administrative regulations stipulate otherwise."[701]

407. Article 4 of the Regulation on the Protection of the Right of Communication through Information Network establishes some basic principles in regard of the legal protection of technological measures. Nevertheless, these rules could not be applied universally to all kinds of technological measures for the reason that Article 4 clearly stipulates: "For the purpose of protecting the right of communication through information network"[702]. In other words, the rules could apply only to the technological measures which protect the right of communication through information network.

This point of view is confirmed by Chinese legislators, Standing Committee of People's Congress expressed that "the technological measures prescribed in this regulation, is referred to the technological measures concerning the right of communication through information network, it does not cover all the technological measures which protect other rights, for instance, the technological measures applied in DVD which prevent others from reproducing. The legal protection of this kind of technological measures should be according to the rules of Copyright Law."[703]

408. Parallel to the Regulation on the Protection of the Right of Communication through Information Network, the Regulation on Computers Software Protection 2013 text, Article 24 also prohibits the act "to knowingly circumvent or sabotage technological measures used by the copyright owner for protecting the software copyright."[704]

409. This gap will be bridged by the third revision of Chinese Copyright Law. It will integrate the rules prescribed in the special regulation into Copyright Law. State Council has integrated Article 4 of the special regulation directly into Article 69 of the Final Draft of third revision of Chinese Copyright Law.[705] Article 69 of the Final Draft of third revision of Chinese Copyright Law prescribes that "For the purpose of protecting copyright and related rights, copyright holders could apply technological measures. Without authorization, no

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[701] Regulation on the Protection of the Right of Communication through Information Network, Article 4. Translated by author.

[702] Ibid.

[703] Interpretation of the Regulation on the Protection of the Right of Communication through Information Network. Edited by Chinese State Council, Bureau of Legal Affaires, 2006. p, 13.

[704] Regulation on Computers Software Protection, 2013. Article 24: "…without the authorization of the software copyright owner, commits any of the following acts of infringement shall, in light of the circumstances, bear civil liability…(3) to knowingly circumvent or sabotage technological measures used by the copyright owner for protecting the software copyright…"

[705] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 69, 70.

person shall intentionally circumvent or sabotage technological measures, no person shall intentionally manufacture, import, offer to the public, provide, or otherwise traffic any devices or components which are mainly for the purpose of circumventing and sabotaging technological measures, no person shall intentionally provide services to the public for the purpose of circumventing or sabotaging technological measures."[706]

II. Specific rules of Chinese legal protection against circumvention of technological measures

410. The legal protection against the circumvention of technological measures in Chinese legislations could also be divided into two main parts: one is the legal protection against the circumvention of technological measures (A); the other is the legal protection against the preparative activities (B).

A. Legal protection against direct circumvention

411. In terms of the direct circumvention of technological measures, two key factors could be extracted: one is the definition of the act of circumvention (1); the other is the definition of technological measures (2).

1. Definition of the act of circumvention

412. In Article 48 (6) of Chinese Copyright Law 2010 text, the act of circumvention is defined as "intentionally circumventing or sabotaging" the technological measures.[707] In the special regulation, the wording in this regard is exactly the same.[708]

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[706] Ibid. Article 69: Chinese original version as "第六十九条 为保护著作权和相关权,权利人 可以采用技术保护措施。 未经许可,任何组织或者个人不得故意避开或 者破坏技术保护措施,不得故意制造、进口或者向公众提供主要用于避开或者破坏技术保 护措施的装置或者部件,不得故意为他人避开 或者破坏技术保护措施提供技术或者服务,但 是法律、行政法规另有规定的除外。"

[707] Chinese Copyright Law 2010 text Article 48 (6) : "intentionally circumventing or sabotaging the technological measures adopted by a copyright owner or an owner of the rights related to the copyright to protect the copyright or the rights related to the copyright in the work or the products sound recording or video recording, without permission of the owner, except where otherwise provided for in laws or administrative regulations"

[708] Regulation on the Protection of the Right of Communication through Information Network, Article 4: "… right owners may apply technological measures. No person shall intentionally circumvent or sabotage technological measures…"

The definitions of the terms: "intentionally" and "circumventing or sabotaging" are not specified by Chinese legislations. Meanwhile, similar terms could be found in the US and the EU. It will compare the Chinese term of "intentionally" with the US and the EU (a) and compare the Chinese term of "circumventing or sabotaging" with the US and the EU (b).

(a) Definition of the "intentionally"

413. According to Article 48 (6) of Chinese Copyright Law 2010 text: "intentionally circumventing or sabotaging the technological measures adopted by a copyright owner or an owner of the rights related to the copyright to protect the copyright or the rights related to the copyright in the work or the products sound recording or video recording, without permission of the owner, except where otherwise provided for in laws or administrative regulations", the signification of "intentionally" is not evident. Does it mean that the "accidental" circumvention would be outside the scope of the legal responsibility? Or does it mean that the intention of the circumvention should be associated with the infringement of copyright? In other words, under Chinese Copyright Law, if the technological measures are circumvented not for the purpose of getting access or reproducing the works, does it incur legal responsibilities?

In other words, the term of "intentionally" could be understood in two different ways: The term of "intentionally" could means that the ultimate purpose is for the circumvention of technological measures itself. The term of "intentionally" could also means that the ultimate purpose of the circumvention of technological measures are for the purpose of the copyright infringement.

414. Does the term of "intentionally" under Chinese Copyright Law means that the "accidental" circumvention of technological measures would be not a copyright infringement? Or does it mean that the purpose of the circumvention shall be getting access to the copyrighted contents which technological measures protect?

Comparing with the US Copyright Law:

In terms of the first question, according to Section 1201 of the US Copyright Law, if the circumvention of technological measures were circumvented not "intentionally" but "accidentally", the technological measures might not be regarded as "effective." Section 1201 the US Copyright Law prescribes that "(1)(A) No person shall circumvent a technological measures that effectively controls access to a work protected under this title…."[709] The term of "effective" was interpreted that it could not mean that the technological protection is

[709] the US Copyright Law. Section 1201 (1)(A).

especially difficult to circumvent in the case of *Universal City Studios, Inc. v. Reimerdes (2000)*.[710] Meanwhile, in the case of *Lexmark v. Static Controls Corp. (2004)*, the technological measure would not be qualified as "effective" if the work protected could be accessed by other alternative ways by using the metaphor of the back door of the house: "Just as one would not say that a lock on the back door of a house "controls access" to a house whose front door does not contain a lock and just as one would not say that a lock on any door of a house "controls access" to the house after its purchaser receives the key to the lock…."[711] Therefore, according to the US legislations and jurisprudences, if a technological measure could be "accidentally" circumvented. It may be arguable that the criterion of "effectiveness" could not be fulfilled.

In terms of the second question, it is clear that under the US Copyright Law, the circumvention of technological measures which protect both the "rights" and the "access" is prohibited according to Section 1201 of the US Copyright Law. However, if the purpose of circumventions is only for the circumvention itself, such as encryption research, they are prescribed as the exceptions in Section 1201 (d), (e), (f), (g), (j) of the US Copyright Law.[712] And Section 1201 (a) (1) of the US Copyright Law prescribes an flexible exception of "rule making."[713]

Although the US Copyright Law does not address the question of the intention of circumvention, some relevant rules could be observed. These detailed rules maybe could help Chinese legislators to interpret precisely what the "intentionally" means.

415. Compared with the EU Information Society Directive, it prescribes in Article 6. 1. that "Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective."[714]

According to the second half of this phrase, a criterion of the subjective or objective

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[710] Universal City Studios, Inc. v. Reimerdes. 111F. Supp. 2d 294 (2000). p, 317, 318. "One cannot lawfully gain access to the keys except by entering into a license with the DVD CCA under authority granted by the copyright owners or by purchasing a DVD player or drive containing the keys pursuant to such a license. In consequence, under the express terms of the statute, CSS 'effectively controls access' to copyrighted DVD movies. it does so, within the meaning of the statute, whether or not it is a strong means of protection"

[711] Lexmark Intern.,Inc. v. Static Control Components, Inc., 387 F. 3d 522(2004). p, 547.

[712] the US Copyright Law Section 1201 (d) Exemption for Nonprofit Libraries, Archives, and Educational Institutions, (e) Law Enforcement, Intelligence, and Other Government Activities (f) Reverse Engineering, (g) Encryption Research, (j) Security Testing.

[713] the US Copyright Law Section 1201 (a) (1) "during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce…"

[714] Directive 2001/29/EC, Article 6.1.

knowledge is introduced. It means that the person shall know or have the reasonable grounds to know that the circumvention of effective technological measures has been conducted. It is possible that the terms of "intentionally" in Chinese Copyright Law could also be interpreted similar to the EU Information Society Directive.

It is not clear that the term of "intentionally" means exactly under Chinese Copyright Law. "Intentionally" could mean that "accidental" circumvention is not within the scope of the legal protection of "effective" technological measures. "Intentionally" could also mean that "the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective" similar to the EU Information Society Directive.[715]

(b) Definition of the "circumventing or sabotaging"

416. The word "circumvent" in the context of legal protection of technological measures is universal. It could be found in the WCT, the US Copyright Law and Chinese Copyright Law[716]. However, some differences could be distinguished.

In the WCT, the definition of "circumvent" is not specified in the text. But "circumvent" is interpreted by WIPO as "any avoiding, bypassing, removing, deactivating or impairing."[717]

In the US Copyright Law, "circumvent" is defined as "descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measures."[718]

417. In comparison, the words used in Chinese Copyright Law and Regulation on the Protection of the Right of Communication through Information Network are the same and quite special: "intentionally 'circumventing' or 'sabotaging' the technological measures…"[719]. "circumvent" is translated from "避开"(bi kai) which means "avoid" "dodge" in Chinese. "sabotaging" is translated from "破坏"(po huai) which means "destroy"

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[715] Ibid.

[716] Chinese Copyright Law 2010 text, Article 48 (6), circumvent is translated officially from "避开." The official english version of translation is made available by WIPO

[717] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.11:
"In general, 'circumvention' means any avoiding, bypassing, removing, deactivating or impairing such a measure."

[718] the US Copyright Law, Section 1201 (a) (3) (A), "to 'circumvent a technological measure' means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measures, without the authority of the copyright owner;"
Section 1201(b) (2) (A), "to 'circumvent protection afforded by a technological measure' means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measures; "

[719] Chinese Copyright Law 2010 text, Article 48 (6)

"ruin" in Chinese.

Chinese legislators explain that "circumvent" "避开"(bi kai) in the context of Chinese legislations means to neutralize the technological measures for one time, meanwhile, "sabotage" "破坏"(po huai) means to remove, destroy the technological measures permanently.[720]

Therefore, although two words, "circumvent" and "sabotage" are used in Chinese legislations to describe the act of circumvention, the scope of the act of circumvention in Chinese legislations is not broader than the one in the WCT, the US or the EU. Generally, they all mean to avoid, bypass, remove and deactivate the technological measures.

2. Definition of the technological measures

418. The scope of protected technological measures is confined by Article 48 (6) of Chinese Copyright Law as "technological measures adopted by a copyright owner or an owner of the rights related to the copyright to protect the copyright or the rights related to the copyright in the work or the products sound recording or video recording."[721]

In comparison, in regard of the protection of direct circumvention of technological measures, the US Copyright Law and the EU Information Society Directive are very different from the Chinese one.

Both the US Copyright Law and the EU Information Society Directive prescribe that the objective of the technological measures is the protection of the copyright holders' rights in the work or the control of access.

The US Copyright Law requires that technological measure should be "effectively controls access to a work".[722] According to the above demonstration of the term "access control", the "effectively controls access to a work" does not require that the technological measures have to protect copyright holders' rights in the work.

419. Similar to the US Copyright Law, Article 6 of the EU Information Society Directive requires that the technological measures should be "effective." The technological measures are deemed "effective" "where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection

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[720] Interpretation of the Regulation on the Protection of the Right of Communication through Information Network. Edited by State Council, Bureau of Legal Affaires, 2006. p, 16.
[721] Chinese Copyright Law Article 48. (6).
[722] the US Copyright Law, Section 1201 (a) (1) (A).

process".[723]

That is to say the scope of technological measures protected under Chinese Copyright Law is significantly smaller than the one in the US and the EU legislations. Chinese Copyright Law only protects the technological measures which protect the copyright holders' right. The technological measures for the control of access to copyrighted contents are not explicitly mentioned by Chinese Copyright Law.

Therefore, the third revision of Chinese Copyright Law probably should work on this issue to define the scope of the technological measure.

B. Legal protection against the preparative activities

420. Chinese Copyright Law does not prohibit the preparative activities of circumvention of technological measures. It only prescribes the legal protection against the direct circumvention of technological measures. Article 48 (6) of Chinese Copyright Law prescribes that "intentionally circumventing or sabotaging the technological measures adopted by a copyright owner or an owner of the rights related to the copyright to protect the copyright or the rights related to the copyright in the work or the products sound recording or video recording, without permission of the owner, except where otherwise provided for in laws or administrative regulations."[724]

Regulation on the Protection of the Right of Communication through Information Network Article 4 provides copyright holders the legal protection against the preparatives activities: "No person shall intentionally circumvent or sabotage technological measures, no person shall intentionally manufacture, import, offer to the public, provide, or otherwise traffic any devices or components which are mainly for the purpose of circumventing and sabotaging technological measures, no person shall intentionally provide services to the public for the purpose of circumventing or sabotaging technological measures."[725]

421. The Chinese legislations in this regard is full of problematics:

Notably, this legal protection under this Chinese regulation could only be applied "for the purpose of protecting the right of communication though information network" according to Article 1 of Regulation on the Protection of the Right of Communication through

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[723] Directive 2001/29/EC, Article 6 (3).

[724] Chinese Copyright Law Article 48. (6).

[725] Regulation on the Protection of the Right of Communication through Information Network. Article 1. "The regulation is enacted for the purpose of protecting the right of communication through information network of copyright holders, performers, audiovisual producers…"

Information Network.[726] It is not reasonable to confine the prohibition of preparative activities within the purpose of the protection of public communication right. This problematic will be solved by the third revision of Chinese Copyright Law. The Final Draft has already integrated the Regulation into Copyright Law, the legal protection of preparative activities will apply to all categories of rights prescribed in Chinese Copyright Law.

The most essential problematic is that the criteria of the preparative activities are not specified by the Regulation nor by the Final Draft of the third revision[727].

422. the WCT requires the member states to provide "adequate legal protection and effective legal remedies against the circumvention…"[728]. The Guide of the WCT expressly indicates that "Contracting Parties may only be sure that they are able to fulfill their obligations under Article 11 of the Treaty if they provide the required protection and remedies:(iii) not only against those devices whose only – sole – purpose is circumvention, but also against those which are primarily designed and produced for such purposes, which only have a limited, commercially significant objective or use other than circumvention, or about which its is obvious that they are meant for circumvention since they are marketed (advertised, etc.) as such…."[729]

The Chinese regulation prescribes that "intentionally manufacture, import, offer to the public, provide, or otherwise traffic any devices or components which are mainly for the purpose of circumventing and sabotaging technological measures" and "intentionally provide services to the public"[730]

The Chinese regulation may not fulfill the obligations under Article 11 of the WCT, because the terms of "mainly for the purpose" and "intentionally provide" are too ambiguous and need to be further elaborated.

423. It is confusing that how to discern "intentionally" from "accidentally" "manufacture, import, offer to the public, provide, or otherwise traffic any devices or components." No interpretations or jurisprudences in China explains that "intentionally" circumventing means that "the person concerned carries out in the knowledge or with reasonable grounds to know, that he or she is pursuing that objective" as defined in the EU Information Society

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[726] Ibid. Article 4.

[727] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012.

[728] the WCT, Article 11.

[729] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.16.

[730] Regulation on the Protection of the Right of Communication through Information Network. Article 4.

Directive.[731]

No interpretations or jurisprudences in China explain that "intentionally" manufacturing, etc, means that the devices is made for the primary purpose of circumventing which is similar to the three criteria stipulated in the EU Information Society Directive and the US Copyright Law: "are promoted, advertised or marketed for the purpose of circumvention; have only a limited commercially significant purpose or use other than to circumvent; are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention."[732]

424. Therefore, in the revision of Chinese Copyright Law, this question should be considered by Chinese legislators. the US, the EU legislations and jurisprudences could provide some ideas. Regarding the US and the EU experiences of legislations, some essential elements of the prohibited products, devices, components and services could be extracted for the future Chinese legislation: first criterion is that they are designed, manufactured for the purpose of circumvention; second criterion is that they are marketed for the purpose of circumvention; third criterion is that they have no other commercial purpose than the circumvention.

These basic elements in regard of the prohibition of preparative activities should be considered by the on-going third revision of Chinese Copyright Law. Unfortunately, they could not be found in the Final Draft of Third Chinese Copyright Law Revision submitted to Chinese State Council.[733]

425. Final Draft Article 69 prescribes the prohibition of preparative activities as "For the purpose of protecting copyright and related rights, copyright holders could apply technological measures. Without authorization, no person shall intentionally circumvent or sabotage technological measures, no person shall intentionally manufacture, import, offer to the public, provide, or otherwise traffic any devices or components which are mainly for the purpose of circumventing and sabotaging technological measures, no person shall intentionally provide services to the public for the purpose of circumventing or sabotaging

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[731] Directive 2001/29/EC, Article 6 (1)

[732] Directive 2001/29/EC, Article 6 (2)
the US Copyright Law Section 1201 (a) (2)

[733] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012.

technological measures."[734]

This provision is almost identical as the Article 4 of the Chinese Regulation. The basic elements in regard of the prohibition of preparative activities are not added into the final draft. However, since the Chinese Regulation is only for the purpose of protecting the right of communication though information network,[735] the Final Draft extended the scope of the prohibition of preparative activities to all the rights enjoyed by copyright holders under Chinese Copyright Law.

§2. Chinese exceptions of the legal protection of circumvention of technological measures

426. It will demonstrate the exceptions prescribed in Chinese legislations to give a global perspective, and compare the Chinese legislations with the WCT, the US and the EU. Then, it will introduce an emblematic Chinese case in regard of exceptions to demonstrate the interpretations of Chinese legislations and compare the interpretations of Chinese court with the US and the EU interpretations.

Therefore, it will demonstrate the exceptions in Chinese legislations (I) and the exceptions interpreted in Chinese jurisprudences (II).

I. Exceptions in Chinese Legislations

427. It will introduce the exceptions of technological measures in Chinese copyright legislations (A) and compare them with the WCT, the US and the EU legislations (B).

A. Introduction of exceptions in Chinese legislations

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[734] Ibid. Article 69: Chinese original version as "第六十九条 为保护著作权和相关权,权利人 可以采用技术保护措施。 未经许可,任何组织或者个人不得故意避开或 者破坏技术保护措施,不得故意制造、进口或者向公众提供主要用于避开或者破坏技术保 护措施的装置或者部件,不得故意为他人避开 或者破坏技术保护措施提供技术或者服务,但 是法律、行政法规另有规定的除外。"

[735] Regulation on the Protection of the Right of Communication through Information Network. Article 4.

428. The exceptions of the legal protection against the circumvention of technological measures are not prescribed in Chinese Copyright Law. But they could be found in Article 12 of Regulation on the Protection of the Right of Communication through Information Network. And this rule will be integrated into Chinese Copyright Law by the third revision.

The rule of exceptions prescribed in Article 12 of the Chinese Regulation on the Protection of the Right of Communication through Information Network: "Under the circumstances listed below, technological measures could be circumvented, whereas devices and components shall not be provided to the public for the purpose of circumventing technological measures, right owners' rights could not be infringed: (1) Any published work, performance or audio-visual product could be provided to a small number of people for the purpose of teaching or scientific research through the information network, whereby the aforesaid published products can only be accessed through the information network; (2) Any of the written works as already published is provided to the blind people through the information network without commercial purposes in a unique way as perceptible by the blind people, and the aforesaid works can only be acquired through the information network; (3) the state institutions exercises their responsibilities according to the administrative and judicial procedures; (4) security testing on computer system or network via information network."[736]

429. The third revision of Chinese Copyright Law will integrate the rules prescribed in the Chinese Regulation on the Protection of the Right of Communication through Information Network into Chinese Copyright Law. State Council has integrated Article 12 of the Regulation directly into and Article 71 of the Final Draft of third revision of Chinese Copyright Law, and the encryption research and revers engineering are also added as exceptions in Article 71 of Final Draft.[737] Article 71 of the Final Draft of the third revision of Chinese Copyright Law prescribes that "Under the circumstances listed below, technological measures could be circumvented, whereas devices and components shall not be provided to the public for the purpose of circumventing technological measures, right owners' rights could not be infringed: (1) Any published work, performance or audio-visual product could be provided to a small number of people for the purpose of teaching or scientific research through the information network, whereby the aforesaid published products can only be accessed through the information network; (2) Any of the written works as already published

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[736] Ibid. Article 12.

[737] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article. 71.

is provided to the blind people through the information network without commercial purposes in a unique way as perceptible by the blind people, and the aforesaid works can only be acquired through the information network; (3) the state institutions exercises their responsibilities according to the administrative and judicial procedures; (4) security testing on computer system or network via information network. (5) Encryption research or computer software revers engineering research."[738]

B. Chinese exceptions compared with the WCT, the US and the EU

430. In comparison with the WCT, the first, second and third cases listed by Article 12 of the Chinese Regulation on the Protection of the Right of Communication through Information Network "(1) Any published work, performance or audio-visual product could be provided to a small number of people for the purpose of teaching or scientific research through the information network, whereby the aforesaid published products can only be accessed through the information network; (2) Any of the written works as already published is provided to the blind people through the information network without commercial purposes in a unique way as perceptible by the blind people, and the aforesaid works can only be acquired through the information network; (3) the state institutions exercises their responsibilities according to the administrative and judicial procedures."[739] could be categorized into the "substantive exception" which is characterized by the Guide to the WCT interpreted by WIPO[740], because the essential purpose of this genre of exceptions is to make the works accessible to users.

Meanwhile, the last case in the Chinese Regulation "(4) security testing on computer system or network via information network"[741] and the added case in Final Draft "(5) Encryption research or computer software revers engineering research"[742] could be categorized in to the "non-substantive exception", because the purpose of this exception is to

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[738] Ibid.

[739] Regulation on the Protection of the Right of Communication through Information Network. Article 12. (1) (2) (3).

[740] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.19.
"What emerged from this analysis was some suggestions for exceptions to the prohibition of the circumvention of technological protection measures in order to guarantee the applicability of certain exceptions to copyright. (These may be called "substantive exceptions" for the reason that their primary purpose is making available works for the works themselves so that they may be seen, listened to, studied, enjoyed as entertainment, etc.)."

[741] Regulation on the Protection of the Right of Communication through Information Network. Article 12. (4)

[742] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 71. (5)

guarantee certain special interests of public.[743]

431. The "substantive exception" cases listed by the Chinese Regulation are almost identical to the EU Information Directive:

Article 6. 4 of the EU Information Directive prescribes "Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)*(a)*, (2)*(c)*, (2)*(d)*, (2)*(e)*, (3)*(a)*, (3)*(b)* or (3)*(e)*."

In the EU Information Directive, Article 5. 2(a) (c) (d) (e) are the exceptions of the reproduction right.[744] They are safeguarded by Article 6. 4. Additional conditions are required in the case of private use exception. These four cases could not be found in the Chinese Regulation because Chinese Regulation is only for the purpose of regulating the "Right of Communication through Information Network" which corresponds public communication right.

Three cases prescribed in Article 5.3 (a) (b) (e) of the EU Information Directive are the exceptions of both the reproduction rights and public communication right. They are safe guarded by Article 6. 4 of the EU Information Directive.

Article 5.3 (a) (b) (e) of the EU Information Directive are almost identical to the Chinese one, it is necessary to demonstrate all of them here in detail: "(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved; (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability; (e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;"

432. According to the Chinese legislators, the elaboration of the Chinese exceptions of technological measures is significantly influenced by the rules in the EU Information Society

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[743] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. Article 11, CT-11.19.
"The latter exceptions may be referred to as "non-substantive exceptions," since their primary purpose is not the making available of works for the works themselves, but for the just mentioned specific reasons."

[744] Directive 2001/29/EC Article 5. 2. "Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases…"

Directive.[745] The intention of the Chinese legislators could be understood: since the legal protection of technological measures in the Chinese Regulation only concerns the right of communication through information network which corresponds to the public communication right, the exceptions of it should also be confined within the scope public communication right. Consequently, the exceptions of technological measures for the purpose of safeguard the exceptions of reproduction right could not be found in the Chinese Regulation.

433. In regard of the other two exceptions in Chinese Regulations, namely, the security testing, revers engineering and encryption research, they could be found both in Section 1201 (g) Encryption Research (j) Security Testing of the US Copyright Law and preamble (48) of the EU Information Society Directive: "Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography."[746]

434. One question could be asked: isn't it necessary for Chinese Copyright Law to add exceptions of legal protection against the circumvention of technological measures to safeguard not only the exceptions of public communication right, but also the exceptions of reproduction right and other rights?

Unfortunately, the Article 70 of the Final Draft is almost the same as the Article 12 of the Regulation, only the revers engineering and the encryption research are added. But regarding the demonstration above, from the perspective of both international convention, namely the WCT, and national legislations, namely the US Copyright Law and the EU Information Society Directive, the copyright exceptions as a whole should be safeguarded by the exceptions of the circumvention of technological measures.

The third revision of Chinese Copyright Law could take the approach of the EU Information Society Directive since the regime of copyright exception in Chinese Copyright Law is more similar to the EU Information Society Directive than the US "faire use."

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[745] Interpretation of the Regulation on the Protection of the Right of Communication through Information Network. Edited by Chinese State Council, Bureau of Legal Affaires, 2006. p, 48.

[746] the US Copyright Law Section 1201 (g) Encryption Research (j) Security Testing.
Directive 2001/29/EC. Preamble (49).

II. Exception interpreted in Chinese jurisprudences

435. It will analyze a Chinese case concerning the interpretations of the exceptions of the legal protection of the circumvention of technological measures (A) and compare the interpretations of Chinese court with the interpretations of the US and the EU courts (B).

A. Chinese case concerning the exception of the legal protection of the circumvention of technological measures

436. A Chinese case concerning the scope of the protection of technological measures and the exception of the protection will be demonstrated here. It is has been elaborated by the Intermediate People's Court of Shanghai and this case is promulgated by Chinese Supreme Court as a guiding case.[747]

It will present the facts of the case (1) and demonstrate the judgement of Chinese court (2).

1. Case Facts

437. Plaintiff Beijing Jingdiao Technology Co., Ltd. (hereinafter referred to as "Jingdiao Company") alleged that: It independently developed a Jingdiao CNC engraving system, which consisted of Jingdiao engraving CAD/ CAM software (JDPaint software), Jingdiao numerical control system, and mechanical body.

The system was used through two computers: one for processing and programming and the other for numerical control. These two computers needed to exchange data to run two different programs, meaning that the programs needed to run through data files. Specifically, first, JDPaint generated data files in Eng format by running on the processing and programming computer, and the data files were received by the control software running on the numerical control computer and converted into processing instructions.

The plaintiff owned copyright in JDPaint, which was unavailable on the market and was only used on the numerical control engraving machines independently manufactured by

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[747] Chinese Supreme Court Guiding Case 2015 No. 48:Beijing Jingdiao Technology Co., Ltd. v. Shanghai Naiky Electronic Technology Co., Ltd.
First trial: First Intermediate People's Court of Shanghai, September 2006. Case number: (2006)沪一中民五(知)初字第 134号民事判决.
Final trial: the Higher People's Court of Shanghai, December 2006. Case number: (2006)沪高高民三 (知)终字第110号民事判决.

the plaintiff.

In early 2006, the plaintiff discovered that defendant Shanghai Naiky Electronic Technology Co., Ltd. (hereinafter referred to as “Naiky Company”) made great efforts on its website to promote the NC-1000 engraving and milling machine numerical control system developed by it which, as it claimed, would fully support all versions of Eng files. The Ncstudio software in the aforesaid numerical control system of the defendant was capable of reading Eng data files output by JDPaint, and the plaintiff had encrypted Eng data files. The defendant's acts of illegally deciphering Eng data files and developing and distributing the numerical control system capable of reading Eng data files were acts of intentionally circumventing or undermining the technical measures taken by the plaintiff to protect its software copyright, infringing upon the plaintiff's software copyright. The defendant's acts enabled other numerical control engraving machines to illegally receive Eng files, causing decrease in the sales volume of the plaintiff's Jingdiao engraving machines and economic loss to plaintiff. Therefore, the plaintiff requested the court to order that the defendant should immediately stop developing and distributing the numerical control system supporting various versions of Eng files output by JDPaint as well as other infringing acts, make a public apology, and compensate the plaintiff for losses in the amount of 485,000 yuan.

438. Naiky Company contended that: Its Ncstudio software was capable of reading data files in Eng format output by JDPaint, but data files in Eng format and the Eng format were not under the protection of computer software copyright. Therefore, the acts of the defendant did not infringe upon the plaintiff's copyright. Naiky Company requested the court to dismiss the plaintiff's claims.

Upon trial, the court found that: In 2001 and 2004, plaintiff Jingdiao Company obtained the No. 0011393 and No.025028 Computer Software Copyright Registration Certificates from the National Copyright Administration, and was registered as the original owner of two pieces of Jingdiao engraving software: JDPaint V4.0 and JDPaint V5.0 (hereinafter referred to as “JDPaint”). In 2004 and 2005, Naiky Company obtained the No. 023060 and No. 041930 Computer Software Copyright Registration Certificates from the National Copyright Administration, and was registered as the original owner of two pieces of software: Naiky numerical control system V5.0 and Weihong Numerical Motion Control System V3.0 (hereinafter referred to as “Ncstudio”). As declared by Naiky Company on its website, Naiky Company launched the NC-1000 engraving and milling machine control system in December 2005. This numerical control system fully supported all versions of data files in Eng format output by JDPaint, and this function was developed for catering to users'

great interest in the typesetting software JDPaint V5.19. The Eng files output by Jingdiao Company's JDPaint were data files in Eng format. Naiky Company's Ncstudio was capable of reading the Eng files output by JDPaint, meaning that Ncstudio was compatible with the Eng files output by JDPaint.

2. Judgement

439. The court held that: the disputes in this case focused on: (1) whether the encrypted data files in Eng format output by plaintiff Jingdiao Company's JDPaint were under the protection of computer software copyright; and (2) whether Naiky Company's act of developing software that could read the Eng files output by JDPaint was an act of "intentionally circumventing or undermining the technical measures taken by the copyright owner to protect its software copyright" as mentioned in item (6) of paragraph 1 of Article 48 of the Copyright Law of the People's Republic of China (hereinafter referred to as the "Copyright Law") and item (3) of paragraph 1 of Article 24 of the Regulation on the Protection of Computer Software.

As for the first dispute, Article 2 of the Regulation on the Protection of Computer Software provided that: "For the purposes of this Regulation, "computer software" (hereinafter referred to as "software") means computer programs and relevant documentation." Article 3 thereof provided that: "For the purposes of this Regulation: (1) "Computer program" means a coded instruction sequence that may be executed by computers and other devices with information processing capabilities or a symbolic instruction sequence or symbolic statement sequence that may be automatically converted into a coded instruction sequence in order for a certain result. The source code program and target code program of a computer program shall be regarded as one work. (2) "Documentation" means written materials and diagrams which are used to describe the content, structure, design, functional specifications, historical development, testing results and usage of a program, such as program design instructions, flow charts, and user's manuals..." Article 4 thereof provided that: "Software protected under this Regulation must be software independently developed by the developer and already fixed in a material form." In accordance with the aforesaid provisions, the protection of computer software copyright covered software programs and documentation.

In this case, the Eng files were data files generated by JDPaint running on the processing and programming computer, and the output format, Eng, was the result from the execution of the target program of JDPaint on a computer. The Eng data files per se were not

the coded instruction sequences, symbolic instruction sequences, or symbolic statement sequences, nor could they run or be executed on a computer. The act of deciphering Eng files would not directly cause any illegal duplication of JDPaint. In addition, data recorded in the Eng files were not inherent in JDPaint of plaintiff Jingdiao Company; instead, were generated after the software user entered engraving processing information. Such data were not owned by Jingdiao Company, the copyright owner of JDPaint. Therefore, neither data nor file format included in Eng data files was a component of JDPaint, and they were not under the protection of computer software copyright.

440. As for the second dispute, in accordance with the provisions of item (6) of paragraph 1 of Article 48 of the Copyright Law and item (3) of paragraph 1 of Article 24 of the Regulation on the Protection of Computer Software, acts of intentionally circumventing or undermining the technical measures taken by the copyright owner to protect its software copyright were acts of infringement upon software copyright. The aforesaid provisions embodied restrictions on the intentional circumvention of technical measures, to protect copyright in computer software. However, the aforesaid restrictions on "intentional circumvention of technical measures" should not be abused. The aforesaid provisions mainly restricted acts of circumventing in bad faith the technical measures taken to protect software copyright. A copyright owner's acts of setting a specific file format for output data, taking encryption measures for the file format, and restricting machines of other brands from reading data saved in the file format so as to ensure that machines to which the copyright owner's computer software was tied enjoyed a competitive edge in the market were not acts of taking technical measures by the copyright owner to protect its software copyright within the meaning of the aforesaid provisions. Any other person's researching and developing software that could read files in a specific format set by the copyright owner did not constitute infringement upon software copyright.

On the basis of the facts in this case, the Eng files output by JDPaint were files for completing data exchange between two computer programs in the "Jingdiao CNC engraving system" of Jingdiao Company. In terms of the design purpose, Jingdiao Company adopted the Eng format, rather than a general format, to complete data exchange not for the encrypted protection of JDPaint, but hoping that only the "Jingdiao CNC engraving system" could receive Eng files and only the engraving machines to which the "Jingdiao CNC engraving system" was tied could use the software. Jingdiao Company adopted the Eng format for the output files of JDPaint, so that JDPaint could only be used in the "Jingdiao CNC engraving system." The fundamental purpose and true intention of Jingdiao Company were to establish

and consolidate the tie-in sales relationship between JDPaint software and its engraving machines. Such acts of Jingdiao Company were not taking technical measures to protect software copyright. If the protection of software copyright was expanded to products to which the software was tied, it would necessarily exceed the extent of copyright protection of computer software as prescribed in the Copyright Law. The technical measures taken by Jingdiao Company in this case were not taken to protect its copyright in JDPaint, but to seek benefits beyond copyright. Therefore, the technical measures taken by Jingdiao Company were not technical measures taken by the copyright owner to protect its software copyright as prescribed in the Copyright Law and the Regulation on the Protection of Computer Software, and Naiky Company's acts of developing software capable of reading Eng files output by JDPaint were not the acts of intentionally circumventing and undermining the technical measures taken by the copyright owner to protect its software copyright.

B. Chinese case compared with the US and the EU

441. In essence, the Chinese Court held firstly that the Eng files were data files generated by JDPaint is not protected by Chinese laws as computer software.

Then, it reasoned that the circumvention of technological measures applied on JDPaint software's Eng files by JingDiao company is not liable of infringement for the reason that the circumvention is for the purpose of facilitating the interoperability of computer software rather than for the purpose of accessing or reproducing the software of JDPaint without authorization.

442. It seems that the two reasons why Chinese Court rejected the plaintiff's claim are independent. The first one completely rejected the copyright protection of the Eng files of JDPaint. While the second one falls within the exceptions of the protection of technological measures.

The first reasoning that the Eng files are not protected under the Chinese Copyright Law could provoke further problematics. However, it is outside the issue of the exception of the legal protection of the circumvention of technological measures.

The second one is interesting and it is similar to the US case: *Chamberlain Group, Inc. v. Skylink Technologies, Inc. case (2004)*[748]. The US court ruled that "U.S.C. § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the

[748] Chamberlain, Inc. v. Skylink Technologies, Inc., 381 F.3d. (2004).

Copyright Act otherwise affords copyright owners."[749] In the US case, the court demonstrated the metaphor that "disabling a burglar alarm to gain 'access' to a home containing copyrighted books, music, art, and periodicals would (not) violate the DMCA."[750] In essence, the US court demanded that the technological measures should be associated with the prerogatives copyright holders have under the US Copyright Law.

443. In this Chinese case, the court ruled that the technological measures applied by JingDiao Company is not for the purpose of the protection of copyright content but for the purpose of eliminating competition, the fundamental purpose and true intention of Jingdiao Company were to establish and consolidate the tie-in sales relationship between JDPaint software and its engraving machines. Similarly, in Chinese case, the court also required that the technological measures applied by copyright holder should be for the purpose of the protection of their rights under Chinese Copyright Law.

However, this judgment by Chinese court could jeopardize the copyright holders interests in China. Naiky Company has made an effort to render its machine compatible with the Eng files which particularly used by the JDPaint software. It is because that as presented in the fact of the case, the JDPaint software is preferred by users. It is true that the JingDiao Company's purpose of applying technological measures is to sell their machine which has been verified by the court. However, regarding the fact that the JDPaint software is not marketed by JingDiao Company, it is susceptible why Naiky Company would make an effort to circumvent the technological measures to render its machine compatible with the JDPaint software. Apparently, Naiky Company's ultimate intention is to run the JDPaint software on its machine. Since the JDPaint software is not available on the market, the access of Naiky Company is surely without the authorization of JingDiao Company.

Briefly, the Chinese court has decided that the JingDiao Company's purpose of applying technological measures is selling the machine rather than protecting copyright. Meanwhile the Naiky Company's purpose of circumvention is to get access to the copyrighted software without authorization.

444. Here, a dilemma is created, on the one hand, the interoperability should be promoted for the interests of the social and scientific development and the competition should also be guaranteed in the market; on the other hand, the interests of the copyright holders should also be protected. How to reconcile these interests in the future? It would be a difficult question for the Chinese legislators and courts.

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[749] Ibid. p, 1202.
[750] Ibid. p, 1201.

Conclusion of Chapter I

445. the WCT firstly introduce the legal protection against circumvention of technological measures in the field of copyright law at international level. It has stipulated several criteria which has been implemented by the US Copyright Law, the EU Information Directive and Chinese Copyright Law.

In comparison of these legislations, the national legislations are similar in the field of general principles. For instance, the US, the EU and China all prohibit the circumvention of "effective" technological measures and the manufacture, distribution of circumvention devices and services. However, in detail, the national legislations are different. For instance, in regard of the interpretation of "effective" "access" and the exceptions of protection, every national law and court has their own interpretation.

The current Chinese Copyright Law only announces the protection of technological measures. The specific rules are found mainly in Regulation on the Protection of the Right of Communication through Information Network. However, this regulations only protects the technological measures which control "the Chinese right of communication to the public."

446. In the foreseeable future, these rules in the regulation will be integrated into the next revision of Chinese Copyright Law.

The problematics remain in both legislations and interpretations: The term of "access" is not stipulated in Chinese legislations. It is not clear that whether Chinese legislations protect only the right control technological measures. How to interpret the "access" and "right" control?

The exceptions of the technological measures is interpreted by Chinese court which is similar to the US *Chamberlain Group, Inc. v. Skylink Technologies, Inc. case (2004)*. However, the interpretation could have the potential to jeopardize the interests of copyright holders in Chinese case. How to interpret the exceptions to balance the interests of copyright holders and users remains a problematic.

In conclusion, the legal protection of technological measures plays an essential rules of protecting copyright facing the technological development. In China, this rule is still in the process of evolution. the WCT, the US and the EU legislations and jurisprudences have influenced the Chinese rules. Meanwhile, an other enforcement measure, Internet Service

Provider's responsibility, is also absolutely critical for the protection of copyright in the digital environment. it will also be demonstrated in a comparative law perspective.

Chapter II. Notice and Take Down in Chinese Legislations compared with the US and the EU Legislations

447. Notice and Take Down is a specific rule within the exemption of the internet service providers' secondary liability. The requirements of Notice and Take Down motivate the eligible internet service providers to remove, disable the access of the infringing contents after receiving the notice from the copyright holders for the purpose of benefiting the exemption of secondary liability. The rules of Notice and Take Down is essential for the copyright enforcement in the digital environment regarding that copyrighted contents could be transmitted massively among individual users enabled by P2P technology and high speed internet.

Notice and Take Down, on the one hand, offers an exemption of liability for internet service providers, on the other hand, gives a powerful weapon to copyright holders to protect their interests.

Although the Notice and Take Down is an important factor for copyright enforcement in the digital environment, it has not been harmonized at international level. It was not prescribed directly into the text of the WCT. Nevertheless, the rules of Notice and Take Down could also be found in the US Copyright Law, the EU directives and Chinese regulation.

Without an unified international obligation, inevitably, the national laws in the US, the EU and China have varied. The rules of Notice and Take Down in the US Copyright Law are elaborated in detail. While the rules in the EU directives have tried to harmonize the national laws among the member states and surpassed the realm of copyright.

In comparison with China, the Notice and Take Down rules are prescribed in a special Chinese regulation within the scope of the public communication right. Chinese legislators have the plan to integrate this rule into the Chinese Copyright Law during the third revision.

What exactly are the Notice and Take Down rules in China? How the US and the EU legislations and jurisprudences have influenced the China in terms of Notice and Take Down rules? How the Chinese Notice and Take Down will probably evolve in the future?

Therefore, it will firstly demonstrate the fundamental elements of the Notice and Take Down in regard of the legislations and the jurisprudences in the US and the EU (Section I).

Secondly it will demonstrate the Notice and Take Down in Chinese legislations and jurisprudences and compare them with the US and the EU (Section II).

Section I. Notice and Take Down in the US and the EU Legislations

448. The legislations and interpretations of the Notice and Take Down of the US and the EU are elaborated for the different purposes. The principal intention of the Notice and Take Down rule in the US Copyright Law is to balance the interests between copyright holders and internet service providers. While the principal intention of the EU is to harmonize the national laws of the Member States at the EU level.

Therefore, the Notice and Take Down under the US Copyright Law specifies the criteria, the procedure. In comparison, the Notice and Take Down in the EU directives establishes some general principles for the purpose of bridging the gaps among national rules.

Enormous problematics are provoked by the rules of Notice and Take Down in both the US and the EU. However, there is no need to dig into the obscurity of this subject. The purpose of this section is to demonstrate the general principles of Notice and Take Down prescribed in the US Copyright Law and in the EU directives and extract the interesting points in a perspective of China.

This section will firstly demonstrate the key rules of the Notice and Take Down in the US Copyright Law and the interpretations by the US courts (§1) and secondly demonstrate the principles established by the EU directives and the case laws of CJEU in regard of the Notice and Take Down (§2).

§ 1. Notice and Take Down in the US

449. Notice and Take Down is a special rule under the “Safe Harbor” in Section 512 of the

US Copyright Law. After complying with the general requirements of "Safe Harbor" and the specific requirements of "Notice and Take Down", the internet service providers could be exempted from the secondary liabilities. This rule provides internet service providers a strong incentive to remove the copyright infringing materials in the digital environment.

It will demonstrate firstly the general requirements of "Safe Harbor" (I) and secondly, demonstrate the specific criteria and precise procedure of "Notice and Take Down" (II).

I. General requirements of "Safe Harbor"

450. "Safe Harbor" is an exemption of secondary liabilities of internet service providers under Section 512 of the US Copyright Law. Notice and Take Down is a specific rule under "Safe Harbor." Therefore, it is necessary to generally introduce the rules of Safe Harbor (A) and to demonstrate the criteria for the exemption of liability under Safe Harbor (B).

A. Introduction of Safe Harbor

451. In Section 512 of the US Copyright Law, it has established a "safe harbor" for four kinds of internet service providers. Namely, "transmitting, routing, or providing connections"[751], the internet service providers who provide the internet access services; "intermediate and temporary storage of material"[752], the internet service providers who provide system caching services; "the storage at the direction of a user of material"[753], the internet service providers who provide information storage services; "referring or linking

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[751] the US Copyright Law Section 512, (a) Transitory Digital Network Communications.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections……

[752] Ibid. Section 512, (b) System Caching. — (1) Limitation on Liability. — A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which……

[753] Ibid. Section 512, (c) Information Residing on Systems or Networks at Direction of Users.— (1) In General. —A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

users to an online location"[754], the internet service providers who provide information searching services.

If the different conditions for different service providers were met, "a service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief."[755]

Consequently, this rule created strong motivation for the internet service providers to comply with the requirements and conditions of "safe harbor" prescribed in Section 512. In the digital environment, facing the massive copying and dissemination of copyrighted contents, the copyright holders thus have an important ally created by the "safe harbor" to fight against online pirating.

452. However, if the internet service providers fail to comply with the requirements and conditions of safe harbor, they would be exposed to the direct, vicarious or contributory liabilities.[756] Although the exact nature of the liability of internet service providers is not clear under the US laws[757], it could be observed that the "safe harbor" clause is a reconciliation between internet companies and the copyright holders. Under "safe harbor", the copyright holders are satisfied because certain weapons are given to them to target the internet service providers; meanwhile, the internet service providers are also happy because if certain duties are accomplished, they are immunized against liabilities.

Under "safe harbor", the "notice and take down" address three kinds of internet service providers: system caching, information residing and information location service providers. It enables copyright holders to delete or block access to infringing material in the digital environment. This rules will be demonstrated hereinafter.

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[754] Ibid. Section 512, (d) Information Location Tools.— A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory index, reference, pointer, or hypertext link, if the service provider……

[755] Ibid.

[756] Ginsburg, Jane C. and R. Anthony Reese. Copyright: cases and materials. New York, NY, Etats-Unis d'Amérique: Foundation Press, 2013. Chapter 8, Enforcement of Copyright, 2. secondary liability of internet service providers: "New section 512 does not purport to define the conduct of an online service provider that would render it liable for direct, contributory or vicarious infringement of copyright. Rather, it identifies several different OSP activities and specifies conditions—in the event the OSP is held to infringe by those activities—for immunizing the OSP against monetary relief and for limiting its exposure to injunctive relief."

[757] Edward Lee, "Decoding the DMCA Safe Harbors", 32 Colum. J.L. & Arts 233 2008-2009. p, 234. "Despite the importance of the DMCA safe harbors for ISPs, basic aspects of them remain unclear. Astonishingly, even the basic question whether the DMCA safe harbors provide any immunity to vicarious liability is still contested."

B. Criteria for the exemption of liability under Safe Harbor

453. Notice and Take Down shall comply with Two general criteria for all the internet service providers under Safe Harbor in order to exempt the secondary liability.

Section 512 (k) of the US Copyright Law defines "service provider" as "(1) Service provider. — (A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received. (B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A)."[758]

The definition of internet service providers under the US Copyright Law actually requires internet service providers to stay as a passive role. The definition of internet service providers under "Safe Harbor" is "derived from the definition of 'telecommunications' found in the Communications Act of 1934 (47 U.S.C. § 153(48)) in recognition of the fact that the functions covered by new subsection (a) are essentially conduit-only functions."[759]

That is to say, if a service provider altered the content designated by its users or it functions outside the scope of the definitions under Section 512(k), the service providers would not be qualified as "service provider" within the meaning of "Safe Harbor."[760]

454. Section 512 (k) Section 512 (i) of the US Copyright Law prescribes a general requirement for all internet service providers: "Conditions for Eligibility.— (1) Accommodation of technology. — The limitations on liability established by this section shall apply to a service provider only if the service provider — (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and (B) accommodates and does not interfere with standard

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[758] the US Copyright Law Section 512 (k)

[759] H.R. REP. No. 105-551, (1998), p, 63.

[760] Ibid. p, 63. "Thus, over-the-air broadcasting, whether in analog or digital form, or a cable television system, or a satellite television service, would not qualify, except to the extent it provides users with on-line ac- cess to a digital network such as the Internet, or it provides trans- mission, routing, or connections to connect material to such a net- work, and then only with respect to those functions. An entity is not disqualified from being a "service provider" because it alters the form of the material, so long as it does not alter the content of the material."

technical measures. (2) Definition. — As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and—(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks."[761]

Section 512 (i) establishes two conditions which internet service providers must meet to be eligible for the "safe harbor." First one is that internet service providers should adopt appropriate policy to terminate the accounts of repeat infringers; second ons is that the internet service providers should accommodate and not interfere with, standard technical measures used to identify or protect copyrighted works.[762]

455. However, The House Report specifically clarifies that "the Committee does not intend this provision to undermine the principles of new subsection (l) or the knowledge standard of new subsection (c) by suggesting that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing."[763]

Conditions for eligibility is the premise of the exemption of secondary liability of all kinds of service providers.[764] It was interpreted by Ninth Circuit Court of the US in *Ellison v. Robertson case (2004)* that in essence it requires "service providers to: (1) adopt a policy that provides for the termination of service access for repeat copyright infringers in appropriate circumstances; (2) implement that policy in a reasonable manner; and (3) inform its subscribers of the policy."[765]

456. In *Ellison v. Robertson case (2004)*, the court held that the internet service provider did not reasonably implement its policy against repeat infringers for the reason that it

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[761] the US Copyright Law. Section 512 (k) Section 512 (i).
[762] S. REP. No. 105-190, (1998), p, 52.
H.R. REP. No. 105-551, (1998), p, 61.
[763] H.R. REP. No. 105-551, (1998), p, 61.
[764] the US Copyright Law Section 512 (i) Conditions for Eligibility.—
(1) Accommodation of technology. — The limitations on liability established by this section shall apply to a service provider only if the service provider —
(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and
(B) accommodates and does not interfere with standard technical measures.
[765] Ellison v. Robertson, 357 F.3d 1072 (2004), p, 1080.

changed its contact email address for copyright infringement notice but fail to register the change with the US Copyright Office promptly.[766]

Similarly, in *In re Aimster Copyright Litigation case (2002)*, the US District court construed that the encryption system of internet service provider absolves them of responsibility "when that scheme is voluntarily instituted by the Defendants themselves. Adopting a repeat infringer policy and then purposely eviscerating any hope that such a policy could ever be carried out is not an 'implementation' as required by by §512(i)."[767] And this decision is confirmed by Seventh Circuit Court.[768]

457. In *Perfect 10, Inc. v. CCBill LLC case (2007)*[769] and *Corbis Corp. v. Amazon.com, Inc. case (2004)*[770], the policies adopted by internet service providers were deemed "reasonably implemented." The court interpreted that "Amazon need only inform users that in appropriate circumstances, it may terminate the user's accounts for repeated copyright infringement" and "the policy stating user's access may be terminated deemed sufficient communication."[771]

In regard of identifying repeat infringers, the *Corbis Corp. v. Amazon.com, Inc. case* (2004) interpreted Section 512 (i) (A) in favor of the interests of internet service providers that "§512(i) does not require a service provider to decide, ex ante, the specific types of conduct that will merit restricting access to its services. As Congress made clear, the DMCA was drafted with the understanding that service providers need not "make difficult judgments as to whether conduct is or is not infringing"[772] and "a service provider who receives notice of a copyright violation be able to tell merely from looking at the user's activities, statements, or conduct that copyright infringement is occurring."[773]

In a word, the interpretations of the conditions for eligibility motivate internet service providers to terminate the "repeat infringers" to protect copyright in the digital environment. briefly, the US courts do not interpret Section 512 (1) (A) in a way that internet service

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[766] Ibid. p, 1080.
[767] In re Aimster Copyright Litigation, 252 F.Supp.2d 634 (2002), p, 659.
[768] In re Aimster Copyright Litigation, 334 F.3d 643 (2003), p, 655.
[769] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (2007)
Perfect 10, Inc. v. CCBill, LLC, 340 F.Supp.2d 1077 (2004)
[770] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (2004)
[771] Perfect 10, Inc. v. CCBill, LLC, 340 F.Supp.2d 1077 (2004), p, 1089.
"The Court notes that this policy states that it will terminate or disable the accounts of IBill clients who are accused of infringing third party copyrights. Therefore, there is no genuine issue of material fact that IBill has adopted a policy that terminates repeat infringers in appropriate circumstances."
[772] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (2004) p, 1101.
[773] Ibid. p, 1105.

providers should identify and terminate the repeat infringers actively, "the court focused on whether the policy allowed the service providers to communicate infringement notices to the service users."[774]

II. Specific requirements of "Notice and Take Down"

458. Notice and Take Down is a powerful weapon of copyright holders provided by the US Copyright Law "Safe Harbor" clause. Several requirements shall be complied by internet service providers for benefiting the exemption of liabilities and also be complied by copyright holders for taking down infringing materials.

It will demonstrate the criteria for three kinds of internet service providers required by Notice and Take Down rules (A) and the precise procedures of Notice and Take Down which both internet service providers and copyright holders shall respect (B).

A. Criteria of Notice and Take Down for internet service providers

459. Three kinds of internet service providers are eligible for the Notice and Take Down for the purpose of the exemption of liabilities, namely, System Caching, Information Residing and Information Location internet service providers. Several criteria are prescribed under the US Copyright Law for the three kinds of internet service providers.

In regard of system caching service providers, Section 512 (b) (2) of the US Copyright Law prescribes several conditions for system caching service providers. The most pertinent one is that Section 512 (b) (2) (E) stipulates the rules of "Notice and Take Down" for system caching service providers.

460. Section 512 (b) (2) (E) prescribes: if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if —

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that

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[774] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (2004) p, 1102.
In re Aimster Copyright Litigation, 252 F.Supp.2d 634 (2002) p, 659.

access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

As prescribed in Section 512 (b) (1) (A) (1), the compliance of the Notice and Take Down under Section 512 (c) could exempt system caching service providers from secondary liability. At the same time, two exceptions are also prescribed in Section 512 (b) (2) (E) (i) and (ii).[775]

461. In terms of Information Residing Service Providers, Section 512 (c) (1) of the US Copyright Law prescribes that "(1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider— (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."[776]

462. In terms of information location internet service providers, Section 512 (d) of the US Copyright Law prescribes "A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider— (1) (A) does not have actual knowledge that the material or activity is infringing; (A) in the absence of such actual knowledge, is not aware of facts or circumstances from which

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[775] S. REP. No. 105-190, (1998), p, 43.
H.R. REP. No. 105-551, (1998), p 52.
[776] the US Copyright Law Section 512 (c) (1)

infringing activity is apparent; or (B) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link."[777]

Two essential criteria for the three kinds of internet service providers under the Notice and Take Down could be extracted. They will be demonstrated below: benefit and control criteria (1) and knowledge criteria (2).

1. benefit and control criteria

463. The condition of financial benefits and control is prescribed in Section 512 (c) (1) (B) and Section 512 (d) (2) for both information residing service providers and information location internet service providers. It prescribes that "does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity."[778]

It is similar to the general rule of secondary liability in regard of copyright established by the US court in *Shapiro, Bernstein & Co. v. H. L. Green Co case (1963)*.[779] The Second Circuit Court established a principle that store owner is liable for the unauthorized sals of its concessionaire for the reasons that the store owner retained the ultimate right of supervision over the conduct of the record concession and its employees and "store owner had a most definite financial interest in the success of concessionaire.

Similarly, in regard of the secondary liability of internet service provider, the premise of the Notice and Take Down procedure requires that the internet service provider should not "receive a financial benefit directly attributable to the infringing activity" in the case that "the service provider has the right and ability to control such activity."

464. However, some different wordings could be found between the general principle and

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[777] Ibid. Section 512 (d)
[778] Ibid. Section 512 (c) (1) (B) and Section 512 (d) (2).
[779] Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F. 2d 304 (1963). p, 308.

the special criteria for internet service providers.

Firstly, the DMCA requires that the internet service providers should not "receive" a financial benefit "directly attributable to the infringing activity", in comparison, the plain words of the general principle are "have a most definite financial interest."

The Senate and House reports on the DMCA all clarified that "in general, a service provider conducting a legitimate business would not be considered to receive a 'financial benefit directly attributable to the infringing activity' where the infringer makes the same kind of payment as non- infringing users of the provider's service. Thus, receiving a one-time set-up fee and flat periodic payments for service from a person engaging in infringing activities would not constitute receiving a 'financial benefit directly attributable to the infringing activity'."[780]

Secondly, the text of "the service provider has the right and ability to control such activity" in DMCA and the principle of "the ultimate right of supervision over the conduct of the record concession and its employees" in *Shapiro, Bernstein & Co. v. H. L. Green Co case (1963)*.[781] Both requires the capability to supervise and cease the infringing activities.

465. But under the DMCA, in *Hendrickson v. eBay case*, the criterion is interpreted by the US court more narrowly than the common standard of secondary liability: the internet service providers' ability to remove the infringing material does not qualify this criterion.[782]

According to the interpretations of the US courts, the common law standard of "financial benefits" was established in *A&M Records, Inc. v. Napster, Inc. case (2001)*, the court concluded that "Financial benefit exists where the availability of infringing material 'acts as a draw' for customers."[783]

466. In *Perfect 10, Inc. v. CCBill LLC case (2007)*, this common law standard was interpreted as consistent with the "direct financial benefit" under DMCA section 512 (c) (1) (B).[784] The court reasoned that "Based on the "well-established rule of construction that where Congress uses terms that have accumulated settled meaning under common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the

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[780] S. REP. No. 105-190, (1998), p, 44.
H.R. REP. No. 105-551, (1998), p 54.
[781] Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F. 2d 304 (1963). p, 308.
[782] Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082 (2001), p 1093, 1094.
[783] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (2001), p, 1023. cited Fonovisa, 76 F. 3d at 263-64 " financial benefit may be shown where infringing performances enhance the attractiveness of a venue"
[784] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (2007), p, 1117. "we hold that "direct financial benefit" should be interpreted consistent with the similarly-worded common law standard for vicarious copyright liability"

established meaning of these terms."[785] It is necessary to reiterate that the House and Senate Reports stated that "in general, a service provider conducting a legitimate business would not be considered to receive a 'financial benefit directly attributable to the infringing activity' where the infringer makes the same kind of payment as non-infringing users of the provider's service. Thus, receiving a one-time set-up fee and flat periodic payments for service from a person engaging in infringing activities would not constitute receiving a 'financial benefit directly attributable to the infringing activity'."[786]

The court cited the former *Ellison v. Robertson case (2004)*[787] that "a vicariously liable copyright infringer derives a direct financial benefit from the infringement and has the right and ability to supervise the infringing activity."[788] "no jury could reasonably conclude that AOL received a direct financial benefit from providing access to the infringing material because the record lacks evidence that AOL attracted or retained subscriptions because of the infringement or lost subscriptions because of AOL's eventual obstruction of the infringement."[789]

Therefore, the court concluded that "In this case, Perfect 10 provides almost no evidence about the alleged direct financial benefit to CWIE. Perfect 10 only alleges that "CWIE 'hosts' websites for a fee. This allegation is insufficient to show that the infringing activity was 'a draw'."[790]

In a word, the standard of "direct financial benefit" is "whether the infringing activity constitutes a draw for subscribers, not just an added benefit."[791] The criterion of "financial benefit" under DMCA is interpreted as a financial benefit which is additionally received because of the infringing activity.

467. In regard of the of "right and ability to control", it is interpreted by the US courts under DMCA is different from the standard elaborated in *A&M Records, Inc. v. Napster, Inc. case (2001)* which stated that " 'the ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise."[792]

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[785] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (2007), p, 1117. quoting Neder v. United States, 527 U.S. 1, 21, 119 S.Ct. 1827,144 L.Ed.2d 35 (1999)
[786] S. REP. No. 105-190, (1998), p, 44.
H.R. REP. No. 105-551, (1998), p 54.
[787] Ellison v. Robertson, 357 F.3d 1072 (2004). pp, 1078, 1079.
[788] Ibid. p, 1078.
[789] Ibid. p, 1079.
[790] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (2007), p, 1117.
[791] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (2007), p, 1117.
Ellison v. Robertson, 357 F.3d 1072 (2004). p, 1079.
[792] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (2001), p, 1023.

In *Viacom Intern., Inc. v. YouTube, Inc. case (2012)*, the court found that the right and ability to control infringing activity under Section 512 (c) (1) (B) requires "something more" than the standard of the ability to remove or block access to materials posted on a service provider's website by examining the legislative history and jurisprudences.[793]

To determine what is "something more" required under DMCA than the common law standard, the court analyzed the *Perfect 10, Inc. v. Cybernet Ventures, Inc. case (2002)*[794] where the court has found that a internet service provider has the right and ability to control infringing activity under section 512 (c) (1) (B).

468. In *Perfect 10, Inc. v. Cybernet Ventures, Inc. case (2002)*, the court found control where the service provider instituted a monitoring program by which user websites received "detailed instructions regarding issues of layout, appearance, and content."[795] The service provider also forbade certain types of content and refused access to users who failed to comply with its instructions[796]. Similarly, inducement of copyright infringement under *Metro–Goldwyn–Mayer Studios Inc. v. Grokster, Ltd. (2005)*, which "premises liability on purposeful, culpable expression and conduct," might also rise to the level of control under § 512 (c) (1) (B) .

After examining the cases of *Perfect 10, Inc. v. Cybernet Ventures, Inc. (2002)*[797] and *Metro–Goldwyn–Mayer Studios Inc. v. Grokster, Ltd. (2005)*[798], the court concluded in *Viacom Intern., Inc. v. YouTube, Inc. case (2012)*, that "something more" is "a service provider exerting substantial influence on the activities of users, without necessarily—or even frequently—acquiring knowledge of specific infringing activity."[799]

It is necessary to note that if internet service provider does not have the right and ability to control, the benefit criterion is not necessary to be examined. In *Corbis Corp. v. Amazon.com, Inc. case (2004)*, it added another criterion that "Because Amazon does not have the right and ability to control the infringing material, it is not necessary for this Court to inquire as to whether Amazon receives a direct financial benefit from the allegedly infringing conduct."[800]

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[793] Viacom Intern., Inc. v. YouTube, Inc., 676 F.3d 19 (2012), p, 38.
[794] Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.Supp.2d 1146 (2002),
[795] Ibid. p, 1173.
[796] Viacom Intern., Inc. v. YouTube, Inc., 676 F.3d 19 (2012), p, 38.
[797] Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.Supp.2d 1146 (2002),
[798] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005)
[799] Viacom Intern., Inc. v. YouTube, Inc., 676 F.3d 19 (2012). p, 38.
[800] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (2004), p, 1110.

2. knowledge criteria

469. The conditions of "knowledge criteria" is prescribed identically in Section 512 (c) (1) (A) (i),(ii) and (iii) and Section 512 (d) (1) (A), (B) and (C) for Information Residing on Systems or Networks and Information Location Tools internet service providers respectively.

It stipulates 3 criteria that Section 512 (c) (1) (A) (i) and Section 512 (d) (1)(A): "does not have actual knowledge that the material or an activity using the material on the system or network is infringing."[801] Section 512 (c) (1) (A)(ii) and Section 512 (d) (1)(B): "in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent."[802] Section 512 (c) (1) (A)(iii)Section 512 (d) (1)(C): "upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material."[803]

Section 512 (c) (1) (A) (i) and (ii), Section 512 (d) (1) (A) and (B) established a standard of "knowledge" at two level. First level is that internet service providers do not have the actual knowledge of the infringing activities. Second level is that the internet service providers do not aware of the infringing fact which is the so called "red flag" criterion.[804]

Section 512 (c) (1) (A) (iii) and Section 512 (d) (1) (C) requires internet service providers to remove or disable the access of the infringing material expeditiously after acquiring the actual knowledge or the "red flag."

470. the US legislative body has tried to strike an uneasy balance between the interests of copyright holders and interests of internet service providers:

On the one hand, as examined by The Senate and House reports on the DMCA: "This provision is intended to promote the development of information location tools generally, and Internet directories such as Yahoo!'s in particular, by establishing a safe-harbor from copyright infringement liability for information location tool providers if they comply with the notice and takedown procedures and other requirements of subsection (d)."[805]

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[801] the US Copyright Law. Section 512 (c) (1) (A) (i) and Section 512 (d) (1)(A).
[802] Ibid. Section 512 (c) (1) (A)(ii) and Section 512 (d) (1)(B).
[803] Ibid. Section 512 (c) (1) (A)(iii)Section 512 (d) (1)(C).
[804] S. REP. No. 105-190, (1998), p, 49. "Subsection (c)(1)(A)(ii) can best be described as a ''red flag'' test… However, if the service provider becomes aware of a ''red flag'' from which infringing activity is apparent, it will lose the limitation of liability if it takes no action."
H.R. REP. No. 105-551, (1998), p 53. " New subsection (c)(1)(A)(ii) can best be described as a ''red flag'' test… However, if the service provider becomes aware of a ''red flag'' from which infringing activity is apparent, it will lose the limitation of liability if it takes no action."
[805] S. REP. No. 105-190, (1998), p, 49.
H.R. REP. No. 105-551, (1998), p 53.

On the other hand, for the purpose of copyright protection in the digital environment, it has to make sure that if internet service providers deliberately ignore the actual knowledge or the "red flag" of an infringing activity, they would not be qualified for the "safe harbor." The reports of the Senate committee on the DMCA offered an example as a guidance: "the copyright owner could show that the provider was aware of facts from which infringing activity was apparent if the copyright owner could prove that the location was clearly, at the time the directory provider viewed it, a ''pirate'' site of the type described below, where sound recordings, software, movies or books were available for unauthorized downloading, public performance or public display."[806]

471. However, the ambiguity of the "red flag" also remains in the criteria. Would it be inappropriate that it is the internet service providers to determine whether the content is copyright infringing or not? Furthermore, the internet service providers would remove the suspected infringing materials for the purpose of entering "safe harbor." Therefore, the interpretation of the criteria of the "knowledge standard" is also essential.

After examined the wording of the two clause and the interpretations of case laws, the US Second Circuit Court in *Viacom Intern., Inc. v. YouTube, Inc. case (2012)* concluded that "The difference between actual and red flag knowledge is thus not between specific and generalized knowledge, but instead between a subjective and an objective standard. In other words, the actual knowledge provision turns on whether the provider actually or 'subjectively' knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person."[807]

In other words, the US court introduced a principle of subjective and objective knowledge standards. "Knowledge" criterion is a subjective standard while "red flag" is an objective standard. Both standards could be applied independently to special case.[808]

472. However, in regard of the subjective and objective knowledge criteria, in *Perfect 10,*

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[806] S. REP. No. 105-190, (1998), p, 49. "Information location tools are essential to the operation of the Internet; without them, users would not be able to find the information they need."

[807] Viacom Intern., Inc. v. YouTube, Inc., 676 F.3d 19 (2012), p, 32.
"The phrase 'actual knowledge', which appears in § 512(c)(1)(A)(i) , is frequently used to denote subjective belief." citing United States v.Quinones, 635 F. 3d 590 (2011).
"By contrast, courts often invoke the language of 'facts or circumstances',which appears in § 512(c)(1)(A)(ii) , in discussing an objective reasonableness standard." citing Maxwell v. City of New York, 380 F.3d 106 (2004).

[808] Viacom Intern., Inc. v. YouTube, Inc., 676 F.3d 19 (2012), p, 32. "The red flag provision, because it incorporates an objective standard, is not swallowed up by the actual knowledge provision under our construction of the § 512(c) safe harbor. Both provisions do independent work, and both apply only to specific instances of infringement."

Inc. v. CCBill LLC case, the facts that the websites are named as "illegal.net" and "stolencelebritypics.com" do not constitute as "red flag" for the reason that Ninth Circuit Court refused to impose investigative duties on service providers. In *Perfect 10, Inc. v. CCBill LLC case (2002)*, the plaintiff Perfect 10 argued that the defendants CCBill provided services to "illegal.net" and "stolencelebritypics.com" must have been aware of the apparent infringing activity. The court disagreed that When a website traffics in pictures that are titillating by nature, describing photographs as "illegal" or "stolen" may be an attempt to increase their salacious appeal, rather than an admission that the photographs are actually illegal or stolen.[809] Therefore, the US court did not place the burden of determining whether photographs were actually illegal on an internet service provider.

This decision corresponds with the intention of the US Congress that internet service providers need not make difficult judgments as to whether conduct is or is not infringing. "Given the complexities inherent in identifying and defining online copyright infringement, § 512(i) does not require a service provider to decide, ex ante, the specific types of conduct that will merit restricting access to its services. As Congress made clear, the DMCA was drafted with the understanding that service providers need not "make difficult judgments as to whether conduct is or is not infringing."[810]

To conclude the analyzations of the US cases, the criteria of knowledge under DMCA is higher than the common law standard: it is not the common law standard of "what a reasonable person would have deduced give all the circumstances". Instead, it is "whether the service provider deliberately proceeded in the face of blatant factors of which it was aware."[811]

B. Requirements of the procedure of Notice and Take Down

473. "Notice and Take Down" procedure targets for three kinds of internet service providers: the system caching, the information residing and the information searching service providers. Internet giants such as Google, Amazon are within the scope.

This rule, on the one hand, provides the exemption of liability for the information residing and information location internet service providers; on the other hand, the

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[809] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (2007), p, 1114.
[810] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (2004), p, 1101.
H.R. REP. No. 105-551, (1998), p, 44.
[811] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (2004), p, 1108.
NIMMER ON COPYRIGHT, § 12B.04[A][1], at 12B–49.

requirements of this rule also motivate the internet service providers to take down infringing contents in the digital environment.

474. Section 512 (c) (1) (C) prescribes that "upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."[812]

Section 512 (d) (3) prescribes that "upon notifications of claimed infringement as described in subsection (c) (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c) (3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link."[813]

475. Section 512 (c) (2), Section 512 (c) (3) stipulate the specific requirements of the "notice and take down": Section 512 (c) (2) requires information residing internet service provider to designate an agent; Section 512 (c) (3) (A) enumerate the elements of a effective notification; Section 512 (c) (3) (B) determines the effect of an ineffective notification.

Section 512 (c) (2) prescribes that "Designated agent.— The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information: (A) the name, address, phone number, and electronic mail address of the agent. (B) other contact information which the Register of Copyrights may deem appropriate. The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory."[814]

It requires internet service providers to designate an agent to receive notifications under Section 512 (c) (1) (C). It also requires internet service providers to make available certain necessary information on their website and provide them to the Register of Copyrights for the purpose of facilitating the communication. If internet service providers fail to create a designated agency or provider necessary information, they will not be qualified to the

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[812] the US Copyright Law. Section 512 (c) (1) (C).
[813] Ibid. Section 512 (d) (3).
[814] Ibid. Section 512 (c) (2).

procedure of Notice and Take Down.[815]

476. Section 512 (c) (3) prescribes that "Elements of notification.—(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following: (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed. (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site. (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material. (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted. (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law. (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B) (i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent. (ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A)."[816]

477. Section 512 (c) (3) (A) prescribes the requirements of an effective notification and Section 512 (c) (3) (B) prescribes the consequences of an ineffective notification.

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[815] H.R. REP. No. 105-551, (1998), p, 54. "New Section 512(c)(2) provides that to qualify for the limitation on liability in new subsection (c), the service provider must designate an agent to receive notifications under new subsection (c)(1)(C)."

[816] the US Copyright Law. Section 512 (c) (3).

In Section 512 (c) (3) (A), an effective notification contains two kinds of elements. One kind of elements is for the purpose of claiming the right on the infringing contents, such as the signature of the copyright holders, the statement of good faith and the statement of accuracy under penalty of perjury. This kind of elements make internet service providers to believe that the claiming party owns the copyright of the contents. Another kind of elements is for the functional purpose, such as the identification of the copyrighted work, the identification of infringing materials and the contact information of complaining party. This kind of elements is for the purpose of enabling the internet service providers to take down the infringing materials. Notably, the identification of the copyright works requires that the copyright owner identify the copyrighted work alleged to have been infringed. Where multiple works at a single online site are covered by a single notification, a representative list of such works at that site is sufficient.

In 512 (c) (3) (B), it firstly prescribes that the notification failed to substantially comply with the requirements shall not be considered as evidence of whether the service providers has actual knowledge or is aware of facts or has received a notification. However, if the notification has provided the identification of the copyrighted work, the identification of the infringing material and the sufficient contact information of complaining party, the internet service providers bear the responsibility to assist the recipient of a effective notification.[817] The US legislators explained their intention of such arrangements: "The Committee expects that the parties will comply with the functional requirements of the notification provisions—such as providing sufficient information so that a designated agent or the com- plaining party submitting a notification may be contacted efficiently—in order to ensure that the notification and take-down procedures set forth in this subsection operate efficiently."[818]

478. Section 512 (f) establishes the responsibilities of the person who knowingly

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[817] H.R. REP. No. 105-551, (1998). p, 56.
"New subsection (c)(3)(B) addresses the effect of notifications that do not substantially comply with the requirements of new sub- section (c)(3). Under new subsection (c)(3)(B), the court shall not consider such notifications as evidence of whether the service provider has actual knowledge, is aware of facts or circumstances, or has received a notification for purposes of new subsection (c)(1)(A)."
"However, a defective notice provided to the designated agent may be considered in evaluating the service provider's knowledge or awareness of facts and circumstances, if: (i) the complaining party has provided the requisite information concerning the identification of the copyrighted work, identification of the allegedly infringing material, and information sufficient for the service provider to con- tact the complaining party; and (ii) the service provider does not promptly attempt to contact the person making the notification or take other reasonable steps to assist in the receipt of notification that substantially complies with new subsection (c)(3)(A). If the service provider subsequently receives a substantially compliant notice, the provisions of new subsection (c)(1)(C) would then apply upon receipt of such notice."
[818] Ibid.

misrepresents that material or activity is copyright infringing.

Section 512 (f) prescribes that "(f) Misrepresentations.— Any person who knowingly materially misrepresents under this section — (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it."[819]

479. Section 512 (g) establishes mainly the "put back procedure" and the "counter notification" through an exception to the immunity of the liability of "take down."

Section 512 (g) prescribes: "Replacement of Removed or Disabled Material and Limitation on Other Liability.—(1) No liability for taking down generally. — Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Exception. — Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c) (1) (C), unless the service provider —(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material; (B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c) (1) (C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and (C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c) (1) (C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

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[819] the US Copyright Law. Section 512 (f)

(3) Contents of counter notification. — To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following: (A) A physical or electronic signature of the subscriber. (B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled. (C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled. (D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person."[820]

480. Section 512 (f) and (g) play as a safe valve of the procedure of Notice and Take Down.

Section 512 (f) is intended to deter knowingly false allegations to service providers in recognition that such misrepresentations are detrimental to rights holders, service providers, and internet users.[821]

Section 512 (g) provides immunity of liability for taking down infringing contents to internet service providers. An exception is also introduced in the case that the material is residing at the direction of subscriber. In such case, for the purpose of regaining the immunity of liability, internet service providers should comply with several requirements of "put back procedure" if a "counter notification is made."

According to the clauses presented above, internet service providers have the responsibility to expeditiously remove the infringing materials after receiving a valid notification for the purpose of availing themselves of "safe harbor" under DMCA. Regarding that Section 512 (c) (3) (B) prescribed that if the notification fails to "comply substantially" with the requirements of notification under Section 512 (c) (3) (A), the internet service

[820] the US Copyright Law. Section 512 (g).
[821] H.R. REP. No. 105-551, (1998).

providers shall not have the responsibility to take down the materials.[822]

481. In regard of the interpretation of "comply substantially" under Section 512 (c) (3) (A), two criteria are established by the US courts.

The US court interprets in *Hendrickson v. eBay, Inc. case (2001)* that a notification which "comply substantially" with the requirements should provide adequate information for internet service providers to identify the claimed materials. Internet service providers should not bear the responsibilities of searching infringing materials. [823]

Meanwhile, the US court also construed in *ALS Scan, Inc. v. RemarQ Communities, Inc. case (2001)* that "comply substantially" does not mean "perfectly."[824] It does not require copyright holders to identify every infringing materials. "Instead, the requirements are written so as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works. Thus, when a letter provides notice equivalent to a list of representative works that can be easily identified by the service provider, the notice substantially complies with the notification requirements."

In a word, the first criterion allege copyright holders to provide sufficient information to identify the infringing materials.

482. In *Perfect 10, Inc. v. CCBill LLC case (2004)*, the US court determined that the requirements under Section 512 (c) (3) (v)[825] and (vi)[826], the statement of "good faith" and the statement of "penalty of perjury" are "substantial."

The court in *Perfect 10, Inc. v. CCBill LLC case (2004)*, reasoned: The requirements of the good faith and the penalty of perjury are not superfluous. Because the notification of copyright holders has drastic consequences: A user could have content removed, or may have

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[822] the US Copyright Law Section 512 (c) (3) (B) (i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.
(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

[823] Hendrickson v. eBay, Inc., 165 F.Supp.2d 1082 (2001), p, 1090.

[824] ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619 (2001), p, 625.

[825] the US Copyright Law Section 512 (c)(3)(v) "A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent or the law."

[826] the US Copyright Law Section 512 (c)(3)(v) "A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed."

his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed.[827] It concluded that "We therefore do not require a service provider to start potentially invasive proceedings if the complaint is unwilling to state under penalty of perjury that he is an authorized representative of the copyright owner, and that he has a good-faith belief that the material is unlicensed"[828]

In a word, the requirements of good faith and penalty of perjury are deemed "substantial" and plays as safe valve for the Notice and Take Down.

§ 2. Notice and Take Down in the EU

483. The Notice and Take Down rules are not completely harmonized at the EU level. The rules concerning removing copyright infringing materials could be found in several the EU directives. Meanwhile, the interpretations by CJEU offered some guidances for the Notice and Take Down rules. Both the EU directives and the interpretations of CJEU have similarities and differences with the US one.

It will compare the Notice and Take Down rules in the EU Directives with the US (I) and then present the interpretations by CJEU in comparison with the US legislations and interpretations (II).

I. the EU legislations of Notice and Take Down compared with the US

484. The Notice and Take Down rules are not directly prescribed in the EU Directives which protect copyright. The specific Notice and Take Down rules are prescribed in the Electronic Commerce Directive which are not limited within copyright.

It will firstly demonstrate the injunctions for copyright holders under the EU directives (A) and the Notice and Take Down rules in the EU Directive 2000/31/EC (E-Commerce Directive) (B).

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[827] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (2007), p, 1112.
[828] Ibid.

A. Injunctions for copyright holders under the EU directives

485. In the field of copyright law at the EU level, the copyright holders have the right to apply an injunction against the internet service providers to terminate the copyright infringing activities, regarding the fact that in the digital environment, the internet service providers play an essential role in digital transmission of infringing materials.[829]

Article 8 of the EU Information Society Directive prescribes in "sanctions and remedies", (3) that "Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."[830]

In Directive 2004/48/EC, Enforcement of Intellectual Property Rights, Article 11 "injunctions" also prescribes that "…in Member States shall also ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC."[831]

486. However, the detailed rules of the injunctions in both Directives are not harmonized at the level of the EU legislations. It is left to the national legislations: "The conditions and modalities relating to such injunctions should be left to the national law of the Member States."[832] "The conditions and procedures relating to such injunctions should be left to the national law of the Member States."[833]

The problematic is emerging: the injunctions could vary from a narrow, specific requirement which is cheap, quick and easy for a service provider to implement, to a wide, complex and expensive obligation which might be practically impossible for a service provider to comply with.[834]

In regard of the specific rules of internet service providers, recital 16 of Information Society Directive states that liability for activities in the network environment concerns not

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[829] Directive 2001/29/EC, Recital 59, "In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States."

[830] Ibid. Article 8.

[831] Ibid. Article 11.

[832] Ibid. Recital 59.

[833] Directive 2004/48/EC, Recital 23.

[834] Darren Meale, "SABAM v Scarlet: of course blanket filtering of the internet", E.I.P.R. 2012, 34(7).

only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in EU E-Commerce Directive 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 ("Directive on electronic commerce").[835] It clarifies and harmonises various legal issues relating to information society services including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.[836]

Article 2(3)(a) of Directive 2004/48 prescribes that "This Directive shall not affect… Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular."[837]

487. In a word, according to the recital 16 in the preamble to Directive 2001/29 and Article 2(3)(a) of Directive 2004/48, the specific rules concerning the Notice and Take Down are elaborated in E-Commerce Directive. Moreover, the rules in E-Commerce Directive shall not be affected by Directive 2001/29 and Directive 2004/48.[838]

Therefore, to demonstrate the Notice and Take Down rules in the EU, it is necessary to examine in detail the pertinent rules prescribed in E-Commerce Directive.

B. Exemption of liability in Electronic Commerce Directive

488. The rules concerning the exemption of liability of internet service providers could be found in the E-Commerce Directive and they are not only for the purpose of taking down the copyright infringing materials, but also for preventing other illegal activities.

Under Electronic Commerce Directive, three kinds of internet service providers are eligible for the exemption of liability, namely, "mere conduit", "caching", "hosting" service providers. since the eligible "mere conduit" service provider only facilitates the transitory

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[835] Directive 2001/29/EC, Recital 16.
[836] Directive 2004/48/EC, Article 2(3)(a)
[837] Ibid. Article 2(3)(a).
[838] CJEU, 24 November 2011, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), Case C-70/10. EU:C:2011:771. para, 34.

transmission of information[839], only "caching" and "hosting" service providers have the responsibility to remove or disable access to infringing materials in order to benefit the exemption of secondary liability. The Section 512 of DMCA also prescribes that "transmitting, routing, or providing connections" internet service providers do not have the responsibility to take down infringing materials[840]. In the US and the EU, the internet service providers who provide the internet access services, are excluded from Notice and Take Down.

489. Article 13, 14 and 15 of The Electronic Commerce Directive prescribes the exemption of secondary liability of "Caching" and "Hosting" service providers as:

Article 13 "Caching", (1) "Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that: (a) the provider does not modify the information; (b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement."[841]

Article 14 "Hosting", "(1) Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of

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[839] Victoria McEvedy, "The DMCA and the Ecommerce Directive", E.I.P.R. 2002, 24(2), 65-73. p, 68. "notification being unlikely given the transitory nature of the communication"

[840] the US Copyright Law, Section 512, (a) Transitory Digital Network Communications.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections……

[841] Directive 2000/31/EC. Article 13.

illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. (2) Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider."[842]

Article 15 prescribes that "1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. 2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."[843]

Article 15 introduces the balance between the take down responsibility of internet service providers and the protection of copyright and the interests of users. It also harmonizes the scope of "injunction" prescribed in Information Society Directive at the EU level by clarifying that internet service providers should not bear the general obligation to monitor the information.

490. Comparing the US Copyright Law with the EU Electronic Commerce Directive, both legislations are striking a balance between different interests holders and establishing a standard in the digital environment.

Notice and Take Down motivates internet service providers to facilitate the efficiency of the transmission of information in the digital environment and to not interfere the contents transmitted.[844] Further more, upon acquiring the knowledge of illegal activities, internet service providers shall remove or disable the access for the purpose of profiting the

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[842] Ibid. Article 14.
[843] Ibid. Article 15.
[844] Directive 2000/31/EC, Recitals, 41, 42, 43.
the US Senate and House Report of DMCA:
S. REP. No. 105-190, (1998), p, 52.
H.R. REP. No. 105-551, (1998), p, 61.

exemption of liability.[845]

491. Two differences could also be distinguished: First is that the rule of the exemption of secondary liability for information location service provider is not prescribed in the EU Electronic Commerce Directive. The reason could not be found in the preparatory works of the Directive.[846]

Second is that the detailed procedure of "Notice and Take Down" is not prescribed in the EU E-Commerce Directive. Namely, the requirements of notification, the responsibilities of misrepresentation, the liability of take down, etc. However, this issue is considered by CJEU. The detailed rules are left to national courts of Member States.[847]

492. The similarities exists in the field of the conditions for the exemptions of liabilities of "hosting" service providers. The actual knowledge and "red flag" criteria, in other words, the

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[845] Directive 2000/31/EC, Article 13, 1. (e) "the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement."
Article 14, 1. (b) "the provider, upon obtaining such knowledge or aware- ness, acts expeditiously to remove or to disable access to the information."
the US Copyright Law Section 512, (c) (1) (A) (iii) and (b) (1) (C)"upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material. "
Section 512, (c) (1) (C) and (b) (3) "upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."

[846] Victoria McEvedy, "The DMCA and the Ecommerce Directive", E.I.P.R. 2002, 24(2), 65-73, p, 69.

[847] CJEU, 12 July 2011, L'Oréal SA,Lancôme parfums et beauté & Cie SNC,Laboratoire Garnier & Cie,L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi, Case C-324/09. EU:C:2011:474. para, 122: "The situations thus covered include, in particular, that in which the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information. In the second case, although such a notification admittedly cannot automatically preclude the exemption from liability provided for in Article 14 of Directive 2000/31, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality."
para, 124: "Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31."

subjective and objective knowledge criteria[848], could all be found in Article 14 1. (a) the EU Electronic Commerce Directive.

The "take down" requirement in Article 14 1. (b) the EU Electronic Commerce Directive and Section 512 (c) (1) (C) the US Copyright Law are also similar. It requires internet service providers to remove the infringing materials after acquiring either subjective knowledge or objective knowledge.

In regard of the "Benefit and Control" criterion, the EU Electronic Commerce Directive Article 14 2. prescribes that "Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider." It requires that the infringing activities should not under the authority or control of internet service provider. The financial benefits criterion is not prescribed by the EU Electronic Commerce Directive Article 14 2.[849]

This requirement is more strict than the US one because the US Copyright Law stipulates that even if the internet service provider has the right and ability to control the infringing activities, internet service provider could also be exempted from the secondary liability on the condition that a direct financial benefit is not received.

However, even the similar criteria prescribed in the US Copyright Law and the EU Electronic Commerce Directive could also be interpreted differently by the US court and CJEU. Therefore, it is indispensable to examine the interpretations regarding this issue.

II. the EU jurisprudences of Notice and Take Down compared with the US

493. The CJEU provided its interpretations of some essential requirements in regard of Notice and Take Down rules. It will firstly, demonstrate the interpretations of the knowledge and control criteria interpreted by CJEU (A). Secondly, it will demonstrate the interpretations "no general obligation to monitor" by CJEU (B).

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[848] Viacom Intern., Inc. v. YouTube, Inc., 676 F.3d 19 (2012), p, 32.
"The phrase 'actual knowledge', which appears in § 512(c)(1)(A)(i) , is frequently used to denote subjective belief." citing United States v.Quinones, 635 F. 3d 590 (2011).
"By contrast, courts often invoke the language of 'facts or circumstances',which appears in § 512(c)(1)(A)(ii) , in discussing an objective reasonableness standard." citing Maxwell v. City of New York, 380 F.3d 106 (2004).
[849] Directive 2000/31/EC. Article 14. 2.

A. Knowledge and control criteria interpreted by CJEU

494. Knowledge and control criteria are prescribed in Electronic Commerce Directive Article 14: "(1)(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent…" and "(2) Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider."[850]

The "knowledge" and "control" criteria is interpreted by CJEU in *Google France and Google case (2010)*[851] as to examine whether internet service providers play a neutral role. The CJEU found that "the activity of the information society service provider is 'of a mere technical, automatic and passive nature', which implies that that service provider 'has neither knowledge of nor control over the information which is transmitted or stored'."[852]

495. According to the wordings of recital 42 in the preamble to Directive 2000/31 "The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored."[853]

In order to find out whether the liability of a service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.[854]

This point of view is confirmed in *L'Oréal v eBay case (2011)*. CJEU considered that eBay played an active role by stating that "the operator has provided assistance which entails, in particular, optimizing the presentation of the offers for sale in question or promoting those

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[850] Directive 2000/31/EC. Article 14.

[851] CJEU, 23 March 2010, Google France SARL, Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA, Luteciel SARL (C-237/08), Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08), Joined Cases, C-236/08 to C-238/08. EU:C:2010:159.

[852] Ibid. paras, 113.

[853] Directive 2000/31, recital 42,

[854] Ibid. paras, 114.

offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale."[855]

496. Moreover, the notification of copyright holders is interpreted as a factor to examine whether a diligent internet service provider should have the "knowledge." In *L'Oréal v eBay case (2011)*, CJEU confirmed the criterion of "knowledge" by examining Directive 2000/31 "it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in Article 14 of Directive 2000/31, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b) of Directive 2000/31."[856] CJEU then reasoned that "although such a notification admittedly cannot automatically preclude the exemption from liability provided for in Article 14 of Directive 2000/31, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality."[857]

In other words, an internet service provider should have the knowledge or aware of the illegal activities, it fails to act expeditiously, it could not enjoy the exemption of liability according to Article 14 (1) (b) Electronic Commerce Directive.[858]

The new terms have been established by CJEU. It motivates internet service providers to not interfere but only facilitate the transmission of informations in order to benefit the exemption of liability, precisely to stay in a neutral and passive role in regard of the online

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[855] CJEU, 12 July 2011, L'Oréal SA,Lancôme parfums et beauté & Cie SNC,Laboratoire Garnier & Cie,L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi, Case C-324/09. EU:C:2011:474. para, 116.

[856] Ibid. para, 120

[857] Ibid. para, 122

[858] Ibid. para, 124: "Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31."

transmission of information.[859]

497. Compared with the US interpretations of knowledge criteria and benefit and control criteria, although the interpretations of the knowledge and control criteria are different, the US courts also similarly required that internet service providers shall not receive direct financial interests if they have control of the transmission; shall remove the infringing contents after acquiring the objective or subjective knowledge.[860]

Notably, similar to the US interpretation, CJEU also interpreted that the mere fact that the internet service providers' services are subject to payment could not deprive the exemptions of liability prescribed in Electronic Commerce Directive.

In *L'Oréal v eBay case (2011)*, CJEU reasoned that "the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31."[861] Similarly, in *Google France and Google case (2010)*, CJEU reasoned that "It must be pointed out that the mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31."[862]

Briefly, both the US courts and CJEU all motivate internet service providers do not interfere with the transmission of contents initiated by users by providing them the exemption of liability.

B. Interpretations "no general obligation to monitor" by CJEU

498. On the one hand, the copyright holders have the right to apply injunctions against

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[859] Céline Castets-Renard, "Le renouveau de la responsabilité délictuelle des intermédiaires de l'internet."Recueil Dalloz 2012. p.827. "De nouveaux termes : «neutralité », « passivité », « contrôle » des informations, apparaissent dans cette décision. La référence au considérant 42 ajoute une condition à la qualification d'hébergeur : outre le caractère technique de la prestation d'hébergement, encore faut-il désormais que le prestataire ait un rôle passif. Bien que la Cour de justice ait, d'un côté, étendu la qualification d'hébergeur aux activités nouvelles du web 2.0, elle hausse, d'un autre côté, le niveau d'exigence."

[860] Infra text, Section 1. Notice and Take Down in the US and the EU. § 1. Notice and Take Down in the US.

[861] CJEU, 12 July 2011, L'Oréal SA,Lancôme parfums et beauté & Cie SNC,Laboratoire Garnier & Cie,L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi, Case C-324/09. EU:C:2011:474. para, 115.

[862] CJEU, 23 March 2010, Google France SARL, Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA, Luteciel SARL (C-237/08), Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08), Joined cases, C-236/08 to C-238/08. EU:C:2010:159. para, 116.

internet service providers according to Article 8 (3) of Information Society Directive and Article 11 of Directive 2004/48/EC; On the other hand, Article 15 of Electronic Commerce Directive expressly states internet service providers have"no general obligation to monitor." Copyright holders have the right to apply injunctions, but these injunctions could not require internet service providers to actively monitor the data of their users.[863]

499. In *the Scarlet Extended case (2011)*, CJEU construed that a filtering system which requires "firstly, that the ISP identify, within all of the electronic communications of all its customers, the files relating to peer-to-peer traffic; secondly, that it identify, within that traffic, the files containing works in respect of which holders of intellectual-property rights claim to hold rights; thirdly, that it determine which of those files are being shared unlawfully; and fourthly, that it block file sharing that it considers to be unlawful" would result in an active observation of all electronic communications conducted on the network of the internet service providers concerned, consequently, would encompass all information to be transmitted and all customers using that network.[864] Consequently, such filtering system is prohibited under Article 15 of Electronic Commerce Directive "no general obligation to monitor."

Similarly, in *SABAM case (2012)*, CJEU also stated that "the injunction imposed on the hosting service provider requiring it to install the contested filtering system would oblige it to actively monitor almost all the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31."[865]

500. Moreover, a rule of proportionality could also mean that the injunction should not incur excessive costs to internet service providers. In *L'Oréal v eBay case (2011)*, CJEU reasoned that "First, it follows from Article 15(1) of Directive 2000/31, in conjunction with Article 2(3) of Directive 2004/48, that the measures required of the online service provider concerned cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property rights via that provider's website. Furthermore, a general monitoring obligation would be incompatible with Article 3

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[863] CJEU, 24 November 2011, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), Case C-70/10. EU:C:2011:771. para, 37. "it is necessary to examine whether the injunction at issue in the main proceedings, which would require the ISP to install the contested filtering system, would oblige it, as part of that system, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights."

[864] Ibid. para, 38.

[865] CJEU, 16 February 2012, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV, Case C−360/10. EU:C:2012:85. para, 38.

of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly."[866]

CJEU also examined the proportionality in the field of fair competition together with fundamental rights.[867] It would not demonstrate this issue since the intention of this paragraph is to demonstrate the EU jurisprudences in comparison with the US jurisprudences and offer some references to the Chinese Notice and Take Down rule.

501. In comparison with the US, the US courts in *Corbis Corp. v. Amazon.com, Inc case* (2004) also similarly interpreted that "service providers need not make difficult judgments as to whether conduct is or is not infringing"[868] and only "standard technical measures" which impose no substantial cost shall be applied by internet service providers.[869]

the US courts are not as explicit as CJEU, but both have the same intention to prevent imposing a general responsibility of controlling copyright infringing materials to internet service providers for the reason that the excessive responsibility of internet service providers would hinder the development of the digital environment.[870]

In a word, the "no general obligation to monitor" prevents an injunction which requires internet service providers to actively monitor all the data of users. The injunction applied by copyright holders should also respect the rule of proportionality which should not be excessively costly and should not affect other fundamental rights.

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[866] CJEU, 12 July 2011, L'Oréal SA,Lancôme parfums et beauté & Cie SNC,Laboratoire Garnier & Cie,L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi, Case C-324/09. EU:C:2011:474. para, 139.

[867] CJEU, 24 November 2011, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), Case C-70/10. EU:C:2011:771. paras, 43-52.

CJEU, 16 February 2012, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV, Case C−360/10. EU:C:2012:85. paras, 41-50.

CJEU, 12 July 2011, L'Oréal SA,Lancôme parfums et beauté & Cie SNC,Laboratoire Garnier & Cie,L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi, Case C-324/09. EU:C:2011:474. paras, 125-144.

C-314/12, Third question.

[868] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (2004) p, 1101.

[869] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (2007), p, 1115.

[870] Céline Castets-Renard, "Le renouveau de la responsabilité délictuelle des intermédiaires de l'internet."Recueil Dalloz, 2012, p, 827. "Il n'est effectivement pas souhaitable que le filtrage devienne le mode de régulation normal de l'internet, ce qui interroge sur les solutions envisagées aux Etats-Unis et à l'échelle mondiale. Le FAI est un acteur central de la lutte contre les infractions mais le filtrage des contenus est coûteux et ne peut être imposé trop largement. Ce prestataire est un acteur économique essentiel au développement de l'activité numérique, sur laquelle l'Union européenne veut fonder la croissance économique, aussi, ne faut-il pas trop entraver ses activités."

Section II. Notice and Take Down in China

502. In China, the Notice and Take Down rules could not be found in Chinese Copyright Law. They are prescribed in Regulation on the Protection of the Right of Communication through Information Network which only protects the Chinese public communication right. This rule has been considered as an implementation of the WCT.

But it is not clear that whether the Notice and Take Down rules in China could only apply to the protection of public communication right or to the protection of all copyright. Meanwhile, in regard of the specific rules of Notice and Take Down, a lot of similarities could be found with the US and the EU in regard of both legislations and jurisprudences. Notably, the Chinese jurisprudences have given onerous burdens to Chinese internet service providers to take down online infringing materials.

Therefore, for the purpose of understanding the current and the future development of the rules of Notice and Take Down in China, firstly it will compare the Chinese legislation of Notice and Take Down with the US and the EU (§1). Secondly, it is necessary to compare the Chinese jurisprudences with the US and the EU (§2).

§1. Notice and Take Down in Chinese legislations

503. It will demonstrate the general rules of the exemption of the secondary liability of internet service provider under the Chinese regulation (I) and the precise rules and procedures of Notice and Take Down (II).

I. Chinese legislations of the exemption of the internet service provider's secondary liability

504. Firstly, it will demonstrate the international obligations implied in the WCT (A). Secondly, it will demonstrate the detail rules of the exemption of the secondary liability of

internet service provider under Chinese regulation compared with the EU (B).

A. Exemption of the secondary liability under the WCT

505. The rules of the exemption of secondary liability and Notice and Take Down are not established at the international level in the WCT. However, this issue has been discussed by the diplomatic conference of the WCT, some principles could be found.

Although an intensive lobbying campaign of non-governmental organizations of internet service providers and telecommunication companies would want to include some guarantees concerning the limitation of the liability of internet service providers for infringements committed by those who use their services[871], the WCT does not directly address the issues.

As a compromise, the first phrase of the statement of Article 8 reads that "it is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention." However, this rule is not the exemption of secondary liability of internet service providers.

506. The issues concerning the exemptions of the secondary liabilities of internet service providers are addressed indirectly in Article 14 (2) of the WCT. It states that "Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."[872]

Article 14 (2) of the WCT does not oblige contracting states to implement the rules of the liability of internet service providers into national legislations. However, according to the explanation of the "Guide to the WCT": "this has certainly some relevance from the

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[871] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. CT-8. 20: "It is quite clear on the basis of what happened during the informal negotiations at the 1996 Geneva Diplomatic 211 Conference that this first sentence of the agreed statement was included as a result of an intensive lobbying campaign of non-governmental organizations of Internet service providers and telecommunication companies. They wanted to include in the text of the two treaties – or, at least, in some agreed statements – some guarantees concerning the limitation of their liability for infringements committed by those who use their services. They did not succeed in this, and, in fact, the above-quoted agreed statement did not address the issue of liability, and in particular not those forms of liability – contributory and/or vicarious liability – in respect of which they mainly sought some limitations."

[872] the WCT. Article 14 (2).

viewpoint of the application of the WCT, since the issues of liability for infringements concern the application of enforcement measures required by Article 14 (2) of the treaty."[873]

507. For the purpose of fulfilling the requirements under Article 14(2) of the WCT, any possible regulation of the liability of service providers, more precisely the limits of liability along with the conditions of such limits, should correspond to the following principles according to "Guide to the Copyright and Related Right Treaties Administered by WIPO" published by WIPO: "(i) immunities should be established at a level that is indispensable for guaranteeing reasonable security for service providers; no blanket immunities would be in harmony with Article 14(2) of the Treaty; (ii) any possible rules should be in accordance with the copyright law in the sense that they must not endanger the fulfillment of the objectives thereof; that is, they must not undermine the incentives for creation, production and dissemination of works and must not disregard the value of human creation; (iii) any such rules should promote cooperation between copyright owners and service providers – where possible, encouraging marketplace solutions – in order to facilitate the detection of copyright piracy, the application of technological means, the removal of infringing materials from networks expeditiously, to identify and pursue infringers, etc.; and (iv) the applicability of injunctive relief and other similar legal remedies by courts should be maintained."[874]

In a word, the exemption of secondary liability of internet service providers has not been prescribed as an international obligation in the WCT. However, some principles have been established by the interpretations of Article 14 (2) of the WCT by WIPO. It is interesting to examine the Chinese rules according to these principles implied in the WCT.

B. Chinese legislation of the exemption of the internet service provider's secondary liability compared with the EU

508. Regulation on the Protection of the Right of Communication through Information Network has prescribed the rules concerning the exemptions of liabilities of internet service providers.

The original text of Article 20, Article 21, Article 22 in Regulation on the Protection

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[873] World Intellectual Property Organization. Guide to the Copyright and Related Right Treaties Administered by WIPO, Geneva: World Intellectual Property Organization, 2003. CT-14.9. "Specific rules will not be found necessary in the legislation of all Contracting Parties concerning the liability of service providers of interactive networks. Nevertheless, there seems to be a trend towards the adoption of such rules, and this has certainly some relevance from the viewpoint of the application of the WCT, since the issues of liability for infringements concern the application of enforcement measures required by Article 14(2) of the Treaty."

[874] Ibid. CT-14.10.

of the Right of Communication through Information Network in Chinese version is actually very similar to the EU Electronic Commerce Directive Article 12 "Mere Conduit", Article 13 "Caching" and Article 14 "Hosting."

Therefore, it is interesting to compare the essential factors of the three kinds of internet service providers: Mere Conduit (1); System Caching (2); Hosting (3); between Chinese regulation and the EU E-Commerce Directive to examine whether the Chinese Regulation complies with the principles of the WCT.

1. Mere Conduit

509. Article 20 of the Regulation on the Protection of the Right of Communication through Information Network is translated as "A network service provider which, at the direction of a service recipient, provides the service of automatic network access, or the service of automatic transmission of a work, performance, or sound or video recording made available by the service recipient, and which meets the following conditions, bears no liability for compensation:
(1) it does not make any selection of and modification to the work, performance, or sound or video recording transmitted thereby; and
(2) it makes available the work, performance, or sound or video recording to anticipated service recipients only, and has prevented any person other than the anticipated service recipients from accessing the said work, performance, or sound or video recording."[875]

Two kinds of services are eligible for the exemption of liability if the criteria are met: One is the service providing automatic internet access; The other is the service providing automatic information transmission.

The texts of Article 20 Chinese regulation: "A network service provider which, at the direction of a service recipient, provides the service of automatic network access, or the service of automatic transmission of a work…"[876], in essence, means that the internet service provider shall provide the services of the access to internet and the transmission of the information at the direction of the service recipients. "Automatic" in Chinese regulation could mean that the internet service providers do not initiate the "access" or "transmission."

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[875] Regulation on the Protection of the Right of Communication through Information Network, translated by BeiJing University, puklaw database, http://en.pkulaw.cn/. The name of this regulation is translated as "Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks." However, such translation would be confusing, since this Chinese regulation is concerning mainly about the "public communication right."

[876] Chinese original version as "或者对服务对象提供的作品、表演、录音录像制品提供自动传输服务." translated by BeiJing University, puklaw database, http://en.pkulaw.cn/.

510. The Article 20 of the Chinese Regulation is in essence similar to the EU E-Commerce Directive. the EU E-Commerce Directive Article 12, 1. (a) reads "Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on the condition that the provider: (a) does not initiate the transmission."[877]

In a word, both Article 20 of Chinese Regulation and Article 12, 1. (a) of the EU E-Commerce Directive require internet service providers who provides internet access service and information transmission service shall not initiate the transmission.

511. Moreover, internet service providers shall met the two following conditions under Article 20 (1) and (2) of Chinese Regulation. Both conditions in Chinese Regulation are similar to Article 12, 1. (b) and (c) of the EU E-Commerce Directive

Article 20 (1) of Chinese Regulation corresponds to Article 12 (c) of the EU E-Commerce Directive: Chinese one prescribes as "it does not make any selection of and modification to the work, performance, or sound or video recording transmitted thereby." the EU one prescribes as "does not select or modify the information contained in the transmission."[878]

Both rules are almost identical. They requires that the service providers do not select or change the information transmitted by the users. The only difference is that the Article 20 (1) of Chinese Regulation uses the word "alter" while the Article 12 (c) of the EU E-Commerce Directive uses the word "modify." But the original Chinese word is "改变"(Gai Bian) which means "change" "alter" or "modify." Therefore, the first condition in both China and the EU is in essence the same.

512. The second condition under Article 20 (2) of Chinese Regulation "it makes available the work, performance, or sound or video recording to anticipated service recipients only, and has prevented any person other than the anticipated service recipients from accessing the said work, performance, or sound or video recording" means in essence that according to the Chinese version of the text: providing works to designated service recipients and preventing

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[877] Directive 2000/31/EC Article 12, 1. (a).

[878] Regulation on the Protection of the Right of Communication through Information Network. Article 20 (1). Directive 2000/31/EC. Article 12 (c)

others from accessing to the works.[879] The word "anticipated" is translated from the Chinese word: "Zhi Ding"(指定). "Zhi" means pointing out. "Ding" means decided. Although "Zhi Ding" is translated as "anticipated" by the official translation[880], but it means anticipated, appointed or designated. The word "designated" could be more suitable in this context.

This Chinese criterion is slightly different from the EU one, the Article (c) of the EU E-Commerce Directive only requires that "does not select the receiver of the transmission." According to the plain words of the Chinese legislations, it seems that the Chinese internet service providers not only should not select the recipient of the transmission but also should actively prevent others to get access to the copyrighted content which transmitted apart from the recipient. However, in the EU E-Commerce Directive, according to the analyzation before,[881] the internet service providers only have to stay in a passive and neutral role in the transmission of information for the purpose of benefiting the exemption of liability. Chinese Regulation requires internet service providers to actively guarantee that the information shall only be access by the designated recipient. It seems that the Chinese Regulation gives more burdens to internet service providers than the EU E-Commerce Directive does.

2. System Caching

513. Article 21 of Regulation on the Protection of the Right of Communication through Information Network prescribes that "A network service provider which, in order to increase the efficiency of network transmission, provides the service of automatic storage of a work, performance, or sound or video recording accessible from another network service provider, and of automatic making available of the work, performance, or sound or video recording to service recipients through a technical process, and which meets the following conditions, bears no liability for compensation:

(1) it does not make any modification to the work, performance, or sound or video recording automatically stored;

(2) it does not hinder the original network service provider which makes available the work, performance, or sound or video recording from keeping abreast of the information concerning the access by service recipients to such work, performance, or sound or video recording; and

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[879] Regulation on the Protection of the Right of Communication through Information Network. Article 20 (1). Chinese original version as "向指定的服务对象提供该作品、表演、录音录像制品，并防止指定的服务对象以外的其他人获得."

[880] Regulation on the Protection of the Right of Communication through Information Network. Article 20 (2)

[881] Section I Notice and Take Down in the US and the EU § 2. Notice and Take Down in the EU

(3) it automatically modifies, removes, or disables access to the work, performance, or sound or video recording through a technical process when the original network service provider modifies, removes, or disables access to the same work, performance, or sound or video recording."[882]

514. The automatic, temporary storage of copyrighted contents for the purpose of making transmission more efficient is eligible for the exemption of liability.[883] It is similar to Article 13 of the EU E-Commerce Directive which prescribes that "Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipient of the service upon their request."[884]

515. Three conditions prescribed in Article 21 (1) (2) (3) of Chinese Regulation correspond with Article 13 (a) (b) (e) of the EU E-Commerce Directive:

Article 21(1) of Chinese regulation reads "it does not make any modification to the work, performance, or sound or video recording automatically stored." In comparison, Article 13 (a) the EU E-Commerce Directive reads "the provider does not modify the information." Article 21 (1) of Chinese Regulation is almost identical compared with the EU one. Generally, they all require that the information or copyrighted contents should not be altered, or modified.[885]

Article 21(2) of Chinese regulation reads "it does not hinder the original network service provider which makes available the work, performance, or sound or video recording from keeping abreast of the information concerning the access by service recipients to such work, performance, or sound or video recording." In comparison, Article 13 (b) the EU E-Commerce Directive reads "the provider complies with conditions on access to the

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[882] Regulation on the Protection of the Right of Communication through Information Network, translated by BeiJing University, puklaw database, http://en.pkulaw.cn/.

[883] Regulation on the Protection of the Right of Communication through Information Network. The original text of Article 21 in Chinese reads "网络服务提供者为提高网络传输效率，自动存储从其他网络服务提供者获得的作品、表演、录音录像制品，根据技术安排自动向服务对象提供，并具备下列条件的，不承担赔偿责任." "a network service provider that automatically stores works, performances, or audio-visual recordings obtained from other network service providers for the purpose of enhancing network transmission efficiency, and automatically provides them to the service objects according to the technical arrangements, shall not assume liability for compensation."

[884] the EU Directive 2000/31/EC. Article 13.

[885] Regulation on the Protection of the Right of Communication through Information Network. The original text of Article 21 (1) in Chinese prescribes "未改变自动存储的作品、表演、录音录像制品." "Having not altered the automatically stored works, performances, or audio-visual recordings"

information." Article 21 (2) of Chinese Regulation is similar, because in essence, they all require that the conditions on access set by the internet service provider who originally making the information available on the networks should be respected.[886]

Article 21(3) of Chinese regulation reads "it automatically modifies, removes, or disables access to the work, performance, or sound or video recording through a technical process when the original network service provider modifies, removes, or disables access to the same work, performance, or sound or video recording." In comparison, Article 13 (e) the EU E-Commerce Directive reads "the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement." Article 21 (3) of Chinese Regulation prescribes basically the same. It means that removing, modifying or disabling access to the copyrighted content after the initial source of the copyrighted contents has been removed, modified or disabled.[887]

516. The differences are that Article 13 (c) (d) of the EU E-Commerce Directive which stipulates that "the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry" "the provider does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information" could not be found in Chinese Regulation.[888] Does it mean that Chinese "Caching" internet service providers do not have to respect the technological standard generally recognized by industry?

Article 21 of Chinese Regulation reiterates that the storage of the copyrighted contents should be "automatic" and the copyrighted contents should be transmitted according to the "technical process": "provides the service of automatic storage of a work, performance, or sound or video recording accessible from another network service provider, and of automatic making available of the work, performance, or sound or video recording to service recipients through a technical process."[889]

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[886] Ibid. The original text of Article 21 (2) in Chinese prescribes "不影响提供作品、表演、录音录像制品的原网络服务提供者掌握服务对象获取该作品、表演、录音录像制品的情况" "Having not affected the original network service provider of the works, performances, or audio-visual recordings in managing the relevant works"

[887] Ibid. The original text of Article 21 (3) in Chinese reads "在原网络服务提供者修改、删除或者屏蔽该作品、表演、录音录像制品时，根据技术安排自动予以修改、删除或者屏蔽" "When the original network provider alters, deletes, or shields the works, performances, or audio-visual recordings, automatically altering, deleting, or shielding them according to the technical arrangement"

[888] the EU Directive 2000/31/EC. Article 13 (c) (d).

[889] Regulation on the Protection of the Right of Communication through Information Network. Article 21.

The term "automatic" under Article 21 of Chinese Regulation could be understood as that the internet service providers shall not initiate the transmission, shall not modify the information, shall not choose the recipient. The term "technical process" has the same meaning which requires internet service providers to transmit the information only according to the "technical arrangement" "automatic" and stay in a passive and neutral role in the transmission of information.[890]

Therefore, it could be concluded that the requirements implied by the terms of "automatic" and "technical process" in Article 21 of Chinese Regulation are similar to the Article 13 (c) (d) of the EU E-Commerce Directive. However, both terms need to be elaborated to bring more legal certainties in the future legislation.

3. Hosting

517. Article 22 of Chinese Regulation prescribes that "A network service provider which provides an information storage space to a service recipient, thus enabling the service recipient to make available to the public through information network a work, performance, or sound or video recording, and which meets the following conditions, bears no liability for compensation:

1. it clearly indicates that such information storage space is provided for the service recipient, and it makes known to the public its name, the person to be contacted and network address of the network service provider;

2. it does not make any modification to the work, performance, or sound or video recording made available by the service recipient;

3. it does not know or has no reasonable grounds to know that the work, performance, or sound or video recording made available by the service recipient is an infringement;

4. it does not gain any direct financial benefit from the service recipient making available the work, performance, or sound or video recording; and

5. upon receiving a written notification of the right owner, it removes, in accordance with the provisions of these Regulations, the work performance, or sound or video recording which

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[890] Interpretation of the Regulation on the Protection of the Right of Communication through Information Network. Edited by State Council, Bureau of Legal Affaires, 2006. Article 21.
"这里的自动储存，是指网络服务提供者根据预先设计的计算机程序…储存在本网站外部储存器上，并根据预先设计的技术安排，向其服务对象提供。"
"the automatically storing in this title, means that internet service providers store the contents into its servers pursuant to the computer softwares pre-designed and provide the contents to their service recipients pursuant to the pre-designed technological arrangements" (translated by author)

the right owner believes to be an infringement."[891]

According to this provision, the "Hosting" internet service provider could be eligible to the exemption of secondary liabilities if the following 5 criteria are met. Similarly Article 14 of the EU E-Commerce Directive prescribes as "Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service…."[892]

518. The three criteria are prescribed under the EU E-Commerce Directive Article 14, 1. (a) (b) and Article 14, 2 which are similar to Article 22, (3) (4) and (5) under Chinese Regulation .

Specifically, in comparison, knowledge criterion prescribed in Article 22, (3) of Chinese Regulation reads that "it does not know or has no reasonable grounds to know that the work, performance, or sound or video recording made available by the service recipient is an infringement."[893] While Article 14, 1. (a) the EU E-Commerce Directive reads that "the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages is not aware of facts or circumstances from which the illegal activity or information is apparent ."[894]

Under Chinese Regulation, "it does not know" in Article 22 (3) could be regarded as the "actual knowledge" criterion. Meanwhile, what is the meaning of "has no reasonable grounds to know" in Article 22 (3) could be confusing. It would be better to analyze this phrase in Chinese version: "has no reasonable grounds to know" (translated from "没有合理的理由应当知道"). It in essence means that objectively, there does not exist a fact showing that the internet service provider should have acquired the knowledge. Therefore, under Article 22 (3), "it does not know" could be regarded as a subjective "actual knowledge" criterion and "has no reasonable grounds to know" could be regarded as an objective "red flag" criterion. They are similar to Article 14, 1(a) of the EU E-Commerce Directive.

519. Article 22 (5) of Chinese Regulation reads "upon receiving a written notification of the right owner, it removes, in accordance with the provisions of these Regulations, the work performance, or sound or video recording which the right owner believes to be an infringement." While Article 14 1, (b) of the EU E-Commerce Directive prescribes that "the

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[891] Regulation on the Protection of the Right of Communication through Information Network.
[892] the EU Directive 2000/31/EC. Article 14.
[893] Regulation on the Protection of the Right of Communication through Information Network. Article 22, (3)
[894] the EU Directive 2000/31/EC. Article 14, 1. (a)

provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information."

According to the EU E-Commerce Directive, under two circumstances, namely, obtaining "knowledge" and "awareness", the information should be removed or the access should be disabled. Under Article 22 (5) of Chinese Regulation, the copyrighted contents should be deleted after receiving a notification. There are no clause concerning the situation after the internet service providers have obtained the "knowledge", "awareness." After acquiring the knowledge or awareness, if internet service providers have expeditiously removed the infringing materials and disable the access, would they be exempted from secondary liabilities under Chinese Regulation? Only reading the Article 22 of Chinese Regulation, the answer is not clear. It would be good that the future Chinese legislations clarify this situation.

520. Article 22 (4) of Chinese Regulation prescribes that "it does not gain any direct financial benefit from the service recipient making available the work, performance, or sound or video recording." While Article 14, 2 of the EU E-Commerce Directive prescribes that "paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider."

That is to say, internet service providers should not have the control over the activities of users in order to benefit the exemption of liability under the EU E-Commerce Directive. Meanwhile, Article 22 (4) of Chinese Regulation prescribes that internet service providers should not receive direct financial benefit from the infringing activities.

521. Interestingly, both "Benefit and Control" criteria could be found under the US Copyright Law. Meanwhile, "benefit" criterion could be found in Article 22 (4) of Chinese Regulation on the Protection of the Right of Communication through Information Network; "control" criterion could be found in Article 14, 2 of the EU E-Commerce Directive.

Section 512 (c) (1) (B) of the US Copyright Law prescribes both "benefit" criterion and "control" criterion as: "does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity."[895]

Under the US Copyright Law, even if the internet service provider has the right and ability to control the activities of users, on the condition that a direct financial benefit is not received, the internet service provider is still eligible for the exemption of secondary liability.

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[895] the US Copyright Law. Section 512 (c) (1) (B).

The Chinese Regulation has skipped the "control" criterion and directly stipulated that no direct financial benefit should be received. It is not clear that whether the control criterion is implied under the Chinese Regulation or it means that the financial benefits should not be received regardless internet service provider has the control or not.

522. The criterion of Article 22 (1) (2) of Chinese Regulation could not be found directly in the EU E-Commerce Directive Article 14. Article 22 (1) of Chinese Regulation requires internet service providers should reveal the information facilitating the notification of copyright holders. Article 22 (2) of Chinese Regulation reiterates that internet service providers should remain a passive role in regard of the transmission of information. The Chinese principles established in both criteria are similar to the EU E-Commerce Directive recital 42: "…this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored."[896]

In a word, Article 20, 21, 22 of the Chinese Regulation prescribe the criteria for the exemption of secondary liability for three kinds of internet service providers which are similar to Article 12, 13, 14 the EU E-Commerce Directive. Moreover, the principles of the exemption of internet service provider's liability established in the WCT could also be considered as fulfilled by the Chinese Regulation, although some rules are not precise.

II. Legislations of Notice and Take Down procedure compared with the US

523. It will demonstrate the specific rules of Notice Take Down in Chinese regulation by comparing them with the US legislations.

Two parallel procedures could be distinguished: the procedure for the protection of copyright holders (A) and the procedure for the protection of users (B).

A. Procedure for the protection of copyright holders' interests

524. Regulation on the Protection of the Right of Communication through Information Network prescribes some specific rules of the procedure of "Notice and Take Down" which are similar to Section 512 of the US Copyright Law. In order to concretely demonstrate the Chinese "Notice and Take Down" procedure, it would be necessary to compared with the US

[896] Directive 2000/31, recital 42.

one:

Article 14 of Chinese Regulation prescribes that: "Where a right owner believes that a work, performance, or sound or video recording involved in the service of a network service provider who provides information storage space or provides searching or linking service has infringed on the right owner's right of communication through information network, or that the right owner's electronic rights management information attached to such work, performance, or sound or video recording has been removed or altered, the right owner may deliver a written notification to the network service provider, requesting it to remove the work, performance, or sound or video recording, or disconnect the link to such work, performance, or sound or video recording. The written notification shall contain the following particulars: (1) the name, contact means and address of the right owner; (2) the title and network address of the infringing work, performance, or sound or video recording which is requested to be removed or to which the link is requested to be disconnected; and (3) the material constituting preliminary proof of infringement. The right owner shall be responsible for the authenticity of the written notification."[897]

525. Article 14 of Chinese Regulation requires that the notification should be in written form which is similar to Section 512 (c) (3) (A) of the US Copyright Law: "a notification of claimed infringement must be a written communication…."[898]

Article 14 (1) of Chinese Regulation prescribes "the name, contact means and address of the right owner." Article 14 (1) of Chinese Regulation requires that it should contain the contact information of copyright holder. It is similar to Section 512 (c) (3) (A) (iv) of the US Copyright Law "information reasonably sufficient to permit the service provider to contact the complaining party…."

Article 14 (2) of Chinese Regulation prescribes "the title and network address of the infringing work, performance, or sound or video recording which is requested to be removed or to which the link is requested to be disconnected ."[899] Article 14 (2) of Chinese Regulation requires that the information to locate the infringing materials, It is similar to the Section 512 (c) (3) (A) (iii) of US Copyright Law, "identification of the material that is claimed to be infringing…." However, the requirement could not be found in Chinese Regulation which is similar to Section 512 (c) (3) (A) (ii) of the US Copyright Law "identification of the

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[897] Regulation on the Protection of the Right of Communication through Information Network, Article 14.
[898] the US Copyright Law. Section 512 (c) (3) (A).
[899] Regulation on the Protection of the Right of Communication through Information Network, Article 14, (2).

copyrighted work claimed to have been infringed….”[900]

Article 14 (3) of Chinese Regulation prescribes “the material constituting preliminary proof of infringement. The right owner shall be responsible for the authenticity of the written notification.”[901] Article 14 (3) of Chinese Regulation requires the information to show that the material could infringe the copyright and a declaration that the complaining party would take the responsibility of the inaccuracy of the notification. It is similar to Section 512 (c) (3) (A) (vi) of the US Copyright Law which requires that “a statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf the owner of an exclusive right that is allegedly infringed.”[902] and Section 512 (c) (3) (A) (v) of the US Copyright Law which requires that “a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”[903]

526. In comparison, Chinese Regulation and the US Copyright Law all require that the complaining party should be responsible of the “authenticity” or “accuracy” of the notification. Meanwhile, complaining party is required to offer “preliminary materials to prove the infringement” under Chinese Regulation, but under the US Copyright Law, only the “good faith” is required.

527. Article 15 of Chinese Regulation prescribes that: “A network service provider shall, upon receiving a notification from a right owner, promptly remove the work, performance, or sound or video recording suspected of infringement, or disconnect the link to such work, performance, or sound or video recording, and shall, at the same time, transfer the notification to the service recipient who makes available the said work, performance, or sound or video recording. Where the notification cannot be transferred because the network address of the service recipient is unknown, the network service provider shall, at the same time, make the contents of the notification known to the public over information network.”[904]

In essence, it prescribes two rules: First one is that after receiving a valid notification, the internet service provider should “promptly” remove or disable access to the material which is claimed to be infringing. Second one is that internet service provider shall notify the service subscriber that the material has been removed or disabled access.

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[900] the US Copyright Law Section 512 (c) (3) (A) (ii).
[901] Regulation on the Protection of the Right of Communication through Information Network, Article 14, (3).
[902] the US Copyright Law Section 512 (c) (3) (A) (vi).
[903] Ibid. Section 512 (c) (3) (A) (v).
[904] Regulation on the Protection of the Right of Communication through Information Network. Article 15.

But the definition of "promptly" is not defined in Chinese Regulation. In comparison, Section 512 (g) (2) (C) of the US Copyright Law prescribes that "replaces that removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice…."[905]

The first rule could also be found in Section 512 (c) (1) (C) of the US Copyright Law which reads "upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."[906]

The second rule is similar to Section 512 (g) (2) (A) of the US Copyright Law "takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material."[907] It is for the purpose of protecting the interests of users. It will be analyzed below.[908]

B. Procedure for the protection of users' interests

528. Article 16 of Chinese Regulation prescribes that "Where a service recipient, upon receiving a notification transferred from a network service provider, believes that the work, performance, or sound or video recording made available thereby does not infringe on the right of another person, the service recipient may deliver a written explanatory statement to the network service provider, requesting it to replace the removed work, performance, or sound or video recording, or to replace the disconnected link to such work, performance, or sound or video recording. The written explanatory statement shall contain the following particulars: (1) the name, contact means and address of the service recipient; (2) the title and network address of the work, performance, or sound or video recording which is requested to be replaced; and (3) the material constituting preliminary proof of non-infringement. The service recipient shall be responsible for the authenticity of the written explanatory statement."[909]

Article 16 of Chinese Regulation established a procedure of the counter notification for users.

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[905] the US Copyright Law Section 512 (g) (2) (C).
[906] the US Copyright Law. Section 512 (c) (1) (C).
[907] Ibid. Section 512 (g) (2) (A).
[908] B. Procedure for the protection of users' interests
[909] Regulation on the Protection of the Right of Communication through Information Network. Article 16.

529. Compared with the rule of counter notification in Section 512 (g) (2) and Section 512 (g) (3) of the US Copyright Law which prescribe that "(2) Exception. — Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider —(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material; (B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and (C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) Contents of counter notification. — To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following: (A) A physical or electronic signature of the subscriber. (B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled. (C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled. (D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person."[910]

530. In regard of the requirement of valid counter notification, Chinese Regulation and the US Copyright Law share some similar requirements of a valid counter notification:

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[910] the US Copyright Law Section 512 (g) (2) and Section 512 (g) (3).

The counter notification should be in written form: Article 16 of Chinese Regulation "…deliver a written explanatory statement to the network service provider…"; Section 512 (g) (3) of the US Copyright Law "a counter notification must be a written communication…."[911]

The contact information of subscribers: Article 16 (1) of Chinese Regulation "the name, contact means and address of the service recipient"; Section 512 (g) (3) (D) of the US Copyright Law "The subscriber's name, address, and telephone number…."[912]

The information to locate the material claimed to be infringing which need to be replaced: Article 16 (2) of Chinese Regulation "the title and network address of the work, performance, or sound or video recording which is requested to be replaced"; Section 512 (g) (3) (B) of the US Copyright Law "Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled."[913]

The statement that subscriber should be responsible for the counter notification: Article 16 (3) clause 2 of Chinese Regulation "The service recipient shall be responsible for the authenticity of the written explanatory statement"; Section 512 (g) (3) (C) of the US Copyright Law "A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled."[914]

531. Some differences could also be distinguished:

Section 512 (g) (3) (A) of the US Copyright Law prescribes a requirement of a signature. It could not be found in Chinese Regulation.

Chinese Regulation requires subscribers to offer the "preliminary" evidences to prove the material non-infringing. Meanwhile, the US Copyright Law only requires subscribes to has a good faith belief that the material is "as a result of mistake or misidentification."

Briefly, the procedure of counter notification is prescribed in Chinese Regulation for the purpose the protection of the interests of users. Compared with the US Copyright Law, some rules in Chinese Regulation are not specified.

532. The US Copyright Law gives internet service providers a choice, a motivation by

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[911] Regulation on the Protection of the Right of Communication through Information Network. Article 16.

the US Copyright Law. Section 512 (g) (3).

[912] Ibid.

[913] Ibid.

[914] Ibid.

stipulating that in essence, if the rule of counter notification is respected, the no secondary liability should be bored by internet service provider in regard of the removing and disabling access materials claimed to be infringing. The exemption of the liability of the wrong "take down" is not established in Chinese Regulation.

In Article 15 of Chinese Regulation, for the purpose of protecting the interests of users, it prescribes that "… transfer the notification to the service recipient who makes available the said work, performance, or sound or video recording. Where the notification cannot be transferred because the network address of the service recipient is unknown, the network service provider shall, at the same time, make the contents of the notification known to the public over information network."[915]

It requires internet service providers to promptly notify the subscriber. Article 15 of Chinese regulation is similar to Section 512 (g) (2) (A) of the US Copyright Law which prescribes that "takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material."[916]

Article 17 of Chinese Regulation prescribes "Upon receiving a written explanatory statement delivered by a service recipient, a network service provider shall promptly replace the removed work, performance, or sound or video recording, or may replace the disconnected link to such work, performance, or sound or video recording and, at the same time, transfer the written explanatory statement delivered by the service recipient to the right owner. The right owner shall not notify the network service provider anew to remove the work, performance, or sound or video recording, or to disconnect the link to such work, performance, or sound or video recording."[917]

It requires internet service providers to replace the material claimed infringing after receiving a valid counter notification. After receiving a valid counter notification, the internet service provider shall "promptly" replace the removed material or cease dialing access to it.

Again, the definition of "promptly" is not defined. Moreover, if internet service providers fail to replace the removed or disabled access material, the responsibilities of them are not clear: do internet service providers bear the secondary responsibility of removing and disabling access or they should bear the direct responsibility? That is to say, a clear motivation of the replacement of the material in response to the counter notification is not given to internet service providers by the Chinese Regulation.

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[915] Regulation on the Protection of the Right of Communication through Information Network. Article 15.
[916] the US Copyright Law Section 512 (g) (2) (A).
[917] Regulation on the Protection of the Right of Communication through Information Network. Article 17.

This rule is similar to Section 512 (g) (2) (B) of the US Copyright Law which prescribes that "upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days."[918]

533. In comparison, Section 512 (g) (2) (A) and (B) of the US Copyright Law establish two conditions for the exemption of liability of "take down." According to Section 512 (g) (1) (2) of the US Copyright Law prescribes that "(1) No liability for taking down generally.-Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing…(2) Exception.-Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider…."[919] If the two conditions could be met, the internet service providers could not be liable even for the wrongly "take down."

Although the two conditions could be found in Article 15 and Article 17 of Chinese Regulation, the Chinese Regulation does not clarify that the liability of "take down" of internet service providers could not be exempted after the two conditions have been satisfied. Article 23 of Chinese Regulation stipulates that "A network service provider which provides searching or linking service to a service recipient and which, upon receiving a written notification of the right owner, disconnects the link to an infringing work, performance, or sound or video recording in accordance with the provisions of these Regulations bears no liability for compensation; however, if it knows or has reasonable grounds to know that the linked work, performance, or sound or video recording is an infringement, it shall bear the liability for contributory infringement."[920]

It only stipulates generally that the "take down" of internet service providers shall not bear the liability. The two conditions prescribes in Article 15 and Article 17 of Chinese Regulation are not integrated into Article 23 of Chinese Regulation. Meanwhile, the two

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[918] the US Copyright Law Section 512 (g) (2) (B).
[919] the US Copyright Law 512 (g) (1) (2).
[920] Regulation on the Protection of the Right of Communication through Information Network. Article 23,

similar conditions under Section 512 (g) (2) (A) and (B) of the US Copyright Law are integrated into Section 512 (g) (1) (2) of the US Copyright Law which stipulates that "No liability for taking down generally."

534. Article 24 of Chinese Regulation prescribes that "Where, as the result of the notification of a right owner, a network service provider wrongly removes, or wrongly disconnects the link to, a work, performance, or sound or video recording, and thereby causes losses to service recipients, the right owner shall bear the liability for compensation."[921]

Article 24 of Chinese Regulation could be understood as that if the complaining party made a notification which has caused internet service provider wrongly removed or disabled access the claimed material, the complaining party should be liable for the damages caused.

535. Two problematics could be raised by Article 24:

First of all, the question could be asked that it is proportionate that the complaining party should be completely liable for the consequence of the "take down" without condition while internet service provider is eligible for the exemption of the liability of "take down"?

If the complaining party does not bear any responsibility of the "notice", the "Notice and Take down" procedure would be abused. Under Section 512 (f) of the US Copyright Law, "any person who knowingly materially misrepresents under this section…shall be liable…."[922] that is to say, the complain party is only liable for the "take down" on the condition that the complain party "knowingly materially misrepresents." Therefore, the first problematic is that the complaining party would bear onerous liability under the Article 24 of the Chinese Regulation

Second problematic is that the scope of "compensation" under Article 14 of Chinese Regulation is not defined. It is not clear whether the complaining party should be liable only for the direct damages which caused to the subscriber or the other damages are also included. Under Section 512 (f) of the US Copyright Law, "any person who knowingly materially misrepresents…shall be liable for any damages, including costs and attorney's fees, incurred

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[921] Ibid. Article 24.

[922] the US Copyright Law Section 512 (f) prescribes that "(f) Misrepresentations.— Any person who knowingly materially misrepresents under this section —
(1) that material or activity is infringing, or
(2) that material or activity was removed or disabled by mistake or misidentification,
shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it."

by the alleged infringer, by any copyright owner or copyright owner's authorized licensee or by a service provider, who is injured by such misrepresentation."[923] That is to say under the US Copyright Law, not only direct damages but also indirect damages such as attorney's fees are within the scope of the liability of "knowingly materially" misrepresentation. The scope of the liability should be specified by the legislative body of China or by the interpretations of the Chinese courts.

§2. Notice and Take Down in Chinese interpretations

536. Two categories of tules could also be distinguished: one is the general rules of the exemption of secondary liabilities of internet service providers; another is the specific rules of the Notice and Take Down. It is interesting to compare the Chinese interpretations with the US and the EU to examine the similarities and differences.

It will firstly demonstrate the interpretations of terms concerning the exemption of secondary liabilities of internet service providers under Notice and Take Down (I). Secondly, it will demonstrate the interpretations concerning the procedure the Notice and Take Down (II).

I. Interpretations of the exemption of secondary liabilities

537. The interpretations of two essential terms concerning the exemption of secondary liabilities will be demonstrated in comparison with the EU and the US copyright legislations. They are the interpretations of knowledge criteria (A) and the interpretations of benefits criterion (B).

A. Interpretations of knowledge criteria

538. "Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of

[923] the US Copyright Law Section 512 (f).

Dissemination on Information Networks" Article 12 reads "Under any of the following circumstances, the people's court may determine that a network service provider providing the information storage space service should have known a network user's infringement of the right of dissemination on information networks, according to the specific facts of the case:

(1) Placing a popular movie or TV play in a position where it is easily appreciable to a network service provider, such as a homepage or any other primary page.

(2) Choosing, editing, organizing, or recommending the themes or contents of popular movies and TV plays or establishing a dedicated ranking for them on its own initiative.

(3) Otherwise failing to take reasonable measures, although the provision of the alleged work, performance, or audio or video recording without permission is easily appreciable."[924]

This provision is the latest interpretations of Chinese Supreme Court concerning the "knowledge criteria." This interpretation could be directly applicable by regional Chinese courts.[925]

539. The interpretations of Chinese Supreme Court is similar to the EU E-Commerce Directive. The EU Directive requires internet service providers to stay in a neutral position in Recital 42 of E-Commerce Directive: "The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored"[926]

540. Both Chinese and the EU interpretations considered that the internet service providers should not engage themselves in the activities of users in order to benefit the exemption of

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[924] "Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks"Article 12, translated by by BeiJing University, puklaw database, http://en.pkulaw.cn/.
Chinese oringinal text as: "列情形之一的，人民法院可以根据案件具体情况，认定提供信息存储空间服务的网络服务提供者应知网络用用户侵害信息网络传播权：（一）将热播影视作品等置于首页或者其他主要页面等能够为网络服务提供者明显感知的位置的；（二）对热播影视作品等的主题、内容主动进行选择、编辑、整理、推荐，或者为其设立专门的排行行榜的；（三）其他可以明显感知相关作品、表演、录音音录像制品为未经许可提供，仍未采取合理措施的情形。"

[925] 崔国斌，《著作权法：原理与案例》北京大学出版社，2014。
Cui GuoBing, Copyright Law: Principles and Cases, Beijing University Publication, 2014. p, 759.

[926] Directive 2000/31/EC, Recital 42.

secondary liability.

The CJEU interpreted the E-Commerce Directive in *Google France and Google case (2010)* that as to examine whether internet service providers play a neutral role: "the activity of the information society service provider is 'of a mere technical, automatic and passive nature', which implies that that service provider 'has neither knowledge of nor control over the information which is transmitted or stored'."[927] Further more, In *L'Oréal case (2011)*, this point of view is confirmed: "by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale."[928]

541. Similar case could also be found in China. In the case of *Bei Jing Xin Chuan Online Information Technology Ltd. v Shang Hai Tu Dou Internet Technology Ltd.*[929] elaborated by Shang Hai First Court of Appeal, the "Hosting" internet service provider, Tu Dou company was held liable for the secondary liability of infringing the copyright of a popular Chinese movie: "Crazy Stone" for the reason that it should have the awareness of the infringing activity of its subscribers.

The Chinese court construed that first of all, the movie "Crazy Stone" was relatively popular. Therefore, the internet service provider should bear more responsibility to be aware of the fact that the movie named "Crazy Stone" uploaded by its subscriber would be infringing material; Secondly, based on the fact that the internet service provider, Tu Dou Company, has censored the contents uploaded by its subscribers and then selected some of the contents for recommendation, Tu Dou Company should have the knowledge that the movie "Crazy Stone" uploaded by its subscribers is copyright infringing.

542. The first point reasoned by the Chinese court seems incompatible with the US and the EU interpretations. By interpreting the "red flag" knowledge criterion, the Chinese court actually requires the internet service provider to actively examine whether all the movies

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[927] CJEU, 23 March 2010, Google France SARL, Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA, Luteciel SARL (C-237/08), Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08), Joined cases, C-236/08 to C-238/08. EU:C:2010:159. paras, 113, 114, 120.
Directive 2000/31, recital 42.

[928] CJEU, 12 July 2011, L'Oréal SA,Lancôme parfums et beauté & Cie SNC,Laboratoire Garnier & Cie,L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi, Case C-324/09. EU:C:2011:474. para, 116.

[929] Bei Jing Xin Chuan Online Information Technology Ltd. v Shang Hai Tu Dou Internet Technology Ltd. Shang Hai First Court of Appeal. 2008.

named “Crazy Stone” in the servers are copyright infringing or not. In comparison, the “red flag” criterion in the US case law is interpreted as to examine “whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.”[930] While in the EU case law, it requires internet service provider to rest in a neutral and passive role.[931] the Chinese Shang Hai First Court of Appeal actually required internet service providers to actively detect copyright infringing activities rather than to stay in a passive and neutral role.

As for the second point, the Chinese Shang Hai First Court of Appeal applied the interpretation of the Chinese Supreme Court demonstrated before, Article 12, (2) “Choosing, editing, organizing, or recommending the themes or contents of popular movies and TV plays or establishing a dedicated ranking for them on its own initiative.” [932] which is similar to the EU E-Commerce Directive. Recital 42 and the CJEU cases of *Google France (2010)* and *L’Oréal case (2011)* demonstrated above which all require internet service provider to stay a passive and neutral role.[933]

B. Interpretations of benefits criterion

543. “Provisions of the Supreme People’s Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks” Article 11 prescribes that “Where a network service provider directly gains economic benefits from the work, performance, or audio or video recording provided by a network user, the people’s court shall determine that the network

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[930] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (2004), p, 1108.
NIMMER ON COPYRIGHT, § 12B.04[A][1], at 12B–49.

[931] Directive 2000/31/EC. Recital 42.
CJEU, 23 March 2010, Google France SARL, Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA, Luteciel SARL (C-237/08), Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08), Joined cases, C-236/08 to C-238/08. EU:C:2010:159. paras, 113, 114, 120.
CJEU, 12 July 2011, L’Oréal SA,Lancôme parfums et beauté & Cie SNC,Laboratoire Garnier & Cie,L’Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi, Case C-324/09. EU:C:2011:474. para, 116.

[932] “Provisions of the Supreme People’s Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks”Article 12, translated by by BeiJing University, puklaw database, http://en.pkulaw.cn/.

[933] Directive 2000/31/EC. Recital 42.
CJEU, 23 March 2010, Google France SARL, Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA, Luteciel SARL (C-237/08), Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08), Joined cases, C-236/08 to C-238/08. EU:C:2010:159. paras, 113, 114, 120.
CJEU, 12 July 2011, L’Oréal SA,Lancôme parfums et beauté & Cie SNC,Laboratoire Garnier & Cie,L’Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi, Case C-324/09. EU:C:2011:474. para, 116.

service provider has a higher duty of care for the network user's infringement of the right of dissemination on information networks. If a network service provider gains benefits from inserting advertisements into a specific work, performance, or audio or video recording or gains economic benefits otherwise related to the disseminated work, performance, or audio or video recording, it shall be determined that the network service provider directly gains economic benefits as mentioned in the preceding paragraph, however, excluding the general advertising and service charges, among others, collected by a network service provider for providing network services."[934]

544. The US legislation is similar compared with this interpretation of Chinese Supreme Court: the US House and Senate Reports stated that "in general, a service provider conducting a legitimate business would not be considered to receive a 'financial benefit directly attributable to the infringing activity' where the infringer makes the same kind of payment as non- infringing users of the provider's service. Thus, receiving a one-time set-up fee and flat periodic payments for service from a person engaging in infringing activities would not constitute receiving a 'financial benefit directly attributable to the infringing activity'."[935]

545. In the US case law, The common law standard of "financial benefits" established in *A&M Records, Inc. v. Napster, Inc. case (2001)* which stipulated that "Financial benefit exists where the availability of infringing material 'acts as a draw' for customers"[936] was interpreted as consistent with the "direct financial benefit" under Section 512 (c) (1) (B) of the US Copyright Law in *Perfect 10, Inc. v. CCBill LLC case (2007)*.[937] Furthermore, together with

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[934] "Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks" adopted at the 1561st Session of the Judicial Committee of the Supreme People's Court on November 26, 2012, are hereby issued and shall come into force on January 1, 2013.
Chinese version as "最高高人人民法院关于审理侵害信息网络传播权民事纠纷案件适用用法律若干问题的规定." Article 11, translated by by BeiJing University, puklaw database, http://en.pkulaw.cn/.
Chinese oringinal text as "网络服务提供者从网络用用户提供的作品、表演、录音音录像制品中直接获得经济利益的，人民法院应当认定其对该网络用用户侵害信息网络传播权的行为负有较高的注意义务。网络服务提供者针对特定作品、表演、录音录像制品投放广告获取收益，或者获取与其传播的作品、表演、录音录像制品存在其他特定联系的经济利益，应当认定为前款规定的直接获得经济利益。网络服务提供者因提供网络服务而收取一般性广告费、服务费等，不属于本款规定的情形。"

[935] S. REP. No. 105-190, (1998), p, 44.
H.R. REP. No. 105-551, (1998), p 54.

[936] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (2001), p, 1023. cited Fonovisa, 76 F. 3d at 263-64 " financial benefit may be shown where infringing performances enhance the attractiveness of a venue"

[937] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (2007), p, 1117. " we hold that "direct financial benefit" should be interpreted consistent with the similarly-worded common law standard for vicarious copyright liability"

the former *Ellison v. Robertson case (2004)*[938], the court interpreted the standard of "direct financial benefit" is "whether the infringing activity constitutes a draw for subscribers, not just an added benefit."[939]

In a word, "direct financial benefit" excluded "the general advertising and service charges, among others, collected by a network service provider for providing network services" in Chinese interpretation and "a one-time set-up fee and flat periodic payments for service from a person engaging in infringing activities" in the US interpretation.

This interpretation by Chinese Supreme Court has not been applied by other Chinese courts. Since the interpretation by Chinese Supreme Court is similar to the US interpretations, in the future application of the interpretation by Chinese Supreme Court, maybe the standard established and elaborated in the US legislation and case laws could be a reference for Chinese regional courts.

II. Interpretations of the procedure of Notice and Take Down

546. It will firstly present the interpretations of the requirements of Notice and Take Down by Chinese courts (A). Secondly, it will criticize the interpretations made by Chinese courts which give excessive liability to internet service providers (B).

A. Interpretations of Notice and Take Down by Chinese Courts

547. "Provisions of the Supreme People's Court" Article 13 reads "Where a network service provider fails to take necessary measures such as deletion, screening and breaking the link in a timely manner after receipt of a notice submitted by the right holder by letter, fax, email or any other means, the people's court shall determine that the network service provider knows the alleged infringement of the right of dissemination on information networks."[940]

"Provisions of the Supreme People's Court" Article 14 reads "Regarding the

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[938] Ellison v. Robertson, 357 F.3d 1072 (2004). pp, 1078, 1079.

[939] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (2007), p, 1117.
Ellison v. Robertson, 357 F.3d 1072 (2004). p, 1079.

[940] "Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks" Article 13, translated by by BeiJing University, puklaw database, http://en.pkulaw.cn/.
Chinese original text as: "网络服务提供者接到权利人以书信、传真、电子邮件等方式提交的通知，未及时采取删除、屏蔽、断开链接等必要措施的，人民法院应当认定其明知相关侵害信息网络传播权行为。"

timeliness of a network service provider's taking necessary measures such as deletion, screening and breaking the link, the people's court shall make a determination after comprehensively considering the form of the notice submitted by the right holder, the accuracy of the notice, the difficulty intaking the measures, the nature of network services, the type, popularity and quantity of the involved works, performances, and audio and video recordings, and other factors."[941]

Chinese Supreme Court specifies that internet service provider should expeditiously "take down" the claimed materials after receiving a valid "notice" to be exempted from the secondary liability.

548. In the case of *HanHan v Beijing Baidu Internet Technology Ltd*. elaborated by Beijing Haidian district court[942], after the author HanHan has notified that his works has been uploaded to the servers of the defendant without the authorization, the defendant, Baidu Company a "hosting" internet service provider, has adopted several kinds of measures to "take down" the infringing materials, inter alia:

After receiving the notification of HanHan, Baidu Company has expeditiously removed the materials which has been located by the notification.

Baidu Company has applied a anti-pirating system to automatically screen or to remove the materials which content the works of HanHan.

Baidu Company has manually censored from Mars 2011 to April 2011 all the materials uploaded by the subscribers which exceeded 1000 words to remove the copyright infringing materials. The works of HanHan have been payed particular attention by the staffs of Baidu Company.

However, the Beijing Handian district court judged that Baidu Company was responsible for the infringing materials uploaded by its subscribers regarding two facts: First one is that HanHan has negotiated with Baidu Company concerning the authorization of his works and the removal of the infringing materials. Baidu Company should have the awareness of the fact that the infringing materials exist in its server. Second one is that since Baidu Company has censored the contents uploaded by the subscribers, it should have the knowledge of the infringing facts. Consequently, a monetary relief has been applied by the

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[941] Ibid. Article 14, translated by by BeiJing University, puklaw database, http://en.pkulaw.cn/.
Chinese original text as: "人民法院认定网络服务提供者采取的删除、屏蔽、断开链接等必要措施是否及时，应当根据权利人提交通知的形式，通知的准确程度，采取措施的难易程度，网络服务的性质，所涉作品、表演、录音录像制品的类型、知名度、数量等因素综合判断。"

[942] HanHan v Beijing Baidu Internet Technology Ltd, Beijing Haidian district court, 2012.

court.

In this case, the decision of the Chinese court was not proportionate. Baidu Company has born onerous responsibilities to monitor the contents uploaded in its server. The Chinese court has wrongly enlarged the responsibility of "expeditiously take down." The specific analyzation will be demonstrated in the followings.

B. Excessive Liabilities under the Chinese interpretations compared with the US and the EU

549. By interpreting the "Regulation on the Protection of the Right of Communication through Information Network" and the provision of Chinese Supreme Court[943], the Chinese Beijing court in *Baidu case*[944], as a matter of fact, required internet service providers to actively monitor the contents transferred. Chinese internet service providers bored excessive responsibilities under this interpretation. The procedure of "Notice and Take Down" and the "Safe Harbor" would be in vain under this excessive interpretation.

In comparison, the US courts and CJEU both construed that the internet service providers should not bear the responsibility to monitor.

In the US case: *Corbis Corp. v. Amazon.com, Inc. (2004)*, the US court interpreted Section 512 (i) (A) in favor of the interests of internet service providers that "§ 512(i) does not require a service provider to decide, ex ante, the specific types of conduct that will merit restricting access to its services. As Congress made clear, the DMCA was drafted with the understanding that service providers need not "make difficult judgments as to whether conduct is or is not infringing"[945] and "a service provider who receives notice of a copyright violation be able to tell merely from looking at the user's activities, statements, or conduct that copyright infringement is occurring."[946]

Similarly, the US court also construed that "comply substantially" the "Notice and Take Down" procedure does not mean "perfectly"[947]. It does not require copyright holders to identify every infringing materials. " Instead, the requirements are written so as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works.

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[943] "Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks"
[944] HanHan v Beijing Baidu Internet Technology Ltd, Beijing Haidian district court, 2012.
[945] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (2004) p, 1101.
[946] Ibid. p, 1105.
[947] ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619 (2001), p, 625.

Thus, when a letter provides notice equivalent to a list of representative works that can be easily identified by the service provider, the notice substantially complies with the notification requirements."

Therefore, according to the interpretations by the US courts, the Chinese internet service provider: Baidu, had complied with the requirements of the procedure of "Notice and Take Down" and should be exempted from the secondary liability.

550. In terms of the EU legislations and interpretations, Article 15 of Electronic Commerce Directive expressly states "no general obligation to monitor." In other words, copyright holders have the right to apply injunctions, but these injunctions could not require internet service providers to actively monitor the data of their users.[948]

In the *Scarlet Extended case (2011)*, a filtering system is prohibited under Article 15 of Electronic Commerce Directive "no general obligation to monitor."[949] Similarly, in *SABAM case (2012)*, CJEU also stated that the injunction applied by copyright holders shall not require internet service providers to monitor all the data transferred.[950]

551. The EU Commissions proposed a reform of Directive in regard of the development of new businesses in the digital environment.[951] It indeed proposed that internet service providers should take more responsibilities in terms of controlling copyright infringing materials in the digital environment:

Article 13. 1. of the proposed Directive prescribes that "Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures

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[948] CJEU, 24 November 2011, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), Case C-70/10. EU:C:2011:771. para, 37. "it is necessary to examine whether the injunction at issue in the main proceedings, which would require the ISP to install the contested filtering system, would oblige it, as part of that system, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights."

[949] Ibid. CJEU construed that a filtering system which requires "firstly, that the ISP identify, within all of the electronic communications of all its customers, the files relating to peer-to-peer traffic; secondly, that it identify, within that traffic, the files containing works in respect of which holders of intellectual-property rights claim to hold rights; thirdly, that it determine which of those files are being shared unlawfully; and fourthly, that it block file sharing that it considers to be unlawful." would result in an active observation of all electronic communications conducted on the network of the ISP concerned and, consequently, would encompass all information to be transmitted and all customers using that network.

[950] CJEU, 16 February 2012, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV, Case C−360/10. EU:C:2012:85. para, 38. "the injunction imposed on the hosting service provider requiring it to install the contested filtering system would oblige it to actively monitor almost all the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31"

[951] COM(2016) 593 final.

to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter."[952]

Article 13. 3. prescribes that "Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments."[953]

Article 14. 1. prescribes that "Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due."[954]

552. But, by reading the Articles, they never impose an obligation of internet service providers to actively monitor the contents uploaded. They only facilitate the cooperations between copyright holders and internet service providers for the purpose of removing copyright infringing materials by using standard content recognition technologies and for the purpose of distributing remunerations among authors, performers and service providers.

However, apparently, in the Chinese *Baidu case*, the internet service provider was required to monitor all the information transferred in its servers: the copyright holder did require internet service provider Baidu not only to filter all the contents suspected as infringing, but also to manually censor all the files uploaded to the servers.

The interpretation which requires internet service provider to actively monitor all the information transferred in its servers is very wrong. It undermines the intention of the

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[952] Ibid.
[953] Ibid.
[954] Ibid. Article 13, Article 14.

Chinese Copyright Law to strike a balance between copyright holders and public interests[955] for the reason that it would cause excessive costs to internet service providers; it would jeopardize the creativity of authors and the prosperity of the market in the digital environment, maybe it would also harm the fundamental rights. Notably, the users' personal information is vulnerable in digital environment facing the excessive enforcement measures.[956]

The ongoing third revision of Chinese Copyright Law will address this issue. Article 73 of the Final Draft of the revision of Chinese Copyright Law prepared by Chinese Copyright Bureau[957] established a principle by stating that "Internet service providers who provide hosting, searching, hyperlink and other mere technical services, shall not bear any responsibility of monitoring related to copyright and neibouring rights."[958] Will this principle be implemented into Chinese Copyright Law? How it will be interpreted by Chinese courts? It needs the future observation.

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[955] Chinese Copyright Law. Article 1, "This Law is enacted, in accordance with the Constitution, for the purpose of protecting the copyright of authors in their literary, artistic and scientific works and the rights and interests related to copyright, encouraging the creation and dissemination of works conducive to the building of a socialist society that is advanced ethically and materially, and promoting the progress and flourishing of socialist culture and sciences" Translated by Chinese Copyright Bureau.

[956] Castets-Renard, Céline, Alain Strowel, and Isabelle de Lamberterie. Quelle protection des données personnelles en Europe? [actes du colloque tenu le 14 Mars 2014 à la Faculté de droit de l'Université Toulouse 1 Capitole]. Europe(s). Bruxelles: Larcier, 2015.

[957] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012.

[958] Ibid. Article 73. original text in Chinese as "网络服务提供者为网络用户提 供存储、搜索或者链接等单纯网络技术服务 时，不承担与著作权或者相关权有关的审查义 务."

Conclusion of Chapter II

553. It has compared the rules of Notice and Take Down between China and the US, the EU. It has demonstrated the essential issues such as the eligibilities of the exemptions of secondary liability, the criteria of "knowledge", the criteria of "benefits and control" and the procedure and the requirements of the Notice and Take Down.

The Chinese rules are more similar to the EU Electronic Commerce Directive because similar to the EU, a lot of issues in this regard are not "harmonized." However, in terms of China, one problematic shall be paid particular attention: the copyright enforcement could not be made only for the interests of copyright holders. It has to balance other interests such as the development of technology, the public interests, the fundamental rights etc.

554. The Chinese legislative body and courts have given onerous burden to internet service provider facing the rampant pirating in Chinese digital environment. The interests of internet service providers have been jeopardized unreasonably. Moreover, the recent feeble copyright enforcement in Chinese digital environment maybe become an over copyright enforcement which repress the online creativities, online freedom of speech via the hand of internet service providers. This is a problematic the future Chinese legislation has to face in regard of the Notice and Take Down Rules. The principle of "no responsibility to monitor" has the merit to be established by Chinese legislative bodies and courts.

The specific rules of Notice and Take Down shall also be elaborated in China: the definition of "expeditiously take down", the liability of "take down" for internet service providers and for the complaining party, the criteria of knowledge, the criteria of benefit and control.

The establishment of proportional principles and specific rules is a process. In the future, it probably could be driven by the development of the Chinese copyright market in the digital environment. While the development of Chinese copyright market in the digital environment is depend on the Chinese enforcement practice to control the illegal transmission of copyrighted contents.

Conclusion of Title I

555. Although the national legislations and interpretations of the legal protection against circumvention of technological measures and the Notice and Take Down vary in detail among the US, the EU and China, they have complied with the obligations under the WCT.

The Chinese legislations of both rules are more similar to the EU directives regarding the facts the Chinese legislations are in the phase of transition while the EU legislations are in the phase of harmonization.

Both specific rules of the legal protection against circumvention of technological measures and the Notice and Take Down are not prescribed in Chinese Copyright Law. They are all prescribed in a special regulation concerning the public communication right.

In the near future, both rules have been planed to be revised and integrated into the Chinese Copyright Law. Therefore, the problematic would be how to elaborate the specific and proportional rules to protect copyright in the digital environment.

556. To properly protect copyright in the digital environment is particularly salient in regard of the situation of China. Now, the copyright enforcement is too feeble to protect the interests of copyright holders envisaging the rampant pirating contents. However, regarding the Chinese legislations and interpretations of the rules of the legal protection against circumvention of technological measures and the Notice and Take Down, it is reasonable to worry that in the future, if internet will become into a controllable virtual space, if Chinese Copyright Law gives copyright holders the excessive right to control the access to works and gives internet service providers the excessive responsibilities to monitor infringing materials, the feeble copyright enforcement would become over copyright enforcement in the digital environment smothering the vitality and creativity. Therefore, the revision of Chinese Copyright Law has to find the balancing point.

After demonstrating the weapons copyright holders dispose in the Chinese copyright legislations, it is both logic to demonstrate how the copyright holders could enforce their rights in the Chinese copyright enforcement practices. First one is theoretical, comparative; Second one is practical, domestic. The two aspects together will give a global understanding of the copyright enforcement in Chinese digital environment.

Title II. Chinese Copyright Enforcement Practices in the Digital Environment

557. Both the existing and future Chinese copyright enforcement practices will be demonstrated.

The existing copyright enforcement actions in the digital environment taken by Chinese copyright authorities are for the purpose of fighting the rampant copyright infringing activities. It will be demonstrated primarily in order to give a general understanding of the landscape of the Chinese copyright enforcement in the digital environment.

Thanks to the existing copyright enforcement practices, the legal offer of contents by Chinese online audiovisual media have the living space to develop. In return, the Chinese online audiovisual media influence the Chinese copyright enforcement in the digital environment. It will demonstrate how the development of Chinese online audiovisual media associated with the copyright enforcement practices and how Chinese online audiovisual media could facilitate the copyright enforcement in the digital environment.

The digital environment not only make the transmission of works extremely efficient, but also facilitated the new forms of creation. The creations of the works are changed from professional creation to amateur's, user's creation, from human creation to robot, Artificial Intelligence creation. How Chinese copyright protection would evolve facing the new forms of creations? How to preserve, promote the creativities in the digital environment while protect the copyright holders' interests?

The emerging new forms of the creation are connected with the future Chinese copyright protection: How could UCC be protected under Chinese Copyright Law in the digital environment? Could UCC be protected by facilitating the flexible copyright license system? How the Artificial Intelligence created works would be defined by future Chinese Copyright Law?

This title will firstly discuss Chinese existing copyright enforcement practices together with the development of Chinese online media (Chapter I). It will secondly discuss the future copyright problematics of the User Created Content (UCC) and the Artificial

Intelligence (AI) created records of the game of Go (Chapter II).

Chapter I. Chinese Existing Copyright Enforcement Practices

558. Although the enforcement measures have been prescribed in the Chinese copyright legislations, how to enforce copyright in practice in the digital environment remains problematic.

As the development of Chinese internet infrastructure, large numbers of audiences have been shifted into the digital environment. There are significant economic interests and creativities at stake. Chinese copyright authorities have undertaken several copyright enforcement actions to try to control the copyright infringing activities in the digital environment.

What are the development status of the Chinese internet? Why it is difficult to enforce copyright in the digital environment in China? What are the scales of copyright infringing activities? What copyright enforcement actions Chinese copyright authorities have undertaken?

Thanks to the copyright enforcement actions, the legitimate copyright businesses emerge in the digital environment in China. As a matter of fact, the development of the online audiovisual media offering legal contents in the digital environment has significant impacts on the copyright enforcement practices. What are their business models? How they influenced the Chinese copyright enforcement in the digital environment? What are their impacts on the future Chinese copyright enforcement in the digital environment?

Therefore, firstly, this Chapter will demonstrate the Chinese copyright infringements in the digital environment and the enforcement actions undertook by Chinese government (Section I). Secondly, it will demonstrate what are the Chinese online audiovisual media and how they facilitated the Chinese copyright enforcement in practice in the digital environment (Section II).

Section I. Copyright enforcement practices of Chinese copyright authorities in the digital environment

559. Copyright enforcement in the digital environment has frustrated copyright holders around the world. It is difficult to be enforced because the individual user is anonymous in the digital environment and everyone of them has the capacity to reproduce and disseminate infringing contents. The illegal BitTorrent and Streaming websites take advantages of this "peer to peer" transmission of copyrighted contents, make enormous profits from jeopardizing the interests of copyright holders. This organized, commercial, illegal exploitation of copyrighted contents prevent the legal websites which honestly search the authorization of copyright holders from developing, because the latter bear more cost than the former. Therefore, the enforcement of copyright is one important factor that copyright industry in the digital environment could be developed.

The internet was started to be constructed in China in late 1980s during the "Reforming and Opening Policy." It is 20 years later than western countries. However, at the beginning of 21 century, the Chinese internet has developed rapidly. Consequently, similar to western countries, the copyright infringing materials have been saturated in Chinese digital environment at the beginning. Because of the characteristics of the digital environment, the copyright enforcement is particularly difficult.

However, the infringing activities harms the market of copyright and demotivate the creation online. Therefore, it is absolutely crucial for China to enforce copyright in the digital environment for the purpose of protecting the online copyright industry and online creativities which are emerging. Chinese authorities have undertaken the Sword Net Action to seize the servers of illegal websites and impose monetary penalty to copyright infringing entities and have established the systems to surveil the copyright infringements online. It is also interesting to demonstrate the copyright enforcement practices undertaken by Chinese copyright authorities in the digital environment.

Firstly, it will introduce the Chinese development of internet, identify the characteristics of internet which have provoked massive copyright infringements and then measure the scale of the two major copyright infringing activities in the digital environment (§1). Secondly, it will demonstrate the Sword Net Action and the copyright surveillance undertook by Chinese authorities for the purpose of enforcing copyright in the digital

environment (§2).

§1. Identification of the digital environment and copyright infringing activities

560. For the purpose of demonstrating concretely the Chinese copyright enforcement practices in the digital environment, it is necessary to primarily examine what are the targets of copyright enforcement and what are the difficulties.

The BitTorrent and the illegal streaming constitute two major copyright infringing activities in the digital environment. it would like to demonstrate what are the scale of the two infringing activities and the damages they have caused. Meanwhile two obstacles of copyright enforcement which attribute to the characteristics of internet could be identified: The objective and subjective obstacles of the digital environment render the copyright enforcement particularly hard. Consequently, BitTorrent and illegal streaming make profits from facilitating the massive transmissions of infringing materials among individual internet users.

Therefore, firstly, it will demonstrate the major infringing activities in the digital environment (I). Secondly, it will demonstrate the difficulties of copyright enforcement in practice in the digital environment (II).

I. Objects of copyright enforcement

561. The major copyright infringing activities in the digital environment will be presented. With the tools of Bit Torrent and Online Streaming[959], internet users could share relatively large film and music files directly among each other in the digital environment. If the films and music can be easily shared without the consent of copyright holders, it will significantly damage the copyright holders' capability of exploiting their works. Consequently, the copyright market in the digital environment will be harmed and the incentive of creation in the digital environment will also be harmed too.

[959] CyberLocker is a file hosting service which allows users to upload files to the server and then get access to it with a link from any device with internet connection.

Two major tools for illegal online file sharing: the Peer to Peer file sharing (A) and the illegal streaming (B) will be analyzed respectively.

A. Copyright infringing scale of peer to peer file sharing

562. Peer to peer file sharing is an efficient way of how large files could be transmitted in the digital environment among individual users. But it has been abused and has frustrated copyright holders. Bit Torrent is the most popular protocol for the peer to peer file sharing.

It was originally designed in 2001 for the purpose of large file transmissions such as Linux system. The BitTorrent protocol can be used to reduce the server and network impact of distributing large files. Rather than downloading a file from a single source server, the BitTorrent protocol allows users to join a "swarm" of hosts to upload to/download from each other simultaneously. At the beginning of download, one small file called Torrent should be downloaded in order to be connected with other peers to start the whole process.

563. Currently, BitTorrent is the most popular large file sharing protocol in cyberspace. The scale of BitTorrent is shocking.

In the North America, Europe and Asia-Pacific, the infringing use of BitTorrent in January 2013 accounted for 178.7 million unique internet users, an increase of 23.6% from November 2011, 7.4 billion page views, an increase of 30.6% from November 2011.[960]

BitTorrent also has consumed large proportion of internet bandwidth worldwide. In year of 2015, BitTorrent was responsible for 26.83% of the upstream bandwidth in North America, 21.08% of the upstream bandwidth in Europe and 48.22% of the upstream bandwidth in Asia Pacific.[961]

564. The scale of BitTorrent in China was larger than the average level of Asia Pacific. Because Qvod player represented 8.89% of the upstream bandwidth in Asia Pacific in the year of 2015 which did not count into the 48.22% of the upstream bandwidth consumed by BitTorrent.[962] the Qvod player is a video player based on BitTorrent protocols which enables to share files among its users. In the year of 2012, it had 200 million users in China which did not count as BitTorrent users.

In regard of the amounts of the files shared via BitTorrent, it is hard identify exactly how many files have been transmitted via BitTorrent because the transmission could be

[960] David Price, "Sizing the piracy universe", report conducted by NetNames, 2013. p, 4.
[961] "Global Internet Phenomena Report 2015", Prepared by SANDVINE, 2015.
[962] Ibid.

conducted privately enabled by online social network. But in the year of 2013, 3.5 million BitTorrent files were available on Public BT tracker.[963] Among 12, 500 torrent files of those in 2013 examined by the report NetNames[964], two identified torrent files out of 12,500 torrents analyzed offered non-infringing content. None of the most popular 10,000 torrent files were found to offer non-infringing content. Large part of the infringing contents were audiovisual works: film represented 33.4%, pornography represented 30.3%, television represented 15.3%, music represented 7.6%

In a word, the scale of the file sharing via BitTorrent is enormous and most of the files shared by BitTorrent are copyright infringing. The films and musics are the most shared files by BitTorrent. It would be understandable that the film and music industries are devastated.

565. It is impossible to calculate exactly how much the infringing contents transmitted via BitTorrent have costed to film and music industries and independent creators. However, it could be demonstrated that how much revenue has been generated by BitTorrent websites by profiting the free pirating contents.

The BitTorrent websites enable individual users to upload Torrent files and make them searchable for the purpose of facilitating download. Nearly all the BitTorrent websites have been operated for profits and advertising has been the principal source of revenue[965]. Typically, sites featured banner advertisements of various shapes and sizes as well as pop-ups and pop-unders which often launched when a search was made or a link on the site was clicked.

The BitTorrent websites were extremely lucrative according to the report conducted in the year of 2014 by a the US non-profit organization focused on Internet safety issues named Digital Citizens Alliance.[966] It demonstrated that for a BitTorrent website which had less than 1 million monthly unique visitors, the annual average revenue from advertisement was amounted to nearly 100,000 the USD meanwhile the annual cost was less than 10,000 the USD. For a BitTorrent website had more than 5million monthly unique visitors, the annual revenue from advertisement reached 6 million the USD while the annual cost was about 360,000the USD.[967] That is to say, the margin of the BitTorrent websites were amazingly high which surpassed 90%.

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[963] David Price, "Sizing the piracy universe", report conducted by NetNames, 2013. p, 28.
[964] Ibid. p, 28.
[965] Ibid. p, 30.
[966] "Good Money Gone Bad, Digital Thieves and Hijacking of the Online Ad Business", Prepared by Digital Citizens Alliance, 2014. Available at www.digitalcitizensalliance.org/followtheprofit.
[967] Ibid. p, 11.

The main reason why the BitTorrent websites were making significant money without many efforts is because the contents shared were nearly all copyrighted works. The copyrighted works such as films and musics which illegally shared by BitTorrent websites represented huge investments of copyright holders. The high margin of BitTorrent websites is because they do not purchase the authorization from copyright holders. Large proportion of their revenue could be regarded as stealing from the copyright holders of the contents illegally shared.

566. In China, the Qvod player, in the year of 2012, had 200 million users and was the most popular BitTorrent download tool and video player. In the same year, the revenue of Qvod player reached 300million CNY equals about 50 million the USD[968]. Similarly large part of its revenue came from the advertisement.[969] Ten thousands of films were uploaded by its users and were available for downloading. Most of them were copyrighted works and were shared without the authorization[970]. The seizure of the servers of Qvod player were proceeded by both Chinese national and regional copyright authorities started from the year of 2013. The seizure was initiated by the Chinese copyright holders and it will be demonstrated in the followings.

B. Copyright infringing scale of illegal streaming

567. Video streaming has become the most popular activities in the digital environment according to the 2015 internet report conducted by Sandvine: In North America, two online streaming websites, Netflix and YouTube represented about 48% of the internet traffic. In Europe, YouTube represented 21.16% of the internet traffic. In Asia Pacific, YouTube represented 24.64% of the internet traffic.[971]

Although Netflix and YouTube which are popular around the world are legitimate websites respecting copyright, the illegal streaming websites still exist. It consists of two types of site that jointly participate to present infringing video content to their users. The first type of site provides links to content and is typically known as a video streaming link site; the second type of site hosts the streaming video, usually displaying it to the user in a Flash-based or HTML5 video player. A user can upload contents to the host sites but the sites

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[968] 韩志宇，“快播播放器的经营方式及其法律责任解读” 中国版权，2016。p, 47。
Han Zhiyu, “the analyzation of the business model and the legal responsibilities of Qvod player”, China Copyright, 2016. p, 47.
[969] Ibid. p, 48.
[970] Ibid. p, 50.
[971] “Global Internet Phenomena Report 2015”, Prepared by SANDVINE, 2015.

themselves are not searchable, instead, a user is provided with a link which could be shared on the link sites.

The illegal streaming is more convenient than BitTorrent. the users of streaming do not have to wait for downloading the audiovisual works, they could watch them simultaneously on the web. For its conveniency, the amount of users of illegal streaming websites grows rapidly according to the report conducted by NetNames: in terms of the video streaming link site, "49.8m aggregate visitors to the most popular twenty video streaming link sites worldwide in July 2009. This had increased by 166.5% to 132.7m by January 2013. " in terms of streaming video host sites, "comScore recorded 82.8m aggregate visitors to the most popular twenty video streaming cyberlockers (video streaming host sites) worldwide in July 2009. This had increased by 56.5% to 130.2m by January 2013, though this represented a significant decrease on the historical high of 213.8m visitors in January 2012, the month that the very popular MegaVideo video streaming cyberlocker was closed."[972]

In China, the scale of illegal online streaming is hard to calculate. Not only the two types of illegal online streaming websites demonstrated before have existed in Chinese digital environment, but also the legitimate websites such as Youku, Tudou, have made large quantities of legal contents available online.

568. The damages caused by illegal streaming could be demonstrated indirectly by how the illegal streaming website generate revenue from pirating copyright contents.

The revenue of illegal streaming comes from two major sources: online advertising and subscription fees. In terms of the online advertising, the illegal streaming websites is similar to BitTorrent websites. The sites insert pop-ups ads which often launched when a search was made or a link on the site was clicked. In terms of the subscription fees, the illegal streaming websites propose high quality contents which could be accessed after a subscription fee has been paid.

The annual revenues generated by illegal streaming websites was not as efficient as BitTorrent websites. According to the report conducted by Digital Citizens Alliance,[973] in the year of 2012, in terms of the illegal streaming link sites, the small one which had less than 1million monthly unique visitors generated about 60,000the USD annually at the cost of 10,000 the USD; the large one which had more than 5million monthly unique visitors generated about 2.5 million the USD at the cost of 300,000the USD. In term of the illegal

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[972] David Price, "Sizing the piracy universe", report conducted by NetNames, 2013. p, 44.

[973] "Good Money Gone Bad, Digital Thieves and Hijacking of the Online Ad Business", Prepared by Digital Citizens Alliance, 2014. Available at www.digitalcitizensalliance.org/followtheprofit. p, 13.

video streaming host sites, the small one generated about 60,000 the USD while the large one generated 1.2million the USD.

Similar with the BitTorrent website, the profits of the both kinds of illegal streaming sites came from the loss of the copyright holders. Regarding the fact that the copyright holders have started to exploit the digital environment by establishing legitimate online distribution systems of films and musics such as Netflix, the illegal streaming sites would impede the development of this legitimate business. Because both legitimate and illegal video websites have used the same technology and have made profits in the same way. Meanwhile illegal sites do not pay for the copyright authorization. Consequently, if the copyright could not be enforced properly, the online copyright industry would not be developed.

569. Interestingly, in China, in the period from 2006 to 2012 which the Chinese internet developed rapidly, the copyright infringing contents were saturated on the video streaming websites such as Youku and Toudou. These websites played the willing blindness to profit the users attracted by the copyright infringing contents. However, recently, because the copyright enforcement in Chinese digital environment has been enhanced. Simultaneously, the online video streaming business has developed to satisfy the growing appetite of the audiences. The emerging legitimate video streaming websites are using the copyright enforcement to maximize their profits. It will reduce the copyright infringing activities in digital environment.

II. Obstacles of copyright enforcement in the digital environment

570. The obstacles of copyright enforcement in the digital environment could be classified as two kinds: One is that physically, the digital environment has changes the traditional way of communication works and the new ways are more pervasive and hard to regulate. Second one is that mentally, the users do not consider the copyright infringements in the digital environment are as bad as in real space.

The demonstration of the obstacles could give some understandings of why Chinese copyright infringements are tenacious and how to enforce in the future.

Therefore, it will firstly demonstrate the objective obstacle of copyright enforcement in the digital environment (A). It will secondly demonstrate the subjective obstacle of copyright enforcement in the digital environment (B).

A. Objective obstacle of copyright enforcement in the digital environment

571. Physically, because of several characteristics of the digital environment, the enforcement of copyright in this virtual space is different than the real space.

As Professor Lessig demonstrated that the original architecture of the internet makes it difficult to regulate, because it is impossible or difficult to know who do what and where in this virtual space by demonstrating an example of online gambling.[974]

It demonstrated that the state which want to control the online gambling will facing several problematics. Firstly, the server of the online gambling could be moved outside the jurisdiction of the state. Secondly, the users in that state could anonymously access to the gambling site. Finally, it would not be proportionate for the state to intrude into the private life of its citizen for the purpose of detecting online gambling. Consequently, the digital environment gives online gambling a virtual space to hide who are running the sites, who is gambling. Professor Lessig concluded because of the architecture of the original internet, "by going online, the gamblers moved into a world where his behavior is no longer regulable."[975] This demonstration could be applied to other kinds of illegal activities in the digital environment, for instance, online copyright infringements. In regard of this thesis, the difficulties demonstrated by the example of regulating online gambling are also the difficulties of copyright enforcement in the digital environment.

572. In terms of copyright, the digital environment gives its online citizens the power that "anyone anywhere could publish to everyone everywhere"[976]. And the contents would not necessarily respect copyright. It has frustrated the copyright holders. However, in a different perspective, the digital environment has changed how the works are communicated to their audiences. In real space, it is publishers, television stations and other intermediaries who decide what works would be presented before the audiences. Meanwhile in the digital environment, it is every individual user who make the works available and it is also every individual user who decide what work they would like to get access.

Moreover, the digital environment has also changed how the works are created. In real space, it is often the motion picture companies, the music recording companies and famous writers who produce the works, because the creation of the works has to engage huge investments of time and money. Meanwhile, in the digital environment, another kind of

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[974] Lessig, Lawrence. Code: version 2.0. New York, NJ, Etats-Unis d'Amérique: Basic books, 2006. p, 16.
[975] Ibid. p, 16
[976] Ibid. p, 19.

creation has been emerged: individual users become also the individual creators. They share their lives their emotions with other peers.

573. In regard of these two phenomenons, the copyright infringing activities are pervasive and it is particularly difficult to regulate in the digital environment. But regarding that the new forms of communication would create new market for copyrighted works which is similar to the radio and television have done in 1990s and the new forms of creation would stimulate the production of new kinds of works, the potential of the digital environment is also fascinating. The essential problematic would be how to enforce the copyright in the digital environment to protect the legitimate interests of copyright holders while develop the market and simulate the creation.

According to the demonstration of Professor Lessig, because of the original architecture of the internet, the illegal activities are difficult to regulate in the digital environment, but it could also transform from impossibility of regulation to perfect regulation by changing the "Code"[977]. In other word, the digital environment could be re-constructed to a virtual space where the copyright could be over protected.

In regard of the problematics of China in the digital environment, the urgent question would be how to properly enforce the copyright. Because evidently, without the protection of copyright in the digital environment, the pirating will render the online copyright market, online creativity impossible to exist. The actions taken by Chinese copyright authorities to enforce copyright in the digital environment would be important.

B. Subjective obstacle of copyright enforcement in the digital environment

574. In the digital environment, the moral sense of individual users is also different from the one in real space, for instance, one steals a CD from a store would normally feel guilty meanwhile one who illegally download a film would not have the same feeling of stealing. Therefore, this fact would render the copyright enforcement more difficult in the digital environment.

Moreover, in China, this problematic is particularly salient. For the reason that the Chinese Copyright Law was drafted to comply with the obligations under international

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[977] Ibid. p,32. "Whether cyberspace can be regulated depends upon its architecture. The original architecture of the Internet made regulation extremely difficult. But that original architecture can change. And there is all the evidence in the world that it is changing. Indeed, under the architecture that I believe will emerge, cyberspace will be the most regulable space humans have ever known."

conventions[978], the Chinese citizens in the digital environment did not recognize and did not believe Chinese Copyright Law as a social code which everyone should obey, they considered Chinese Copyright Law as an obstacle to prevent them from accessing films, music, computer softwares. The one which circumvented the technological measures not only would not be condemned as a criminal by internet citizens, but strangely would be honored as a hero by internet citizens for the reason that the contents were made available for all the internet citizens by him.

575. To demonstrate this point of view more concretely , it is necessary to demonstrate a famous Chinese case known as *Tomato Garden case*. From December 2006 to August 2008, three Chinese technicians: Hong Lei and his friends Zhang Tianping and Liang Chaoyong, without the permission of Microsoft, illegally published a computer operation system on its Web site called "Tomato Garden" which was based on pirating Window XP. By modifying the browser's home page, providing default search page, bundling software of other companies and so on, Hong Lei and his friends implanted commercial advertisement and allowed individual users to freely download the pirated Window XP system[979].

The Chinese Huqiu District Court judged in August 2009 that: "in light of Criminal Code of People's Republic of China, Article 217, defendants Hong Lei, Zhang Tianping, Liang Chaoyong for the purpose of commercial benefits, replicated computer software without the permission of its copyright holder; the illegal incomes are enormous, the circumstances are particularly serious; they all committed the crime of copyright infringement.[980]" Hong Lei was sentenced 1 million CNY monetary punishment and three year of prison. The other two were sentenced two year and three month respectively.

576. Regardless of the criminal punishment imposed by the Chinese court, the internet users regarded Hong Lei as a hero. Because at the time of Tomato Garden was established in 2004, the authentic Window XP cost 200 dollar in 2004 in China, while the average income per person per year in China is only 1510 dollar.[981] To spend two months of the income to get the Window XP would be considerable for the users.

Since Tomato Garden has made the Window XP free for downloading, practically

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[978] See Part1 Title 1. Chinese author's rights and exceptions complying with the Berne Convention

[979] Case: People's Procuratorate of Huqiu District, Suzhou City, Jiangsu Province prosecute Chengdu Gongruan Networking technology Corporation, Sun XianZhong, Hong Lei, Zhang Tianping, Liang Chaoyong the infringement of copyright. Trialed by People's Court of Huqiu District, SuzhouCity, Jiangsu Province in 2009.

[980] Ibid.

[981] World Bank. GNI per capita (GNI per capita, formerly GNP per capita, is the gross national income, converted to U.S. dollars using the World Bank Atlas method). Available at http://data.worldbank.org/country/china?view=chart.

everyone was using the pirated Window XP. These pirated Window XP by Hong Lei were more convenient and more suitable to Chinese users. According to the interview of CCTV, netizens regard Hong Lei as a hero, a legend.[982] He not only made Windows XP available for everyone, but also ameliorated it. He deleted some redundant functions of Windows XP, beautified the operating interface, etc.[983] Thus, there are absolutely no incentives for anyone to buy the authentic version of Window XP.

In a word, morally, the pirating activities conducted by Hong Lei were supported by Chinese internet citizens. This phenomenon would certainly encourage the copyright infringements in the digital environment. It would be necessary to educate the Chinese internet citizens that pirating a copyrighted work is as bad as stealing a book from a store and to cultivate a habit of the Chinese internet citizens to consume authentic version of works.

§2. Enforcement actions taken by Chinese copyright authorities

577. Regarding the infringing activities in Chinese digital environment, the Chinese authorities have taken several measures to enforce copyright in the digital environment. They could be classified as two kinds.

First one is the government raid. Chinese authorities actively investigate the copyright infringing activities and seize the servers of the illegal websites.

Second one is the government surveillance. Chinese authorities control the entrance of the services which provide contents in the digital environment and monitor the contents uploaded.

The two kinds of enforcement measures could be criticized as inefficient or not proportionate. But these existing enforcement measures has provided the spaces for the development of legal copyright business.

How to reform the existing copyright enforcement measures to proportionately enforce copyright and facilitate the development of legal business in the digital environment

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[982] Inter alia: Online Report of Tomato Garden Case in Sohu, Sina, Tencent.

[983] Case: People's Procuratorate of Huqiu District, Suzhou City, Jiangsu Province prosecute Chengdu Gongruan Networking technology Corporation, Sun XianZhong, Hong Lei, Zhang Tianping, Liang Chaoyong the infringement of copyright. Trialed by People's Court of Huqiu District, SuzhouCity, Jiangsu Province in 2009

will be discuss in the next chapter. Here, it will demonstrate concretely the existing copyright enforcement measures in China.

Two kinds of major enforcement measures have been taken by Chinese government to control the pirating in the digital environment: First one is the government raid (I); Second one is the government surveillance (II).

I. Government raid

578. Government raid has been the most direct and efficient way to enforce the copyright in the digital environment in China. It will demonstrate concretely how the government raid is undertaken in China.

It will demonstrate the online copyright enforcement action at national level: Sword Net Action (A) and a specific QvodPlayer case undertaken by Chinese copyright authorities both at national and regional level (B).

A. Sword Net Action

579. Sword Net Action is an action undertaken by Chinese State Council for the purpose of controlling copyright infringements in the digital environment. In China, the special actions of copyright enforcement could be particularly efficient in regard of controlling online pirating contents.

Since 2005, it has been undertaken every year under the collaboration of 4 Chinese departments under Chinese State Council, namely, Chinese Copyright Bureau, Chinese Internet Information Bureau[984], Chinese Ministry of Industry and Information[985], Chinese Ministry of Public Security.

580. 5 goals are listed in the most recent 2015 Sword Net Action which demonstrate the

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[984] An institution established in May 2011 under Chinese State Council for the purpose of regulating the information on the internet.

[985] Ministry of Industry and Information Technology (MIIT) of the Chinese government, established in March 2008, is the state agency of the People's Republic of China responsible for regulation and development of the postal service, Internet, wireless, broadcasting, communications, production of electronic and information goods, software industry and the promotion of the national knowledge economy.The Ministry of Industry and Information Technology is not responsible for the regulation of content for the media industry. This is administered by the State Administration of Radio, Film and Television. The responsibility for regulating the non electronic communications industry in China falls on the General Administration of Press and Publication. See Wikipedia.

intention of Chinese Copyright Bureau and other three authorities in regard of enforcing copyright online. At the same time, in the perspective of copyright holders, the interests within the scope of the 5 goals listed by 2015 Sword Net Action would be particularly protected by Chinese authorities.

First is "undertaking the special action to regulate the copyright of the music played online; reinforcing the copyright enforcement and copyright monitor against the music website; firmly fighting against the copyright infringing activities such as the transmissions of musical works without authorization; motivating the copyright self regulations and the copyright authorization among music websites; establishing correct copyright rules and business models for online music."[986]

Second is "undertaking the special action to regulate the internet cloud storage services in regard of copyright; motivating important cloud storage service providers to respect and protect copyright by themselves, firmly fighting against the copyright infringing activities via the internet cloud storage services, controlling the rampant pirating using the internet cloud storage services."[987]

Third is "undertaking special action to fight against the copyright infringements via mobile applications, establishing copyright rules for the enterprises producing mobile applications and the store of mobile applications."[988]

Fourth is "undertaking special action to regulate the online advertising market, investigating the online advertising enterprises which knowingly support the copyright infringing activities, guiding the online advertising enterprises to establish copyright protection system."[989]

Fifth is "further regulating the online reproduction, reinforce the copyright protection

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[986] "the outline of 2015 Sword Net Action" published by Chinese Copyright Bureau, 2015. p, 1. "The missions" the original text as "剑网行动大纲", "加强对音乐网站的版权执法监管力度，严厉打击未经许可传播音乐作品的侵权盗版行为，推动音乐网站版权自律和互相授权，建立良好的网络音乐版权秩序和运营生态" translated by author.

[987] Ibid. p, 1. "The missions", the original text as "开展规范网络云储存空间版权专项整治行动，推动重点网络云储存企业就其版权问题开展自查自纠，坚决查办利用网络云储存空间进行侵权盗版的违法活动，遏制利用网络云储存空间侵权盗版的势头" translated by author.

[988] Ibid. the original text as "开展打击智能移动终端第三方应用程序侵权盗版专项整治行动，规范应用程序企业及应用程序商店的版权秩序" translated by author.

[989] Ibid. the original text as "开展规范网络广告联盟专项整治行动，对故意为侵权盗版提供支持的网络广告联盟进行查处，指导大型网络广告联盟建立版权保护机制" translated by author.

of the contents published in the digital environment "[990]

581. From the demonstration above, the Sword Net Action is an action of copyright enforcement in the digital environment particularly focused on the problematic fields: the online copyright infringements in the field of music, clouding service, online advertising, mobile application, online reproduction of copyrighted contents.

For the interests of copyright holders, filing a lawsuit could be frustrating, fruitless and could suffer from the local protectionism in China. However, complaining a copyright infringement to the Chinese Copyright Bureau which correspondents with the scope of Sword Net Action could be extremely efficient, for instance, after LeTV complained an online copyright infringement of Qvod player to Chinese Copyright Bureau, the servers of Qvod player were confiscated. It will be demonstrated later.

Therefore, as an efficient way to enforce copyright, the mechanisms, the procedures of Sword Net Action are worth to be analyzed in the followings.

582. 5 measures to protect copyright have been listed by Chinese Copyright Bureau for regional authorities to implement:

The first measure is "motivating copyright holders to complain copyright infringements. Using newspapers, radio broadcasting, TV and news website to propagate the special action. Facilitating the ways to complain a copyright infringements, publishing telephone number, address, email address, Wei chat, etc. as the ways to complain copyright infringements. Encouraging copyright holders and public to actively offer the clues of the cases of copyright infringements. At the same time, enlarging the propagation of fighting against pirating, exposing infringing website, analyzing classic cases, educating the public, establishing a agreeable environment for the copyright protection." [991]

The first measure could be summarized as to facilitate the complaining procedure of copyright authorities and to educate the public.

The second measure is "fully undertaking the censorship. Enumerating and continuously updating the internet websites under jurisdiction, taking the websites, mobile

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[990] Ibid. the original text as "进一步规范网络转战版权秩序，加强数字出版内容的版权保护，强化对互联网媒体的版权监管力度，严厉查处未经许可非法转载、传播他们作品的侵权盗版行为，保障和推动传统出版和新兴媒体融合发展" translated by author.

[991] "Ibid. p, 2. "the measures" original text as "发动群众投诉举报。要充分利用报纸、广播、电视、新闻网站等新闻媒体大力宣传专项行动，畅通群众投诉举报渠道，通过媒体反复公布举报电话、信函、电子信箱、微信等投诉举报方式，鼓励权利人以及社会各界积极提供案件线索。同时要加大对侵权盗版案件查处的宣传，曝光侵权网站，剖析典型案例，开展警示教育，为开展专项行动营造良好的舆论环境。"

applications and online stores which transfer copyrighted contents under the copyright monitor, fully and regularly censor the copyrighted contents. Organizing the online enterprises to remove the copyright infringing materials themselves, and to find copyright infringing problems. If the copyright infringing problems were found, the enterprise should be required to fix the problems within a limited date. The failure of the compliance shall be subject to legal liability."[992]

In essence, the second measure is to require regional copyright authorities to actively censor, monitor the copyright contents transferred on the internet and require online enterprises to comply with the censorship and remove the copyright infringing materials found.

The third measure is "establishing a fast reaction system. For the copyright infringing website, copyright enforcement authorities shall expeditiously require internet and information authorities to disable the internet access. Internet and information authorities shall take measures to expeditiously disable the access according to the law concerned. Regional copyright enforcement authorities shall cooperate with the internet and information authorities to establish an efficient 'notice and take down' system within the internet service providers."[993]

In essence, the third measure is to require regional copyright authorities to establish an efficient "notice and take down" system.

The fourth measure is "firmly undertaking the investigation of copyright infringing cases. Regional copyright enforcement authorities shall increase the amount of administrative penalty for the online copyright infringements. Locating a sum of important online copyright infringing cases, gathering the force and rapidly processing the cases, increasing the quantity

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[992] Ibid. p, 2. "the measures" original text as "开展全面清理检查。要摸清并不断更新辖区内互联网网站的底数，把辖区内传播音乐、影视、新闻、游戏、文学、软件等作品的重点网站和智能移动终端第三方应用程序，以及网络云储存空间、网络广告联盟、智能移动终端应用软件商店、网络销售平台等纳入版权检测范围，定期全面清查。组织辖区互联网企业开展自查自纠，查找侵权盗版问题；对发现的问题要责令企业进行限期整改，对未按期完成整改的要依法严厉查处。"

[993] Ibid. p, 2. "the measures" original text as "健全快速处理机制。对于从事侵权盗版活动的非法网站，版权行政执法部分要依法制止其违法行为，及时提请通信主管部门予以暂停网络接入；通信主管部分要依照相关法律法规采取措施及时暂停网络接入。各地版权行政执法部分要在互联网信息内容主管部分和通信主管部门的指导下，进一步建立健全与基础电信企业、互联网信息服务企业构建快速有效的 '通知—移除侵权' 工作机制，对侵权盗版内容迅速核查、移除。"

and quality of the cases…"[994]

In essence, the fourth measure is saying that the online copyright infringing cases shall be punished without mercy.

The fifth measure is "establishing a longterm working mechanism…continuously learning the successful experiences in regard of monitoring music website, internet cloud services and internet advertising, rapidly establishing rules and regulations according to the successful experiences. Actively motivating copyright holders to cooperate with online enterprises to establish a copyright protection system, creating a database of website's copyright and a convenient way for copyright holders to claim their right."[995]

In essence, the fifth measures emphasis that the copyright enforcement at regional level should motivate copyright holders and online platforms to cooperate to establish a copyright protection system in the digital environment and the successful experiences shall be shared. It would be interesting to observe how the cooperation between copyright holders and "online enterprises" will be promoted by Chinese copyright authorities to protect copyright in the digital environment. This strategy is also proposed by the EU Commissions.[996]

583. Regarding the five measures stipulated by Chinese Copyright Bureau, 3 remarks could be made:

First remark is that the copyright enforcement seems to be regarded as fighting a crime. The wording of Chinese Copyright Bureau seems like eliminating the pest. However, the intention of copyright enforcement in the digital environment is striking a balance between copyright holders, users and internet service providers rather than totally eliminating the copyright infringement online. Beside guaranteeing the motivation of creation by authors, the users' liberty, the development of technology, the development of new market should also be taken into consideration by the copyright enforcement online.

Second remark is that from the wording of the Chinese Copyright Bureau, it could be

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[994] Ibid. p, 2. "the measures" original text as "全力抓好案件查办。各级版权行政执法部门要加大对网络侵权盗版案件的行政处罚力度，确定一批网络侵权盗版重点案件，集中力量，快速查办，提高办案的数量和质量；对侵权事实严重、社会影响大的侵权盗版网站，要依法从严查处，对涉嫌构成犯罪的，要根据'两法衔接'机制及时移交公安部门立案查办。"

[995] Ibid. p, 2. "the measures" original text as "完善长效工作机制。国家版权局等四部门将联合挂牌督办一批涉案标的重大、违法犯罪情节严重、社会影响恶劣的大案要案，对列入督办的案件采取专题研商、督导检查等方式，构建多部门共同参与的联动工作机制。各地要健全常态化的联合挂牌督办机制，定期督办一批重点案件，做到及时督办，及时上报，及时结案。要不断总结对重点音乐网站、网络云存储空间、网络广告联盟的监管措施和成功经验，及时转化为工作机制和制度。要积极推动权利人及组织与互联网企业建立版权合作机制，建立完善网站版权信息库、权利人维权绿色通道。"

[996] COM(2016) 593 final. Article 13, Article 14.

observed that every regional copyright authorities have large latitude to enforce copyright online. The regional copyright authorities only should comply with the general goals set by Chinese Copyright Bureau.

Third remark is that, as a matter of fact, the copyright infringements are indeed rampant in Chinese digital environment and the foreign copyright holders have been frustrated by the online copyright infringements. It is apparent that the governmental action, namely Sword Net Action is very bold, but efficient in regard of copyright enforcement. If the foreign copyright holders complain the copyright infringement to the authorities of Sword Net Action which mentioned above[997], there is a chance that their rights could be enforced immediately. Since the regional copyright authorities have large latitude, the copyright holders should study, anticipate the intentions of the regional authorities and find the common interests with the regional copyright authorities. Then the copyright would be enforced properly by the regional authorities. Or it could also be very efficient to enforce a foreign copyright, if it could find a local media, local enterprise to cooperate and to share the interests with them. the local enterprise will negotiate and cooperate with the local government authorities to protect the copyright for their own interests.

As the Chinese online media thrive in the digital environment. they have played an active role in regard of the online copyright enforcement. This subject will be discussed in the following section.

B. Seizure of QvodPlayer

584. It will demonstrate a seizure of a Chinese copyright infringing software, QvodPlayer, by Chinese national and regional copyright authorities under the Sword Net Action. It presents concretely how the seizure worked and what was the impact in regard of the protection of copyright online.

QvodPlayer is an application which enable its users to stream the contents while simultaneously engage in the transmission of the contents to other users. It is similar to BitTorrent. But it also allows the users to watch the downloading contents simultaneously. Large numbers of copyrighted contents were made available by QvodPlayer users. It is similar to the services provided by Grokster in the US case of *MGM Studios, Inc. v. Grokster,*

[997] 4 authorities under Chinese State Council mentioned above: "Chinese Copyright Bureau, Chinese Internet Information Bureau, Chinese Ministry of Industry and Information, Chinese Ministry of Public Security"

Ltd.[998] Grokster was deemed as liable for the copyright infringement.

The company who developed QvodPlayer never seek the authorization copyright holders for the contents played on its player. This free riding had lasted from 2005 to 2013. Some other Chinese online media also developed their own players, such as Leshi's LeTV, Soho's Soho Video, Tencent's Tencent Video. Most of them diligently tried to get the authorization of the contents available on their players. In this situation, the infringements of copyright by QvodPlayer jeopardized significantly the interests of them.

585. From 2012, Leshi, SoHo, and Motion Picture of America, Motion Picture of China brought plaints to the Chinese copyright authorities concerning the copyright infringements of QvodPlayer. In the year of 2013, Chinese Copyright Bureau determined in the name of Sword Net Action to govern the rampant copyright infringements using QvodPlayer.[999]

At the beginning of the 2013 Sword Net Action, the regional copyright authorities seized the servers of a large numbers of copyright infringing websites which offered super links for QvodPlayer. In November 2013, Chinese Copyright Bureau for the first time engaged itself to a particular case, in December 2013, Chinese Copyright Bureau decided that the QvodPlayer shall be liable for the copyright infringements, the QvodPlayer is required to changed to efficiently protect the copyright and the administrative punishment of 250,000 CNY is applied.[1000]

586. However, QvodPlayer failed to comply with the decision of Chinese Copyright Bureau: in Mars 2014, the copyright authorities of ShenZhen city where the QvodPlayer company has resided, received the plaints that QvodPlayer continued to undertake copyright infringing activities.

In Avril 2014, the police and the copyright authority of ShenZhen city cooperated to seize the servers of QvodPlayer and preserve the evidences of copyright infringements.[1001] According to the later investigation, QvodPlayer had transmitted "Beijing Love Story" and other popular Chinese dramas to the public. Pursuant to Article 47 of Chinese Copyright

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[998] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

[999] 10 cases of 2013 Sword Net Action. Chinese State Council. 2013. Available at http://www.scio.gov.cn/zhzc/8/5/Document/1358299/1358299.htm

[1000] Ibid.

[1001] The decision of Market and Quality Supervision Commission of Shenzhen Municipality, Shenzhen Intellectual Property Bureau. Available at http://www.szmqs.gov.cn/xxgk/xwzx/mtbd/201503/t20150320_2829716.htm

Law[1002], and Article 36 of Chinese Regulation for Copyright Enforcement[1003], the administrative punishment shall be 3 times of the illegal turn over of QvodPlayer.

The final amount of administrative punishment imposed by ShenZhen copyright authorities was 260 million CNY which was 1000 times more than the one imposed by Chinese Copyright Bureau.

After the seizure, QvodPlayer company has tried to respect copyright according to the announcement on its website: "since Mars 2014, QvodPlayer has undertaken the reformation of business model to create original and transmit authorized contents. We are willing to comply with the administrative punishment, actively reform the business activities as a whole, finally changed the business model of QvodPlayer. QvodPlyer would like to facilitated the healthy development of online video business, and are willing to hear the advices from the public. Thank you for your support."[1004]

587. QvodPlayer was the most popular application. According to the data published in 2012 by the website of QvodPlayer, QvodPlayer had been downloaded 750 million times. The amount of cumulated users has reached 200 million. The income of QvodPlayer reached 300 million CNY according to its CEO Wang Xin in 18 August 2012.

This fact could also be observed according to the internet reports of Sandivine[1005]: In the year of 2013, The QvodPlayer represented 14.10% of the upstream internet traffic, 4.51% of the downstream internet traffic and 7.61% aggregate internet traffic consumed by applications in Asia-Pacific. It was placed the second in upstream internet traffic after

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[1002] Article 48 of Chinese Copyright Law: "Anyone who commits any of the following acts of infringement shall, depending on the circumstances, bear civil liabilities such as ceasing the infringement, eliminating the bad effects of the act, making an apology or paying compensation for damages; where public rights and interests are impaired, the administrative department for copyright may order the person to discontinue the infringement, confiscate his unlawful gains, confiscate or destroy the copies produced through infringement, and may also impose a fine; where the circumstances are serious, the said department may, in addition, confiscate the material, tools and instruments mainly used to produce copies through infringement; and where a crime is constituted, criminal liabilities shall be investigated in accordance with law…"
(official translation) available at WIPO http://www.wipo.int/

[1003] Article 36, Chinese Regulation for Copyright Enforcement: "The infringing activities listed by Article 48 of Chinese Copyright Law, illegal turn over surpassed 50,000 CNY could be fined 1 to 5 times of its illegal turn over by copyright administrative authorities…" (translated by author)

[1004] http://www.kuaibo.com. Oringinal text: "自2014年3月以来，快播已启动商业模式全面转型，从技术转型原创正版内容。我们愿意积极配合相关主管单位的行政处罚，主动进行整体业务的整改，最终推动快播业务的成功转型。快播愿意与同行共同推动视频行业的健康发展，也欢迎社会各界的监督。感谢大家一直以来的支持"

[1005] See Wikipedia. Sandvine Incorporated is a networking equipment company based in Waterloo, Ontario, Canada. Sandvine network policy control products are designed to implement broad network policies, ranging from service creation, billing, congestion management, and security. Sandvine targets its products at consumer Tier 1 and Tier 2 networks including cable, DSL, and mobile.

BitTorrent, placed fourth in both downstream and aggregate internet traffic after Bit Torrent, YouTube and HTTP.[1006] Regarding the fact that the QvodPlayer was an application mainly used by Chinese users, The QvodPlayer surely represented a more important role regarding the internet consummation in China. According to a study[1007], only 0.01% of the files shared by P2P services were not copyrighted. Therefore, it could be concluded that nearly all of the enormous internet traffic consumed by QvodPlayer was engaged in illegal file sharing.

After the seizure of the servers of QvodPlayer and the administrative punishment, it could be observed that the scale of copyright infringement via QvodPlayer decreased. According to the internet reports of Sandivine, the internet traffic consumed by QvodPlayer has been decreased continuously. In 2014, it represented 10.98% of upstream internet traffic (second place after BitTorrent), 3.20% of downstream traffic (seventh place after YouTube, Bit Torrent, HTTP, RTSP, Facebook and MPEG), 5.55% aggregate traffic (fifth place after BitTorrent, YouTube, HTTP, RTSP) in Asia-Pacific.[1008] In 2015, it represented 8.89% of upstream internet traffic (second place after BitTorrent), lower than 1% of downstream traffic out of top 10 listed by the report, 2.31% aggregate traffic (sixth place after BitTorrent, YouTube, HTTP, Facebook, Thunder) in Asia-Pacific.[1009] That is to say, after 2014, the total amount of the files shared by QvodPlayer has been dropping. Moreover, according to the statement of QvodPlayer after the seizure of 2014, it promised that it would seek the authorization of copyrighted contents and create original works to comply with copyright rules. Therefore, it could be concluded that after the seizure in 2014, the files shared by QvodPlayer has been less than before and among the files shared, some of them are not copyright infringing.

588. To compared the situation before and after the seizure of QvodPlayer in 2013 and 2014 respectively, the copyright enforcement of ShenZhen copyright authorities was efficien. However, the seizure of QvodPlayer has a fascinating short term effect but not in long term. As the development of technology, other form of the transmission of copyrighted contents will surely be enable by new technology and will surely be more efficient than before. In terms of the copyright, the new way of transmission will be either hard to be defined as an infringement of copyright or hard to be detected by copyright enforcement authorities. For instance, now in China, the cloud services such as Baidu cloud storing services has outraged

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[1006] "Global Internet Phenomena Report 2013", Prepared by SANDVINE, 2013. p, 30.

[1007] "Technical Report: An Estimate of Infringing Use of Internet", Envisional commissioned by NBC Universal, 2011. Available at http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf

[1008] "Global Internet Phenomena Report 2014", Prepared by SANDVINE, 2014. p, 25.

[1009] "Global Internet Phenomena Report 2015", Prepared by SANDVINE, 2015. p, 8.

the copyright holders. Therefore, although the seizure of the servers engaged in copyright infringing activities is efficient and indispensable, the enforcement of copyright should also depend on other mechanism which has long terms effect envisaging the development of technology.

In China, currently, a system of online surveillance has been constructed by government to protect copyright. At the same time, the online media which respect copyright are thriving in China. They will surely facilitate the copyright enforcement for protecting their own interests.

II. Government surveillance

589. The online contents and the online media have been surveilled by the Chinese authorities. Illegal online contents and illegal websites would not be allowed. In regard of online copyright enforcement, the Chinese active government surveillance could offer copyright holders a powerful tool to take down the infringing materials and shut down the infringing websites.

Therefore, two kinds of government surveillance will be demonstrated respectively: government censorship of the online contents (A) and copyright monitoring list of Chinese Copyright Bureau (B).

A. Censorship of the online contents

590. Although it is not only for the protection of copyright, the censorship of the contents efficiently prevent the copyright infringing materials from transmitting in the digital environment. Precisely, all the online media have to obtain a license issued by The State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China (SAPPRFT) and this authority has the right to scrutinize all the contents made available in the digital environment by the online media. If the law was violated, including copyright law, the contents shall be taken down and the license of the online media could annulled.

The State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China (SAPPRFT) is an executive branch under the Chinese State Council. It controls directly the state owned media such as China Central Television, China

National Radio, China Radio International.[1010] And it is responsible for issuing the licenses of all kinds of media and censoring all the contents on these media.

Interestingly, the Direct General of SAPPRFT is also the Direct General of Chinese Copyright Bureau.

591. According to the Regulation on the Online Audiovisual Works and Services promulgated in 20 December 2007 by State Council, Article 3, SAPPRFT has the responsibilities to govern and supervise the online audiovisual works and services; regional administrative institutions of media have the responsibility to govern and supervise the online audiovisual works and services within its territorial jurisdiction. [1011]

Article 7 of the Regulation stipulates that a license is indispensable for the purpose of providing online audiovisual contents and services, "no person or institution shall provide audiovisual contents and services online without obtaining the license issued by administrative institution of radio, film and television"[1012]

Article 10 specifies that the license shall be applied to SAPPRFT via the regional administrative institutions of media. But the state directly owned media could apply directly to SAPPRFT. And the procedure is also specified as "…within 20 working days, the preliminary opinions shall be offered and submitted to the administrative institution of radio, film and television under State Council. The administrative institution of radio, film and television under State Council shall decide within 40 days after receiving the preliminary opinion…."[1013]

592. Article 8 prescribes 8 criteria for the license of online media. 6 of them require online media to be competent as a media or to comply with other laws and the administrative procedure, for instance, no criminal records, has the competent expertise and competent

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[1010] See, Wikipedia. The State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China (SAPPRFT)

[1011] the Regulation on the Online Audiovisual Works and Services, promulgated by Chinese State Council in 2007, revised in 2015. Article 3. Original text as "国务院广播电影电视主管部门作为互联网视听节目服务的行业主管部门，负责对互联网视听节目服务实施监督管理，统筹互联网视听节目服务的产业发展、行业管理、内容建设和安全监管。国务院信息产业主管部门作为互联网行业主管部门，依据电信行业管理职责对互联网视听节目服务实施相应的监督管理。地方人民政府广播电影电视主管部门和地方电信管理机构依据各自职责对本行政区域内的互联网视听节目服务单位及接入服务实施相应的监督管理"

[1012] Ibid. Article 7. Original text as "从事互联网视听节目服务，应当依照本规定取得广播电影电视主管部门颁发的《信息网络传播视听节目许可证》"

[1013] Ibid. Article 10. Original text as "申请《许可证》，应当通过省、自治区、直辖市人民政府广播电影电视主管部门向国务院广播电影电视主管部门提出申请，中央直属单位可以直接向国务院广播电影电视主管部门提出申请。省、自治区、直辖市人民政府广播电影电视主管部门应当提供便捷的服务，自收到申请之日起20日内提出初审意见，报国务院广播电影电视主管部门审批；国务院广播电影电视主管部门应当自收到申请或者初审意见之日起40日内作出许可或者不予许可的决定，其中专家评审时间为20日。"

online resources and technical capacity.[1014]

In regard of copyright enforcement online, the second and third criteria are pertinent: Second criterion is prescribed as "have the efficient system for the safety of the transmission of contents and the secured protection of technological measures(sic)." Third criterion reads "own a proportional resources of audiovisual contents which complies with the rules of the state(sic)" In other words, the second criterion requires that the online media shall have the capacity to guarantee the security of the transmissions of copyrighted contents online. The copyrighted contents shall be protected by efficient technological measures from illegal reproduction, retransmission. The third criterion requires that the online media shall obtain the copyright authorization of the reasonable amount of the copyrighted works.

593. Whether the criteria is good or bad for the development of online media is discussable. They indeed have offered a powerful weapon for the copyright holders to enforce their rights online. According to Article 25, if the criteria listed including the two criteria demonstrated are not fulfilled by the online media, SAPPRFT has the power to annul the license or to apply monetary punishment.[1015]

At the same time, according to Article 21 of the regulation, The copyright holders could bring a plaint to SAPPRFT and regional administrative institutions of media.[1016] They have to take actions to verify that the criteria are fulfilled by the online media.

SAPPRFT and the regional administrative institutions of media have also the responsibility to censor the online audiovisual contents according to the Regulation on the Online Audiovisual Works and Services, Article 16 and 18.

594. However, the listed 9 kinds of audiovisual contents prohibited by the Article 16 regulation do not contain the copyright infringing materials.[1017] Nevertheless, the final clause of Article 16 stipulates that "other contents prohibited by laws, administrative regulations and national rules(sic)." Therefore, the copyright infringing contents are also within the

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[1014] Ibid. Article 8. Original text as "第八条 申请从事互联网视听节目服务的，应当同时具备以下条件：（二）有健全的节目安全传播管理制度和安全保护技术措施；（三）有与其业务相适应并符合国家规定的视听节目资源；"

[1015] Ibid. Article 25. Original text as
Article 25 "对违反本规定的互联网视听节目服务单位，电信主管部门应根据广播电影电视主管部门的书面意见，按照电信管理和互联网管理的法律、行政法规的规定，关闭其网站，吊销其相应许可证或撤销备案，责令为其提供信号接入服务的网络运营单位停止接入。"

[1016] Ibid. Article 21. Original text as "广播电影电视和电信主管部门应建立公众监督举报制度。公众有权举报视听节目服务单位的违法违规行为…"

[1017] Ibid. Article 16.

SAPPRFT's responsibility of censorship.[1018]

Article 18 of the regulation specifies that the administrative institutions of film and television shall take necessary measures to control the online media violating Article 16. the online media shall remove the contents violating Article 16 immediately, and preserve relevant records and report to the administrative institutions of film and television. Moreover, it prescribes that "the investor and the manager of the online media shall be responsible for the audiovisual contents transmitted or uploaded."[1019]

595. If the "Notice and Take Down" has created a secondary liability rules provoking a chilling effect for internet service providers to protect copyright. This government censorship prescribed in the regulation requires the online media to be responsible directly to all the material transmitted by them. It seems that the feeble copyright enforcement in the digital environment has the possible to go to another end in China: the overprotection of copyright online which would suffocating the new online media and the creativity in the digital environment.

596. Maybe the online media in China is reasonable to bear the infinite responsibility in certain extreme cases listed in Article 16 of the regulation such as leaking the national secret, jeopardizing the national territorial sovereignty which are out of the subject of copyright. In regard of the protection of copyright, the principal of proportion must be respected. Chinese freedom of speech is not as enshrined as in the US and the EU. At least, the enforcement of copyright shall not jeopardize the prosperity of the market of online media.

Nevertheless, this rule prescribed in this regulation enables copyright holders to complain the copyright infringing activities before the SAPPRFT and the regional administrative institutions of media. According to Article 18 of the regulation, the administrative institutions have to take actions against the illegal activities and the online media have to remove the infringing material otherwise their license could be annulled and administrative punishment could be applied.[1020]

[1018] Ibid. Article 16. Original text as "互联网视听节目服务单位提供的、网络运营单位接入的视听节目应当符合法律、行政法规、部门规章的规定。已播出的视听节目应至少完整保留60日。视听节目不得含有以下内容：（十）有关法律、行政法规和国家规定禁止的其他内容。"

[1019] Ibid. Article 18. Original text as "广播电影电视主管部门发现互联网视听节目服务单位传播违反本规定的视听节目，应当采取必要措施予以制止。互联网视听节目服务单位对含有违反本规定内容的视听节目，应当立即删除，并保存有关记录，履行报告义务，落实有关主管部门的管理要求。互联网视听节目服务单位主要出资者和经营者应对播出和上载的视听节目内容负责。"

[1020] Ibid. Article 18.

B. Copyright monitoring list of Chinese Copyright Bureau

597. From the year of 2014, Chinese Copyright Bureau has started to actively monitor both online copyrighted works and the major audiovisual websites for the purpose of controlling online copyright infringements.

Since 2014, a list of the popular audiovisual works for special copyright protection online has been made several times a year by Chinese Copyright Bureau according to the surveys of the copyright authorization market.

598. In the year of 2016, 7 lists have been made by Chinese Copyright Bureau[1021]. Around 400 audiovisual works have been included. Chinese Copyright Bureau has specified which websites have the authorization to communicate the work to the public, and the duration of authorization.

For instance, in the fifth list of 2016, it specified that SoHo Video has the authorization of a very popular TV drama in China created by the US company Warner Bros called the Big Bang Theory Season 8 and 9. The duration is from July 21 2016 to July 20 2017. And the authorization is exclusive, no other website has the right to play it online. [1022]

Chinese Copyright Bureau require internet service providers to take the following measures to protect the listed audio visual works. According to Chinese Copyright Bureau: "Firstly, the internet service provider who directly makes the contents available to users shall not communicate the listed works to the public; Secondly, the internet service provider who provide storing services shall prohibit users to upload the listed works; Thirdly, the internet service provider who provide information researching services shall only provide the searching results of the website who has the authorization of the listed works; Finally, the internet retail websites and the applications shall accelerate the process of protecting the listed works according to the notification made by right holders to remove the infringing contents or disable the internet access."[1023]

599. Two problematics could be observed. First is that only the listed popular works enjoy

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[1021] The lists of the works particularly protected by Chinese Copyright Bureau are available at http://www.ncac.gov.cn/chinacopyright/channels/483.html

[1022] 2016 fifth list of the works by Chinese Copyright Bureau. Available at http://www.ncac.gov.cn/chinacopyright/upload/files/2016/8/5173059749.pdf

[1023] Available at http://www.ncac.gov.cn/chinacopyright/contents/483/307814.html. Original text as "相关网站应对版权保护预警名单内的重点作品采取以下保护措施：直接提供内容网站未经许可不得上传版权保护预警名单内的作品；用户上传内容网站应禁止用户上传版权保护预警名单内的作品；提供搜索链接网站应仅提供获得合法授权网站的搜索结果及跳转链接服务；电商网站及应用平台应加快处理版权保护预警名单内作品权利人关于删除侵权内容或断开侵权链接的通知"

the special copyright protection online. That is to say, the gaps definitely exist between the listed works and the large part of other works. It is Chinese Copyright Bureau to decide which works is "popular." Therefore, a system which discriminates the copyright protection of one kind of works from another is not good for the heathy development of the market of copyright. Because evidently the copyright holders of the works non listed bear more costs to protect their rights. Second problematic is that the measures taken by Chinese Copyright Bureau requires the Chinese internet service providers to "make a difficult judgement."[1024] It requires internet service providers to find and eliminate the copyright infringing activities which infringe the copyright right of listed works. In this situation, internet service providers bear unreasonable liabilities and they have no choice but to remove all the contents suspected as copyright infringing. Large amount of non-infringing contents could be taken down. The interests of users could be jeopardize.

Nevertheless, for the protection of copyright, it would be extremely interesting for copyright holders to make the work appear on the list of Chinese Copyright Bureau.

600. In 2015, Chinese Copyright Bureau monitored two kinds of websites. The websites provide music playing services and video playing services.

In regard of monitoring music playing services, Chinese Copyright Bureau requires the online music service providers to remove copyright infringing contents themselves. 2,2 million music works were taken down by the online music service provider.[1025]

In regard of monitoring video playing services, a special monitoring list included 20 major online video websites was made by Chinese Copyright Bureau. The listed online video playing service providers shall fully reform their services in limited time given by Chinese Copyright Bureau and shall pass the examination made by Chinese Copyright Bureau. If the examination was not passed, the video playing service providers would have the risk of the government seizure and administrative punishment.[1026]

601. The problematic of the monitor of Chinese Copyright Bureau is that Chinese Copyright Bureau takes too many onerous responsibilities on its shoulder. It takes too many active actions to enforce the copyright in the digital environment. It could not be denied that these active enforcement actions have positive effect in terms of the copyright protection. But

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[1024] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090 (2004) p, 1101. "service providers need not make difficult judgments as to whether conduct is or is not infringing"

[1025] "2015 report of copyright enforcement", Chinese Copyright Bureau, 2015. p, 30. available at http://www.ncac.gov.cn/chinacopyright/upload/files/2016/4/27161449900.pdf

[1026] Ibid. p, 32.

the infringing activities in the digital environment are enormous, and they evolve rapidly according to the development of technology. Therefore, to actively monitor the internet service providers is not a efficient solution. This problematic is identified by Chinese Copyright Bureau itself in the its report of 2015: "…motivate internet music service providers to establish an efficient copyright authorization business model."[1027]

602. The efficient solution could be the copyright market which gives a strong motivation of copyright protection in the digital environment: Chinese Copyright Bureau stays a passive role to established rules of the market to protect the copyright. The copyright holders could exploit the interests from market according to the rules. It would be the strongest motivation to protect the copyright. The internet service providers should comply with the rules otherwise they would face the risk of punishment.

In China, the new media is thriving in the digital environment. They need copyright to motivate the creation of works, to extract interests, to compete with their rivals. Therefore, the online media, the copyright holders online, shall play an active role to protect their own right.

Section II. Legal offer of contents by Chinese online audiovisual media

603. That large numbers of audiences have shifted into the digital environment. The online media have developed rapidly in China. The Chinese online audiovisual media have invested a lot of money to purchase the copyright from film and music producers. In such circumstances, the online copyright infringements has been the arch enemy of these Chinese online media. The Chinese online audiovisual media depends on the copyright enforcement to protect their commercial interests.

In return, the Chinese online audiovisual media could facilitate the copyright enforcement in the digital environment. It could be observed that the development of Chinese online audiovisual media have facilitated the copyright enforcement in the digital

[1027] Ibid. p, 32.

environment:

Chinese online audiovisual media have continuously brought plaints before both regional and national copyright authorities claiming the online infringements. They are often the direct causes of government seizure of illegal websites; they also have initiated enormous lawsuits to protect the copyright they own in order to fight against infringing activities or compete with other media for the purpose of maximizing their interests. The online audiovisual media have also facilitated legitimate access to contents. They cultivate the users habit of consuming legal contents in the digital environment and marginalize the infringing activities.

It is necessary to introduce firstly the development of online audiovisual media in China associated with Chinese copyright enforcement (§1). Secondly, it will demonstrate online audiovisual media facilitating the copyright enforcement in practice (§2).

§1. Development of online audiovisual media in China associated with Chinese copyright enforcement

604. The online audiovisual media in China is the fruit of the development of the internet infrastructure and the copyright enforcement actions taken by Chinese copyright authorities. Thanks to the development of the internet infrastructure, a large numbers of audiences has been shifted in the digital environment. Thanks to the copyright enforcement actions taken by Chinese copyright authorities, the online audiovisual media could survive facing the competition of the illegal websites which do not bear the costs of copyright authorization. Therefore, it would be interesting to demonstrate the online audiovisual media in China.

Firstly, the history development of Chinese online audiovisual media will be demonstrated generally associated with the copyright enforcement (I). Secondly, it will demonstrate precisely two kinds of online media thriving in China and their copyright strategies (II).

I. Development of Chinese online audiovisual media associated with the copyright enforcement

605. The development of Chinese online audiovisual media is associated with the development of the internet infrastructure and the strict copyright enforcement actions undertaken by Chinese government in the digital environment.

The rapid development of Chinese online audiovisual media started from 2005 at the moment the infrastructure of Chinese high speed internet was constructing. The Chinese copyright enforcement action, "Sword Net Action", started as the same time too. It would be interesting to demonstrate the development of Chinese online audiovisual media facilitated by the internet infrastructure and the strict copyright enforcement actions.

Firstly, it will introduce the birth of Chinese online audiovisual media given by copyright enforcement (A). Secondly, it will demonstrate the Chinese copyright market constructed by online audiovisual media as an incentive of copyright protection (B).

A. Birth of Chinese online audiovisual media given by copyright enforcement

606. In China, it is the copyright protection who gave birth to the online audiovisual media. At the beginning of 21st century, Chinese online audiovisual media started to emerging thanks to the construction of internet infrastructure and the increase of the amount of internet users[1028]. In 2004, the first Chinese online audiovisual media: LeTV, started to provide online streaming services for internet users. It is the milestone of the development of Chinese online media.

From 2004, enormous small and middle size video websites were established. They were using peer to peer technology to make the contents circulate among users. Massive copyright infringing materials were uploaded into these websites. During this period, the online audiovisual media developed rapidly. The giant online audiovisual media nowadays such as iQiyi, Tencent video, LeTV, Youku, were conceived during this period.

607. Interestingly, at the same time, Chinese copyright authorities started to established rules and control infringing activities in the digital environment:

Since 2005, "Sword Net Action"has been undertaken every year to date under the

[1028] Demonstrated in Title 2, Chapter 1, Section 1, §1. Identification of the digital environment and copyright infringing activities

collaboration of 4 Chinese departments under Chinese State Council, namely, Chinese Copyright Bureau, Chinese Internet Information Bureau , Chinese Ministry of Industry and Information , Chinese Ministry of Public Security.[1029]

In 2006, the "Regulation on the Protection of the Right of Communication through Information Network" was adopted by Chinese State Council. This regulation prescribes some specific rules of the Chinese public communication right according to the delegation of Chinese Copyright Law[1030] and the copyright enforcement measures of the legal protections of technological measures[1031] and "Notice and Take Down"[1032].

When the illegal websites started to be controlled by Chinese government authorities and the basic copyright rules started be established in the digital environment. The Chinese

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[1029] See, official website of Chinese Copyright Bureau. "Sword Net Action." http://www.ncac.gov.cn

[1030] Chinese Copyright Law 2010, Article 59, "the right of communication through information network shall be formulated separately by the State Council."

[1031] Regulation on the Protection of the Right of Communication through Information Network Article 4 : "For the purpose of protecting the right of communication through information network, right owners may apply technological measures. No person shall intentionally circumvent or sabotage technological measures, no person shall intentionally manufacture, import, offer to the public, provide, or otherwise traffic any devices or components which are mainly for the purpose of circumventing and sabotaging technological measures, no person shall intentionally provide services to the public for the purpose of circumventing or sabotaging technological measures. Unless the law, administrative regulations stipulate otherwise."

[1032] Ibid. Article 20, Article 21, Article 22

Article 20: "Under the following circumstances, a network service provider that provides automatic access services according to the instructions of the service object, or provides automatic transmission services of the works, performances, or audio-visual recordings to its service objects, shall not be liable for compensation:1. Having not selected or altered the transmitted work, performance, or audio-visual recording; 2. Having provided the work, performance, or audio-visual recording to the designated service objects, and having prevented others beyond the designated service objects from obtaining access."

Article 21: "Under the following circumstances, a network service provider that automatically stores works, performances, or audio-visual recordings obtained from other network service providers for the purpose of enhancing network transmission efficiency, and automatically provides them to the service objects according to the technical arrangements, shall not assume liability for compensation: 1. Having not altered the automatically stored works, performances, or audio-visual recordings; 2. Having not affected the original network service provider of the works, performances, or audio- visual recordings in managing the relevant works; 3. When the original network provider alters, deletes, or shields the works, performances, or audio- visual recordings, automatically altering, deleting, or shielding them according to the technical arrangement."

Article 22: "Under the following circumstances, a network service provider that provides information storage space to a service object or provides works, performances, or audio-visual recordings to the public through the information network, shall not be liable for compensation:

1. Having clearly mentioned that the information storage space is provided to the service object, and also having publicized the name, contact information, and web address of the network service provider;
2. Having not altered the work, performance, or audio-visual recording provided to the service object;
3. Having not known and having no justified reason to know that the works, performances, or audio-visual recordings provided by the service object have infringed upon an other's right;
4. Having not directly obtained economic benefits from the service object's provision of the work, performance, or audio-visual recording;
5. After receiving the notification from the owner, having deleted the work, performance, or audio- visual regarded as infringing on the right of the owner according to the provisions of this Regulation."

online audiovisual media which respect copyright law started to emerge.

608. As long as the development Chinese online audiovisual media, the Chinese copyright authorities gradually pushed forward the construction of copyright rules and the enforcement actions:

In 2007, as demonstrated before, the State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China (SAPPRFT) was established according to Article 3 of the Regulation on the Online Audiovisual Works and Services[1033]. According to Article 7 of this regulation, an obligatory license of Chinese online audiovisual media was created: "no person or institution shall provide audiovisual contents and services online without obtaining the license issued by administrative institution of radio, film and television"[1034]. SAPPRFT also has other power to regulate online contents not only within the field of copyright.[1035]

At the same period of time, around the year of 2010, possibly because of the obligatory license, enormous small and middle size video websites were shut down and the rest online audiovisual media started to merge.[1036] During this period, iQiyi was bought by Baidu and then integrated with PPTV.[1037] Two largest Chinese free access websites YouKu and TouDou were integrated[1038] CCTV had established its own online channel China Network Television.

609. These giants have more money and patience to adopt long term copyright policies to comply with the Chinese copyright rules. Moreover, They are more regulable. Two consequences in regard of copyright enforcement in the digital environment could be observed.

First one is that the online media like Youku which depend on the users generated

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[1033] the Regulation on the Online Audiovisual Works and Services, promulgated in 2007, revised in 2015. Article 3.

[1034] Ibid. Article 7.

[1035] See, infra text, Chapter 1, Section 1, §2. Enforcement actions taken by Chinese copyright authorities II. Government Surveillance.

[1036] 贾金玺，"中国视频网站发展简史"，中国社会科学网，2014。"国家广电总局公布了互联网视听节目服务抽查情况，土豆网等32家视频网站因内容违规遭到警告处罚。迅雷中国、猫扑视频等25家网站被责令停止视频节目服务。"

Jia Jinxi, "History of Chinese Video Websites", Chinese Social Science Network, 2014. "Chinese Broadcasting and Television Bureau published the report of the investigation of the internet audiovisual content services, TouDou and other 32 video websites were fined because of the illegal contents. Xunlei China, Mao Pu and other 25 websites were required to stop the provision of online video services." Translated by author, available at http://www.cssn.cn/zt/zt_xkzt/zt_wxzt/jnzgqgnjtgjhlw20zn/zghlwfz20znhg/201404/t20140417_1070127_1.shtml

[1037] See Wikipedia, term of iQiyi, https://en.wikipedia.org/wiki/IQiyi

[1038] See Wikipedia, term of Youku, https://en.wikipedia.org/wiki/Youku

content; the television companies like CCTV which depend on its own TV programs; the internet giant like Tencent and Baidu which buy directly from the contents providers.[1039] Consequently, the one who invested significantly into copyright authorization would not tolerate the copyright infringements by its peers.

In 2014, in response to the plaints of Chinese online audiovisual media: LeTV and SoHo; Motion Picture of America and Motion Picture of China, the QvodPlayer which provided illegal streaming services was took down by both national and regional copyright authorities.[1040]

610. Second one is that probably regarding the fact that Chinese online audiovisual media had merged together. From 2014, Chinese Copyright Bureau started to monitor the audiovisual works on the major online audiovisual media[1041]. Chinese Copyright Bureau made a list to protect the "popular" audiovisual works. It specified which websites have the authorization to communicate the listed works to the public, and the duration of authorization. The non-authorized audiovisual websites bear the responsibilities specified by Chinese Copyright Bureau.[1042] If the audiovisual websites does not comply with the responsibilities, they would be named on a warning list by Chinese Copyright Bureau and would be subjected to further examination which may lead to the sanctions.

Briefly, it could be observed that Chinese copyright enforcement in the digital environment and online audiovisual media are mutually influenced. The rhythm of the development of the Chinese online audiovisual media is corresponding with the rhythm of the Chinese copyright enforcement in the digital environment. The Chinese copyright enforcement in the digital environment provided a space for Chinese legitimate online

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[1039] "The Report of Chinese Internet Audiovisual Development 2015", p, 13. released by CCTV and CNNIC , p, available at http://www.cctv.com, http://download.cntv.cn/2015wlstfzyjbg.pdf.

[1040] "2015 report of copyright enforcement", Chinese Copyright Bureau, 2015. p, 32. available at http://www.ncac.gov.cn/ chinacopyright/upload/files/2016/4/27161449900.pdf

[1041] See, infra text, Chapter 1, Section 1, §2. Enforcement Actions Taken by Chinese Government II. Government Surveillance. B. Copyright monitoring list of Chinese Copyright Bureau

[1042] Available at http://www.ncac.gov.cn/chinacopyright/contents/483/307814.html. Original text as "相关网站应对版权 保护预警名单内的重点作品采取以下保护措施:直接提供内容网站未经许可不得上传版权保护预警名单内的作 品;用户上传内容网站应禁止用户上传版权保护预警名单内的作品;提供搜索链接网站应仅提供获得合法授权 网站的搜索结果及跳转链接服务;电商网站及应用平台应加快处理版权保护预警名单内作品权利人关于删除侵 权内容或断开侵权链接的通知"

"Firstly, the internet service provider who directly makes the contents available to users shall not communicate the listed works to the public; Secondly, the internet service provider who provide storing services shall prohibit users to upload the listed works; Thirdly, the internet service provider who provide information researching services shall only provide the searching results of the website who has the authorization of the listed works; Finally, the internet retail websites and the applications shall accelerate the process of protecting the listed works according to the notification made by right holders to remove the infringing contents or disable the internet access."

audiovisual media to emerge, to survive and to develop. In return, the development of Chinese online audiovisual media also shaped the copyright enforcement in the digital environment.[1043]

B. Chinese copyright market constructed by online audiovisual media as an incentive of copyright protection

611. In 2016, after almost a decade of development and regulation, the Chinese online media start to mature. In the report of Chinese Internet Audiovisual Development conducted by CCTV and CNNIC in December 2015, it demonstrated that the market of online audiovisual market is promising: From 2009 to 2014, the online audiovisual contents consumers had been increased rapidly by a 15%-20% rate per year. In 2015, the number of online audiovisual contents consumers reached 461 million. However, only 17% of them have the experiences of paying for the online audiovisual contents.[1044]

The revenue of the online media mainly come from the online advertisement. Nevertheless, the online advertisement market is big enough to guarantee the income of the online media. The market volume of online advertisement was estimated at 19.87 billion CNY in 2015 by CNNIC.[1045] But, estimated by the report of Chinese Internet Audiovisual Development, the number of paying internet users of all internet audiovisual website has been soaring from 2014. The pay for each access and subscription fee will become one of the major sources of revenue in the future.[1046]

612. From 2014, for the both reasons of strict copyright enforcement online and the maturity of the online copyright industry, the online media have been inevitably envisaging the competition of copyright. Regarding the ferocious competition among the online media, for the purpose of attracting internet users, the core competitiveness of these online media is the copyrighted contents which they have the right to communicate to their users.

There exist the online media like Youku which depend on the users generated content;

[1043] Lewinski, Silke von. International Copyright Law and Policy. Oxford New York: Oxford University Press, 2008. para, 25.25. "…developing countries depend on protected works and phonograms less than on patented inventions from in dustrialized countries to advance their own development… what they need for their development in the cultural field is a working infrastructure and the technical and financial capacities to produce and market high-quality movies and other products in order to become competitive exporters of their own cultural goods and actually better benefit from international protection."

[1044] "The Report of Chinese Internet Audiovisual Development 2015", p, 16. released by CCTV and CNNI. Available at http://www.cctv.com, http://download.cntv.cn/2015wlstfzyjbg.pdf.

[1045] Ibid. p, 10.

[1046] Ibid. p, 14.

the television companies like CCTV which depend on its own TV programs; the internet giant like Tencent and Baidu which buy directly from the contents providers. The costs of the copyright contents represent average 40% of the total costs of the Chinese online media.[1047]

After the development of internet infrastructure, the establishment of basic copyright rules and the copyright enforcement, finally, the market of copyright has been gradually constructed in the digital environment.

613. With a Chinese market of copyright in the digital environment, the difficult situation of Chinese copyright enforcement surely would be ameliorated.

Before the construction of a Chinese market, it would be difficult to enforce copyright in China. Because the adoption of first Chinese Copyright Law and the later two revisions were for the purpose of complying with international obligations. The adoption of first Chinese Copyright Law in 1990 was mainly for the purpose of complying with the minimum standard of Berne Convent and ratifying it.[1048] The first revision of Chinese Copyright Law in 2001 was under the pressure of joining WTO, because in order to join WTO, the first Chinese Copyright Law should be revised to fully comply with the minimum standard of the Berne Convention[1049]. The second revision of Chinese Copyright Law in 2010 was obliged by the decision of WTO Dispute Settlement Body[1050]

Therefore, the authors' rights, the exceptions, the enforcement measures in Chinese Copyright Law were not the results of the fierce confrontations of the different interests groups. Most of them were prescribed for reaching the minimum standard of the Berne Convention.

614. Since the copyright market in the digital environment has just be constructed, the copyright holders have not brought enough controversial cases before the Chinese courts.

[1047] Ibid. p, 13.

[1048] Memorandum of understanding between the government of the People's Republic of China and the government of the United States of America on the protection of intellectual property. 1992. available at http:// tcc.export.gov/ trade_agreements/all_trade_agreements "The Chinese Government will accede to the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) (Paris 1971). The Chinese Government will submit a bill authorizing accession to the Berne Convention to its legislative body by April 1, 1992 and will use its best efforts to have the bill enacted by June 30, 1992. Upon enactment of the authorizing bill, the Chinese Government's instrument of accession to the Berne Convention will be submitted to the World Intellectual Property Organization with accession to be effective by October 15, 1992."

[1049] TRIPS agreement. Article 9 Relation to the Berne Convention. "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom."

[1050] WT/DS362/10 IP/D/26/Add.1 27 March 2009.

Consequently, the rules in Chinese Copyright Law have not been well interpreted[1051]. Therefore, Chinese Copyright Law was like a transplanted organ which was not integrated into the eco-system of China. It functioned not well.

However, with a domestic market of copyright in the digital environment, a well functional Chinese Copyright Law and the specific rules concerning the substantial rights and the enforcement measures in the digital environment would be gradually built by the confrontation and reconciliation of different interests group in the copyright market in the digital environment.

In addition, the domestic market of copyright in the digital environment would give a strong motivation to Chinese copyright authorities to enforce copyright holders' rights online. Because in the perspective of Chinese copyright authorities, the domestic copyright industry is at stake. In the perspective of Chinese copyright holders, the commercial interests is at stake. They will push national and regional copyright authorities to protect their copyright.

In a word, the Chinese copyright market in the digital environment is a motivation. A motivation to elaborate specific rules in Chinese copyright legislations and to enforce these rules.

II. Free Access & Pay for Access online audiovisual media associated with Chinese copyright enforcement

615. Two kinds of Chinese online media could be distinguished. One is the free access online media. The other one is the Pay for access online media. It will introduce the development of both pay for access and free access online media and then demonstrate concretely the copyright strategies of both online media.

Free access online media associated with Chinese copyright enforcement will be examined firstly (A). Pay for Access Online Media associated with Chinese copyright enforcement will be examined secondly (B).

A. Free access online audiovisual media associated with Chinese copyright enforcement

616. The contents of free access online media are mainly uploaded by users and all other

[1051] See the demonstration of public communication right and private use exception in Part1 Title 2. and the enforcement measures in Part 1 Title 1.

users could freely access to them. The revenue of free access online media depends on the advertisement.

YouKu Inc. is a typical Chinese free access online media. It was founded in June 2006 by Victor Koo, the former president of Sohu, a Chinese internet portal.[1052] Briefly, YouKu is similar to Youtube.

The development of YouKu is fast: in 21 June 2006, YouKu commenced the open beta test. Three month after, it obtained 12 million the USD venture capital from Sutter Hill Ventures, Farallon Capital and Chengwei Ventures.[1053] In the year of 2007, The video views of YouKu surpassed 100 million times per day.

617. The YouKu's copyright strategy to motivate users to create ingenious contents played an important factor of its early success:

YouKu released a mobile application in 2007 which enabled its users to shoot and edit a short video within 6 minutes. The videos made could be uploaded by its creators and other users could download or stream these videos. The creators of the original video have been called PaiKe. They have created enormous interesting contents which traditional media could not have capacity to produce. The PaiKe has recorded the first hand material of the 2008 Chinese winter storms, the 2008 Sichuan earthquake, etc. in the cases that the traditional media was totally incapable. For such reason, a lot of videos made by the users of YouKu were cited directly by national and regional TV station like CCTV: CCTV had cited the video clips shoot about the 2008 Chinese winter storms.

At the same time, the users of Youku contain incredible creativities. For instance, one Chinese internet user named HuGe created a 20 minutes video clip to parody a high cost movie called "The Promise" directed by Chen Kaige. The film was forgotten soon, while this parody was continuously adored by the Chinese internet users. It was far more influential than the film itself. It was remarked as the mile stone of an era which every one could be a creator, a film director.[1054]

Although the user generated contents had attracted large amount of users, it has to admit that at the beginning of YouKu, the copyright infringing contents was rampant on the website of YouKu similar to the other user generated contents websites in China or in the world.

[1052] Chinese names as 优酷(YouKu) , 古永锵(Victor Koo).

[1053] See, Sina News, http://tech.sina.com.cn/i/2006-12-12/21091284894.shtml

[1054] See, Wikipedia, https://zh.wikipedia.org/wiki/一个馒头引发的血案.

618. Regarding the economic interests and the creativities in the digital environment, the "Notice and Take Down" rule which exempt the internet service provider from the secondary liability plays an essential role for the development of the open-access online media like YouKu.

According to Chinese Regulation on the Protection of the Right of Communication through Information Network Article 22, the online audiovisual media like YouKu could be qualified as "hosting" service providers which is eligible for the exemption of secondary liability after the "Notice and Take Down" rule has been complied. This issue has been demonstrated before.[1055]

However, according to the interpretation of Chinese courts in regard of the "Notice and Take Down" rule, the responsibility of "expeditiously take down" was interpreted too vast which in fact gave internet service providers a responsibility to actively monitor the contents in their servers. Moreover, the government monitor of works adopted by Chinese Copyright Bureau may also gave an excessive responsibility to the free access online audiovisual media. The question has been posed: "In the presence of exclusive rights granted under copyright law, policy makers should impose a heavier burden on intermediaries, or thither the market should solicit a more direct involvement of right holders, and their representatives, in the quest for systems that could gradually substitute unlawful file-sharing."[1056]

619. Therefore, the Chinese free access online audiovisual media like Youku have the interests to motivate Chinese legislative bodies and copyright authorities to adopt a stable, unified and proportional rule of the exemption of secondary liabilities. This rule would reduce the costs of the free access online audiovisual media and provide them an agreeable the digital environment.

The ongoing third revision of Chinese Copyright Law will attack this issue. Article 73 of the Final Draft of the revision of Chinese Copyright Law prepared by Chinese Copyright Bureau[1057] established a principle by stating that "Internet service providers who provide hosting, searching, hyperlink and other mere technical services, shall not bear any

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[1055] Chapter II Notice and Take Down Section II Notice and Take Down in China

[1056] Stamatoudi, Irini A. Copyright Enforcement and the Internet. Information Law Series 21. Austin Boston Chicago: Wolters Kluwer Law & Business, 2010. p, 145.

[1057] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012.

responsibility of monitoring related to copyright and neibouring rights."[1058]

Possibly, the establishment of this principle was influenced by the development of Chinese free access online audiovisual media. During the ongoing revision of Chinese Copyright Law, it would be sure that the Chinese free access online audiovisual media would motivate the legislative bodies to elaborate this principle. Specifically, the Chinese free access online audiovisual media like Youku would like to establish some rules in detail such as what constitute a valid notification, what is the knowledge criteria under the Chinese "Notice and Take Down" rule.[1059] These specified rules would provide a stable, proportional responsibility for YouKu in the digital environment.

620. Youku has also changed its copyright strategy. It lanced a plan to cooperate with the traditional contents producers and traditional media. In April 2010, YouKu started to invest more than 100 million CNY to buy the copyright of 108 popular TV shows, and 80% of the Chinese TV series.

Logically, YouKu could no longer keep the absolute free access after investing enormously on the copyright. It develops two parallel systems for the free users and the paying subscribers: The free users have only access to the video clips uploaded by other users and limited access to copyrighted films, musics and TV series in normal definition. Meanwhile, the paying subscribers have access to the latest and popular films, musics and TV series in high definition and they could enjoy a high bandwidth location.

Nevertheless, the user created contents in the free access online media such as YouKu played an important factor in regard of copyright. It not only stimulated the creativities of internet users, but also played as a substitution for the traditional copyrighted contents. In other words, the free access contents generated by internet users could also marginalize the illegal sharing of similar contents online.

B. Pay for access online audiovisual media associated with Chinese copyright enforcement

621. The online media acquire the right of online communication of the copyrighted contents and then transmit the contents to their subscribers. The revenue depends on the fees charged for the users' each access or subscription.

[1058] Ibid. Article 73. original text in Chinese as "网络服务提供者为网络用户提 供存储、搜索或者链接等单纯网络技术服务 时，不承担与著作权或者相关权有关的审查义 务."

[1059] See Part 2, Title 1, Chapter 2 Notice and Take Down. Section 2. Notice and Take Down in China.

Leshi Internet Information and Technology Corp.(LeTV) is a typical pay for access online media in China. LeTV was founded in 2004 in Beijing.[1060] While at that time, other online media profited the unregulated online pirating in China, LeTV has been obstinate to buy the copyright of musics, films, TV series and then transmitted them to its subscribers.

622. The copyright strategy of LeTV contains two parts. First strategy is that LeTV buys the copyright directly from the producers: LeTV cooperates with the films producers such as Sony Pictures Entertainment, Inc, Paramount Pictures Corporation, Warner Bros. Entertainment Inc, etc to get the right to online stream their films. LeTV is also enthusiastic to get the online communication right of sport events from NBA, Chinese Football Super League, Association of Tennis Professionals, etc. [1061]

The costs of direct purchase of copyright is astonishing. In regard of sports events, in 2015, LeTV bid 500 million the USD for the 5 years exclusive right of transmitting NBA games in China. However, it failed, the Tencent got the right[1062]. In February 2016, LeTV successfully got the exclusive right of online transmitting Chinese Foot Super League in the next two years. It costed LeTV 2.7 billion CNY, around 450 million the USD.[1063] In regard of films and TV series, LeTV has planned to invest 10 billion CNY to enlarge its online resources of copyright contents[1064]

Regarding the high costs of buying the copyright, Second strategy of LeTV is to produce its own films and TV series. It established its own motion picture company in 2011[1065]. In 2014, it produced 13 films of which the aggregated sales of box office reached 2.4 billion CNY.[1066]

623. The large investments of LeTV is for the purpose of attracting subscribers by high quality and exclusive contents. Because started from 2015, the number of the paying subscribers has been soaring, in 2016, this number will probably reach 50 million.[1067] The market volume of paying subscribers has reached 9.6 billion CNY in 2016[1068]. In regard of LeTV type of online media, the revenue from paying subscribers has surpassed 2 billion CNY in 2016 which represents 15.5% of its total revenue. To be more precise, 53.4% comes from

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[1060] See, Wikipedia, le.com, https://en.wikipedia.org/wiki/Le.com.
[1061] See, Baidu Baike, LeTV. http://baike.baidu.com/item/乐视.
[1062] See, SoHo news, http://mt.sohu.com/20160229/n438832875.shtml
[1063] Ibid.
[1064] See, NetEase, http://ent.163.com/16/0411/07/BKBRPKMQ00032DGD.html
[1065] Le Vision Pictures, Chinese name as "乐视影业." See wikipedia.
[1066] See Baidu Baike, Le Vision Pictures. http://baike.baidu.com/view/7833132.htm
[1067] "Report of Paying Subscribers of Chinese Audiovisual Website", 2016 , Conducted by IResearch Consulting Group. p, 4.
[1068] Ibid. p, 5.

advertisement, 27.9% comes from other sectors such as online gaming, online retailing. 3.1% comes from the authorization fees of copyright.[1069]

624. Since the pay for access online media has invested enormously on the copyrighted contents to generate the revenue from paying subscriber and advertisement, the copyright enforcement plays an essential role.

Specifically, the legal protection of the circumvention of technological measures is crucial to the business model of the pay for access online media. Because their revenue which comes from both subscriptions and advertisements depend on the user's access to copyrighted works. The pay for access online media would apply the technological measures to protect their copyrighted contents from the unauthorized reproduction and access in the digital environment. Therefore, they need the rule of the legal protection of the circumvention of technological measures.

625. As demonstrated before[1070], in Chinese copyright legislations, the legal protection of the circumvention of technological measures is not stipulated in a unified way. Article 48 Clause 6 of Chinese Copyright Law prohibits the act of "intentionally circumventing or sabotaging the technological measures adopted by a copyright owner or an owner of the rights related to the copyright to protect the copyright or the rights related to the copyright in the work or the products sound recording or video recording, without permission of the owner, except where otherwise provided for in laws or administrative regulations"[1071]. It stipulates that the remedies would be "civil liabilities such as ceasing the infringement, eliminating the bad effects of the act, making an apology or paying compensation for damages"[1072]

Further specific rules have not been established by Chinese Copyright Law, for instance, the prohibition of the preparative activities of the circumvention of the technological measures. Such prohibition would be important for the Chinese pay for access online media to fight against the online copyright infringing activities in commercial scale. But under the current Chinese copyright legislation, it could not be found under Chinese Copyright Law, only the Regulation on the Protection of the Right of Communication through Information Network Article 4 prohibits the preparative activities as "…No person shall intentionally manufacture, import, offer to the public, provide, or otherwise traffic any

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[1069] Ibid. p, 6.
[1070] Part 2 Title 1 Chapter 1 Legal protection against circumvention of technological measures. Section 2. Legal Protection Against Circumvention of Technological Measures in China.
[1071] Chinese Copyright Law 2010 text. Article 48 clause (6)
[1072] Ibid.

devices or components which are mainly for the purpose of circumventing and sabotaging technological measures, no person shall intentionally provide services to the public for the purpose of circumventing or sabotaging technological measures."[1073] Because this regulation only regulates the "right of communication through information network" which corresponds public communication right in Chinese laws, it is arguable that the prohibition of preparative activities under this regulation would be applicable to the other patrimonial rights.

626. The pay for access online media would be eager to motivate Chinese legislative bodies to adopt an unified, comprehensive rule of the legal protection of the circumvention of the technological measures.

In the Final Draft of the third revision of Chinese Copyright Law prepared by Chinese Copyright Bureau, Article 69 prescribes the prohibition of preparative activities as "For the purpose of protecting copyright and related rights, copyright holders could apply technological measures. Without authorization, no person shall intentionally circumvent or sabotage technological measures, no person shall intentionally manufacture, import, offer to the public, provide, or otherwise traffic any devices or components which are mainly for the purpose of circumventing and sabotaging technological measures, no person shall intentionally provide services to the public for the purpose of circumventing or sabotaging technological measures."[1074]

Specific rules such as the scope of the effective technological measures and the definition of the act of circumvention still have not been drafted into the third revision of Chinese Copyright Law. But at least, the principle of the prohibition of preparative activities is clearly established. If it could be adopted under Chinese Copyright Law, there will exist not doubt that such prohibition would be applicable to all the patrimonial rights of copyright holders.

In the future Chinese copyright legislation, the pay for access online media would encourage the copyright legislative bodies and copyright authorities to elaborate stable and specific rules about the legal protection against the circumvention of the technological measures.

[1073] Regulation on the Protection of the Right of Communication through Information Network. Article 4.

[1074] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 69. Original Chinese text as "为保护著作权和相关权，权利人 可以采用技术保护措施。 未经许可，任何组织或者个人不得故意避开或 者破坏技术保护措施，不得故意制造、进口或 者向公众提供主要用于避开或者破坏技术保 护措施的装置或者部件，不得故意为他人避开 或者破坏技术保护措施提供技术或者服务，但 是法律、行政法规另有规定的除外。"

§2. Online audiovisual media facilitating the copyright enforcement

627. From the demonstration above, the online audiovisual media invest significantly to obtain the copyright of the contents in order to get advantages when competing with others. Consequently, when the online audiovisual media try to smash their adversaries with the copyright they own, the enforcement of copyright has be done. Moreover, the online audiovisual media also provide legal contents to users in the digital environment freely or with reasonable price. It facilitates users to consume legal contents rather than infringing contents and it cultivates users habits to respect copyright law.

What exactly the online audiovisual media facilitate the enforcement copyright law in the digital environment? How they encourage users to get access to legitimate contents and respect copyright?

It will demonstrate firstly that the online audiovisual media motivate domestic right holders to protect copyright (I). It will demonstrate secondly that the online audiovisual media facilitate internet users to respect copyright (II).

I. Online audiovisual media motivate the protection of copyright

628. Regarding that the online media have invested a lot to obtain the authorization to transmit copyrighted contents online, they surely will fight against the online pirating of copyright contents to protect their own interests.

For the interests of copyright holders, since their works have significant values in the market, they also will firmly protect their own interests. In recent years, Chinese online media and copyright holders have brought complaints before both Chinese copyright authorities (A) and Chinese courts (B).

A. Chinese copyright authorities motivated by Online audiovisual media

629. From 2013 to 2015, several Chinese infringing websites which frustrated both domestic and foreign copyright holders have been took down by the Chinese national and regional copyright authorities. Most of them are directly initiated by the complaints made by the Chinese online media and the copyright holders.

For instance:

In the year of 2013, Chinese Copyright Bureau had received the complaints from YouKu, Tencent, LeTV, SoHu, claiming that Qvodplayer[1075] and Baidu player communicated copyright infringing contents to the public. At the end of 2013, Chinese Copyright Bureau required them to stop the online infringing activities and Baidu and Qvod companies were fined 250000 CNY.[1076]

In September 2014, the Motion Picture Association of America (MPAA) had made a complaint to the copyright authority of ShangHai claiming that the website called "shooter"[1077] infringed its copyright. After a short investigation, in November 2014, the copyright authority of ShangHai shut down the "www.shooter.com" and it was fined 100000 CNY.[1078]

In November 2014, the Copyright Bureau of HuNan provence received the complaint of copyright holders and undertook the investigations of the copyright infringing activities of the YYeTs website. In July 2015, the servers of YYeTs[1079] were seized and it was also fined.[1080]

Qvodplayer, Shooters and YYeTs were the major copyright infringing sites and had frustrated copyright holders for years. The three cases have been published by Chinese Copyright Bureau as the 10 most significant cases of 2013, 2014 and 2015.[1081]

630. A interesting fact is that Qvodplayer was founded in the year of 2007, Shooters was founded in 2006 and YYeTs was founded in 2006. It was the same period of time which the internet was democratized and the copyright rules in the digital environment was started to establish in China. Around 10 years later, they were all shut down by copyright authorities almost at the same year. The question would be asked: why?

After the seizure of the website of shooter, its founder claimed on the website of shooter that "the era which needs my site has gone away." It could be an ambiguous

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[1075] Chinese name as "快播", a software enables its users to stream films online. See wikipedia Qvodplayer.

[1076] 10 most important cases of 2013 published by Chinese Copyright Bureau. See, website of Chinese Copyright Bureau, http://www.ncac.gov.cn/.

[1077] Chinese name as "射手网", a website for users to download subtitles of films and TV series.

[1078] 10 most important cases of 2014 published by Chinese Copyright Bureau. See, website of Chinese Copyright Bureau, http://www.ncac.gov.cn/.

[1079] Chinese name as "人人影视", a website for translating and downloading audiovisual contents. See wikipedia YYeTs.

[1080] 10 most important cases of 2015 published by Chinese Copyright Bureau. See, website of Chinese Copyright Bureau, http://www.ncac.gov.cn/.

[1081] 10 most important cases published by Chinese Copyright Bureau in 2013, 2014 and 2015. See, website of Chinese Copyright Bureau, http://www.ncac.gov.cn/.

explanation which provokes further questions: What kind of the era is in China now?

631. One possible explanation could be that in the year of 2006, there was no industry of the online media in China and most of the pirating works are foreign works. Therefore, since there was no online media industry, there was no market for the copyright online. Without a domestic copyright market, it was forcing Chinese copyright authorities to enforce foreign copyright holders' rights at their own costs to bring inconveniences to its own citizens.

Indeed, according to the Chinese Copyright Law, Chinese copyright authorities bear the obligations to protect foreign copyright holders' legitimate rights. But it has to admit that the motivation was missing. Moreover, without a domestic copyright market in the digital environment, the internet users had no other way to get the copyrighted contents other than the pirating websites.

But from 2010, the market of copyright for the online transmission has been gradually constructed by Chinese online media. Consequently, on the one hand, there are huge domestic and foreign interests at stake regarding the online pirating, on the other hand, the users could get access to copyright contented via legitimate online media. Therefore, the online copyright enforcement is necessary in China. The Chinese copyright authorities both national and regional have been motivated to protect copyright in the digital environment.

B. Chinese Courts motivated by Online audiovisual media

632. The online media have no hesitation to sue anyone who dare to infringe their copyright for the reason that they are aware of the fact that their core competitiveness is the copyrighted contents.

LeTV (Leshi Internet Information and Technology Corp.), from 2013 to date, has sued nearly all the both traditional and online Chinese media to protect its copyright:

In April 2016, LeTV sued iQiyi an online video platform owned by Baidu for the copyright infringement of a TV show "我们一起来(Wo Men Yi Qi Lai)" before Beijing Haidian district court. The plaint of LeTV was supported by the court.[1082]

Similarly, LeTV sued YouKu for infringing the copyright of its films, TV series and

[1082] 乐视网（天津）信息技术有限公司诉北京爱奇艺科技有限公司侵害作品信息网络传播权纠纷案，北京市海淀区人民法院，民事判决书，(2016)京0108民初6038号。2016年4月。
Leshi Internet Information and Technology Corp., Tianjing v Beijing iQiyi Technology Corp., Beijing Haidian district court, case number:(2016)京0108民初6038号. April, 2016.

TV shows 8 times in 2013 and 2014 before the Beijing Haidian district court.[1083] Every time, the court rendered monetary remedies against the copyright infringements.

LeTV also sued the traditional media for the copyright infringements: in May 2016, it brought CCTV before the Beijing Haidian district court claiming that its copyright of one TV series was infringed by the online television channel of CCTV(CNTV-CBox)[1084]. The court ruled that CCTV shall stop the copyright infringement, however, no monetary remedy was applied because the court reasoning that CCTV had obtained the authorization from the producer of the TV series and had no reason to know that the right was exclusively owned by

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[1083] 1.乐视网（天津）信息技术有限公司诉合一信息技术（北京）有限公司侵犯著作权纠纷案，北京市海淀区人民法院，(2014)年海民(知)初字第21069号，2014年8月19日。
Leshi Internet Information and Technology Corp., Tianjing v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2014)年海民(知)初字第21069号. 19, August, 2014.
2.乐视网（天津）信息技术有限公司诉合一信息技术（北京）有限公司侵犯著作权纠纷案，北京市海淀区人民法院，(2014)海民初字第7967号， 2014年8月15日。
Leshi Internet Information and Technology Corp., Tianjing v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2014)海民初字第7967号. 15, August, 2014.
3.乐视网（天津）信息技术有限公司诉合一信息技术（北京）有限公司侵犯著作权纠纷案，北京市海淀区人民法院，(2014)海民初字第11152号，2014年6月19日。
Leshi Internet Information and Technology Corp., Tianjing v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2014)海民初字第11152号. 19, June, 2014.
4.乐视网（天津）信息技术有限公司诉合一信息技术（北京）有限公司侵犯著作权纠纷案，北京市海淀区人民法院，(2014)海民初字第7960号，2014年4月16日。
Leshi Internet Information and Technology Corp., Tianjing v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2014)海民初字第7960号. 16, April, 2014.
5.乐视网（天津）信息技术有限公司诉合一信息技术（北京）有限公司侵犯著作权纠纷案，北京市海淀区人民法院，(2014)海民初字第4233号，2014年3月28日。
Leshi Internet Information and Technology Corp., Tianjing v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2014)海民初字第4233号. 28, Mars, 2014.
6.乐视网（天津）信息技术有限公司诉合一信息技术（北京）有限公司侵犯著作权纠纷案，北京市海淀区人民法院，(2014)海民初字第3949号，2014年3月19日。
Leshi Internet Information and Technology Corp., Tianjing v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2014)海民初字第3949号. 19, Mars, 2014.
7.乐视网（天津）信息技术有限公司诉合一信息技术（北京）有限公司侵犯著作权纠纷案，北京市海淀区人民法院，(2013)海民初字第17567号，2013年10月29日。
Leshi Internet Information and Technology Corp., Tianjing v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2013)海民初字第17567号. 29, October, 2013.
8.乐视网（天津）信息技术有限公司诉合一信息技术（北京）有限公司侵犯著作权纠纷案，北京市海淀区人民法院，(2013)海民初字第23549号，2013年10月18日。
Leshi Internet Information and Technology Corp., Tianjing v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2013)海民初字第23549号. 18, October, 2013.

[1084] China Network Television (CNTV) is a national web-based TV broadcaster officially launched on December 28, 2009. CNTV International offers 6 local language services (Chinese, Mongolian in Mongol Script, Tibetan, Kazakh, Uyghur and Korean) and 6 foreign language services (English, French, Spanish, Russian, Korean and Arabic). They also provide viewers with a host of news and feature programs from China National Television's foreign channels. See Wikipedia China Network Television (CNTV)

LeTV.[1085]

Similarly, LeTV sued China Telecom SuZhou company for the copyright infringement of several films and TV series before SuZhou district court in July 2016 and a monetary remedy was applied,[1086] sued ChongQing Cable Television before Beijing Chaoyang district court and an agreement was reached between two parties.

633. Briefly, LeTV has invested a lot of money to buy the copyrighted contents. So it is crucial to enforce to protect the copyright for the purpose of exploiting these contents. Consequently, large amount of lawsuits have been made by LeTV. In this regard, LeTV, and other online media, has played an important factor of protecting, enforcing copyright in Chinese digital environment.

Meanwhile, LeTV also has been sued by other online media: In February 2015, iQiyi sued LeTV for the copyright infringement of a TV series before Beijing Chaoyang district court. The plaint was also supported by the court and a monetary remedy was applied.[1087]

Many lawsuits were made among the online media such as LeTV, iQiyi, YouKu, etc. Copyright now is an intellectual "property" in China. These online media are defending their "property" their territory from trespassing.

634. In 2008, the decision of Chinese courts preferred to protect the interests of internet service providers rather than the copyright holders. The same Chinese court: Beijing Haidian district court, the same defendant: Youku owned by HeYi company. Youku successfully

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[1085] 乐视网（天津）信息技术有限公司与央视国际网络有限公司侵害作品信息网络传播权纠纷案，北京市海淀区人民法院，(2016)京0108民初2912号，2016年5月9日。
Leshi Internet Information and Technology Corp., Tianjing v CCTV International Network Co., Ltd., Beijing Haidian district court, case number:(2016)京0108民初2912号. 9 May, 2016.

[1086] 乐视网（天津）信息技术有限公司与中国电信股份有限公司苏州分公司、苏州新华网络科技有限公司侵害作品信息网络传播权纠纷案，(2016)苏0505民初1406号，苏州市虎丘区人民法院 2016年7月4日。
Leshi Internet Information and Technology Corp., Tianjing v China Telecom Corporation Limited SuZhou, SuZhou XinHua Internet Technology Corp, SuZhou HuQiu district court, case number: (2016)苏0505民初1406号, 4, July, 2016.

[1087] 北京爱奇艺科技有限公司诉乐视网信息技术（北京）股份有限公司侵害信息网络传播权纠纷案，北京市朝阳区人民法院，(2014) 朝民(知)初字第35254号，2015年2月6日。
Beijing iQiyi Technology Corp., Beijing v Leshi Internet Information and Technology Corp., Beijing, Beijing Chaoyang district court, case number: (2014) 朝民(知)初字第35254号, 6 February 2015.

dodged the monetary relief by claiming the "safe harbor" rules under Chinese law.[1088]

However from 2013 to 2016, the Chinese courts have supported the claim of copyright holders. Notably, as demonstrated before, the Chinese Beijing Haidian district court supported eight case dated from 2013 to 2014 complained by LeTV against Youku.

The Chinese "Notice and Take Down" rule and the rules of the exemption of internet service providers' liability have not been revised since its first adoption in the Regulation on the Protection of the Right of Communication through Information Network.[1089] Then, what have changed? Why the Chinese courts in 2008 try to protect the internet service providers interests but from 2013, try to protect the copyright holders' interests?

635. One hypothesis would be in 2008, there exist no commercial scale of the exploitation of copyrighted works in the digital environment. In other words, there exist no market. However, Youku owned by HeYi company has successfully established a model of free access online media base on the contents uploaded by its users. Its development and the business model was demonstrated before.

Therefore, although the copyright infringing contents could be found on Youku, the Chinese Beijing Haidian district court was reluctant to harm the existing market to protect a potential interests. Meanwhile, in 2013, 2014, LeTV had exploited its copyrighted works in digital market. The interests of the copyright holders were no longer potential. Therefore, the Chinese Beijing Haidian district court did not hesitate to protect the interests of LeTV and it will not hesitate to protect the interests of other copyright holders too.

As long as the development of Chinese online media, Chinese courts are motivated to protect copyright in the digital environment.

[1088] 北京华夏树人数码科技有限公司诉合一信息技术(北京)有限公司侵犯著作权纠纷案， 北京市海淀区人民法院，(2008)海民初字第9200号，2008年6月17日。
Beijing Huaxia Shuren Digital Technology Corp. v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2008)海民初字第14023号, 17 June 2008.
北京广电伟业影视文化中心诉合一信息技术(北京)有限公司侵犯著作权纠纷案， 北京市海淀区人民法院，(2008)海民初字第14023号，2008年6月30日。
Beijing Guangdian Weiye Audiovisual Cultural Center v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2008)海民初字第14023号, 30 June 2008.
世纪龙信息网络有限责任公司诉合一信息技术(北京)有限公司侵犯著作权纠纷案， 北京市海淀区人民法院，(2008)海民初字第10776号，2008年8月26日。
Shiji Long Internet Information Corp. v Beijing HeYi Information and Technology Corp., Beijing Haidian district court, case number:(2008)海民初字第14023号, 26 August 2008.
[1089] Regulation on the Protection of the Right of Communication through Information Network. Article 20, 21, 22.

II. Online audiovisual media facilitate internet users to respect copyright

636. At the beginning of 21st century, the Chinese internet users were claiming that the pirating contents shall and could not be controlled and constitute the an essential part of their online life. However, as the development of Chinese online media, in 2016, the Chinese internet users have been changed to copyright friendly.

How this change has been undertaken? It is necessary to examine the impacts of online media on Chinese internet users: First one is that Online media provide legal access to users (A); Second one is that Online media cultivate users' behavior respecting copyright (B).

A. Online media provide legal access to users

637. Before the advent of online media, there was a period of time in China that the online copyrighted works could not be accessed other than the pirating websites, and the Chinese internet users worshiped the pirating of films, musics and softwares as the great freedom of internet.

The question could be asked that regarding the fact that internet users did not have other access to copyrighted works beside pirating website, is the online pirating tolerable?

Under the copyright regime of "droit d'auteur", the answer is definitely negative. Because the author shall have the exclusive right of the works towards everyone based on the only fact of his creation.[1090] The pirating websites online infringe the author's both moral and patrimonial rights. How dare this question could even be asked.

However, under the regime of "copyright", regarding the optimal purpose is promoting the progress of science and useful arts[1091], if the internet users have no other choice but to get access to the works via pirating website, is it discussable that online pirating maybe has the merits to be tolerated before the market of copyright has been constructed online?

The further discussion of this question will lead to an obscure theoretical domaine of copyright or author's right. Regarding the fact that the Chinese online media have enjoyed a

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[1090] French Intellectual Property Code, Article L111-1, "L'auteur d'une oeuvre de l'esprit jouit sur cette oeuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusif et opposable à tous."

[1091] the US Copyright Law, The Constitution Provision Respecting Copyright: "The Congress shall have power…to promote the progress of science and useful arts, by securing for the limited times to authors and inventors and exclusive right to their respective writings and discoveries."

rapid development in recent years and the internet users could get access to copyrighted works via these legitimate online media, it is more practical to demonstrate how online media have changed the Chinese internet users' habit of pirating copyrighted contents.

638. As long as the development of Chinese online media, the online media have complied with the Chinese laws and respect the copyright. They purchased the copyright from the content producers and transmitted the contents to the internet users.

The history repeat itself, in the mid-1970s in the US, the home satellite TV enabled its owners to freely download copyrighted TV programming. The cable TV industry claimed to be losing 10 million the USD per month of subscription fees from such piracy. After a long period of battling, a settlement was reached. The satellite TV companies bought the TV programming controlled by the cable TV companies and transmitted them to their audiences. In 1990s, the legitimate business of satellite TV enjoyed a large success. The piracy was largely marginalized because on the one hand, the users have the option to choose the legitimate access to satellite TV programmings; on the other hand, the satellite TV companies have to eliminate the piracy to protect their business.[1092]

Both stories sounds familiar that a new way of communication technology frightened the old industry by offering users free access to the copyrighted material. Then a new market was born, new business model was emerged to provide more convenient rapid contents and services to its users and enjoyed a great success.

639. Therefore, regarding the satellite TV experiences of the US and the ongoing copyright battling among online media[1093], it is foreseeable that the online piracy will also be marginalized in China by these online media because of similar to reasons: First one, the internet users have the choice to get access to copyright contents via legitimate websites. Second one, the Chinese online media will eliminate the online pirating to protect their interests.

In conclusion, online media not only give internet users a choice to get access to copyright contents via legitimate websites, but also cultivate a users' habit of consuming non pirating contents.

[1092] Stephen Keating. "File sharing, Copyright, and Privacy." 25 Hastings Comm. & Ent. L.J. 697 2002-2003. p, 689.

[1093] See, Infra, §2. online media facilitating the copyright enforcement in China I. online audiovisual media motivate domestic right holders to protect copyright

B. Online audiovisual media educate users to respect copyright

640. The Chinese online media will change the internet users' habit from downloading pirating contents to visiting legitimate website. In other word, the Chinese online media could facilitate the internet users to respect the copyright. This argument could be supported by two facts on the Chinese internet.

The pay for access online media in China have cultivated gradually the internet users' habit of paying for the copyrighted contents online. A survey indicates that started from 2013 the number of internet users who have paid for the online audiovisual works has been soaring: 4.1 million in 2013, 7.9 million in 2014, 28.8 million in 2015, 54.4 million in 2016. [1094] The market volume of pay for access online audiovisual contents has increased from 690 million CNY in 2013 to 9600 million CNY in 2016. According the numbers, it could be concluded that at least, the 54.4 million internet users out of the total amount of 641 million Chinese internet users do not have the habit of infringing copyright online.

Moreover, the free access online media in China have also changed the internet users' habit of downloading infringing contents, because the contents in the free access online media could be the substitution of the copyright contents which the access is restricted and since the internet users could get access to the free access contents wherever and whenever they want, there is no need to download pirating contents.

641. To be more concretely, in the year of 2015, the top 3 Peak Period Traffic of fixed access in Asia Pacific were consumed by BitTorrent 24.95%, YouTube 24.64%, HTTP 8.39%. In comparison, at the same year, in North America, the top 3 were Netflix 33.81%, YouTube 14.63% and HTTP 6.08%. It is evident that in North America, the users' habit has been cultivated by the legitimate pay for access online media: Netflix and free access online media: YouTube. Meanwhile, in Asia Pacific, the illegal file sharing BitTorrent[1095] was preferred by the internet users. Moreover, regarding that the YouTube could not be access in China, it is sure that more internet users would get access to audiovisual contents via BitTorrent. Therefore, by comparing the numbers, it would be foreseeable that as long as the development of Chinese legitimate online media, the illegal file sharing would be replaced.

[1094] "The Report of the Paying Subscribers of the Chinese Audiovisual Website", conducted by IResearch, 2016. p,4.
"中国视频网站付费用户典型案例研究报告", IResearch, 2016. p,4.

[1095] 99.9% traffic of BitTorrent is used for sharing copyrighted contents without authorization. See, "Technical Report: An Estimate of Infringing Use of Internet", Envisional commissioned by NBC Universal, 2011. Available at http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf

642. We could take the Big Bang Theory again as an example. As demonstrated before[1096], in 2016, Big Bang Theory was listed as the popular audiovisual works for special copyright protection in the digital environment by Chinese Copyright Bureau.[1097] It specified that SoHo Video has the authorization of the Big Bang Theory Season 8 and 9. The duration is from July 21 2016 to July 20 2017. And the authorization is exclusive, no other website has the right to play it online

A practical research could be undertaken:

We could search for the resources of Big Bang Theory in Chinese on "Baidu" (the most favorited search engine by Chinese internet users). All the resources for online streaming of Big Bang Theory season 8 lead to the page of SoHo Video.[1098]

In comparison, we could search "Big Bang Theory streaming" on Google. Various resources are available on different Cloud storage website such as "Openload" "Exashare" which are obviously not authorized by copyright holders.

Therefore, it could be observed that Big Bang Theory Chinese version is better protected than the english version. Possibly, it is because SoHo Video provides legal high quality access of Big Bang Theory which marginalizes other illegal access.

In a word, hopefully, the development of Chinese online media could be a long term solution for the online protection of copyright which compensate the disadvantages of the government actions of copyright enforcement.

[1096] B. Copyright monitor by government

[1097] 2016 fifth list of the works by Chinese Copyright Bureau. Available at http://www.ncac.gov.cn/chinacopyright/upload/files/2016/8/5173059749.pdf

[1098] Searching "生活大爆炸第8季在线观看" "Big Bang Theory season 8 streaming" on Baidu.

Conclusion of Chapter I

643. Briefly, this Chapter tells a story between technology and copyright which has happened repeatedly: In China, the development of internet infrastructure enabled the transmission of works both legal and illegal in the digital environment. This fact initiated the establishment of the basic copyright enforcement measures and practices. Consequently, the development of copyright enforcement protected the development of legitimate business of Chinese online audiovisual media. In return, Chinese online audiovisual media stimulated the copyright legislations and enforcement.

From the demonstration of the copyright infringing activities, the copyright enforcement actions and the online audiovisual media in the digital environment in China, it is important for the Chinese copyright authorities to control the copyright infringing activities in the digital environment to protect the emerging legitimate copyright businesses. In return, the development of the emerging legitimate copyright businesses act as an impulse to motivate Chinese legislative bodies to elaborate specific rules and copyright authorities to strictly protect facing the copyright infringements in the digital environment.

More specifically, in terms of the Chinese enforcement practices in the digital environment, regarding the procedure and mechanism of Chinese "Sword Net Action", copyright holders could bring the plains to the Chinese authorities to initiate the seizure of copyright infringing website. Regarding the Chinese monitoring system of online contents, it would be really important for copyright holders to make their works appear on the monitoring list of Chinese Copyright Bureau.

In terms of the Chinese online audiovisual media, it could be observed that the Chinese online audiovisual media could motivate the Chinese copyright authorities to strictly protect the copyright in the digital environment and the Chinese legislative bodies to elaborate pertinent rules. Therefore, the foreign copyright holders could cooperate with the Chinese online audiovisual media for the purpose of better protecting their copyright and sharing the copyright market in the digital environment.

In a word, the Chinese online audiovisual media in practice created a copyright market in the digital environment which constitutes a motivation for the future Chinese copyright enforcement practices and possibly would shape the Chinese copyright legislations.

Chapter II. Future Chinese Copyright Protection

644. The development of technology and the digital environment not only has changed how the works could be transmitted, distributed and communicated, but also has changed how the works could be produced, generated and created.

The users in digital environment enabled by the different digital editing and distributing tools have changed from the passive contents receivers to the active creators. The artificial intelligence could be capable of creating the works similar to the way how the works could be created by the human beings.

The issues of the User Created Content and an artificial intelligence created work will be examined with the purpose of Chinese Copyright Law and the Chinese traditions. Regarding the fact that the work could created by the users and the artificial intelligence, the new technology perturbs the fundamental terms in Chinese Copyright: Who is "author"? What is "creation"? On the one hand, the new kinds of creativities of User Created Content and artificial intelligence need to be preserved and promoted; on the other hand, the copyright holder's interests of existing works need also to be protected. How to elaborate a Chinese Copyright Law to balance the interests?

Therefore, firstly, it will discussed the copyright protection of User Created Contents in China (Section I); Secondly, it will discussed the copyright protection of the record of the game of Go created by Artificial Intelligence (Section II).

Section I. Copyright protection of User Created Content in China

645. In the digital environment, the creation of works is no longer the privilege of professionals. The users have changed their passive role into an interactive, creative role. Large amount of ingenious works have been created by individual users in the digital

environment. This phenomenon of User Created Content (UCC) has perturbed both the copyright legislations in theory and the copyright enforcement in practice.

In regard of the copyright legislations, because the creation of UCC is based on the existing works, should copyright exceptions be enlarged to leave some necessary space for the creativity of UCC? In order to preserve this creativity of UCC, should the legal protection of the circumvention of technological measures leave a back door to the "transformative" use of users?

In regard of the copyright enforcement in practice, the Chinese largest UCC platform WeChat would be an interesting case to analyze together with the copyright influence of Chinese traditions. It is an inevitable case in China for purpose of discussing how to protect copyright holders' interests while preserve the users' creativity on the UCC platform. How to enforce the copyright on the internet platform while promoting the creativities of UCC?

This section will firstly demonstrate User Created Content and future Chinese copyright legislations (§1).

Secondly, it will demonstrate User Created Content and future Chinese copyright enforcement on WeChat influenced by Chinese traditions (§2).

§1. User Created Content and future Chinese copyright legislations

646. User Created Content (UCC) is a new phenomenon in the digital environment which has significant impact on copyright legislation. There does not exist a generally acknowledged definition of UCC.

In regard of Chinese copyright legislation, the phenomenon of UCC stunned the Chinese copyright legislation. Because when Chinese legislators are trying to establish increasingly strict copyright protection rules in the digital environment, UCC asks the question of how to respect the users' needs to "remix."

It will firstly demonstrate what is UCC and what problematics have been provoked by it (I). Secondly, it will demonstrate the future Chinese copyright legislations for User Created Content (II).

I. Identification of User Created Content

647. Since the copyright issues arise from the new phenomenon of UCC, it would be necessary to identify of the scope of User Created Content defined by OECD and the EU Commission (A). It would be pertinent to identify the creativities of User Created Content need to be preserved (B).

A. Identification of the scope of User Created Content defined by OECD and the EU Commission

648. User Created Content (UCC) is also called User Generated Content (UGC). It refers to the content created by individual users in the digital environment via social media: Twitter and WeChat in China; audiovisual contents sharing website: Youtube and Youku in China.

A report of UCC prepared by Organization for Economic Co-operation and Development (OECD) defines UCC as "i) content made publicly available over the Internet, ii) which reflects a certain amount of creative effort, and iii) which is created outside of professional routines and practices"[1099]

The first one "content made publicly available over the Internet" is a requirement of publication. It excludes the works created by users which are not communicated to public. In other words, the contents which are circulated among limited numbers of family members and friends would not be qualified as UGS under the definition of OECD. For instance, email and instant message.

The second one "reflects a certain amount of creative effort" is a criteria of work in terms of copyright. It excludes the works which are a mere copy of a proportion of existing works and are uploaded in the digital environment. In other words, the users/creators must edit, remix the existing work and add the value to it. UCC is a derivative work rather than just a copy of existing work.

Notably, the directly uploaded audiovisual works without "a certain amount of creative effort" are outside the definition of UCC.[1100] The most of the copyright infringing activities of illegal downloading and streaming could be excluded from UCC.

[1099] OECD, DSTI/ICCP/IE (2006)7/Final, Working Party on the Information Economy, Participative Web: User Created Content, 12 April 2007.p, 4.
[1100] Ibid.p, 4.

The third one "created outside of professional routines and practices" brings some ambiguity to UCC. It is not clear what is professional routines and practices. Possibly, it could means that the creation of UCC is "amateur" work which is different from the "professionals" work. The intention of the "professionals" work is for commercial interests while the intention of "amateur" work is for fun. As examined by the report of OECD, the intention of UCC is "connecting with peers, achieving a certain level of fame, notoriety, or prestige, and the desire to express oneself ."[1101]

According to the definition of OECD, UCC is a new work created and made available to public in the digital environment by users without commercial and professional motivation.

649. A report "User-Created-Content: Supporting a participative Information Society" commissioned by the European Commission provided a classification of UCC.[1102] Its classification based on the three criteria: Type of content, social aspect and economic aspect.

According to the report: "The criterion Type of content refers to the level of editorialisation/scenarization of content by the creator. This criterion establishes a distinction between a personal content (with no real added value. It is a kind of 'rough' content not specifically created to be shared out) and a content elaborated in a way to 'tell a story' to other people."[1103]

It covers the two following aspects: "Personal: refers to content developed without editorial views (example: souvenir photos); Story telling: refers to content developed with editorial views (example: online photo album integrating comments, music, etc.)."[1104]

In terms of copyright, this criterion asks whether the creation of contents is based on the existing works and whether the users or creators make a creative effort to generate the contents.

650. Similarly to the definition of UCC by OECD, the definition of UCC by the EU Commission also excluded the mere uploading of existing copyrighted works outside the scope of UCC.

According to the report: The criterion "Social aspect" refers to the level of sharing of the content wanted by the creator. This criterion is clearly linked to the main characteristics of

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[1101] Ibid.p, 8.
[1102] IDATE, TNO & IVIR, User-Created-Content: Supporting a participative Information Society, SMART, 2007/2008.
[1103] Ibid. p, 24.
[1104] Ibid. p, 24.

UCC and Web 2.0: sharing and the sense of community.

It covers the two following aspects: Happy Few: refers to a restricted access to content. The creator appoints the people who will be authorized to access the content. Large/ Open access: refers to a large or totally open access to the content, that is to say that every people having access to the service (either through a registration process or not) will be able to access the content.[1105]

In terms of copyright, this criterion asks whether the UCC has been communicated to public.

According to the report: The criterion "Economic aspect" refers to the possibility for the creator to earn money or not thanks to his content. This criterion is designed to evaluate the ability of the so-called participative Web to develop an economy not only for UCC platforms and services, but also for the users/contributors themselves.

It covers the two following aspects: Revenue: when it is possible for the creator to earn money (even if it is not systematic); No revenue: when it is not possible for the creator to derive revenue from his creation (even if the UCC service could earn money thanks to this content).[1106]

In terms of copyright, this criterion asks whether the UCC is exploited for commercial end by the UCC platforms and by UCC creators.

651. Comparing the definition provided by OECD and the classification provided by the report commissioned by the European Commission, no universal definition of User Created Content has been provided.

However, we could extract three principle factors of UCC: first factor is the scope of the circulation of UCC; second factor is the creative effort of UCC; third factor is the intention of UCC creation

According to the definition provided by OECD and the method of the classification provided by the report commissioned by the European Commission, in terms of the copyright protection in the digital environment, it would like to discuss the UCC which is communicated to public in the digital environment; the UCC which is created by individual users in the digital environment based on existing works with minimum creativity effort required by copyright law; the original intention of users to create UCC is not "professional."

[1105] Ibid. p, 24.
[1106] Ibid. p, 24.

B. Identification of the creativities of User Created Content need to be preserved

652. Digital environment gives individual users the power to reproduce, to distribute, to mix up the existing works and also enable them to communicate to collaborate with each other. The users in the digital environment no longer stay as passive. They actively create ingenious contents. They are both audiences and content providers. Huge numbers of individual users in the digital environment are constantly downloading, uploading, creating, mixing existing copyrighted contents and creating new copyrighted contents.

UCC have significant impacts on copyright law. The creation of UCC highly depends on the existing works. Therefore, on the one hand the users need to use the existing works to create UCC; on the other hand the copyright holders of the existing works need to protect their works from copyright infringing activities in the digital environment.

653. It would be necessary to demonstrate the fact how the creation of UCC depends on the existing works and to analyze how to protect copyright in the digital environment facing the creativity of UCC.

In the digital environment, the users are no longer passive receivers but active creators. Taking audiovisual works as an example, before the creation of digital tools, the creation of a film was an enormous work which is only accessible to professionals. In the digital environment, with various APPs available and a camera in its smartphone, every individual user is capable of shooting and editing his own "film."

As examined by the OECD report, the video and film UCC is "recording or editing video content and posting it. Includes remixes of existing content, homemade content, and a combination of the two."[1107]

It is identified as "the remix phenomenon" or "the remix culture": "add to the culture they read by creating and re-creating the culture around them Culture in this world is flat; it is shared person to person"[1108] "Even as a mere 'conceptual cloud', the label may be useful to discuss the societal shifts in content creation brought about by the Internet and perhaps best epitomized by the remix phenomenon."[1109]

654. This fact poses two problem to the copyright law. First one is how to protect the

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[1107] OECD, DSTI/ICCP/IE (2006)7/Final, Working Party on the Information Economy, Participative Web: User Created Content, 12 April 2007.p, 4.

[1108] LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 28 (Penguin Press 2008)

[1109] D. Gervais, « The Tangled Web of UGC : Making Copyright Sense of User-Generated Content », Vanderbilt Journal of Entertainment and Technology Law, 2009, p.842.

copyright of the existing works. The dissemination of UCC in the digital environment would be a direct infringement of copyright holders' public communication right, if UCC could not be qualified as new works for the reason that the "creative effort" made by user/creator is not enough. The creation of UCC could be subjected to the copyright holders' authorization, if the creation of UCC falls into the scope of the copyright holders' patrimonial rights, for instance, the universal right of translation under Article 8 of the Berne Convention.[1110]

Therefore, how to stimulate the creativities of users by giving them the latitude to use existing works to create new ingenious UCC while properly protecting the copyright of the existing works?

655. In order to stimulate the creation of UCC, copyright legislation must provide proper copyright exceptions and implement proper copyright enforcement measures.

In terms of Chinese copyright exceptions, the copyright exceptions in Article 22 of Chinese Copyright Law offer the users in the digital environment an opportunity to legitimately use the existing works. Precisely, Article 22 Clause 1 private use exception "use of another person's published work for purposes of the user's own personal study, research or appreciation" Clause 2 "appropriate quotation from another person's published work in one's own work for the purpose of introducing or commenting a certain work, or explaining a certain point." The two kinds of exceptions are the classic copyright exceptions for private use and quotation which could be also found in the EU Information Society Directive[1111] and the Berne Convention[1112].

656. But it is far from enough for the appetite of the user/creator in the digital environment: "Whereas social media have in recent times become an essential means of social and cultural communication, current copyright law leaves little or no room for sharing 'user-generated content' that builds upon pre-existing works. By the same token, current limitations and exceptions rarely take into consideration current educational and scholarly practices, such as the use of copyright protected content in Powerpoint presentations, in

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[1110] the Berne Convention Article 8. Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.

[1111] Directive 2001/29/EC. Article 5, 2.(b): "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial,"
Article 5, 3. (d): "quotations for purposes such as criticism or review…"

[1112] the Berne Convention. Article 10. "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries"

'digital classrooms', on university websites or in scholarly e-mail correspondence."[1113]

Therefore, the question would be how to construct a proper copyright exception to simulate the creativity of the user/creator in the digital environment.

II. Future Chinese copyright legislations for User Created Content

657. After the demonstration of copyright problematics of UCC, it could be observed that copyright legislations would leave some latitude for the user/creator to create ingenious UCC in the digital environment. What latitude Chinese copyright exceptions should leave to UCC? How to prevent the Chinese the legal protection against circumvention of technological measures from undermining this latitude of UCC?

Therefore, in terms of Chinese copyright legislations, it will firstly demonstrate the future Chinese copyright exceptions for User Created Content inspired by the EU and Canada copyright legislation (A). It will demonstrate secondly the future Chinese exception of the legal protection against circumvention of technological measures safeguarding User Created Content (B).

A. Future Chinese copyright exceptions for User Created Content inspired by the EU and Canada copyright legislation

658. The two existing classic Chinese copyright exceptions for private use and quotation do not fully consider the creativity boosted by the digital environment. In order to stimulate the creation of UCC, it exists a possibility that a new copyright exception could be introduced to provide more latitude to the user/creator new way of creation in the digital environment.

659. This issue has been examined by the EU. In the Green Paper Copyright in the Knowledge Economy, it described the UCC phenomenon as "Web 2.0 applications such as blogs, podcasts, wiki, or video sharing, enable users easily to create and share text, videos or pictures, and to play a more active and collaborative role in content creation and knowledge dissemination."[1114]

It pointed out the problematic that "The Directive does not currently contain an

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[1113] Hugenholtz, P. Bernt, and Martin Senftleben. "Fair Use in Europe: In Search of Flexibilities." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, November 14, 2011. https://papers.ssrn.com/abstract=1959554. p, 10.

[1114] COM(2008) 466/3. Green Paper, Copyright in the Knowledge Economy. p,19.

exception which would allow the use of existing copyright protected content for creating new or derivative works. The obligation to clear rights before any transformative content can be made available can be perceived as a barrier to innovation in that it blocks new, potentially valuable works from being disseminated. However, before any exception for transformative works can be introduced, one would need to carefully determine the conditions under which a transformative use would be allowed, so as not to conflict with the economic interests of the rightsholders of the original work."[1115]

Therefore, it is the classic copyright dilemma in new the digital environment: on the one hand, the copyright holders' interests must be protected, on the other hand, certain latitude must be leaved to "educational and scientific" use, in the case of UCC, according to the EU Green Paper above: "transformative" use.

660. In Chinese copyright legislation, how to elaborate a proper copyright exception to balance the interests between the copyright holders of the existing works and the users' need to create transformative works? The copyright exception in Canada Copyright Law would provide some inspirations for China.

Canada Copyright Law Section 29.21 (1) prescribes that "It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing

[1115] Ibid.

or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one."[1116]

According to the text, the users' legitimate use of the existing works has several criteria. The existing works must be published or made available to public. The use of the existing works must for the purpose of creating new works. The UCC is only for non-commercial purpose. The resource must be cited. The UCC does not "conflict with the normal exploitation of the existing work."

661. However, the Chinese Copyright Law is not suitable to directly implement these rules in Canada Copyright Law. Because China remains on the phase that the copyright infringing activities have not yet been controlled in the digital environment. The adoption of such exceptions would maybe undermine the Chinese copyright protection in the digital environment. Nevertheless, the creativity of users in the digital environment should also be preserved, protected.

The first step for Chinese Copyright Law would be specifying that the use for the purpose of parody and caricature would be the copyright exception. The copyright exception of parody and caricature could be found in Article 5. 3. (k) of the EU Information Society Directive.[1117] But in the twelve cases listed in Article 22 of Chinese Copyright Law, no such copyright exception would be found.[1118] The use of existing works for parody and caricature would be essential for the purpose of creating UCC, although the creation of UCC is not limited to parody and caricature.[1119]

The next step would for Chinese Copyright Law to safeguard the copyright holders' interests by integrating the principle of Three Step Test of the Berne Convention. This

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[1116] Canada Copyright Law Section 29.21 (1)

[1117] Directive 2001/29/EC, Article 5. 3. (k) "use for the purpose of caricature, parody or pastiche;"

[1118] Chinese Copyright Law Article 22 "…(1) the user's own personal study, research or appreciation; (2) appropriate quotation … (3) unavoidable inclusion or quotation of a published work in the media… (4) publishing or rebroadcasting by the media… (5) publishing or broadcasting by the media… (6) translation, or reproduction in a small quantity… (7) use of a published work by a State organ … (8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc. for the purpose of display, or preservation of a copy, of the work; (9) gratuitous live performance of a published work… (10) copying, drawing, photographing or video-recording of a work of art put up or displayed in an outdoor public place; (11) translation of a published work of a Chinese citizen, legal entity or other organization from Han language into minority nationality languages for publication and distribution in the country; and (12) transliteration of a published work into braille for publication."

[1119] Hugenholtz, P. Bernt, and Martin Senftleben. "Fair Use in Europe: In Search of Flexibilities." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, November 14, 2011. https://papers.ssrn.com/abstract=1959554. p, 28. "Hence, the international three-step tests are unlikely to impose substantial constraints on national lawmakers seeking to offer breathing space for parody or user-generated content. Use of this type fulfils important social and cultural functions and is supported, as pointed out above, by the fundamental guarantee of freedom of expression and information."

integration has been undertaken by the Third revision of Chinese Copyright Law. Article 43 of the Final Draft of copyright law revision prepared by Chinese Copyright Bureau, the last phrase stipulates that "the utilization of the work prescribed above, shall not conflict with the normal exploitation of the work and shall not unreasonably prejudice the legitimate interest of the author."[1120]

B. Future Chinese exception of the legal protection against circumvention of technological measures safeguarding User Created Content

662. The legal protection against circumvention of technological measures rule as powerful rules for copyright holders to enforce copyright in the digital environment would also have the possibility to hinder the creativity of UCC.

No exceptions for the legal protection against circumvention of technological measures could be found in Chinese Copyright Law.[1121] Meanwhile, Regulation on the Protection of the Right of Communication through Information Network Article 12 prescribes several exceptions: "In any of the following cases, technological measures may be circumvented, provided that technologies, devices or components used to circumvent technological measures are not made available to other persons, and that the other rights enjoyed by a right owner in accordance with law are not infringed:

(1) when a published work , performance or sound or video recording is made available to a small number of teachers or scientific researchers through information network for the purpose of classroom teaching or scientific research, and the said work , performance or sound or video recording is only accessible over information network;

(2) when a published written work is made available to blind persons through information network for a non-profit purpose in such particular way that it is perceptible to them, and the

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[1120] 中华人民共和国著作权法修订送审稿, 中国版权局, 2012年10月.
Final Draft of Copyright Law Revision of People's Republic of China. Prepared by Chinese Copyright Bureau, October 2012. Article 43.

[1121] Chinese Copyright Law 2010 text Article 48 "Anyone who commits any of the following acts of infringement shall, depending on the circumstances, bear civil liabilities such as ceasing the infringement, eliminating the bad effects of the act, making an apology or paying compensation for damages; where public rights and interests are impaired, the administrative department for copyright may order the person to discontinue the infringement, confiscate his unlawful gains, confiscate or destroy the copies produced through infringement, and may also impose a fine; where the circumstances are serious, the said department may, in addition, confiscate the material, tools and instruments mainly used to produce copies through infringement; and where a crime is constituted, criminal liabilities shall be investigated in accordance with law."
Part 2, Title 1, Chapter 1, Section 2. Legal Protection Against Circumvention of Technological Measures in China §1. Legal Protection

said work is only accessible over information network;

(3) when a State organ fulfills its official duties in accordance with the administrative or judicial procedure; or

(4) when a safety test is carried out over information network on a computer and its system or on such network." This rule has been demonstrated and compared with the EU rule before.[1122]

663. However, the exceptions in Chinese regulation would not be sufficient for the UCC because the technological measures applied by copyright holders could, as a matter of fact, protect the existing works from the users' access and reproduction. For the reason that the provision of tools and services of circumvention is absolutely prohibited, individual users would unable to get access nor copy the existing works protected by the technological measures. Without accessing the existing work, how could they "remix" and create?

Therefore, in regard of the legal protection of technological measures, maybe a balance of interests between the interests of copyright holders and the user/creator would be introduced into Chinese Copyright Law.

664. In the future Chinese copyright legislation, in order to safeguard the creativity of UCC in the digital environment, it would be better to clarify that the legal protection of the circumvention of technological measures does not affect the copyright exceptions. This exception of the legal protection of technological measures has been prescribed in both the US Copyright Law and the EU Information Society Directive:

Section 1201 (c) (1) of the US Copyright Law prescribes that "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." However, the interpretations of the US courts were confusing: In *Universal City Studios, Inc. v. Corley (2001)*, the US court found that the circumvention itself without the authorization of copyright holders for the purpose of "fair use" is prohibited by Section 1201 of the US Copyright Law. Section 1201 (c) (1) concerns the later use of

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[1122] Regulation on the Protection of the Right of Communication through Information Network. Article 12
Directive 2001/29/EC Article 6. 4. "Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned. "

copyright content.[1123] Meanwhile, in *Chamberlain Group, Inc. v. Skylink Technologies, Inc. case (2004)*, the US court construed that the technological measures applied should only be applied for the purpose of the protection of a copyright.[1124] Therefore, although the US Copyright Law clearly stated that the "fair use" shall not be affected by the legal protection of the circumvention measures, the US jurisprudences did not specific "how"

In Article 6. 4 of the EU Information Society Directive prescribes that "…Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)*(a)*, (2)*(c)*, (2)*(d)*, (2)*(e)*, (3)*(a)*, (3)*(b)* or (3)*(e)*…A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)*(b)*, unless reproduction for private use has already been made possible by rightholders…"[1125] According to the CJEU cases, *VG Wort case (2013)*[1126], *ACI ADAM case (2014)*[1127], *CopyDan case (2015)*[1128], CJEU reiterated that "Member States should like wise promote the use of voluntary measures to accommodate achieving the objective of such exception or limitation."

665. In comparison, no rule could found in Chinese Copyright Law or Regulation on the Protection of the Right of Communication through Information Network to safeguard the

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[1123] Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001). p 443. "it simply clarifies that the DMCA targets the circumvention of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the use of those materials after circumvention has occurred." "Subsection 1201(c)(1) ensures that the DMCA is not read to prohibit the "fair use" of information just because that information was obtained in a manner made illegal by the DMCA."

[1124] Chamberlain, Inc. v. Skylink Technologies, Inc., 381 F.3d. (2004). p, 1203. "A copyright owner seeking to impose liability on an accused circumventor must demonstrate a reasonable relationship between the circumvention at issue and a use relating to a property right for which the Copyright Act permits the copyright owner to withhold authorization."

[1125] Directive 2001/29/EC. Article 6. 4.

[1126] CJEU, 27 June 2013, Verwertungsgesellschaft Wort (VG Wort) v Kyocera, formerly Kyocera Mita Deutschland GmbH, Epson Deutschland GmbH, Xerox GmbH (C−457/11), Canon Deutschland GmbH (C−458/11), Fujitsu Technology Solutions GmbH (C−459/11), Hewlett-Packard GmbH (C−460/11), v Verwertungsgesellschaft Wort (VG Wort), Joined Cases C−457/11 to C−460/11. EU:C:2013:426. para 57. "Accordingly, the technological measures that rightholders have the possibility of using should be understood as technologies, devices or components which are capable of ensuring that the objective pursued by the private copying exception is achieved or capable of preventing or limiting reproductions which are not authorised by the Member States within the framework of that exception."

[1127] CJEU, 10 April 2014, ACI Adam BV and Others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding, Case C-435/12. EU:C:2014:254. para 43, 44. "it is, consequently, for the Member State which, by the establishment of that exception, has authorised the making of the private copy to ensure the proper application of that exception, and thus to restrict acts which are not authorised by the rightholders"

[1128] CJEU, 5 March 2015, Copydan Båndkopi v Nokia Danmark A/S, Case C-463/12. EU:C:2015:144. para, 69-73. "it is for the Member State which, by the establishment of that exception, has authorised the making of copies for private use to ensure the proper application of that exception, and thus to restrict acts which are not authorised by rightholders"

copyright exceptions as a whole. Article 12 of Regulation on the Protection of the Right of Communication through Information Network only prescribes three individual exceptions for the circumvention of technological measures: "(1) when a published work , performance or sound or video recording is made available to a small number of teachers or scientific researchers through information network for the purpose of classroom teaching or scientific research, and the said work , performance or sound or video recording is only accessible over information network; (2) when a published written work is made available to blind persons through information network for a non-profit purpose in such particular way that it is perceptible to them, and the said work is only accessible over information network; (3) when a State organ fulfills its official duties in accordance with the administrative or judicial procedure; or…."[1129]

No exception is prescribed for the purpose of preserving or stimulating the "transformative" use of works.

Although US and EU copyright legislations do not establish a particular copyright exception for the UCC, it would be necessary for Chinese copyright legislations to introduce a general principle of the exception of the legal protection of the circumvention of technological measures for the purpose of safeguard the creation of UCC similar to the general exceptions in the US and the EU rules.

666. Between the US and the EU rules, the EU rule of the exception would be more suitable for China than the US case by case examinations of the impact of "fair use" on the exception of technological measures. Because the EU principle is clear: "Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation", "Member States should like wise promote the use of voluntary measures to accommodate achieving the objective of such exception or limitation."[1130]

In ongoing third revision of Chinese Copyright Law, it would be beneficial to introduce a general principle of the exception in the legal protection of the circumvention of technological measures to safeguard the creativity of UCC in the exception of technological measure.

[1129] Regulation on the Protection of the Right of Communication through Information Network. Article 12.
[1130] Directive 2001/29/EC, Preamble 49.
Directive 2001/29/EC, Article 6 (4).

§2. User Created Content and future Chinese copyright enforcement on WeChat influenced by Chinese traditions

667. WeChat is the most successful Chinese UCC platform. In regard of the copyright enforcement in China in the digital environment, it is inevitable to discuss how the copyright could be enforced in practice on WeChat. It is one of the most essential problem of copyright enforcement in future China.

Regarding the issue of copyright enforcement on WeChat, the Chinese traditions concerning the intention of creation and the unique way of creation have important impact on how to protect the copyright holders' interests and how to stimulate the creation of UCC. These two problematic would be better to be analyzed together.

Therefore, the questions could be asked: What are the UCC on WeChat? What are the Chinese traditions in regard of copyright? How to protect copyright holders' interests on WeChat? How to stimulate the creativities on WeChat by taking the Chinese traditions into consideration?

It would like to firstly demonstrate User Created Content on WeChat and Chinese traditions regarding the copyright enforcement (I). Secondly, it would like to demonstrate Copyright enforcement practice of User Created Content on WeChat (II).

I. Identification of User Created Content on WeChat and Chinese traditions regarding the copyright enforcement

668. In order to discuss the copyright enforcement practice on WeChat, it would be necessary to firstly demonstrate what is WeChat and the copyright problematics related to UCC. In order to discuss the Chinese traditions related to the copyright problematic of UCC, it would be interesting to examine what is the Chinese traditional intention of creation and what is the Chinese traditional unique way of creation.

It will demonstrate the identification of User Created Content on WeChat regarding Chinese copyright enforcement (A) and the identification of Chinese traditions influencing the copyright enforcement (B).

A. Identification of User Created Content on WeChat regarding Chinese copyright enforcement

669. WeChat is an application developed by Tencent. It was released in January 2011. It enables its users not only to send text and voice messages but also to share text, photos and videos among friends and to the public. In May 2016, WeChat had one billion registered accounts, 864 million active users.[1131] WeChat in fact is the most popular UCC platform in China.

Individual creativity has thrived on WeChat. Individual users generate their own texts, videos and circulate these contents via WeChat by three main ways:

First way is one to one communication. The contents are shared from one user to another user.

Second way is sharing among friends. WeChat provides a service called "Moments." The contents published in "Moments" by a user could be accessed by all his friends.

The third way is sharing to the public. WeChat providers a subscription service. User could create a channel and other users could subscribe the channel to get access to the contents published in this channel.

With the large qualities of materials accessible in digital environment, enormous texts, photos and videos have been created and shared by users. Every individual user could be the author, producer and the publisher of his own work. But the creation of the new works is always based on appreciating, learning and citing the existing works. It would be crucial that on the WeChat, on the one hand, the existing copyrighted contents shall not be prejudiced unreasonably, on the other hand, the creativities of individual users would not be smothered by the copyright holders.[1132]

[1131] Wikipedia, WeChat. Available at https://en.wikipedia.org/wiki/WeChat. "WeChat (Chinese: 微信; pinyin: About this sound Wēixìn; literally: "micro message") is a cross-platform instant messaging service developed by Tencent in China, first released in January 2011. It is one of the largest standalone messaging apps by monthly active users. As of May 2016, WeChat has over a billion created accounts, 700 million active users; with more than 70 million outside of China (as of December 2015). In 2016, WeChat has currently 864 million active users."

[1132] TREPPOZ Édouard, "Klasen : liberté de création en tension" Juris art etc. 2016, n° 39, p, 28. "Ma fille de quatorze ans doit-elle bénéficier de la même liberté que Peter Klasen, artiste reconnu et établi, pour puiser à l'infini sur Internet, source inépuisable de matériaux disponibles, afin de créer ses collages éphémères?" "le contrôle de proportionnalité est une riche idée s'il permet véritablement d'assurer un juste équilibre entre tous les droits en présence."

670. As defined by OECD: "created outside of professional routines and practices"[1133], the creators on WeChat, mostly are not for the purpose of monetary reward or at least not directly. Most of them are "amateur" creators who want to share the "Moments" with other users, although among the "amateurs", there are professional contents producers such as journalists, writers, film producers.

Even the users who establish a channel and make large amount of original contents available to the public are for the purpose of attracting subscribers to promote their products, ideas, values, etc. Rarely, on WeChat, the access to the contents demand subscription fee or pay-per-view which differs from the "professional" platform.

Possibly, the Chinese traditional intention of creation influenced the creators on WeChat. They do not refuse that the contents would be shared to more users and their channel to attract more subscribers so that they could gain more reputation from the contents.

671. On the platform of WeChat, the copyright infringement activities are very different from the BitTorrent and online streaming. It is rare that the movies and other audiovisual works are illegally shared among users, because the video surpassed 20M could not be posted by users.[1134]

Regarding that the contents published on WeChat are often very short. Some users reproduce or retransmit the contents created by others without their authorization or even without indicating the author. Or worse, some create a pirating channel which only copy other popular channel's contents to attract subscribers. It is a typical free riding situation: creators invest their energy, talent, time and money to their works and others could just copy them.

Therefore, the infringements on WeChat which not only do not respect the patrimonial rights but also do not respect the moral rights of authors could demotivate the creativity on WeChat. How to enforce the copyright on WeChat which preserving the creativity could be an inevitable question in the future.

B. Identification of Chinese traditions influencing the copyright enforcement

672. The Chinese traditional intention of creation and the collective way of creation have important impact on how the UCC was created and how the UCC should be protected in practice in China.

[1133] OECD, DSTI/ICCP/IE (2006)7/Final, Working Party on the Information Economy, Participative Web: User Created Content, 12 April 2007.p, 4.

[1134] The policies of WeChat. See, the website of WeChat, https://weixin.qq.com/

It will demonstrate the two kinds of Chinese traditional values respectively: Chinese traditional intention of creation (1) and Chinese collective way of creation (2).

1. Chinese traditional intention of creation

673. The occidental copyright or author's right are based on the premise that the incentive of creation is money. The US economic analysis of copyright suppose that copyright holders are all rational economic men who are consistently and narrowly self-interested agents and usually pursue their subjectively-defined ends optimally. However, in China, the oriental traditional value of creation is different. In Chinese traditional concept, the creation of works is for perpetual reputation rather than for the purpose of pecuniary interests.

The value of creation is always inaugurated by the artists and writers. In China, the Confucius culture which passed down by Chinese artists and writers generation by generation affects the Chinese value of creation and it is very different from the occidental one. Interestingly, the occidental value of author's right which lays the foundation of the Berne Convention is also elaborated by artists and writers in 1878 Paris Congress[1135].

674. In comparison, the occidental value emphasis the protection of works and the remuneration of author's labor invested in works.[1136] While the oriental Confucius culture of creation appreciates the inheritance of ancestors[1137] and notably, Chinese artists and writers despise the monetary gains from their works or at least it is a shame for them to pursue commercial interests manifestly.[1138]

Under such circumstances, in the digital environment, this tradition plays a significant factor because a large proportion of Chinese authors would allow not only the free access to

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[1135] Ricketson, Sam, and Jane C. Ginsburg. International Copyright and Neighbouring Rights (2 Volumes): the Berne Convention and Beyond 2 Volumes. 2 edition. Oxford; New York: Oxford University Press, 2006. p, 47. "The Congress opened on 17 June 1878 under the presidency of no less a figure than Victor Hugo, and further sessions were held over the next 12 days. Apart from Hugo, other distinguished authors, publishers, and prominent public figures from three continents were present, including Turgenev from Russia, Bancroft from the United States, Lowenthal from Germany, and Jerrold from the UK." This Congress proposed "a general Union which would adopt uniform law in relation to artistic property"

[1136] Ibid. p, 47. the important principles discussed in 1878 Congress are "(i) The right of the author in his work constitutes, not a concession by the law, but one of the forms of property which the legislature must protect. (ii) The right of author, his beneficiaries and legal representatives is perpetual."

[1137] Alford, William P. To steal a book is an elegant offense: intellectual property law in Chinese civilization. Stanford, Calif., Etats-Unis d'Amérique: Stanford University Press, 1995. p, 27. "engagement with the past validated the present" "the resource of the past to renew . . . life repeatedly in the recurrent present." p,28. "As Wu Li (1632-1718) put it, 'to paint without taking the Sung and Yuan masters as one's basis is like playing chess on an empty chessboard, without pieces.'." The authentic Chinese expressions are "怀古以述新" "画不以宋元为基，则如弈棋无子，空秤何凭"

[1138] Ibid. "in matters of calligraphy and painting, one is not to discuss price. The gentleman is hard to capture by money."

works but also other kinds of private use regarding that the access by large amount of users could promote the dissemination of works which is beneficial to bring greater fame.

675. Consequently, when their works are used, accessed, copied by users, they generously acknowledge such use of works because it proves the high quality of their works, even allowing the use of works for commercial use would show the author's elegance of "the gentleman would not be capture by money."[1139] Confucius promotes a value of creation which focused on the tradition and education rather than commercial interests. The ultimate goal of creation is for the perpetual reputation among all the ancient Chinese artists and writers.[1140]

While occidental authors regard their works as their property: "to every cow its calf" and "to reap where he sow", the authors should have the right to exploit their works. Meanwhile, oriental authors consider their works as a further interpretation or admiration of ancient works and hope that their works could be passed down to the next generation.[1141]

676. This traditional value affects also the intention of the creation of Chinese modern authors. Although in modern China, most of the professional authors would demand fair remuneration of their works, this ancient value of creation also makes them very generous towards the access of individual users.

Even in the digital environment, a lot of modern Chinese authors would allow the non-commercial reproduction and dissemination of their works on the condition that their moral right should be respected.

677. For example, a great player of the game of Go in China, Chen Zhude[1142], has written a

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[1139] Ibid. "In view of the foregoing, there was what Wen Fong has termed a 'general attitude of tolerance, or indeed receptivity, shown on the part of the great Chinese painters towards the forging of their own works.' Such copying, in effect, bore witness to the quality of the w o r k copied and to its creator's degree of understanding and civility. Thus, Shen Zhou (1427-1509) is reported to have responded to the suggestions that he put a stop to the forging of his work by remarking, in comments that were not considered exceptional, 'if my poems and paintings, which are only small efforts to me, should prove to be of some aid to the forgers, what is there for me to grudge about?' Much the same might be said of literature, where the Confucian disdain for commerce fostered an ideal, even if not always realized in practice, that true scholars wrote for edification and moral renewal rather than profit."
Fong, Wen. The Problem of Forgeries in Chinese Painting. Artibus Asiae, 1962. p, 100.
Shen Zhou was a Chinese painter in the Ming dynasty. See Wikipedia Shen Zhou.
The authentic expression of Shen Zhou is "使吾书画易事，而微助于彼，吾何足靳邪！"

[1140] Lewinski, Silke von. International Copyright Law and Policy. Oxford New York: Oxford University Press, 2008. para, 25.36. "…an idea or concept…may be born out of a specific culture and not easily be transferred to other cultures where different concepts existed from the outset such as Asian cultures, where it was often an honor for a master to be copied rather than a violation of his 'rights'."

[1141] Alford, William P. supra note 1134. p, 29. "as it was expressed so compactly in a famed Chinese aphorism, "Genuine scholars let the later world discover their work rather than promulgate and profit from it themselves."

[1142] The Chinese Go player who has firstly defeated Japanese best Go player by applying the ancient Go theory.

series of books which demonstrate his researches of the ancient Go games. The books were published by CITIC Group[1143] in 2011. In the preface of the books, Chen Zhude expressed his purpose of creation: "After years of playing and studying, I feel it is necessary to edit and publish these great games played hundreds of years ago, they are the heritage of own ancestors. Finally, I made up my mind to take this huge burden, although it will be taken for years. After all, it is my responsibility, it is my destiny." "The game of Go has been passed down for three thousands of years, now it is our responsibility to pass it down to the next generation."[1144]

Although he invested a lot of time and labor into his work, he never particularly expected pecuniary remunerations. From his own wordings, his purpose of writing this series of books is to inherit and interpret the ancient works. If possible, he would not restrict the users individual access to the books or even would not refuse the users to create derivative works on the condition that the moral rights could be respected.

678. There exist a dilemma, if he would like to communicate his book to more audiences, he has to publish his books. In consequence, he would be obliged to give the copyright to the publisher. The modern copyright law gives copyright holders the right to control the works, the one who holds the copyright of his books has the right to maximize his own interests by prohibiting the access of users. In such situation, the work which author created does not serve the original purpose. In other words, the copyright not only does not stimulate the creation, but also prevents the author from achieving his original purpose of creation.

The purpose of Chinese Copyright Law is to stimulate the creation of artistic and scientific works. It is necessary to preserve and promote the author's incentive of creation. However, under modern Chinese Copyright Law, the copyright of works in certain circumstances shall be transmitted from author to copyright holders who would not have the same intention of the author. How to harmonize the modern copyright and Chinese tradition is a hard question.

2. Chinese collective way of creation

679. A collective way of creation is preferred in oriental culture. It plays an important role in oriental culture and it is particularly interesting when the collective creation shifts into the digital environment.

The creation in Chinese traditional culture is in a dynamic, consecutive and collective

[1143] CITIC Group is a state owned company which is the pioneer to modernize People's Republic of China
[1144] Chen Zhude. Chinese Ancient Kifu Explanation Series. First edition . CITIC Publication, 2011. Preface, p,8.

way. The work is constantly developed, recreated among its users. At first, the work is created by one author and later elaborated interpreted by a group of people who share the similar esthetic value.

680. For instance, the greatest Chinese novel "Hong Lou Meng"[1145] or translated as "Dream of the Red Chamber"[1146] does have a author named Cao Xueqing who wrote this novel three hundred years ago. But this novel was later commented, edited, modified and redrafted by other great writers who have owned the copy of this novel. There exist different editions with different commentaries.

Interestingly, these different editions and commentaries now are all valued as high as the original one by artists and writers. This novel is the greatest one not only because of the genius ideas of its original author but also because every user who has later enriched it.

This collective creation is not the same as Traditional Culture Expression, although they are similar in some parts.[1147]

Firstly, the work which was created collectively has an original author. Even the person who later contributed significantly to the work was honored the same as original author in this collective creation process.[1148] In comparison, Traditional Culture Expression never had a real author, it was created by a whole community.

Secondly, Traditional Culture Expression is the symbol of a tribe, it reflect the identity of a social group. The collective creation in Chinese culture do not reflect any identity of any tribe, it is not passed down by certain geographic social group. It reflect the personality and the esthetic preference of its original author and the appreciation and admiration of the later contributors.

681. In this process of dynamic creation in China, the Confucius drafted an tacit agreement

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[1145] "红楼梦", "Dream of Red Chamber", the greatest novel in Chinese history.

[1146] Cao XueQin, and Kathrine de Courtenay. Dream of the Red Chamber. CreateSpace Independent Publishing Platform, 2015.

[1147] WIPO Publication, "Consolidated Analysis of The Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore." available at http://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf. p,26. "In summary, therefore, and looking also at how they are defined in many national and regional laws, it seems that TCEs/expressions of folklore in general (i) are handed down from one generation to another, either orally or by imitation, (ii) reflect a community's cultural and social identity, (iii) consist of characteristic elements of a community's heritage, (iv) are made by 'authors unknown' and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so, (v) and often not made for commercial purposes but as vehicles for religious and cultural expression, and (vi) are constantly evolving, developing and being recreated within the community."

[1148] For instance, two other significant contributors who later preserved, edited the novel "Dream of the Red Chamber" or even most of researchers believe that the two have modified and prolonged the novel, have been honored as quasi authors by the later generations.

between authors, users and contributors: users could freely copy the work and freely create the derivative works on the condition that all the works would also remain free for later users.

Even nowadays, in Japan, this kind of collective creation could also be observed. Manga is one of the symbols of Japanese culture, it has large market in Japan and world wide. A phenomenon called doujinshi exists in the manga market. It allows other creators to take a mainstream comic and develop it with a different story line[1149]. Doujinshi as a collective creation also reflects the conflict between Japanese culture and the modern copyright law. Professor Laurence Lessig commented that "Yet this illegal market exists and indeed flourishes in Japan, and in the view of many, it is precisely because it exists that Japanese manga flourish."[1150]

682. A similar agreement was elaborated in the digital environment in late 1990s by hacker community: Open Source Software. Generally, it is a license that the author makes the source code of the software available for public and allows users to copy, modify, redistribute on the condition that the later version of the software should remain so.[1151] The prestigious Linux operating system is an Open Source Software. The operation system kernel was originally provided under OSS agreement by a computer science student named Linus Torvalds in 1991. Since then, the Linux system is unstoppable. It has been developed by computer geniuses from world wide. Different version of Linux systems which are compatible for different computers, internet servers and smart phones are freely available on internet.

In comparison, the traditional Chinese novel "Dream of the Red Chamber" has been created and developed in the same way. It was its original author Cao Xueqing who provided the very first "kernel" of the novel and then has been enriched and interpreted by great writers from all over the oriental civilization in different era. The novel is like an "Open Source Literature."

683. The Chinese traditional collective way of creation is compatible with the value of

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[1149] Lessig, Lawrence. Free culture: the nature and future of creativity. New York, Etats-Unis d'Amérique: Penguin Books, 2005. p, 26. "These copycat comics are not a tiny part of the manga market. They are huge. More than 33,000 "circles" of creators from across Japan produce these bits of Walt Disney creativity. More than 450,000 Japanese come together twice a year, in the largest public gathering in the country, to exchange and sell them. This market exists in parallel to the mainstream commercial manga market. In some ways, it obviously competes with that market, but there is no sustained effort by those who control the commercial manga market to shut the doujinshi market down. It flourishes, despite the competition and despite the law."

[1150] Lessig, Lawrence. Free culture: the nature and future of creativity. New York, Etats-Unis d'Amérique: Penguin Books, 2005. p,26.

[1151] Vasudeva, Vikrant Narayan. "Open Source Software and Intellectual Property Rights." Wolters Kluwer Law & Business, 2014. p, 65. "GPL has several interpretative ambiguities…segregating it into 'The Initial Developer Grant' and the 'Contributor Grant'…"

creation in the digital environment. The Chinese traditional collective way does not segregate the authors from readers. Readers are free to express their own ideas and enrich the original works. In the digital environment, similarly, it does not have producers and recipients. Everyone is the "user" who is the producer, the publisher and the audience at the same time.

In this regard, the development of technology not only changed how the works are communicated from producers to their audiences. But also changed how the works are produced and recreated. The Chinese collective way of creation could be rejuvenated in the digital environment.

Therefore, regarding that the Chinese traditional intention of creation is main for the reputation and the collective way of creation is preferred by the Chinese creators, the copyright enforcement practices of UCC in China would be focused on how to protect the Chinese traditional intention of creation and how to facilitate and promote the collective way of creation in the digital environment.

II. Copyright enforcement practice of User Created Content on WeChat

684. In order to discuss the copyright enforcement practice of UCC on WeChat, it would take a classic perspective of balancing the interests of copyright holders and users. How the copyright could be protected for the interests of copyright holders on WeChat? Could WeChat adopt a "Creative Commons" license for the purpose of both stimulating the creativity of UCC and respecting copyright?

It would like to firstly demonstrate the copyright enforcement of User Created Content on WeChat inspired by the EU (A). Secondly, it will demonstrate the Creative Commons license for User Created Content on WeChat inspired by Chinese traditional intention of creation and collective way of creation (B).

A. Copyright enforcement of User Created Content on WeChat inspired by the EU

685. In terms of establishing an efficient copyright enforcement system on WeChat, a lot of Chinese scholars have proposed to create a copyright authority to guarantee the remuneration of individual creators or to identify the individual copyright infringing users and help

copyright holders to enforce their rights.[1152]

More concretely, they propose that an authority should be established to enforce copyright on WeChat. WeChat shall require the identities of individual users when register an account or receive certain services. The collected information of identities shall be provided to the copyright authority.

The copyright authority could create a system to register the original works created on WeChat. The work registered in this system would be actively protected by the authority. The infringing materials would be identified and deleted by the authority. The reproduction, retransmission of the registered works would be subjected to authorization fees which would be collected by the authority. The collected remunerations would be distributed among creators by the authority. The authority would have the right to reconcile the disputes among users, right holders and infringers.

686. However, creating an authority to enforce the copyright on WeChat is not a good idea, it would demonstrate the EU's proposal for regulating the "online platforms" to show that their exist alternative way other than creating a copyright authority:

In regard of the problematics provoked by "online platforms", the EU Commission has prepared a communication named the Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe.[1153]

One kind of the online platforms identified by the EU Commission is similar to WeChat in China. It is called "Over-the-top messaging" which provide interactive communication services to its users.[1154] Regarding the rapid development of the new kinds of businesses in the digital environment, the EU Commission has proposed several solutions. Some of these solutions could be the good ideas for Chinese government to regulate the copyright infringements on WeChat and promote the prosperities on WeChat.

687. The EU Commission recognized that it is crucial to "maintain a balanced and predictable liability regime for online platforms for the further development of the digital

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[1152] Wei Chao, Chen Luying, "Reflection about the copyright protection of WeChat and We blog", China Publishing Journal, volume 16, 2015. p, 73.
魏超，陈璐颖，"微博与微信的著作权问题思考"，中国出版，第16期，2015年。p,73.
Yang Suqing, "Discussion of the copyright protection of digital works", China Copyright, 2015. p, 35.
杨淑青，"数字作品的著作权管理探讨"，中国版权，2015. p, 35.
Li Bingxiang, Zhang Xihua, "A Study on Copyright Protection in WeChat Public Platform", Shandong Trade Union's Tribune, volume 22, No.4, 2016. p, 69.
李冰祥，张希华，"微信公众平台中的著作权维权研究"，山东工会论坛，第22卷第4期，2016。p, 69.
[1153] COM(2016) 288 final.
[1154] Ibid. p, 6.

economy and for unlocking investments in platform ecosystems"[1155]. To achieve this goal, 3 specific points mentioned by the EU Commission are particularly interesting for the Chinese future copyright environment on WeChat:

First point: the EU Commission proposed that the value generated by the new forms of online content distribution shall be fairly shared between distributors and right holders. the EU Commission will also aim to "address the issue of fair remuneration of creators in their relations with other parties using their content, including online platforms"[1156]. The Commission will also continue to "engage with platforms in setting up and applying voluntary cooperation mechanisms aimed at depriving those engaging in commercial infringements of intellectual property rights of the revenue streams emanating from their illegal activities, in line with a 'follow the money' approach".[1157]

In a Proposal of Directive made by the EU Commission, it recommended to facilitate the cooperation between "online platform" and copyright holders: "To facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to set up a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body. The body should meet with the parties and help with the negotiations by providing professional and external advice. Against that background, Member States should decide on the conditions of the functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation forum."[1158] In essence, it would like to facilitate the copyright holders to make the contents available in the digital environment and share the value created with the internet service providers.

688. Second point: the EU Commission will encourage online platforms to take voluntary measures to deal with the copyright issues by clarifying the exemptions of secondary liabilities of online platforms. "a number of online platforms in the public consultation raised the concern that the introduction of voluntary measures would mean they would no longer benefit from the exemption from intermediary liability under the e-Commerce Directive. Providing more clarity to online platforms with regard to the exemption from liability for intermediaries under that Directive in light of any such voluntary measures taken by them would, therefore, be important in enabling them to take more effective self-regulatory

[1155] Ibid. p, 8.
[1156] Ibid. p, 8.
[1157] Ibid. p, 8.
[1158] COM(2016)593 final. recital 30,

measures."[1159]

689. Third point is that the EU Commission recognized that "there is a need to monitor existing procedures for notice and action to ensure the coherence and efficiency of the intermediary liability regime." Notice and action is the rule similar to "Notice and Take Down." "action" may mean that "take down" and "stay down" in the context of the communication of the EU Commission.[1160]

690. Although the EU Commission did not only consider the problematics of copyright enforcement on online platform, and the "Over-the-top messaging" providers which are similar to WeChat are only one kind of the online platform, the three pertinent propositions of the EU Commission could provide some ideas for Chinese copyright enforcement on WeChat.

691. Creating a special copyright authority to enforce copyright on WeChat would not be efficient. The technology in the digital environment develops fast, if every time a new way of communication enables its users to share copyrighted contents which causes copyright infringement, an authority should be created to enforce copyright envisaging such new technology. The creation of authority could never keep up the pace of the development of technology. This solution would not be efficient.

Since the incentives of the creators on WeChat are not money, the question would be posed that is it necessary to make huge effort to guarantee the creators' remuneration on WeChat. The ultimate purpose of the Chinese Copyright Law is not guarantee the copyright holders remuneration but to motivate the creation of ingenious works.[1161] Therefore, it is more efficient to examine what motivate the creativity on WeChat and promote this motivation.[1162]

[1159] COM(2016) 288 final. p, 9.

[1160] Online Platforms Public Consultation Synopsis Report. the EU Commission. May, 2016. "Over half of the respondents believe that action taken by hosting service-providers should not remain effective over time i.e. they opposed the "take-down and stay-down" principle; about 40% were in its favour. The majority of intermediaries, over half of the content- providers and a vast majority of individual users opposed the "take-down and stay-down" principle. All notice-providers and a majority of right-holders favoured it." available at https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries

[1161] Chinese Copyright Law Article 1: "This Law is enacted, in accordance with the Constitution, for the purpose of protecting the copyright of authors in their literary, artistic and scientific works and the rights and interests related to copyright, encouraging the creation and dissemination of works conducive to the building of a socialist society that is advanced ethically and materially, and promoting the progress and flourishing of socialist culture and sciences."

[1162] BENABOU Valérie-Laure, "Quelles solutions pour les UGC en France?" Juris art etc. 2015, n°25, p.20 "il est loisible de construire un futur plus équilibré pour les UGC…d'impliquer davantage les plateformes commerciales dans la distribution de la valeur produite…"

692. The side effect of an authority could surpass its benefits. If an authority has the power to collect the real identity of every individual user behind the avatar of WeChat and to investigate and take down the infringing materials. It would be another problematic that how to guarantee that this power would not be abused. The creation of a Chinese authority could turn WeChat into a space where only censored contents could be published.

693. Therefore, instead of creating an authority to enforce the copyright on WeChat, establishing a proportional Notice and Take Down system on WeChat would be more efficient and fundamental.

In terms of the Chinese "Notice and Take Down" rule, the UCC would be vulnerable facing this powerful tool. A counter notification has been prescribed in Article 16 and 17 of Chinese Regulation on the Protection of the Right of Communication through Information Network.[1163] Nevertheless, in practice, the Chinese court in *HanHan case* interpreted the responsibility of "Take Down" in an excessive way which require the internet service provider was required to monitor all the information transferred in its servers.[1164] Consequently, for benefiting the exemption of secondary liability, internet service providers would be very suspicious against the contents uploaded by the users and would not reluctant to delete them even without a notification. It would endanger the UCC which is created by the user/creator's creative effort.

694. When China try to strictly enforce the copyright in the digital environment, it would be important to elaborate more prudent Notice and Take Down rule in order to not sabotage the creativity of the users. Internet service providers would not bear the responsibilities to monitor similar to the EU E-Commerce Directive.

Article 14 and 15 of Regulation on the Protection of the Right of Communication

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[1163] Regulation on the Protection of the Right of Communication through Information Network.
Article 16: "After receiving the notification transferred by the network service provider, if the service object feels the provided work, performance, or audio-visual recording has not infringed on an other's right, he or she can submit a written notification to the network service provider requesting that the deleted work, performance, or audio- visual recording be recovered or reconnected to the discontinued link. The written notification shall include the following contents:
1. The name, contact information and address of the service object;
2. The title and web address of the work, performance, or audio-visual recording to be resumed;
3. Preliminary materials to prove that there has been no infringement. The service object shall be responsible for the authenticity of this written notification."
Article 17: "After receiving written notification from the service object, the network service provider shall immediately resume the deleted work, performance, or audio-visual recording, or reconnect the disconnected link to the work, performance, or audio-visual recording, and transfer the written notification from the service object to the owner. The owner shall not request that the network service provider delete the work, performance, or audio-visual recording, or disconnect the link to the work, performance, or audio-visual recording."
[1164] HanHan v Beijing Baidu Internet Technology Ltd, Beijing Haidian district court, 2012.

through Information Network prescribe the "take down" procedure of internet service provider. Article 16 and 17 prescribe the "counter notification" and the restore of the materials taking down.[1165] If the internet service providers comply with the requirement of "Notice and Take Down", the liability shall be exempted.

Therefore, for the purpose of enforcing copyright on WeChat, the Chinese legislations could require WeChat to construct the system of Notice and Take Down in order to profit the exemption of liability. As the EU Commission stated "Providing more clarity to online platforms with regard to the exemption from liability for intermediaries."[1166]

695. Two key elements of Notice and Take Down are particularly important under Chinese legislations for WeChat to enforce copyright.

Firstly, it is necessary for WeChat to designate a special agency to receive the notifications and counter notifications from the users. The contact information of the agency should be communicated to its users to facilitate the Notice and Take Down Procedure. This requirement is not complied by WeChat. Copyright holders do not have clear way to notice WeChat and take down the infringing contents. Therefore, it is suspicious that WeChat should bear the responsibility of the copyright infringement for the storage services it provided.

Secondly, it is necessary for WeChat to close the account of repeat infringers. This is a requirement prescribed in the Section 512 (i) of US Copyright Law "has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."[1167]

696. This requirement is not expressly prescribed in Chinese copyright legislations. But WeChat shall adopt a policy to terminate the account of repeat infringers. As explained by the US Congress: "there are different degrees of on-line copyright infringement, from the inadvertent and noncommercial, to the willful and commercial. In addition, the Committee

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[1165] Regulation on the Protection of the Right of Communication through Information Network. Article 14. 15. 16. 17.

[1166] COM(2016) 288 final. p, 8.

[1167] the US Copyright Law Section 512 (i) "Conditions for Eligibility.—

(1) Accommodation of technology. — The limitations on liability established by this section shall apply to a service provider only if the service provider —

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

does not intend this provision to undermine the principles of new subsection (l) or the knowledge standard of new sub-section (c) by suggesting that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing. However, those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access."[1168] To close the account of repeat infringers is important for the copyright enforcement on WeChat.

697. Regarding the copyright infringements on WeChat also vary largely, Notice and Take Down exempts WeChat from actively investigating possible infringements, monitoring the contents on its platform and making the judgment of whether the contents are copyright infringing, WeChat only need to terminate the accounts which flagrantly and repeatedly infringe copyright. The users would know that the copyright infringing activity would make them lose their access to WeChat.

B. Creative Commons license for User Created Content on WeChat inspired by Chinese traditional intention of creation and collective way of creation

698. Furthermore, WeChat could facilitate the copyright licensing among the users to promote the legal sharing and transmission of copyrighted contents. As the EU Commission recommended: "the value generated by the new forms of online content distribution shall be fairly shared between distributors and right holders", "encourage online platforms to take voluntary measures to deal with the copyright issues by clarifying the exemptions of secondary liabilities of online platforms", "To facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to set up a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body."[1169]

Indeed, it would be a great idea to encourage the WeChat to take voluntary measures and to cooperate with the creators, copyright holders. But regarding that the intention of creation on WeChat is influenced by the Chinese traditional intention of creation, most of the creators do not pursue the monetary interests on WeChat, it may be possible that the WeChat could adopt the voluntary measures which are more adapted to Chinese traditions.

699. Regarding that most of the creators are "amateurs" who are not pursuing monetary

[1168] H.R. REP. No. 105-551, (1998), p, 61.
[1169] SWD(2016) 172 final. p, 8.

interests, a kind of copyright licensing called "Creative Commons" could provide several possibilities for the creators on WeChat. Creative Commons provide 6 kinds of licenses[1170] under which the creators could choose whether the derivative works, commercial users are allowed. As declared on the website of Creative Commons: "The combination of our tools and our users is a vast and growing digital commons, a pool of content that can be copied, distributed, edited, remixed, and built upon, all within the boundaries of copyright law."[1171] This idea is particularly fit for the Chinese traditional intention of creation and the creativities on WeChat, because they both prefer that the contents could be shared among more audiences on the condition that the moral rights could be respected. The licenses of Creative Commons provide the Chinese creators on WeChat a simple solution.

The Creative Commons copyright license system is adapted to the UCC's character of "amateur" creation. Because before the era of the digital environment, the copyright license for creating derivative works is supposed for the "professionals." "For approximately 290 of its nearly 300-year history, the "copyright" was thus traded by way of licenses or assignments among professionals, including authors, publishers, producers, and broadcasters."[1172] Now, UCC needs an efficient license system to support its creativities in the digital environment based on using existing works[1173].

The Creative Commons would be a good choice for both reasons of the characteristics of UCC and the Chinese traditions concerning copyright.

700. The Creative Commons license is suitable for the needs of UCC because it has taken the characteristics of UCC into consideration. UCC's principle intention is not for the commercial interests.[1174] The Creative Commons license provide UCC a more flexible way to respect copyright in the digital environment.

Precisely, according to the 6 licenses of Creative Commons, the licensed works are automatically authorized to be copied or distributed according to the copyright holders' willingness to reserve or waive certain aspect of rights. For instance, the non-commercial

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[1170] There are six kinds of licenses to choose whit different limitations. 1. Attribution. 2 Attribution- shareAlike. 3 Attribution-Noderivs. 4. Attribution-NonCommercial. 5.Attribution-NonCommercial-ShareAlike. 6. Attribution-NonCommercial-NoDerivs.

[1171] See, http://creativecommons.org/licenses/?lang=en.

[1172] D. Gervais, « The Tangled Web of UGC : Making Copyright Sense of User-Generated Content », Vanderbilt Journal of Entertainment and Technology Law, 2009, p.842.

[1173] Edward Lee, "Warming Up to User-Generated Content", 2008 U. Ill. L. Rev. 1459 2008. p, 1485.

[1174] OECD, DSTI/ICCP/IE (2006)7/Final, Working Party on the Information Economy, Participative Web: User Created Content, 12 April 2007.p, 4.

"iii) which is created outside of professional routines and practices"

requirement or non-derivative works requirement.[1175]

701. Moreover, the Creative Commons would be suitable for the Chinese individual creators because it fits for the Chinese traditional intention of creation and the Chinese collective way of creation.

Precisely, In regard of the Chinese traditional intention of creation, the Creative Commons provide the users a possibility to get access to the works while provide the creators a possibility to protect their right of authorship. It is particularly motivating for Chinese creators because as demonstrated before, their principle intention of creation is the reputation.

In regard of the Chinese collective way of creation, the Creative Commons in practice provides a license system of collective creation. It facilitates the creators to authorize the creation of the derivative works on the condition that "If you remix, transform, or build upon the material, you must distribute your contributions under the same license as the original."[1176] This arrangement would be extremely interesting for the Chinese creators of UCC because influenced by the Confucius culture, as demonstrated before, the Chinese creators considers their works as a further interpretation or admiration of ancient works and hope that their works could be passed down to the next generation.[1177] Therefore, they would embrace the license proposed by Creative Commons.

Therefore, maybe regarding the Chinese traditions and the inspiration of the EU reformation, WeChat could facilitate the licenses of Creative Commons on its platform and protect the moral rights of individual creators by implementing an efficient "Notice and Take Down" system. It could be a more efficient way than creating a special authority.

[1175] See Creative Commons License, Available at https://creativecommons.org/licenses/

[1176] Share Alike License of Creative Commons. Available at https://creativecommons.org/licenses/by-sa/4.0/

[1177] Alford, William P. To steal a book is an elegant offense: intellectual property law in Chinese civilization. Stanford, Calif., Etats-Unis d'Amérique: Stanford University Press, 1995. p, 29. "as it was expressed so compactly in a famed Chinese aphorism, "Genuine scholars let the later world discover their work rather than promulgate and profit from it themselves."

Section II. Copyright protection of Artificial Intelligence created Go game record

702. The creator of a work has been presumed as a human being in Chinese Copyright Law. As the development of technology, enabled by the immense network, an artificial intelligence created by Google DeepMind called AlphaGo has defeated top level human player by "learning" the games played by top level human players.

In Chinese tradition, the game of Go is enshrined as a artistic work which represents the philosophy of the whole universe. The value of the record of the game of Go has been appreciated similar to Chinese painting and Chinese calligraphy.

Regarding the fact that AlphaGo is capable of replacing human author to create the records of the game of Go, it provokes some problematics to Chinese Copyright Law.

First of all, the basic question would be that although the game of Go is traditionally regarded as an art, according to the modernly established Chinese Copyright Law, could it be protected as "work"?

Secondly, it would like ask some obscure questions concerning the AlphaGo both in theory and in practice: who is the author of AlphaGo created records? who shall own the copyright under Chinese Copyright Law? how to protected the copyright of existing works in regard of AlphaGo's learning process?

Therefore, it would like to demonstrate the copyright protection of the game of Go under Chinese Copyright Law (§1) and the copyright protection of AlphaGo created records (§2).

§1. Copyright protection of the game of Go under Chinese Copyright Law

703. The game of Go is a traditional form of artistic activity undertaken in China for thousands of years. In the digital environment, as the creativities of individual users have been boosted, and the development of Chinese copyright legislation and enforcement, this

traditional game of Go has the possibility to be protected under Chinese Copyright Law. The copyright protection would motivate the creation of more records of game of Go and stimulate the progress of the techniques of the game of Go according to the logic of copyright law.

Therefore, it would like to examine whether the game of Go could fulfill the criteria of work and be protected under Chinese Copyright Law.

Firstly, it is necessary to introduce the game of Go and its interests at stake (I). Secondly, it will examine the possibility copyright protection of the record of the game of Go as work under Chinese Copyright Law (II).

I. Introduction of the game of Go and its interests at stake

704. In Chinese practice, the record of the game of Go is not protected as copyrighted works. However, traditionally, it is created by its author and appreciated by its audiences as an artistic work. Could the game of Go enjoy the copyright protection?

Firstly, it will introduce the game of Go (A). Secondly, it will demonstrate the interests to protect the game of Go under copyright (B).

A. Introduction of the game of Go

705. The game of Go is called 棋 "Qi" in Chinese. It is the oldest board game which was invented 2500 years ago in ancient China. The game of Go has been played continuously throughout the consecutive civilization of China thanks to its simple rule and its infinite variations.

706. From a personal point of view, the game of Go has only one essential rule: The liberty. Two players take turns to place black and white stones on the intersections of the Go board. The open intersections connected to the stones placed on the board are the liberties of these stones. The stones need the liberties to live on the board otherwise they will be captured from the board. At the end of the game, who has more living stones living on the Go board

wins the game.[1178]

707. Despite the simple rule, the variation on the Go board is infinite. Calculated by the mathematicians, the possibilities of this game is $2.08168199382\times10^{170}$ which is more than the total number of atoms in the visible universe[1179]. Basically, for a player of Go, the board is a immense universe.

708. Probably for the reason of infinite choices on the Go board, officially, there exist no universal rule of the game of Go. Because despite its simple essential rule, when two very strong players confront with each other, some very special situations would be created[1180]. In these situations, every country has its own rule to decide the result of the game.

It will briefly introduce the french rule of the game of Go. According to Fédération Française de Go: the game of Go is played by two. the one who play black stones shall play first move and the other play the white stones. During the game, the players place one stone of their color on the intersections on a Go board or pass. There also exist Japanese rule, Korean rule, Chinese rule, America rule etc. Generally, there rules are similar. But in the special situations, the tiny differences existed in different rules could change the result of the game.

709. The game of Go in Asian culture is a piece of art. For instance, According to Wu Qing Yuan (Go Seigen) the greatest Go player in the 20th century[1181], his dream is to play a flawless match and it could be passed down generation by generation.[1182]

The game of Go has been regarded as “the parole with the hand” in China. It means that the Go board is an universe in which the players could express their ideas and experience all kinds of emotions with the moves they played.

710. It is the same reason that in Japan, it existed a famous expression that “the Go is life” which means that playing a match of Go is similar to have passed a whole life during which the player could have a lot of accomplishments and regrets and could experience happiness, depress, fear, anger, etc.

[1178] This rule is extracted by author. There exist other ways to interpret this rule. But they are more complicate and confusing. In essence, the different way of interpretations leads to the same result. See Wikipedia Go (game), https://en.wikipedia.org/wiki/Go_(game)
There are also other artificial rules to avoid the draw game and several different ways to count the result. But the core rule is the rule of “liberty.”

[1179] Wikipedia, Go and mathematics https://en.wikipedia.org/wiki/Go_and_mathematics

[1180] The rule of Ko, Seki, “长生劫” (no translation in english), etc.

[1181] See, wikipedia, Go Seigen, https://en.wikipedia.org/wiki/Go_Seigen

[1182] 吴清源, 中的精神. 中信出版集团. 2016.
Wu QingYuan, Spirit of Zhong. Zhong Xin Press. 2016.

Therefore, the high level matches of the game of Go have been often recorded. The players of the game of Go could appreciate the beauty of the record of the game of Go.

711. Regarding the fact that the game of Go serves the same purpose as an artistic work in China, could it be protected by copyright law in order to promote the creation and protect the author's interests?

Here we would like to discuss whether the record of the game of Go. It is the most possible aspect of the game of Go which could be protected under Chinese Copyright Law. The record of the game of Go is a record of the sequences of the black and white stones placed by two Go players. The sequences is marked with numbers. The record of the game of Go could be on paper or in digital format.[1183]

The record of the game of Go would be a very different "work" for the reason that its creation shall include two kinds of contributors.

First kind of contributors is the players of the game of Go. They are the authors of the game of Go. They play their ingenious moves to try to win the game. Their moves are recorded distributed so that they could be appreciated by other Go players. It is the players who have done the creative works in the record of the game of Go.

Second kind of contributors is the one who record the game. The players of the game of Go could not record their own game during playing. Therefore, nearly every record of the game of Go is made by someone else. The recorders' level of the game of Go shall be almost as strong as the players in order to note precisely how the sequences of the black and white stones are placed. Nowadays this work could be replaced by the digital devices which could videotaping the whole match. But this new technology has been applied to some very important tournaments because one match normally lasts 1 whole day, some last 3 days.

Therefore, the recorders also plays an important factor in terms of the creation of the game of Go.

From the facts demonstrated above, it could be observed that the record of the game of Go may have the possibility to be defined as works under Chinese Copyright Law, although some specialties of the record of the game of Go exist.

[1183] In the record of the game of Go, the sequences of the black and white stones would be demonstrated concretely by the examples available on the "Revue Français de Go." Available at http://rfg.jeudego.org/
The record of the game of Go played between team France and team Tchèque in the tournament Pandanet is available at http://rfg.jeudego.org/item/309-ronde-7-du-pandanet-france-3-1-republique-tcheque

B. Interests to protect the game of Go under copyright

712. The game of Go has been considered as one of the four arts together with 琴 "Qin" (a stringed instrument), 书 "Shu" (Chinese calligraphy) and 画 "Hua" (Chinese painting). The four arts were the four main academic and artistic accomplishments required of the aristocratic ancient Chinese scholar gentleman caste[1184]. Interestingly, the composition of the music of "Qin", the Chinese calligraphy and Chinese painting are all protected as copyrighted works not only under Chinese Copyright Law but also international copyright conventions. Only the records of the game of Go are not expressly protected under Chinese copyright legislations and are also not protected in practices. Should Chinese Copyright Law protect the record the game of Go as a work?

713. Interestingly, there exists a very famous anecdote that in 1739 Qing dynasty, a rich business man purchased the "copyright" of the records of the game of Go. The man called Zhang Yong Nian. He sponsored two strongest players at that time to play 10 matches with each other. The records of the games were exclusively owned by him. He regarded the records as treasures and prohibited any public access to the records. After he died, the 10 matches were published by his heirs and have been inherited, commented by China, Korea and Japan to nowadays.[1185]

714. Actually, this kind of sponsorship of the game of Go still exists. For example, the Samsung Cup of the game of Go.[1186] It has been sponsored by Samsung Fire & Marine Insurance company since 1996. The sponsor has recorded the games played in the Samsung Cup and transmitted them to the public exclusively. However, in China, the meaning of "exclusively" is relative. Because once the records are available in the digital environment, they are no longer controllable. The sponsor has only the time advantage.

Therefore, in China, regardless that the important value of the record of the game of Go has been recognized, the record itself is not protected by Chinese Copyright Law in practice.

715. Moreover, the game of Go is a collective creation: it is always played by two parties: black stone and white stone. The top level games which have significant commercial value

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[1184] Wikipedia, Four Arts https://en.wikipedia.org/wiki/Four_arts

[1185] "当湖十局"
"Dang Lake 10 Games"
See wikipedia, https://zh.wikipedia.org/wiki/当湖十局

[1186] Samsung Fire Cup. See wikipedia, https://en.wikipedia.org/wiki/Samsung_Fire_Cup

shall be explained by other professional players other wise the public could not understand the game. Therefore, one match of the game of Go has necessarily two players and several commentators. Interestingly, every professional player would have different interpretations regarding the same move, because the understandings and interpretations are based on the personal characters and knowledges of the player.

This collective creation is also not regulated by the Chinese Copyright Law. It is not clear that whether the commentators shall demand the authorization of players, how to protect the commentaries as derivative works, etc.

716. Interestingly, Japan has protected the record of the game of Go in practice, but the Japanese law and precise rules of copyright protection remain obscure. However, the Japanese protection of the record of the game of Go would offer some references for China.

According to Nihon Ki-in (Japanese Go Federation)[1187], the game of Go played and recorded is protected under Japanese Copyright Law. The author and the copyright owners of the game of Go is both sides of the players. As for the sponsors of the tournament of the game of Go, they sign the contract individually with the Go players or collectively with Nihon Ki-in to determine the specific terms. Generally, the sponsors would have the right to exclusively transmit the game to their audiences via traditional or online media and have the right to comment the game simultaneously. But The players have reserved the right to comment their own games after the game and make derivative works.[1188]

However, the specific questions about the copyright protection of the game of Go remains unclear: How the record of game of Go is protected as copyrighted work under Japanese copyright legislations? How exactly the collective management of the game of Go works under the Japanese copyright legislations? does the digital environment change the authorization system of the game of Go in Japan. It is necessary to launch a new research concerning Japanese copyright legislations and copyright protection of the game of Go.

In regard of this thesis, we could ask a basic question: could the record of the game of Go be protected as work under Chinese Copyright Law?

[1187] See, official website of Nihon Ki-in. https://www.nihonkiin.or.jp/english/

[1188] Response of the officers of Nihon Ki-in, Email address: overseasdept@nihonkiin.or.jp

II. Possibility copyright protection of the record of the game of Go as work under Chinese Copyright Law

717. For the purpose of enjoying the copyright protection under the Chinese Copyright Law, the record of the game of Go shall fulfill with the criteria of work. In this regard, the most important one is the criterion of originality. The others are less important but also obligatory.

It will demonstrate the record of the game of Go examined by the criterion of "Originality"under Chinese copyright legislations(A). Secondly, it will demonstrate the record of the game of Go examined by the criteria of "scope" "expression" and "fixation" under Chinese copyright legislations (B).

A. Record of the game of Go examined by the criterion of "Originality" under Chinese copyright legislations

718. The most import criterion is the criterion of "originality", according to the interpretations provided by Commission of Legislative Affaires of People's Congress which revised and enacted the Chinese Copyright Law.[1189]

According to the interpretation of Commission of Legislative Affaires of People's Congress, it expressly pointed out: "the work under the meaning of Chinese Copyright Law shall be created by author himself rather than copied from other's works."[1190] However, "the originality under copyright law is different from the novelty under pattern law."

Briefly, the Chinese People's Congress clarifies that the criteria of "originality" of work requires that the work shall not be the mere copy of existing work while it does not require that the work shall be the unique, revolutionary.

719. The interpretation of Chinese People's Congress possibly is influenced by the Berne Convention. In the Guide to the Berne Convention made by WIPO, more specific interpretation and concrete examples are provided. It says that "The Convention uses the expression 'original works' later in this sense and to distinguish from those copied (Article

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[1189] Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001. Article 2.

[1190] Ibid. Article 2.

Chinese text as "即著作权法所称的作品必须是自己创作的，而不是从别人的作品中抄袭来的" "著作权法的独创性必须有别于专利法的新颖性"

2(3)). But originality must never become confused with novelty."[1191] That is to say, the "original" works are the opposite of the copied works. Then, it offers two concrete examples: "two artists, placing their easels on the same spot and each making a picture of the same landscape, each separately creates a work; the second painting is not novel, because the same subject has already been dealt with by the first painter, but it is original because it reflects the personality of its maker. Equally, two craftsmen carving the figure of an elephant in wood each creates an original work even though the two elephants are indistinguishable and there is no question of novelty. Of course the question of originality, when prescribed, is a matter for the courts."

Therefore, according to the interpretation of both Chinese People's Congress and WIPO, the bar of the "originality" criterion is a relatively low. Any work which is created by the author's own intellectual efforts would comply with the "originality" criterion.

720. In terms of the record of the game of Go, it is created by the conflict of both players' intellectual forth. The most important factor is that because of the immense choices existing on the board of the game of Go[1192], it does not exist two identical records among all the game of Go which have ever been played in the history of humanity. Moreover, it is also impossible for the players to imitate the successful moves of the other players, because every individual game of Go is unique, every situation on the board is different.

Therefore, the record of the game of Go played by two players is the individual thinking of the both players. It could comply with the criteria of "originality."

B. Record of the game of Go examined by the criteria of "scope" "expression" and "fixation" under Chinese copyright legislations

721. According to the interpretation of Chinese People's Congress, the criterion "scope" means that the work must be created "within the scope of literary, artistic and scientific fields."[1193]

Article 3 of Chinese Copyright Law listed non-exhaustively 8 kinds of literary, artistic and scientific works: written works; oral works; musical works; works of the fine arts and

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[1191] World Intellectual Property Organization. Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). Geneva: World Intellectual Property Organization, 1978. p, 17, para 2.8

[1192] Wikipedia, Go and mathematics https://en.wikipedia.org/wiki/Go_and_mathematics

[1193] Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001. Article 2.
Chinese text as "必须属于文学、艺术和科学范围的创作"

architecture; photographic works; cinematographic works; graphic works; computer software.[1194]

722. The record of the game of Go is difficult to tell which category of work it belongs to. It is not necessary to examine the definition and the scope of each kinds of works for the purpose of finding a category which the record of the game of Go could be included, because the protected works under the Berne Convention is interpreted widely and the Article 3 clause 9 of Chinese Copyright Law extend the protected works to "other works as provided for in laws and administrative regulations."[1195]

Therefore, it would be enough for Chinese Copyright Law if the record of the game of Go could be protected under the Berne Convention. We could examine the Berne Convention and its interpretations to demonstrate the possibility to be qualified as work for the record of the game of Go.

723. Article 2 of the Berne Convention prescribes that "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as…" Then, it makes a list of works "books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico- musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science." Article 2 of the Berne Convention is similar to Article 3 of the Berne Convention, there also could not found one category of work which could perfectly include the record of the game of Go.

724. However, according to the interpretation of WIPO, the Guid to the Berne Convention explains that : "Although paragraph (1) of Article 2 refers to literary and artistic works, it must not be taken to intend a division into two mutually exclusive categories." "But the wording of the Convention is intended to cover them all. The expression 'literary and artistic works' must be taken as including all works capable of being protected. In order to illustrate this, paragraph (1) of Article 2 gives an enumeration of the works. The use of the words 'such as' shows that the list is purely one of examples and not limitative: it is a matter of providing

[1194] Chinese Copyright Law 2010 text. Article 3.
[1195] Chinese Copyright Law 2010 text. Article 3. Clause 9.

a number of guides for the national law makers; in fact all the main categories of works are set out." Briefly, it interprets that the list of Article 2 the Berne Convention is not limitative, exhaustive, and the expression of "literary and artistic works" must be taken as including all works capable of being protected.

725. Is the record of the game of Go capable of being protected? The answer would be positive. Because of three reasons based on the logic of copyright law: First reason is that there exist a copyright protection practice of the record of the game of Go in Japan. Second reason is that it is a fact that there are many sponsors who would like to finance the Go matches in which the high level players could create the records of the game Go in high quality. The introduction of the copyright protection would motivate the sponsors and the players to create more "works." Third reason is that in the digital environment, the records of the game of Go have been distributed in digital format. Without a copyright protection, the enormous free riding in the digital environment will discourage the players to play the games, the sponsors to finance the games and to make the records available in the digital environment. Therefore, the record of the game of Go is capable of being protected and there exists a real need.

726. The last two criteria "expression" and "fixation" in Chinese Copyright Law are least important in regard of the record of the game of Go. The interpretation of the criteria of "expression" and "fixation" by the Legal Department of People's Congress is a confirmation of the WCT and the Berne Convention.[1196]

They could also be found in the WCT and the Berne Convention. Article 2 of the WCT prescribes that "Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

Article 2 of the Berne Convention prescribes that "It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."

The record of the game of Go is an expression made by the players not just an idea and it is fixed in paper or in digital form. It could be concluded that the two criteria of "expression" and "fixation" are fulfilled.

From the demonstration above, it would be possible to conclude that the record of the

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[1196] Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001. Article 2.

game of Go could comply with the four criteria of work implied under Article 3 of Chinese Copyright Law: the expression, the fixation, the originality, the scope of work.

§2. Copyright protection of AlphaGo created records

727. AlphaGo is a computer program or an artificial intelligence developed by Google DeepMind. It has defeated the best human player by "learning" the human players' records and "created" new valuable records.

This new process of creation perturbs the Chinese Copyright Law. what is the definition of "author" "creativity"? How to protect the record of the game of Go created by human players and AlphaGo?

It will demonstrate firstly what is AlphaGo in the perspective of Chinese Copyright Law (I). Secondly, it will demonstrate two problems provoked by AlphaGo which needs further researches (II).

I. Records created by AlphaGo under Chinese Copyright Law

728. Copyright law is always influenced by the development of technology. Similar to precedent inventions of technology, the AlphaGo will also similarly shape the rules of copyright law.

As a proposition of further research, it will demonstrate the facts of the AlphaGo associated with copyright (A) and the problematic of authorship provoked by AlphaGo under Chinese Copyright Law (B).

A. Introduction of AlphaGo

729. As long as the development of technology, the problematic of the game of Go in regard of copyright becomes increasingly interesting. A computer program called AlphaGo has been developed by Google DeepMind.

AlphaGo's algorithm uses a Monte Carlo tree search to find its moves based on

knowledge previously "learned" by machine learning, specifically by an artificial neural network (a deep learning method) by extensive training, both from human and computer play.[1197] Briefly, in terms of copyright, AlphaGo needs to "learn" existing record of the game of Go played by professional players to become stronger.

730. In March 2016, AlphaGo played 5 matches of the game of Go with Lee Seedole. The matches are organized and sponsored by Google. Lee Seedol is one of the strangest player, 18 time world champion holder. This 5 games attracted significant attention because it was the first time that artificial intelligence was strong enough to play an equal game with top human players.

The five games was simultaneous transmitted on Youtube and commentated in english by Michael Redmond an American professional player. In China, they were transmitted by all the Chinese major online media: LeTV, Tencent Video, Sina Video and commentated by Chinese top level Go players. Since the copyright of the game of Go is not clear, non of them has required the authorization of DeepMind team or Lee Seedol.

After AlphaGo defeated Lee Sedol 4:1, 8 volumes of books were published on the DeepMind website.[1198] The books were written by Chinese-born French professional Go player Fan Hui analyzing the data of AlphaGo. Two Chinese world champions: Gu Li and Zhou Ruiyang provided expert advices. 5 of them are the commentaries of the games with Lee Sedol. 3 of them are the commentaries of the games played by AlphaGo itself. The interesting fact is that the qualities of the 3 games played by AlphaGo is very high. All the professional Go players spend large part of their time to analyze these three games.

731. The question could be asked: how the record of the game of Go should be protected regarding the AI creation? We could feel that the fundamental concept of the copyright have been perturbed.

Firstly, the copyright law always presumes that the creator, the author would be a human being. Now, AlphaGo could make a good choice out of $2.08168199382\times10^{170}$ possibilities on the board of the game of Go. How faraway that it or he could write a literary and artistic book? Therefore, the primary question would be who owns the record of the game of Go played by AlphaGo, who is the author?

Secondly, is AlphaGo itself a work protected under Chinese Copyright Law as a computer program? If AlphaGo itself is a work under the meaning of copyright law, since

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[1197] See, AlphaGo, wikipedia, https://en.wikipedia.org/wiki/AlphaGo.

[1198] See, https://deepmind.com/research/alphago/

AlphaGo's development and its function depend on the existing record of the game of Go played by top level players, under Article 10 Clause 5 of Chinese Copyright Law right of reproduction[1199], Clause 14 right of adaptation[1200] or under the Berne Convention Article 9 right of reproduction[1201] and Article 12 right of adaptation, arrangement and other alteration[1202], on the condition that the record of the game of Go could be protected as a copyrighted work, Alpha Go may have to ask the authorization of the copyright holders of the existing record of the game of Go played by top level players.

732. Moreover, If AlphaGo is a work under copyright law, the use of existing record of the game of Go played by top level players to create a work which could then created infinite records of the game of Go which have the same quality as the records played by top level players is probably contrary to the "Three Step Test" "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author"[1203].

However, it would be unreasonable for AlphaGo to demand individually the authorization of every record it has "learned." How to balance this immense creativity of AlphaGo based on the exiting records of the game of Go?

B. Authorship of the records created by AlphaGo under Chinese Copyright Law

733. Under Chinese Copyright Law, the record of the game of Go has the possibility to be protected as work, the authors would be the two players who "create" the game. As a matter of fact, AlphaGo has defeated the top level human players.

AlphaGo asks the fundamental questions to copyright law: who is the author?

734. Article 11 of Chinese Copyright Law prescribes that: "Except where otherwise provided for in this Law, the copyright in a work shall belong to its author. The author of a

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[1199] Chinese Copyright Law 2010 text. Article 12 Clause 5 "the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work, or by other means;"

[1200] Chinese Copyright Law 2010 text. Article 12 Clause 14 "the right of adaptation, that is, the right to change a work into a new one with originality."

[1201] the Berne Convention Article 9. (1) "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."

[1202] the Berne Convention, Article 12. "Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works."

[1203] the Berne Convention Article 9. (2) "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. "

work is the citizen(sic, official translation) who creates the work. Where a work is created under the auspices and according to the intention of a legal entity or other organization, which bears responsibility for the work, the said legal entity or organization shall be deemed to be the author of the work. The citizen, legal entity or other organization whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work."[1204]

It is clear that the author shall only be a human under Chinese Copyright Law. The legal entity or organization is "deemed" as author in the case of "work for hire." But the real author still is "the citizen who creates the work."

The interpretations of Chinese Copyright Law provided by Chinese People's Congress states that "the citizens become author by investing their creative labor to create a work", "regarding that the work is the result of creative behavior and only natural person has the intelligence and the capacity of thinking, only natural person could be an author."[1205]

735. It is universal that the author of a work could only be human. the Berne Convention wisely does not expressly defined the term of author. But in Article 7 (1) of the Berne Convention, it prescribes that "The term of protection granted by this Convention shall be the life of the author and fifty years after his death." the Berne Convention also presumes that the author is mortal, is a human being. "The need for authors to be "human" is a longstanding assumption in national copyright laws, particularly given that the vast majority of countries today now adhere to the Berne Convention for the Protection of Literary and Artistic Works."[1206]

Therefore, in a word, according to Chinese Copyright Law, AlphaGo could not be the author of the game it played. It is not quite problematic in regard of the copyright protection of this valuable work. Because Lee Seedol, its opponent could be the author. Or the developer of AlphaGo could be "deemed" as the author. In terms of who owns the copyright of the games played by AlphaGo, it will be demonstrated later.

736. However, the logic in the interpretation provided by Chinese People's Congress could

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[1204] Chinese Copyright Law 2010 text. Article 11, Chinese text as "著作权属于作者，本法另有规定的除外。创作作品的公民是作者。 由法人或者其他组织主持，代表法人或者其他组织意志创作，并由法人或者其他组织承担责任的作品，法人或者其他组织视为作者。" Official translation.

[1205] Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001. Article 11.
Chinese text as "公民能够运用自己的智慧通过创造性的劳动创作作品而成为作者"，"作品既然是一种智力创作行为，而只有自然人才具备智慧和思维能力，所以只有自然人才能从事创作。"

[1206] Sam Ricketson, "The Need for Human Authorship" European Intellectual Property Review. 2012. p,1

be perturbing to the Chinese Copyright Law. It presumes that the creative efforts could only be made by natural person. This presumption could lead to the further question that since the AlphaGo is not a natural person, it could not make creative efforts, could the record of the game of Go played by AlphaGo be protected as work by Chinese Copyright Law?

It is ironic that the AlphaGo is presumed by Chinese Copyright Law as incapable of making creative efforts while AlphaGo has used some moves which seems irrational to professional players to defeat Lee Seedol. Moreover, the records of the games played by AlphaGo and Lee Seedol have significant commercial value regarding the fact that they have revolutionized how human players' understanding of the game of Go.[1207]

Therefore, the future Chinese Copyright Law may have the interests to clarify that the work created by artificial intelligence could be protected by Chinese Copyright Law on the condition that the criteria of work in the interpretations of Chinese Copyright Law made by Chinese People's Congress could be fulfilled.[1208]

737. The Australian Copyright Law Review Committee (the CLRC) examined issues of computer "If the materials produced with the assistance of a computer program amount to an original form of expression of an idea, and that expression comes within one of the recognized categories of works protected under the Copyright Act 1968 (the Act) the materials should also be protected as such, protection being granted regardless of how much easier the author's task is may have been made by the use of the computer program."[1209]

Following the logic CLRC, in essence, it acknowledges that the works which could fulfill the criteria of work under copyright law are originated from the creative efforts of the human being.[1210]

Indeed, the reason why AlphaGo could defeat Lee Seedol is because of the creative efforts of DeepMind team. Any artificial intelligence is "artificial." It is alway the fruit of the intelligence of human being.

However, the problematics of AlphaGo in terms of Chinese Copyright Law remain: Who should be the copyright holders of the records created by AlphaGo? should it belong to

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[1207] See, commentaries and records of AlphaGo. Available at https://deepmind.com/research/alphago/

[1208] Interpretation of Copyright Law Of People's Republic of China. Edited by Standing Committee of People's Congress, Commission of Legislative Affaires, 2001. Article 2.

[1209] Copyright Law Review Committee, Computer Software Protection (Canberra: Office of Legal Information and Publishing, Attorney-General's Department, 1995), Ch.13. Referred to in Telstra Corp Ltd v Phone Directories Co (2011) 90 I.P.R. 1.

[1210] Paul Lambert. "Computer-generted works and copyright: selfies, traps, robots, AI and machine learning." European Intellectual Property Review. 2017. p, 7.

DeepMind and Lee Seedol?

II. Future practical questions of the copyright protection of AlphaGo created records

738. Regarding the facts and the rules in Chinese Copyright Law demonstrated, two questions in regard of the future copyright protection of the record of the game of Go envisaging the artificial intelligence could be asked:

Who is the copyright holder of the AlphaGo created records (A)? Is the AlphaGo "learning" of existing records an copyright infringement under Chinese Copyright Law (B)?

A. Copyright holder of AlphaGo created records

739. From the demonstration before, according to Chinese Copyright Law and its interpretation made by Chinese People's Congress, the record of the game of Go played by AlphaGo has the possibility to be protected as work; the AlphaGo could not be the author, but the record of the game of Go played by AlphaGo could be also protected as work because the creative efforts could be recognize as coming from the developer of AlphaGo.

It seems that the DeepMind as the developer of AlphaGo could be the copyright holder of the games played by AlphaGo.

740. As commented by Sam Ricketson: "the CLRC recognised that the difficulty arising with works generated solely or almost solely by computer processes would be that of identifying who was the human author of the resultant expression."[1211]

This point of view could provide some helps to the logic in Chinese Copyright Law and its interpretation by Chinese People's Congress: try to find the human author of the works created by artificial intelligence. In AlphaGo case, it would be the DeepMind team.

741. However, it provokes further problems: DeepMind developed the AlphaGo, AlphaGo is a computer program, so AlphaGo is a work and DeepMind is the author under Chinese Copyright Law. The record of the game of Go is created by AlphaGo, following the logic of "identifying who was the human author of the resultant expression"[1212], the author of the record of the game of Go would be also DeepMind. Briefly, one creative effort of DeepMind makes them justified as the author of two totally different works.

[1211] Sam Ricketson, "The Need for Human Authorship" European Intellectual Property Review. 2012. p, 2.
[1212] Ibid.

In a word, AlphaGo and the development of Artificial Intelligence could revolutionize the fundamental terms of "create", "author", "work" under copyright law.

742. It would like to propose a practical solution in terms of Chinese Copyright Law envisaging the record of the game of Go created by AlphaGo without touching the theoretical, obscure terms of copyright.

The ultimate purpose of Chinese Copyright Law is to "encouraging the creation and dissemination of works…", "promoting the progress and flourishing of socialist culture and sciences."[1213] Briefly, the ultimate purpose of Chinese Copyright Law is to promote the creation of literary, artistic and scientific works, to stimulate the progress of art and science.

In the case of the records of the game of Go played by AlphaGo, according to the demonstration above, there are several candidates for the copyright holders: AlphaGo, DeepMind, Lee Seedol. It would be evident that giving the copyright to AlphaGo would not stimulate it creating more records of the game of Go, because it is an emotionless robot.

Therefore, it leaves the choice to DeepMind and Lee Seedol. Since DeepMind does not make the direct creative efforts to create the records, it would be reasonable that Lee Seedole shall enjoy the copyright exclusively, since he is the only eligible author under Chinese Copyright Law who created the record. However, if the copyright is exclusively enjoyed by Lee Seedole, it is foreseeable that DeepMind would be less willing to let the AlphaGo play with the human players for the reason that there is not interests for DeepMind.

743. Consequently, as the developer and the one who possess AlphaGo, DeepMind should enjoy the copyright of the record of the game of Go played by AlphaGo. According to the logic of copyright, this arrangement would encourage DeepMind to exploit the AlphaGo which would promote the creation more works and would stimulate the progress of technology.

744. The record of the game of Go would be a particular kind of "work" under Chinese Copyright Law.

For the purpose of facilitate the amateur players to appreciate the beauties of the games played by top level players by only watching the record, it needs a commentator who is also a top level Go player to explain why the move is played. In most cases, the commentator will correctly interpret the meaning of the moves played by the players. But when it comes to the subtle issues, everyone has his own understanding of the game based his

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[1213] Article 1, Chinese Copyright Law 2010 text. Chinese original text as "鼓励作品的创作和传播""促进社会主义文化和科学事业的发展与繁荣."

own personalities. Even the commentator is the player himself, at different age, he would express different opinions on the same move he played.

The record of the game of Go always need a commentator to facilitate the public to understand the work. This interpretation also contains the personal creative efforts of the commentator.

If the commentators write a book based on the interpretations of the data of AlphaGo when it was playing the game, is this book a derivative work which subjected to be authorization of DeepMind? Is the commentator an independent author?

Further researches are needed to examine what is the "work" in digital era? is AlphaGo a "work" or a "creator"? Are the data generated and the game played by AlphaGo the independent works or they are one work together with AlphaGo which is created by DeepMind?

B. AlphaGo learning subjected to copyright authorization

745. As demonstrated before, AlphaGo needs to "learn" (machine learning) existing record of the game of Go played by professional players to become stronger.[1214] The "creativity" of AlphaGo is based on the existing works. It is similar to the "creativity" of human which is also based on learning existing works.

We presume that the record of the game of Go could be protected as "work." Under Chinese Copyright Law, the questions could be asked: does the "learning" of AlphaGo violated the Chinese public communication right? if the copyright holders of the existing records applied the technological measures, is the "learning" a violation or an exception.

According to the analyzation before, the Chinese public communication right is named as "the right of communication through information network" in Article 10 Clause (12) Chinese Copyright Law.[1215] According to the rules elaborated in the Chinese Copyright Law Regulation on the Protection of the Right of Communication through Information Network, regardless that the name is different from the Article 8 of the WCT, "the right of communication through information network" in China is for the purpose of complying

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[1214] See, Machine learning, Wikipedia. https://en.wikipedia.org/wiki/Machine_learning.

[1215] Chinese Copyright Law, Article 10 Clause (12). "the right of communication through 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."

Article 8 of the WCT.[1216] Influenced by the EU opinion, this Chinese right of communication through information network covers all the interactive on-demand transmission of works.[1217] Precisely, the copyright holders have the right to authorize "the making available to the public of their works" and "the public may access these works from a place and at a time individually chosen by them."[1218]

746. It would be evident that if AlphaGo "learn" a record of the game of Go, AlphaGo has to firstly get access to the record of the game of Go which is made available in the digital environment by its copyright holders.

Currently, it is a fact that almost all the records of the game of Go is freely accessible in the digital environment.[1219] Since all the users could get access to the records, does it mean that the access of AlphaGo does not violate the public communication right under Chinese Copyright Law?

Furthermore, if in the future, the access of the records of the game of Go is restricted, a subscription fee must be paid, is the AlphaGo's access to the records after paying the subscription fee a violation of Chinese public communication right?

747. In both cases, the AlphaGo's access to the records of the game of Go may be deemed as a violation of public communication right in China. It is because that AlphaGo is a "public" different from the public at which the original act of communication the work is directed.[1220]

The new "public" is a rule interpreted by CJEU. But the term of "public" is assimilated by the Chinese Supreme Court's interpretation of "information network": "the information network which the work resides must be accessible to public, public could

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[1216] the WCT. Article 8 of "Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or 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."

[1217] Reinbothe, Jörg, and Silke von Lewinski. The WIPO treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. London, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord: Butterworths, 2002. Chapter 2, Article 8, para 17.

[1218] the WCT. Article 8.

[1219] See, Revue Française de Go. Available at http://rfg.jeudego.org

See also, go4go, a data base of the record of the game of Go. Available at http://www.go4go.net/go/

[1220] CJEU, 7 December 2006, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, Case C-306/05. EU:C:2006:764. para 40. "a transmission is made to a public different from the public at which the original act of communication the work is directed, that is, to a new public."

'download, watching or obtain the work by other means'."[1221] A similar new "public" rule is interpreted in Chinese jurisprudence the transmission of TV series in the local network of a cyber café is a violation of Chinese public communication right for the reason that the local network is not within the scope of information network the copyright holder has authorized.[1222]

748. If Chinese copyright legislation and interpretation continue to follow the "new public" rule in the EU, the AlphaGo is a "new public" which separately needs the copyright holder's authorization.

According to the interpretations of CJEU, in *SGAE case (2006)* and *Football Association Premier League case (2011)*, it construed that "a transmission is made to a public different from the public at which the original act of communication the work is directed, that is, to a new public."[1223], "it is also necessary for the work broadcast to be transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they authorized their use by the communication to the original public"[1224]

In a word, it could be concluded that if the transmission, communication or access of work is outside the original scope of the copyright holder's authorization, such "act of communication" shall demand the independent authorization of copyright holder.

Making the records of the game of Go available in the digital environment by copyright holders regardless of the free access or restricted access is targeted to human's appreciation and human's learning. The access of AlphaGo to the records for the purpose of "learning" would be a complex technical detail which is totally different from the human's access for the purpose of appreciation and learning.

The original scope of copyright holders' authorization does not cover the AlphaGo's access to their records of the game of Go. Therefore, the AlphaGo's access would constitute a "new public."

[1221] 最高人民法院《关于审理侵害信息网络传播权民事纠纷案件适用法律若干规定》(2012)第3条第2款 Chinese Supreme Court "stipulations of the application of law concerning elaborating civil cases in regard of infringements of the right of communication through information network", 2012, Article 3, Clause 2.

[1222] 北京网尚文化传播有限公司v.南宁市一网通网吧，南宁中院2009。Pekin Wangshang Cultural Communication Ltd v Nanning City Yiwangtong Cyber Café, Nanning City Intermediate Court, 2009.

[1223] CJEU, 7 December 2006, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, Case C-306/05. EU:C:2006:764. para 40.

[1224] CJEU, 4 October 2011, Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen (C-403/08), Karen Murphy v Media Protection Services Ltd (C-429/08), Joined cases, C-403/08 and C-429/08. EU:C:2011:631. para, 197.

749. However, if the AlphaGo's access to the records of the game of Game needs the authorization of copyright holders, it would provoke further problematics.

The AlphaGo's access and "learning" process is massive, automatic. It would be onerous to get the copyright holder's individual authorization of every record of the game of Go.[1225] This problematic may be attenuated by the copyright collective management. The copyright collective management of the record of the game of Go is another subject which needs further study. The existing Japanese experiences of copyright protection demonstrated before would be utterly interesting to study.

Regarding that the purpose of AlphaGo's access and "learning" is creating the record of the game of Go in high quality. By "learning" the records of the top level human players, AlphaGo has defeated the top level human player: Lee Seedol. Therefore, the use of existing works by AlphaGo is creative, transformative. Envisaging this new creativity of AlphaGo, Chinese Copyright Law should leave some latitude to AlphaGo. In the future, Chinese Copyright Law maybe shall leave the some latitude to the artificial intelligence's access to existing works.

[1225] ROBIN Agnès, "Création immatérielles et technologies numériques: la recherche en mode open science", Propriétés Intellectuelles, N° 48, 2013. p, 261. "le phénomène des « réseaux de la connaissance » bouleverse également les modalités de création et de production…La prolifération à grande échelle des données et leur mise en réseau invite désormais à une analyse des données…"

Conclusion of Chapter 2

750. The developments of technology and the digital environment have changed the traditional way of how the works are created. Envisaging this challenge, Chinese Copyright Law has to protect the copyright of existing works while not hider the new creativities in the digital environment and the development of technology.

It could be observed that both UCC and AlphaGo changed the traditional copyright concepts of "author" and "creation." UCC changes the authors from professionals to amateurs and changes the creation from exclusive to collective. While AlphaGo changes the creators from human to artificial intelligence and changes the creation from human "learning" to machine "learning." Further observations and researches are needed to answer the question of who is "author" and what is "creation" in terms of the two new copyright phenomenons.

751. However, from the practical perspective, Chinese Copyright Law could be adjusted to stimulate the new forms of creativities in the digital environment. In regard of the UCC, Chinese Copyright Law could facilitate the cooperations between UCC online platforms such as WeChat and the individual users/creators. It could also encourage the UCC online platforms to adopt more flexible copyright license system like Creative Commons. In regard of AlphaGo, base on the analyzation of rules, interpretations and logic of Chinese Copyright Law, it could in practice, "deem" that the copyright holder of the records created by AlphaGo is its developer, Google DeepMind for the purpose of stimulating more creations of the records and the development of technology.

752. It could also be observed that similar to other form of creativities, the new creativities of both UCC and AlphaGo are depended on the existing works. How to properly protect the copyright of existing works without hinder the new creativities of UCC and AlphaGo is a hard question to answer.

In regard of UCC, maybe Chinese Copyright Law should not adopt a broad copyright exception as Canada Copyright Law does for the reason that the infringements in the digital environment are still not controlled. Chinese Copyright Law could firstly integrate the Three Step Test of the Berne Convention to just establish a principle for both the protection of copyright holders' interests and the preservation of new creativities. The specific rules could be elaborated later according to the development of UCC and the development of copyright protection in China. Therefore, further researches need to be undertaken concerning this

problematic.

In regard of AlphaGo, according to the current rules in Chinese Copyright Law, the "learning" of AlphaGo could be subjected to the authorization of copyright holders. However, regarding the massive amount and the automatic learning process, the individual authorization of AlphaGo "learning" would hinder the development of AlphaGo, and smother this kind of new creativity. Could the copyright collective management be a solution for this problem? How to establish this copyright collective management? Or, since in terms of the AlphaGo learning, the purpose of use is transformative, the whole process is private, could the "learning" process of AlphaGo be qualified as copyright exception? All these question may need further researches.

Conclusion of Title 2

753. The copyright infringing activities in the digital environment in China have jeopardized the interests of copyright holders. The copyright enforcement activities taken by Chinese copyright authorities have tried to control the copyright infringements in the digital environment.

Although the copyright infringing activities in the digital environment are tenacious, the copyright enforcement actions should not be too excessive to ignore other interests. The long term and efficient way is to maintain the copyright enforcement actions for the purpose of safeguard the legal offer of contents and stimulate the development of Chinese online audiovisual media. Because they could marginalize the copyright infringing activities in the digital environment. Moreover, they could motivate the elaborations of Chinese copyright legislations and the interpretations of Chinese courts by lobbying the Chinese legislative bodies and the bringing judicial cases before the Chinese courts.

754. The copyright protection under Chinese Copyright Law shall also take the future issues into consideration, namely the User Created Content (UCC) and Artificial Intelligence (AI) created records of the game of Go. The two modern, future issues are interestingly connected with the Chinese traditions. In terms of copyright protection UCC, regarding that Chinese traditional intention of creation is not money and the Chinese traditional way of creation is collective, the Chinese UCC plate form should try to cooperate with the creators and promote a flexible copyright license system. In terms of AI created records of the game of Go, the records of the game of Go as traditional form of art in China should be protected under Chinese Copyright Law. The copyright of AI created works should be attribute to its developer for the purpose of stimulating the creation of works and the development of technology.

Conclusion of Part 2

755. The Chinese copyright enforcement in the digital environment is now shaping by both international influence and domestic development.

In terms of the copyright enforcement legislations, the legal protection of technological measures under Chinese Copyright Law is very similar to the rules under the WCT and the EU Information Directive. But It is not clear what is the scope of effective technological measures and what it the scope of the preparative activities.

Similarly, the criteria of the internet service providers under Notice and Take Down rule in Chinese legislation are almost identical to the rules under the EU Information Directive. And the requirements of notification and counter notification, the procedures of Notice and Take Down are similar to the rules under the US Copyright Law. However, the Chinese Notice and Take Down need to be properly applied to legal practice and be interpreted correctly. The internet service provider shall not bear excessive responsibilities to monitor the contents transmitted under the Chinese Notice and Take Down rule.

756. In terms of the copyright enforcement practices, the Chinese copyright enforcement actions have shut down the copyright infringing websites. It provided a living space for the legal services to development.

The development of the Chinese online audiovisual media which offers legal contents in the digital environment plays an essential factor. The copyright enforcement has been done while the online audiovisual media try to protect its commercial interests. It give an strong domestic motivation to enforce copyright. Moreover, as long as the development of online audiovisual media, since the contents have been provided by legal resources, the illegal online downloading and streaming would be marginalized by the legal services.

Therefore, in the future, the Chinese copyright enforcement actions would be maintained to protect the commercial interests of the Chinese online audio visual media. However, the side effect of these enforcement actions must be paid attention. The Chinese copyright authorities shall not have the right to require the internet service providers to censor the informations transmitted via their servers for the purpose of enforcing copyright.

757. At last, the new forms of creation in the digital environment have been discussed: the

User Created Content and the AI created records of the game of Go. It could be observed that the new creativities have been emerging in the digital environment. Chinese Copyright Law shall inevitably envisage these problematics. The cooperation between UCC platform and creators and the flexible copyright license should be promoted. The copyright holders of AI created work under Chinese Copyright Law should be the developer of the AI in order to stimulate the creation of more works.

Conclusion

758. Historically speaking, from the collapse of the last empire of Qing in 1912, China has been awoken from the sweet dream of “Celestial Empire” and started to appreciate and learn the western technologies, philosophies and laws.

The copyright law is one of the concepts which had not interested the Chinese emperors nor Chinese scholars before the collapse of Qing dynasty. During the period of colonization and civil war, the concept of copyright law has been gradually introduced to China similar to other western technologies, cultures and laws.

The current Chinese Copyright Law in the People’s Republic of China was started to be elaborated from the beginning of the Chinese Reforming and Opening Policy in 1976. China has gradually constructed an interior market and has tried to integrate into the international society. For the purpose of rendering the domestic market attractive to the foreign capitals and facilitating the negotiations of the trade agreements, it would be indispensable for Chinese copyright legislations to comply with the international obligations, notably to comply with the Berne Convention.

Therefore, the elaboration and the enactment of first Chinese Copyright Law is focused on complying with minimum standard of the Berne Convention. Right after the enactment of first Chinese Copyright Law, the Berne Convention was ratified by China under the international pressure. For the purpose of implementing the Berne Convention, first and second revisions of Chinese Copyright Law had been made.

The modernization of Chinese Copyright Law is started by the pressure of the ratification of the Berne Convention and the later implementation. The domestic copyright holders had limited impacts on the elaboration of the rights and exceptions in first Chinese Copyright Law. Meanwhile, since Chinese copyright industry is developing, it would be crucial to elaborate the rights and exceptions to protect the copyright holders’ interests to promote the public warfare and to stimulate the development of copyright market. The third revision of Chinese Copyright Law is ongoing. It would be different from the last two. Regarding that the Chinese copyright industry has been developing, it would be necessary to consider both the domestic needs and the international obligations.

The current Chinese Copyright Law has been elaborated and revised mainly for the purpose of complying the international obligations. The potential conflicts have existed. First one would be the conflict between the high level protection standard in the Berne Convention and the undeveloped domestic market. Second one would be the conflict between the individualism of the concept of copyright law and the Chinese traditional values of creation rooted from the Chinese philosophies such as Confucianism. These conflicts and facts has shaped the scope of the authors' rights and the copyright exceptions in China.

When Chinese Copyright Law was modernized in 1976, the development of internet had started to challenge the copyright law. Basically, the development of internet has created a digital environment where the works could be copied and transmitted without consuming significant time and resources. For the purpose of protecting authors' rights and safeguarding the users' latitude in the digital environment, the public communication right and private use exception are critical for protecting the copyright holders' interests and safeguarding the users' interests.

759. Nowadays, under the current Chinese Copyright Law, the specific rules have not been well elaborated. The author's rights and exceptions in Chinese Copyright Law could be interpreted in a way that undermines the interests of the copyright holders in the digital environment. Therefore, several propositions could be made for the third revision of Chinese Copyright Law in order to prevent the copyright holders interests from potential unreasonable prejudices in digital environment.

In order to facilitate the understanding of Chinese Copyright Law, the english translation of Chinese Copyright Law could be ameliorated. Some copyright terms in the official translation of Chinese Copyright Law which is deposited in WIPO are confusing. They could not correspond to the copyright terms which are used habitually. For instance, RenGeQuan (人格权), "moral rights" has been translated as "personal rights" in Article 10 of Chinese Copyright Law; GongMin (公民), "natural person" has been translated as "citizen" in Article 2 of Chinese Copyright Law.

760. The public communication right is prescribed as an international obligation under Article 8 of the WCT. Article 10 Clause 12 of Chinese Copyright Law covers the digital interactive transmission of works which are required by the WCT by prescribing "the right of communication through information network". Six particular exceptions of "the right of communication through information network" are independently prescribed in Article 6 of Regulation on the Protection of the Right of Communication through Information Network.

The third revision of Chinese Copyright Law is planning to integrate the Regulation. But only a group of the general copyright exceptions has been prescribed in Article 43 of the final draft. The six particular exceptions of the right of communication through information network will disappear according to the final draft.

Regarding that exceptions of "the right of communication through information network" are more restricted under the Chinese regulation. It would be necessary to distinguish the copyright exceptions for the "the right of communication through information network" from the general copyright exceptions in order to protect the copyright holders interests. The final draft of Chinese Copyright Law should add a clause which prescribes the particular copyright exceptions for "the right of communication through information network" independently.

761. "The right of communication through information network" was not interpreted proportionately by the Chinese courts. The provision of hyperlink was not the "act of communication" according to the interpretation of Chinese Beijing Superior Court. This exclusion will undermine the public communication right. It is contradictory to the interpretation of CJEU in *Svensson case (2014)* that "the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication'".

Therefore, it is important that the third revision of Chinese Copyright Law clarifies that "the right of communication through information network should cover all communication to the public not present at the place where the communication originates and all the transmission or retransmission of a work to public by wire or wireless means". It is similar to EU Information Directive recital 23: "this right should cover any such transmission or retransmission of a work to the public by wire or wireless means".

762. The private use exception under Article 22 of Chinese Copyright Law is prescribed in a broad way: "use of another person's published work for purposes of the user's own personal study, research or appreciation." The final draft of the third revision of Chinese Copyright Law has revised the private use exception: the private copy of the entire work has been prohibited and the "personal appreciation" has been deleted.

However, the phrase "a work may be used without permission from, and without payment of remuneration to the copyright owner" in Article 22 of Chinese Copyright Law which governs the private use exception has not been revised by the final draft. "Without payment of remuneration" in the context of the digital environment would be considered as

the non-compliance of the Three Step Test in Article 9 of Berne Convention.

The US and the EU have established further conditions for the private use in the digital environment. They could provide some inspirations for Chinese copyright revision. The third revision of Chinese Copyright Law would add more conditions to the private use exception in order to face the challenges of the digital environment.

First of all, the phrase "a work may be used…without payment of remuneration…" should be deleted. Instead, a statement should be added: "the use of the work for personal study and research shall not prevent the copyright holders from receiving equitable remuneration". Secondly, the private use exception of the final draft should clarify that "the purpose of the private use shall neither direct nor indirect commercial."

The proposed clause of the private use exception would be "the use of another person's published work for the user's own personal study and research, such use shall neither prevent the copyright holders from receiving equitable remuneration nor for the direct or indirect commercial purpose."

763. Two propositions of the right of communication through information network and the Chinese private use exceptions are made to protect the copyright holders interests. These clear rules could encourage the copyright holders to make the copyrighted contents available in the digital environment and to exploit the huge market potential in the digital environment.

764. In terms of the future Chinese Copyright Law, with the development of the infrastructure of internet and the Chinese Copyright Law, the copyright market in the digital environment has been gradually constructed by the online audiovisual media who provide legal access of the copyrighted contents. The copyright enforcement measures in Chinese Copyright Law and the copyright enforcement practices undertaken by Chinese copyright authorities prevent the benefits of the online audiovisual media from being pirated by the illegal downloading and streaming.

In return, the online audiovisual media also shaped the legislation of the rights, exceptions and the copyright enforcement measures by lobbying the Chinese legislative bodies. It also promoted the copyright enforcement practices by ferociously complaining the online copyright infringing activities before the Chinese copyright authorities, because every penny the infringing activities have earned is the benefits they have lost. In the future, the phenomenon could be observed that the copyright infringing activities in the digital environment in China have been marginalized by providing the legal contents to the users. The users' habit would be cultivated to consume the copyrighted contents via the legal online

audiovisual media.

Therefore, the future Chinese copyright enforcement in the digital environment shall take the online audiovisual media into consideration. Several propositions could be make in this regard:

According to Article 16 of the Regulation on the Online Audiovisual Works and Services, the online media shall have the responsibility to delete the illegal contents in their servers inter alia copyright infringing contents. It gives the online audiovisual media an infinite responsibility to monitor the contents transmitted via their servers. Unreasonable costs will be born by them. Consequently, the development of the online audiovisual media together with the copyright market in the digital environment will be hindered.

It would like to propose that the third revision of Chinese Copyright Law shall govern the secondary responsibilities of internet service providers in the field of the copyright infringement similar to Section 512 "Limitations on liability relating to material online" of US Copyright Law. It should created a "safe harbor" for the internet service providers who comply the rules of the Notice and Take Down. The eligible online audiovisual media could be included in the "safe harbor".

The revision shall stipulate expressly that "the internet service providers shall not be liable for the information transmitted via its server, on the condition that…" Moreover, The third revision of Chinese Copyright Law should stipulate clearly that under the Notice and Take Down rule, "the eligible internet service providers shall not bear the general obligation to monitor the information transmitted" and "no additional cost shall be incurred".

765. As the development of technology and the commerce in digital environment, new forms of creations are emerging.

The creation of the works in the digital environment has shifted from professional to amateurs. Users are not only passive receivers of contents but also active creators. It is the so-called User Created Contents.

For the purpose of stimulating the new forms of creation in the digital environment, the users' transformative use of the works shall be safeguarded by the Chinese Copyright Law. However, the users access to works in the digital environment is often control by the technological measures. The circumvention of the technological measures is protected under the Article 4 of Regulation on the Protection of the Right of Communication through Information Network: "No organization or individual may intentionally circumvent or sabotage technological measures…" Only four exceptions of the circumvention of the

technological measures are allowed in Article 12 of the Regulation. Non of them has safeguarded the general exceptions under Article 22 of Chinese Copyright Law.

In comparison, Section 1201 (c) (1) of US Copyright Law safeguarded the "fair use" by stipulating expressly ""Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use." Article 6. 4 of the EU Information Society Directive safeguarded the exceptions of the reproduction rights as "Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5 (2)*(a)*, (2)*(c)*, (2)*(d)*, (2)*(e)*, (3)*(a)*, (3)*(b)* or (3)*(e)* the means of benefiting from that exception or limitation…".

Unfortunately, Article 71 of the final draft of the third revision only added the exceptions of the encryption research and the reverse engineering. The general copyright exceptions still are not safeguarded.

Therefore, in order to facilitate the users' access to works for the purpose of transformative use, an exception of the legal protection of technological measures which safeguard the general exceptions of the Chinese Copyright Law shall be added by the third revision as: "nothing in this title shall affect the copyright exceptions under Article…"

In order to stimulate the individual users' creativity, the cooperation between UCC platform and individual user/creator could be facilitated. Moreover, regarding that the Chinese traditional intention of creation is not for money and the way of traditional creation is collective a flexible copyright license system could be promoted among the users/creators on the Chinese UCC platform:

On the Chinese biggest UCC platform: WeChat, the on-click license could be promoted using the different licenses of the Creative Commons. Precisely, after the user of WeChat has written a text or shoot a video clips, the on-click license enables the user to license the contents under the licenses system of the Creative Commons. The authorship is respected and the creators could choose whether the derivative works, the commercial uses are allowed. It could protect the author's moral rights while have the options to allow non-commercial and transformative use.[1226]

766. The creation of the works in the digital environment is not exclusively for human. The

[1226] There are six kinds of licenses to choose whit different limitations. 1. Attribution. 2 Attribution- shareAlike. 3 Attribution-Noderivs. 4. Attribution-NonCommercial. 5.Attribution-NonCommercial-ShareAlike. 6. Attribution-NonCommercial-NoDerivs.

Artificial Intelligence (AI) developed by Google DeepMind called AlphaGo has created the record of the game of Go in higher quality than human players. It could be observed that the record of the game of Go has been appreciated traditionally in Asian as a piece of art and at the same time, it could have the possibility to be protected under Chinese Copyright Law.

Regarding the ultimate purpose of Chinese Copyright Law, a practical solution could be proposed that the third revision of Chinese Copyright Law could stipulate that "the AI created works shall belong to its developers" for the purpose of stimulating the creation of literary and artistic works.

Considering the fact that the AlphaGo's creativity is based on "learning" the existing records of the game of Go, under Chinese Copyright Law, this process has the possibility to be subjected to copyright holders' authorization within the field of the public communication right. But the process of machine learning may fall within the scope of copyright exceptions for the purpose of stimulating and facilitating the creativity of AI.

It should reiterate the proposition made before in terms of the Chinese public communication right: "the right of communication through information network should cover all communication to the public not present at the place where the communication originates and all the transmission or retransmission of a work to public by wire or wireless means". In other words, the new way of machine "learning" of copyrighted shall be subjected to the copyright holders' authorization.

Therefore, envisaging the new way of creation emerging from the digital environment, the Chinese Copyright Law shall shall respect Chinese own traditions and shall always serve its ultimate purpose: to stimulate the creation of works and the development of art and science.

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INDEX

TABLE DES MATIERES

Résumé en français

En Chine, la protection du droit d'auteur dans l'environnement numérique est un problème au niveau international et national. Pourquoi le droit d'auteur ne peut-il pas être protégé correctement? Quels sont les droits et les outils mis à la disposition des auteurs?

Sous la pression de la rétorsion commerciale des États-Unis, la Chine a ratifié la Convention de Berne en 1992. Le premier droit d'auteur en Chine et les deux révisions avaient principalement pour but de se conformer à la Convention de Berne. Autrement dit, le droit d'auteur chinois est artificiel. Il ne représente pas la réconciliation de conflits d'intérêts différents.

Les actions de la mise en œuvre du droit d'auteur en environnement numérique ont été entreprises par les autorités chinoises. Elles pourraient être très efficaces. Des sites Internet illégaux sont contrôlés et le contenu qui atteint au droit d'auteur est supprimé. Néanmoins, les actions pourraient être excessives.

L'environnement numérique a non seulement augmenté la capacité individuelle de la reproduction et la transmission des œuvres, mais a aussi changé la façon dont les œuvres peuvent être créées. Comment protéger les droits d'auteur existants, d'un côté, et stimuler la créativité individuelle des internautes, d'un autre côté?

Résumé en anglais

Chinese copyright protection in the digital environment has been a problem at both international and national level. Why Chinese copyright could not be properly protected? What rights and enforcement tools the copyright holders have?

Under the pressure of the US trade retaliation, China ratified the Berne Convention in 1992. The first Chinese Copyright Law and the later two revisions were mainly for the purpose of complying with the Berne Convention. In other words, the Chinese Copyright Law is artificial. It is not the reconciliation of the conflicts of different interests.

Copyright enforcement actions have been undertaken by the Chinese copyright authorities in the digital environment. They could be very efficient. Major pirating websites are seized and enormous infringing contents are taken down. However, the actions could also be excessive.

The digital environment not only boosted the individual capacity of the reproduction and transmission of works, but also changed the way of how works could be created. How to protect the existing copyright on the one hand, to simulate the individual user's creativity, on the other?

Mots-Clés:

Digital environment; Chinese Copyright Law; Berne Convention; WCT; Public communication right; Private use exception; Technological measure; Notice and Take Down; User Created Content; Chinese tradition; Legal offering of contents; Artificial Intelligence.