
**Cross-Border Copyright Protection in the UK and China:
From Copyright Law and Private International Law Perspectives**

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ABSTRACT

Traditionally, copyright protection is territorial. As international exchange and Internet technology develop, the nation-by-nation exploitation of copyright is being replaced by cross-border exploitation; thus, foreign-related copyright disputes arise more frequently than before. Accordingly, there is an increasing relevance of applying private international law (or conflict of laws) in the efficient settlement of copyright disputes and the effective enforcement of copyright law.

This research focuses on the comparative study concerning cross-border protection of copyrighted work in the UK and China from two perspectives: copyright law and private international law. It first compares differences concerning the substantive issues to examine whether those differences will pose problems for China in protecting foreign copyright. The examination of copyright law will also contour the general picture of substantive issues which have implication for the subsequent discussion on jurisdiction and choice of law.

This thesis will primarily explore the international jurisdictional rule and the choice-of-law rule concerning copyright infringement in both countries. It examines jurisdictional factors related to defendants and factors related to the dispute in law, and the application of approaches in practice to assess whether the traditional approaches require refinement in copyright infringement. Since *lex loci protectionis* has been widely accepted in law and thoroughly examined by the doctrinal study, this thesis will focus on the application of *lex loci protectionis* in practice to highlight the misunderstanding of this concept, the errors in application and the potential problem of numerous overlapping national copyright laws. This thesis will evaluate different approaches to fine-tune jurisdiction and choice of law concerning copyright infringement.

Keywords: Cross-border Copyright Protection; Copyright Infringement; Internet-related Activities; Jurisdiction; Choice of Law

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ABBREVIATIONS

AOIC	The author's own intellectual creation (defined in EU case law)
BC	Berne Convention for the Protection of Literary and Artistic Works
BG	Beijing High People's Court Guidance on Copyright Infringement Trial
BIR	Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)
BRR	Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels Regulation Recast)
CDPA	Copyright, Designs and Patents Act 1988
CIN right	The right to communicate information on networks (defined in China)
CINRR	Regulation on CIN Right Protection
CJEU	Court of Justice of the European Union
CL	Copyright Law of the PRC
CLFCR	Law of the PRC on Choice of Law for Foreign-related Civil Relationships
CPL	Civil Procedure Law of the PRC
CR	Regulation on the Implementation of the Copyright Law of the PRC
GPCL	General Principles of Civil Law
HPC	High People's Court (China)
IFPI	International Federation of the Phonographic Industry
IPC	Intermediate People's Court (China)
IPR	Intellectual property right
ISP	Internet Service Provider

JI	Judicial Interpretation (legally binding in China)
LDMA	Literary, dramatic, musical and artistic works (defined in CDPA)
LEW	Legal entity work (defined in China)
MC	Mainland China
MS	Member State
NCAC	National Copyright Administration of China
NT	National Treatment
SPC	Supreme People’s Court (China)
TFEU	Treaty on the Functioning of the European Union
TP	Territoriality Principle
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
WCT	WIPO Copyright Treaty
WFH	Work for hire (defined in China)
WIPO	World Intellectual Property Organization

TABLE OF CASES

EU

- C-133/11, Folien Fischer AG and Fofitec AG v Ritrama SpA, ECLI:EU:C:2012:664
C-135/10, Societá Consortile Fonografici (SCF) v Del Corso, ECLI:EU:C:2012:140
C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and Others,
ECLI:EU:C:2011:798
C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others,
ECLI:EU:C:2016:644
C-170/12, Pinckney v KDG Mediatech AG, ECLI:EU:C:2013:635
C-173/11, Football Dataco Ltd v Sportradar GmbH, ECLI:EU:C:2012:642
C-189/08, Zuid-Chemie BV v Filippo’s Mineralenfabriek NV/SA,
ECLI:EU:C:2009:475
C-189/87, Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and
others, ECLI:EU:C:1988:459
C-192/04, Lagardère Active Broadcast (LAB) v SPRE and GVL, ECLI:EU:C:2005:475
C-194/16, Bolagsupplysningen OÜ, Ingrid Ilsjan v Svensk Handel AB,
ECLI:EU:C:2017:766
C-21/76, Handelskwekerij G. J. Bier BV v Mines de potasse d’Alsace SA,
ECLI:EU:C:1976:166
C-228/11, Melzer v MF Global UK Ltd, ECLI:EU:C:2013:305
C-26/91, Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces
SA, ECLI:EU:C:1992:268
C-281/02, Andrew Owusu v N.B. Jackson, trading as ‘Villa Holidays Bal-Inn Villas’
and Others, ECLI:EU:C:2005:120
C-310/17, Levola Hengelo BV v Smilde Foods BV, ECLI:EU:C:2018:899
C-324/09, L’Oréal SA and Others v eBay International AG and Others,
ECLI:EU:C:2011:474
C-360/12, Coty Germany GmbH v First Note Perfumes NV, ECLI:EU:C:2014:1318
C-387/12, Hi Hotel HCF SARL v Uwe Spöering, ECLI:EU:C:2014:215
C-406/10, SAS Institute Inc. v World Programming Ltd, ECLI:EU:C:2012:259
C-441/13, Pez Hejduk v EnergieAgentur.NRW GmbH, ECLI:EU:C:2015:28
C-494/15, Tommy Hilfiger Licensing and Others, ECLI:EU:C:2016:528
C-5/08, Infopaq International A/S v Danske Dagblades Forening,
ECLI:EU:C:2009:465
C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH,
ECLI:EU:C:2012:220
C-527/15, Stichting Brein v Jack Frederik Wullems, ECLI:EU:C:2017:300
C-539/03, Roche Nederland BV v Primus and Goldenberg, ECLI:EU:C:2006:458
C-604/10, Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG,
ECLI:EU:C:2012:115
C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:456
C-618/15, Concurrence SARL v Samsung Electronics France SAS, Amazon Services
Europe Sàrl, ECLI:EU:C:2016:976
C-68/93, Fiona Shevill and Others v Presse Alliance SA, ECLI:EU:C:1995:61
C-683/17, Cofemel – Sociedade de Vestuário SA v G-Star Raw CV,
ECLI:EU:C:2019:721

C-98/06, Freeport Plc v Olle Arnoldsson, ECLI:EU:C:2007:595
C-393/09, Bezpečnostní softwarová asociace (BSA) v Ministerstvo kultury,
ECLI:EU:C:2010:816
C-469/17, Funke Medien NRW GmbH v Bundesrepublik Deutschland,
ECLI:EU:C:2019:623
Joined Cases C-403/08 and C-429/08, Football Association Premier League Ltd and
Others v QC Leisure and Others and Karen Murphy v Media Protection Services
Ltd, ECLI:EU:C:2011:631
Joined Cases C-509/09 and C-161/10, eDate Advertising GmbH v X and Olivier
Martinez and Others v MGN Ltd, ECLI:EU:C:2011:685
Joined Cases C-585/08 and C-144/09, Pammer v Reederei Karl Schuler GmbH & Co
KG and Hotel Alpenhof GmbH v Heller, ECLI:EU:C:2010:740

UK

1967 Ltd & Ors v British Sky Broadcasting Ltd & Ors [2014] EWHC 3444 (Ch)
ABKCO Music & Records Inc v Music Collection International Ltd. & Anor [1995]
R.P.C.657, 660
Argos v Argos [2018] EWCA Civ 2211
Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd & Anor [2017]
EWHC 2600 (Ch)
Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors [2014] EWHC
3354 (Ch)
Confetti Records v Warner Music [2003] EWHC 1274 (Ch)
Cramp & Sons v Frank Smythson [1944] A.C. 329
Creation Records Ltd. & Ors v News Group Newspapers Ltd [1997] EWHC Ch 370
EMI Records Ltd & Ors v British Sky Broadcasting Ltd & Ors [2013] EWHC 379 (Ch)
Exxon Corp. v Exxon Insurance Consultants International Ltd [1982] Ch. 119
Forensic Telecommunications Services Ltd v West Yorkshire Police & Anor [2011]
EWHC 2892 (Ch)
Francis Day and Hunter Ltd v Bron [1963] Ch 587
Hyperion Records Ltd v Sawkins [2005] EWCA Civ 565
Interlogo AG v Tyco Industries and Others [1989] 1 AC 217
L'Oreal v eBay [2009] EWHC 1094
Ladbroke v William Hill [1964] 1 All ER 465
Lucasfilm Ltd & Ors v Ainsworth & Anor [2011] UKSC 39
Macmillan and Company Limited v K. & J. Cooper (Bombay) [1923] UKPC 90
Martin & Anor v Kogan & Ors [2017] EWHC 2927 (IPEC)
Newspaper Licensing Agency v Marks [2003] 1 AC 551
Omnibill (Pty) Ltd v Egpsxxx Ltd & Anor [2014] EWHC 3762 (IPEC)
Pasterfield v Denham [1999] FSR 168
SAS Institute Inc v World Programming Ltd [2013] EWCA Civ 1482, [2014] RPC 8
T & A Textiles and Hosiery Ltd v Hala Textile UK Ltd & Ors [2015] EWHC 2888
(IPEC)
Temple Island Collections Ltd v New English Teas Ltd & Anor [2012] EWPC 1
The Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors [2010]
EWHC 3099 (Ch) [2011] EWCA Civ 890
Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc [2011]
EWHC 1981 (Ch)

Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd [2010] EWHC 608 (Ch)
University of London Press v University Tutorial Press [1916] 2 Ch 601
Warner Music and Another v TuneIn Inc [2019] EWHC 2923 (Ch)
Warwick Film Producers Ltd v Eisinger [1969] 1 Ch 508

Dutch

Expandable Grafts Partnership and Others v Boston Scientific BV [1999] FSR 352

China

Alt-N v Xinxinglong [2015] Zhejiang Ningbo IPC Zhe Yong Zhi Chu No.4. (2015) 浙甬知初字第 4 号.
Alt-N v Fenghua [2015] Zhejiang Ningbo IPC Zhe Yong Zhi Chu No.70. (2015) 浙甬知初字第 70 号.
Anle v Shiyue [2008] Beijing 2nd IPC Er Zhong Min Chu No.10396; [2009] Beijing HPC Gao Min Zhong No.3034. (2008) 二中民初字第 10396 号; (2009) 高民终字第 3034 号.
Asmodus (US) v Asmodus (Beijing) [2017] Beijing HPC Jing 0105 Min Chu No.47023. (2017) 京 0105 民初 47023 号.
Bangbang v COL [2006] Beijing 1st IPC Yi Zhong Min Zhong No.13999. (2006) 一中民终字第 13999 号.
Beijing Billich v Charles Billich (Australian) [2003] Beijing 2nd IPC Er Zhong Min Chu No.03814; [2004] Beijing HPC Gao Min Zhong No.36. (2003) 二中民初字第 03814 号; (2004) 高民终字第 36 号.
Beijing Water Design v CSCA and Xihu [2016] Beijing Haidian District People's Court Jing 0108 Min Chu No.15322; [2017] Beijing IP Court Jing 73 Min Zhong No.1404. (2016) 京 0108 民初 15322 号; (2017) 京 73 民终 1404 号.
Busheng Music v Baidu [2005] Beijing Haidian District People's Court Hai Min Chu No.14665. (2005) 海民初字第 14665 号.
Cao Haihui v Apple [2015] Beijing IP Court Jing Zhi Min Chu No.00253; [2018] Beijing HPC Jing Min Zhong No.150. (2015) 京知民初字第 00253 号; (2018) 京民终 150 号.
CCTV v Baofeng [2015] Beijing IP Court Jing Zhi Min Zhong No.1055. (2015) 京知民终字第 1055 号.
Chen Jie and others v Shilidianchuan and others [2020] Beijing Internet Court Jing 0491 Min Chu No.2880. (2020) 京 0491 民初 2880 号.
Chunguang v Nanguo [2017] Haikou IPC Qiong 01 Min Chu No.416; [2018] Hainan HPC Qiong Min Zhong No.552. (2017) 琼 01 民初 416 号; (2018) 琼民终 552 号.
COL v Apple (Beijing) and Apple (US) [2012] Beijing 2nd IPC Er Zhong Min Chu No.1200; [2013] Beijing HPC Gao Min Zhong No.2079. (2012) 二中民初字第 1200 号; (2013) 高民终字第 2079 号.

COL v Apple (US) and Apple (Beijing) [2016] Beijing IP Court Jing 73 Min Xia Zhong No. 149. [2017] Beijing IP Court Jing 73 Min Xia Zhong No.1396. (2016) 京 73 民辖终 149 号; (2017) 京 73 民辖终 1396 号.

COL v Apple [2018] Beijing Dongcheng District People's Court Jing 0101 Min Chu No.3243, 5320, 5322, 5323, 5325, 5326, 5328 and 5329. (2018) 京 0101 民初 3243、5320、5322、5323、5325、5326、5328、5329 号.

Daxuesheng v Li Xiang [2000] Beijing 2nd IPC Er Zhong Zhi Chu No.18; [2001] Beijing HPC Gao Zhi Zhong No.51. (2000) 二中知初字第 18 号; (2001) 高知终字第 51 号.

Entertainment One UK limited and Astley Baker Davies limited v Tuge [2018] Beijing Internet Court Jing 0491 Min Chu No.1045. (2018) 京 0491 民初 1045 号.

Fengxuan v Tianshi and others [2014] Shanghai 2nd Court Hu Er Zhong Min Wu (Zhi) Chu No.60; [2014] Shanghai HPC Hu Gao Min San (Zhi) Zhong No. 94. (2014) 沪二中民五(知)初字第 60 号; (2014) 沪高民三(知)终字第 94 号.

Football Fans Association (FFA) v Yuanfu and Xu [2005] Shenyang IPC Shen Zhong Min Zhi Chu No.64. (2005) 沈中民四知初字第 64 号.

Gao and Deng v QTD and others. [2015] Beijing Chaoyang District People's Court Chao Min (Zhi) Chu No. 20524; [2017] Beijing IP Court Jing 73 Min Zhong No. 797. (2015) 朝民(知)初字第 20524 号; (2017) 京 73 民终 797 号.

Getty v Mianyang Newspaper [2012] Sichuan Mianyang IPC Mian Min Chu No.147; [2013] Sichuan HPC Chuan Min Zhong No.627; [2014] SPC Min Shen No.971. (2012) 绵民初字第 147 号; (2013) 川民终字第 627 号; (2014) 民申字第 971 号.

Gong Wenjun v Apple [2016] Beijing Dongcheng District Court Jing 0101 Min Chu No.20567. (2016) 京 0101 民初 20567 号.

Guangyi v Blumberg [2011] Chongqing HPC Yu Gao Fa Min Zhong No.00319. (2011) 渝高法民终字第 00319 号.

Jiuzhang v Xu [2018] Sichuan HPC Chuan Min Zhong No.757 and No.758. (2018) 川民终 757 号和 758 号.

KOEN Media (Korea) v JSTV [2016] Beijing Haidian District Court Jing 0108 Min Chu No.38614. (2016) 京 0108 民初 38614 号.

Kuaileyangguang (KLYG) v Tongfang [2014] Beijing Haidian District Court Hai Min (Zhi) Chu No.19960; [2015] Beijing IP Court Jing Zhi Min Zhong No.559. (2014) 海民(知)初字第 19960 号; (2015) 京知民终字第 559 号.

KuaiShou v Huaduo [2017] Beijing Haidian District Court Jing 0108 Min Chu No.51249; [2018] Beijing IP Court Jing 73 Min Zhong No.2053. (2017) 京 0108 民初 51249 号; (2018) 京 73 民终 2053 号.

Lego v Xiaobailong and Huayuanxidan [2013] SPC Min Shen No.1269. (2013) 民申字第 1269 号.

Longchamp v Yihe [2016] Guangdong Dongguan 2nd Court Yue 1972 Min Chu No.10468. (2016) 粤 1972 民初 10468 号.

Maqi v Leshanchubanju [2015] SPC Min Shen No.1665. (2015) 民申字第 1665 号.

MCSC v Konka [2004] Beijing 2nd IPC Er Zhong Min Chu No.11835. (2004) 二中民初字第 11835 号.

Nike v Zhu [2005] Beijing HPC Gao Min Zhong No.538. (2005) 高民终字第 538 号.

Qiongyao v Yu Zheng [2015] Beijing HPC Gao Min (Zhi) Zhong No.1039. (2015) 高民(知)终字第1039号.

Rhino v Zhousite [2015] Guangdong Shenzhen Futian District People's Court Shen Fu Fa Zhi Min Chu No.17. (2015) 深福法知民初字第17号.

Rhino v Bowen [2015] Guangdong Shenzhen Futian District People's Court Shen Fu Fa Zhi Min Chu No.18. (2015) 深福法知民初字第18号.

Rhino v Luotuoshijia [2015] Guangzhou IP Court Yue Zhi Fa Zhu Min Chu No.37. (2015) 粤知法著民初字第37号.

Rhino v Zhisheng [2015] Guangzhou IP Court Yue Zhi Fa Zhu Min Chu No.38. (2015) 粤知法著民初字第38号.

Rhino v Guogou [2015] Guangzhou IP Court Yue Zhi Fa Zhu Min Chu No.39. (2015) 粤知法著民初字第39号.

Ruide v Dongfang [1999] Beijing 1st IPC Yi Zhong Zhi Zhong No.64. (1999) 一中知终字第64号.

Shengdengyong v Dongfang [2018] Shanghai Yangpu District People's Court Hu 0110 Min Chu No.16067. (2018) 沪0110民初16067号.

Sina v Tianyingjiuzhou [2014] Beijing Chaoyang District Court Chao Min (Zhi) Chu No.40334; [2015] Beijing IP Court Jing Zhi Min Zhong No.1818; [2020] Beijing HPC Jing Min Zai No.128. (2014) 朝民(知)初字第40334号; (2015) 京知民终字第1818号; (2020) 京民再128号.

Spinmaster (Canada) v Guangyijinguang, Lin Yongzhong and Xianniu (China) [2018] Guangdong HPC Yue Min Zhong No.361. (2018) 粤民终361号.

Tencent v E-Link Way Tech Co [2015] Beijing Haidian District Court Hai Min (Zhi) Chu No. 40920; [2016] Beijing IP Court Jing 73 Min Zhong No.143. (2015) 海民(知)初字第40920号; (2016) 京73民终143号.

Tezuka (Japan) v Atongmu (China) [2014] Fujian HPC Min Zhong No.413; SPC Min Shen No.3427. (2014) 闽民终字第413号; (2017) 最高法民申3427号.

Universal Music and others v Alibaba [2007] Beijing HPC Gao Min Zhong No.1188. (2007) 高民终字第1188号.

Wanbo v Hairun [2003] Beijing 1st IPC Yi Zhong Min Chu No.9020. (2003) 一中民初字第9020号.

Wang Lu v Yahoo [2006] Beijing HPC Gao Min Zhong No.1365. (2006) 高民终字第1365号.

Wang Qingxiu v PPSUC Press [2008] Qinhuangdao IPC Qin Min Er Chu No.25; [2010] Hebei HPC Ji Min San Zhong No.12; [2010] SPC Min Shen No.621; [2010] SPC Min Ti No.166. (2008) 秦民二初字第25号; (2010) 冀民三终字第12号; (2010) 民申字第621号; (2010) 民提字第166号.

Wang v Google China and Google (US) [2011] Beijing 1st IPC Yi Zhong Min Chu No.1321; [2013] Beijing HPC Gao Min Zhong No.1221. (2011) 一中民初字第1321号; (2013) 高民终字第1221号.

Wang Xiaodi v Apple [2015] Beijing IP Court Jing Zhi Min Chu No.00255. (2015) 京知民初字第00255号.

Warner v Tangrenjie [2004] Beijing HPC Gao Min Zhong No.156. (2004) 高民终字第156号.

Wenxiantang v Qingdao Daily [2003] Beijing Haidian District People's Court Hai Min Chu No.6428. (2003) 海民初字第6428号.

-
- Wu Guanzhong (Mainland China) v Duoyunxuan (Mainland China) and Yongcheng (Hong Kong) [1995] Shanghai HPC Hu Gao Min Zhong (Zhi) No.48. (1995) 沪高民终(知)字第48号.
- Xiang Weiren v Peng Lichong [2015] Beijing Chaoyang District Court Chao Min (Zhi) Chu No.9141; [2015] Beijing IP Court Jing Zhi Min Zhong No.1814; [2017] Beijing IP Court Jing 73 Min Shen No.30. (2015) 朝民(知)初字第9141号; (2015) 京知民终字第1814号; (2017) 京73民申30号.
- Xijie (Korean) v China Telecom [2009] Hubei Wuhan IPC Wu Zhi Chu No.211. (2009) 武知初字第211号.
- Xijie (Korean) v Shijilong [2009] Hubei HPC E Min San Zhong No.58. (2009) 鄂民三终字第58号.
- Xinli v Chongqing Weipu and others [2004] Beijing HPC Gao Min Zhong No.668. (2004) 高民终字第668号.
- Xishan v Hongbiantian [2005] Wuxi IPC Xi Zhi Chu No.86. (2005) 锡知初字第86号.
- Yang Chunbao v Xinhua [2002] Shanghai 2nd IPC Hu Er Zhong Min Wu (Zhi) Chu No.166. (2002) 沪二中民五(知)初字第166号.
- Yang Jikang v Sungari Auction and Li Guoqiang [2013] Beijing 2nd IPC Er Zhong Bao No.9727. (2013) 二中保字第9727号.
- Yang Songyun v Tibetan Pagoda Office (TPO) [1998] Xizang HPC Zang Fa Min Zhong No.2. (1998) 藏法民终字第2号.
- Ye Jiaxiu v Dongfangmeili [2017] Guangdong Dongguan 2nd Court Yue 1972 Min Chu No.13367. (2017) 粤1972民初13367号.
- Ye Jiaxiu v Gehuang [2017] Guangdong Dongguan 1st Court Yue 1971 Min Chu No.10178 and No. 10179. (2017) 粤1971民初10178号和10179号.
- Yigal Messika v JK [2010] Beijing 1st IPC Yi Zhong Min Chu No.10067. (2010) 一中民初字第10067号.
- Yinzhuxie (MCSC) v Zhilanyushu [2017] Beijing Dongcheng District Peoples' Court Jing 0101 Min Chu No.20999; [2018] Beijing IP Court Jing 73 Min Zhong No.1885. (2017) 京0101民初20999号; (2018) 京73民终1885号.
- Youdu v Wangshang [2010] Zhejiang Hangzhou IPC Zhe Hang Zhi Chu No.471-1. (2010) 浙杭知初字第471-1号.
- Yuanhang v Tencent [2007] Shanxi Xi'an IPC Xi Min Si Chu No.23; [2007] Shanxi HPC Shan Min San Zhong No.25. (2007) 西民四初字第23号; (2007) 陕民三终字第25号.
- Zhang Muye v China Film and others [2016] Beijing Xicheng District People's Court Jing 0102 Min Chu No.83; [2016] Beijing IP Court Jing 73 Min Zhong No.587. (2016) 京0102民初83号; (2016) 京73民终587号.
- Zhanglian v Guangdonggaojiao and Xinhua [2014] Shanghai 2nd IPC Hu Er Zhong Min Wu (Zhi) Zhong No. 46. (2014) 沪二中民五(知)终字第46号.
- Zhengchengsi v Shusheng [2004] Beijing Haidian District People's Court Hai Min Chu No.12509; [2005] Beijing 1st IPC Yi Zhong Min Zhong No.3463. (2004) 海民初字第12509号; (2005) 一中民终字第3463号.
- Zhongkai v China Netcom [2008] Beijing HPC Jing Gao Min Zhong No.1154. (2008) 高民终字第1154号.

-
- Zhongkai v Shulian and Kafu [2008] Shanghai HPC Hu Gao Min San (Zhi) Zhong No.7. (2008) 沪高民三(知)终字第7号.
- Zhongliang v Changcheng [2016] Beijing IP Court Jing 73 Min Xia Zhong No.68. (2016) 京73民辖终68号.
- Zhuangyou v Langshi (Anye Qiji) [2017] Shanghai IP Court Hu 73 Min Zhong No.241. (2017) 沪73民终241号.
- Zhuangyou v Shuoxing (Qiji Shenhua) [2015] Shanghai Pudong District People's Court Pu Min San (Zhi) Chu No.529. (2015) 浦民三(知)初字第529号.
- Zhuxiaoming v Wanli [2006] Shanghai HPC Hu Gao Min San (Zhi) Zhong No.35. (2006) 沪高民三(知)终字第35号.

TABLE OF LEGISLATION

International Conventions

Berne Convention for the Protection of Literary and Artistic Works (1886, 'BC')
Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign
Judgments in Civil or Commercial Matters
Agreement on Trade-Related Aspects of Intellectual Property Rights (1994, 'TRIPs')
Universal Copyright Convention (1952, 'UCC')
WIPO Copyright Treaty (1996, 'WCT')

EU

Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs
Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules
concerning copyright and rights related to copyright applicable to satellite
broadcasting and cable retransmission
Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of
copyright and certain related rights
Directive 96/9/EC of 11 March 1996 on the legal protection of databases
Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society
services, in particular electronic commerce, in the Internal Market ('E-Commerce
Directive')
Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of
copyright and related rights in the information society ('InfoSoc Directive')
Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on
certain rights related to copyright in the field of intellectual property (codified
version)
Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright
and certain related rights (codified version)
Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs
(codified version)
Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the
term of protection and certain related rights
Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works
Directive 2019/790/EU 17 April 2019 on copyright and related rights in the Digital
Single Market ('DSM Directive')
Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and
enforcement of judgments in civil and commercial matters (recast) (Brussels
Regulation Recast, 'BRR')

Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation, ‘BIR’)

Regulation 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation)

Treaty on the Functioning of the European Union (‘TFEU’)

UK

Copyright Act 1956

Copyright, Designs and Patents Act 1988 (‘CDPA’)

Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479)

Copyright and Related Rights Regulations 2003 (SI 2003/2498)

Duration of Copyright and Rights in Performance Regulations 1995 (SI 1995/3297)

Intellectual Property Enforcement Regulations 2006 (SI 2006/1027)

Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929)

Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 (SI 2014/2861)

Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 (SI 2014/2863)

Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 (SI 2019/605)

Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834)

China

‘BG’: Beijing High People’s Court Guidance on Copyright Infringement Trial (2018)

‘CINRR’: Regulation on CIN Right Protection (2006, 2013)

‘Civil Code’: Civil Code of the PRC (2020)

‘CL’: Copyright Law of the PRC (1990, 2001, 2010, 2020)

‘CLFCR’: Law of the PRC on Choice of Law for Foreign-related Civil Relationships (2010)

‘CPL’: Civil Procedure Law of the PRC (1991, 2007, 2012, 2017)

‘CR’: Regulation on the Implementation of the Copyright Law of the PRC (1991, 2002, 2013)

‘GPCL’: General Principles of Civil Law (1986, 2017)

Ji Domain Name [2001] No.24: Judicial Interpretation by SPC concerning Domain Name

JI Trademark Law [2002] No.32; [2020] No.19: Judicial Interpretation of SPC on Trademark Law

JI Personality Tort [2014] No.11: Judicial Interpretation by SPC concerning Online Personality Tort

JI Preservation [2018] No.21: Provisions on Several Issues Relating to the Application of Law in the Review of Cases of Acts of Preservation in Intellectual Property Disputes

JI CL [2012] No.20: Judicial Interpretation of SPC on CIN Right Infringement

JI CL [2000] No. 48; [2004] No.1; [2006] No.11: Judicial Interpretation of SPC on Online Copyright Infringement

JI CLFCR [2012] No.24: Judicial Interpretation of SPC on Choice of Law for Foreign-Related Civil Relationships (I)

JI CPL [2015] No.5: Judicial Interpretation of SPC on Civil Procedure Law

NCAC Regulation on Reproduction of Digitalised Works [1999] No.45

Regulation of Implementation of International Copyright Treaties [1992] No.15

SPC [1998] No.6: Notice of SPC on General Principles of the Civil Law of the PRC

SPC [2015] No.67: Notice of SPC on the Foreign-related Judgments

Proposals

ALI (The American Law Institute), Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes

CLIP (The European Max Planck Group on CLIP), Principles on Conflict of Laws in Intellectual Property

J-K Joint Proposal, Joint Proposal by Members of the Private International Law Association of Korea and Japan

Japanese Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property

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INTRODUCTION

1. Overview

In this globalised world with frequent cultural and economic exchanges, creative works are enjoyed and exploited freely across the nations with access to the Internet. It promotes the dissemination of the works but also leads to numerous copyright disputes. These factual disputes connect various countries, simultaneously, of which legal issues involve different jurisdictions. It becomes more complicated when the cross-border exploitation of copyright replaced the paradigm of national country-by-country exploitation.¹

There is no doubt that international conventions have offered unified copyright norms to some extent. This process of harmonisation might eliminate several conflicts of national laws among different countries. However, substantive disputes still exist in key aspects. Even though within the EU internally ‘borderless’ single market, copyright laws remain territorial.² This continuing parallel national copyright systems cannot avoid the question of how to enforce copyrights in the cross-border exploitation context.

The interaction between private international law (‘PIL’)³ and copyright (or IPRs) is not a new topic. As early as around 2000, heated discussion on conflict of laws in IPRs started in the western and some Asian countries.⁴ However, this topic did not receive enough attention in China.⁵

¹ Torremans 2016:2, 381.

² EU announced the copyright harmonisation designed to fit the digital age in 2015 and published DSM Directive in 2019. EU: ‘Towards a Modern, More European Copyright Framework’ (9 Dec 2015) <<https://ec.europa.eu/digital-single-market/en/news/towards-modern-more-european-copyright-framework-commission-takes-first-steps-and-sets-out-its>>. This thesis was submitted on 30 March 2021 and the websites cited were current as of that date unless otherwise noted.

³ ‘Conflict of laws’ is referred to in Common Law system. This thesis will use those two concepts interchangeably and mainly focus on jurisdiction and choice of law.

⁴ Fawcett & Torremans 2011; Wadlow 1998; van Eechoud 2003; Drexler & Kur 2005; Matulionyte 2011; Kono 2012; CLIP 2013; Svantesson 2016; De Miguel Asensio 2020.

⁵ Chinese literature: Cong 2007; Yang Changhai 2011; Dong 2014; Xu 2015. Professor Cong puts more emphasis on the substantive copyright issues and copyright reform in relation to Internet and one chapter illustrates his opinion on PIL related issues. Yang’s book elaborates general principles in IPR without significant detailed discussion in copyright and online copyright. Dong’s thesis centres around the jurisdictional rule and practice in the EU and the US, but in lack of Chinese law and practice in detail. Xu’s book focuses on general PIL theories concerning the copyright issue, however without sufficient

The primary reason might be that there were other urgent issues to address. At the time when ALI, CLIP and J-K proposals were published around 2010, China was experiencing its second amendment of copyright law: on the one hand, working hard to combat ‘notorious’ copyright infringement; on the other hand, tackling the emerging multiple domestic copyright issues due to the development of the Internet. The main focus of copyright law was and had always been centring on these internal problems in China.

Another reason might be that the territoriality principle is deeply rooted in copyright law. As noted by scholars, there was little interaction between IP and PIL decades ago.⁶ When students open Chinese IPRs or Copyright textbooks, the first chapter must introduce the characteristic of IPRs Law – ‘territoriality’.⁷ So it is natural for people in the copyright field ignoring the PIL methodology.

Moreover, the extensive ‘Foreign v Chinese’ infringement cases solidified the territorial principle in copyright. Chinese parties were used to be the alleged infringers who committed copyright infringement in China. It was therefore commonly seen in Chinese courts that foreign rightsholders initiated lawsuit against Chinese infringers. Due to the *actor sequitur forum rei*, it is apparent that Chinese courts shall adjudicate the case and then unquestioningly apply Chinese copyright law. The numerous ‘Foreign v Chinese’ cases reinforced the pattern of thinking within the box that Chinese courts shall hear those cases and apply Chinese laws.

Recently, China started to shift its role from being a copyright importing country to an exporter. During the past ten years, big rightsholder companies developed dramatically and generated huge commercial value from exploiting copyrighted works within China.⁸ There is a tendency for those big rightsholders to exploit the work worldwide. For example, many Chinese novels have been translated into foreign languages and disseminated worldwide via the English website ‘Webnovel’ hosted by Tencent. As Chinese copyright owners are more involved in the international copyright exploitation, raising PIL awareness and refining copyright-related PIL rules will benefit copyright protection and enforcement under the cross-border context.

Chinese copyright law was established around the 1990s and revised only twice in a piecemeal way before 2020. Most of provisions are outdated and do not meet the

copyright background and practice. The most recent related Chinese book is Du 2020. It is a translation of ALI (2008) and provides translation of CLIP provisions as an appendix. In English literature, few short chapters or paragraphs discuss Chinese PIL rule and practice concerning copyright, such as Wang Fangfei 2010; Tang, Xiao & Huo 2016. It is even not commonly seen in English literature researching PIL from Chinese perspective (Chap.3 n 47 Professor He’s research). The current copyright and PIL research from Chinese perspective is general and doctrinal, without sufficient examination of the judicial practice.

⁶ Dinwoodie 2001, 429.

⁷ Wu Handong 2019, 13-14. Wang Qian 2015, 15.

⁸ Chap.1 Sec.2.2.

needs of creative industry today. Therefore, more and more participants start to seek an answer from the court on the width and depth of copyright protection.⁹ Many scholars have conducted sufficient and thorough research on copyright issues from a domestic perspective during this period of copyright law transition.

On 11 November 2020, the third amendment was officially published. Several provisions have been substantially amended, based on the rich experience of courts and the thorough study by scholars. The current Copyright Law ('CL') embodies unique characteristics shaped by the domestic need, which does not follow any legal tradition worldwide.¹⁰ Those substantive differences between China and other countries shall be respected. Accordingly, a PIL perspective shall be considered to mitigate the legal conflicts arising from international copyright exploitation.

Unfortunately, compared with the heated discussion in substantive copyright issues, it seems PIL has made no progress since 2010, when Law of the PRC on Choice of Law for Foreign-related Civil Relationships (2010) ('CLFCR') was enacted. CLFCR was regarded as a significant progress on PIL legislation in China. However, there were still many imperfections. From a general perspective, PIL legislation is fragmented. CLFCR only prescribes the choice-of-law rule, while jurisdiction is governed by domestic Civil Procedure Law and Copyright Law. From a detailed perspective, the legislative provisions are oversimplified and outdated, thus creating multiple problems in practice. As foreign-related copyright exploitation increases, there is a need to explore how current PIL rules applied to copyright cases in practice, and a detailed examination is necessarily required to inform further improvement of copyright law and PIL in China.

2. Research objectives

A lot of English literature has been written concerning PIL rules in copyright infringement, both in doctrinal analysis and case study. In comparison, discussion on Chinese PIL rules and judicial practice in the copyright field is not commonly seen in English literature. Even in Chinese language literature, there is little analysis of the application of Chinese PIL rules in copyright cases. This thesis hopes to fill the gap concerning Chinese law and practice in the interaction between PIL and Copyright Law.

The first objective of the research is to conduct a comparative study in the UK and China concerning the major field of copyright law. Firstly, it clarifies the substantive differences of major aspects of UK and Chinese copyright law and points out whether these differences will pose problems for China in protecting foreign copyright. Secondly, substantive chapters may function as the general picture of copyright issues which might have implication for the subsequent PIL discussion, in particular, jurisdiction and choice of law.

⁹ Chap.1 Sec.2.4.

¹⁰ Chap.1 Sec.2.1.

The second and principal objective is to examine PIL's application to copyright cases in both countries. By combining PIL and copyright, it focuses on jurisdiction and choice of law in copyright disputes.¹¹ Furthermore, it explores the complicated issues and challenges emerging from the Internet, which the copyright industry centres around today. Subsequently, it discusses whether the current rule is satisfactory and how the traditional approach could be well applied under Internet context.

3. Structure

Questions would be divided into two parts in this thesis where private international law is considered as mortar surrounding the copyright bricks.¹² The first copyright part will begin with a general framework of substantive copyright laws in Chapter 1. It mainly answers: How are copyrighted works created? Who owns the copyright? When is the protection terminated? Subsequently, Chapter 2 deals with offline and online copyright infringement issues. What acts are restricted by law? How to determine infringement? As more participants are involved in online copyright exploitation, who is responsible for the infringement? Whether the substantive copyright law provides a clue on where the infringing acts occur, since the location of activities is essential in PIL.

Chapter 3 serves as the linking chapter between Copyright chapters and PIL chapters. It begins with some concepts and their implication for adopting PIL methodology to solve copyright disputes. Subsequently, it examines how the jurisdictional and applicable law issues arise in copyright infringement. Finally, a general introduction of PIL legislation is provided as the legislative background for the subsequent detailed analysis in Chapter 4 and Chapter 5.

One point has to be mentioned here that PIL normally consists of three intricately interconnected issues: jurisdiction, choice of law and recognition and enforcement of foreign judgments. This thesis will not discuss recognition and enforcement in further detail. Generally, if the jurisdictional rule is accepted in one state, then the foreign judgment of the court selected under the agreed jurisdictional rule might be easily enforced and recognized. In addition, the prerequisite of recognizing a foreign judgment is whether the applicable law is closely and reasonably closed to the dispute. In other words, if states agree on the jurisdictional rule and the applicable law rule, there will be little or no obstacles in recognizing and enforcing the foreign judgment.

¹¹ Since party autonomy is widely accepted in foreign-related contractual relationship, this thesis will not put much emphasis on the contractual issue. It will be mentioned if necessary, when copyright infringement may arise from a breach of contract.

¹² Svantesson 2016, 15. 'PIL could obviously also be viewed as an area of law, but for the purpose of clarifying the substantive scope, that would be unworkable. Instead PIL should be viewed as the mortar that surrounds the bricks (the bricks being areas, like contract, trademarks, copyright and defamation).'

In short, this thesis will separately discuss jurisdiction (Chapter 4) and choice of law (Chapter 5), although they are interrelated. The adjudication jurisdiction decides which court is competent to hear the case when a foreign-related dispute is raised. And subsequently, if a court accepts to hear such a dispute, it shall answer which law shall be applied. In these two chapters, steps to research are similar: how the law prescribes the rule; how the court evolves the approach; how the problems arise in practice; how the traditional rule be appropriately applied, indicated by proposals such as CLIP.

Chapter 4 focuses on jurisdiction. It compares approaches adopted by both courts to determine their competence, mainly in two-fold: factors related to defendants and factors related to the dispute. Furthermore, it examines the application of those approaches in practice. More importantly, it highlights challenges arising from the Internet and assesses whether current approaches work well in online copyright disputes. Finally, it suggests several factors which might be considered in refining the international jurisdictional rules.

Chapter 5 centres on the applicable law issues. Since *lex loci protectionis* has been widely accepted in law and thoroughly examined by doctrinal study, this Chapter will emphasise how this rule is applied in practice. It examines the misunderstanding of *lex loci protectionis* and the potential problems of numerous overlapping national copyright laws in online infringement. Finally, it raises the concern of the current deviation in applying *lex loci protectionis*.

4. Methodology

Comparative law is the study of describing, juxtaposing and identifying similarities and differences¹³ from a large scale or a small scale,¹⁴ which is ‘involved in all methods of scholarly investigation’.¹⁵ Among the several practical benefits brought by comparative law, the primary one is that it is beneficial for the developing nations in framing domestic legislation,¹⁶ and another is facilitating the regional or international unification of laws, for example, the Europeanization of private law.¹⁷

Comparative analysis would facilitate achieving the two objectives in this thesis. This research’s main objective is to identify and analyse similarities and differences concerning the cross-border copyright exploitation from copyright law and PIL between China and the UK. It attempts to understand the differences between the two legal systems and the possibility of further agreement. A comparative analysis would be an appropriate method to provide descriptive work by mapping common and divergent copyright law and PIL. It is also helpful for further articulating why the two

¹³ Nelken 2007, 25.

¹⁴ Zweigert & Kötz 1998, 4-5.

¹⁵ Örüçü 2007, 45.

¹⁶ Zweigert & Kötz 1998, 17.

¹⁷ Reimann 2002, 699.

nations set forth interpretations and applications similarly or differently.¹⁸ This research plans to raise the awareness of possible alternatives and mutual respect between the developed and developing countries, thus prompting them to move towards the same direction but not the same rules. The second purpose of this research is to provide the suggestion on the refinement of PIL rules in copyright disputes involving foreign elements. As EU Brussels and Rome regulations (respectively governing jurisdiction and choice-of-law issues) have been established for a period of time, it will be beneficial for China to study how these regimes work to enforce copyright outside territory and whether those approaches work well today. The comparative study is appropriate for a country with little experience to learn lessons from others with rich experience.

In order to understand laws in China¹⁹ and the UK, a doctrinal method is also adopted. The term ‘doctrinal’ means instruction, knowledge or learning.²⁰ The main feature of the doctrinal method is that it will ‘rectify the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources’,²¹ which usually includes a two-part process of locating traditional legal materials and using techniques to interpret them.²²

It would be a little complicated for this research under the circumstance of Brexit, which has significant and far-reaching implications on the UK copyright and conflict of laws. It is impossible to foresee whether new rules are enacted or not in the end. However, due to the long-time of shared legislation, it is possible to see an appropriate coordination concerning EU law in the UK. Since EU rules have been involved in the UK law for decades, it is inevitable for this research to read both the common legal heritage of English law and EU law whenever necessary.

Moreover, the case-law of the UK and CJEU²³ is important. EU case before Exit Day might apply, but the Supreme Court will not be bound by it.²⁴ In China, even though there is no judicial precedent system, the Judicial Interpretation (‘JI’) issued by the Supreme People’s Court (‘SPC’) has a legally binding effect. Since JIs throw some light on the evolution and application of the law, they will be examined as well. In addition to national legislation and case law, related normative sources and authoritative sources would also be examined.

¹⁸ Ewald 1995, 2149.

¹⁹ Chinese law in this thesis mainly refers to the law effective in Mainland China.

²⁰ Hutchinson & Duncan 2012, 84.

²¹ McConville & Chui 2007, 3-4.

²² Hutchinson 2018, 18.

²³ TFEU Article 267. Moreover, AG’s opinions are of research value, even though those are not binding (Article 252). Rosati 2014:2.

²⁴ Exit Day, 31 January 2020. The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No.3) Regulations 2019, SI 2019/1423.

CHAPTER 1 COPYRIGHT PROTECTION IN THE UK AND CHINA

1. Introduction

Since the nineteenth century, the international community has endeavoured to harmonise copyright law by a series of conventions.¹ Promulgated in 1886, Berne Convention (BC) is considered as the primary international copyright treaty, providing the template for the subsequent series of copyright-related conventions. These conventions have set out several harmonised rules and reduced legal conflicts to some extent. However, marked differences still exist and territoriality of copyright is not changed.

The regional effort in the EU has established a body of harmonised copyright norms² by way of implementing directives³ and cases⁴, however not yet complete.⁵ The recent DSM Directive attempts to harmonise certain aspects of copyright law,⁶ but national and parallel copyright systems within the EU still exist.⁷ Since there is no unitary copyright regime internationally or regionally, substantive differences become the obstacle for protecting foreign copyright and enforcement in foreign countries.

This chapter compares major aspects of copyright in both countries, which also serves as a general picture of substantive background for the following PIL chapters. In addition, the differences reveal the inadequacy of CL in protecting foreign copyright and also highlight the need for applying PIL in foreign-related copyright dispute.

¹ Copyright and neighbouring rights are protected by an interlocking network: [1] Copyright: Berne Convention (BC), Universal Copyright Convention (UCC) and WIPO Copyright Treaty (WCT). [2] Neighbouring rights: 1961 Rome Convention (protection of performers, producers of phonograms and broadcasting organizations); 1971 Geneva Convention (protection of producers of phonograms); 1974 Brussels Satellite Convention (distribution of programme-carrying signals transmitted by satellite); 1996 WPPT (WIPO Performances and Phonograms Treaty); 2012 Beijing Treaty (audiovisual performances).

[3] WTO trade-related: TRIPs agreement (Trade-Related Aspects of Intellectual Property Rights, 1994).

² Goldstein & Hugenholtz 2019, 64. In many aspects, the EU protection of copyright and neighbouring rights exceeds international minimum standards, for example the term of 70 years (PMA) is well above BC standard.

³ For the list of eleven directives and two regulations, see European Commission, 'EU Copyright Legislation' (29 October 2020) <<https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation>>.

⁴ Rosati 2019. EU case-law has a significant role in EU copyright harmonisation, even reshaped key copyright aspects in the UK.

⁵ Lucas-Schloetter 2014, 7.

⁶ DSM Directive, Article 1.

⁷ De Miguel Asensio 2020, 205-219.

2. Background of copyright protection in the UK and China

2.1 The evolution of Copyright Law

Before analysing specific aspects in copyright law, the fundamental difference will be introduced initially, that is, how the current copyright law is evolved in both countries. This section does not aim to trace back the whole history of copyright law but serves as a background for the following detailed provisions and judicial practice.

Copyright law was rooted profoundly in the UK. It emerged from printing privileges in the domestic publishing activities in the 1710 Statute of Anne.⁸ In 1911, the Copyright Act was adopted to protect work without formality and then evolved into 1956 Act and CDPA 1988, which are the most significant modern copyright legislations worldwide.

Since 1998, when the Green Paper marked the starting point of EU copyright harmonization,⁹ the traditional UK common law rule has experienced Europeanization in several essential aspects.¹⁰ Although Brexit has stopped that trend and might be an opportunity for the UK to go back to the traditional copyright system in some previously Europeanised respects,¹¹ it would not amount to immediate substantive changes in the UK¹² and the consequence on copyright law is yet to be clarified.¹³

In China, the concept of copyright came into existence at the beginning of the 20th century.¹⁴ In 1910, the Late Qing Government promulgated the Qing Copyright Law.¹⁵ Then, the Beiyang Government and the National Government of the Republic of China also promulgated the Copyright Law in 1915 and 1928 respectively.¹⁶ However, due to decades of war and chaos, those laws were not effectively implemented. ‘Copyright

⁸ Although Statute of Anne grants the privilege to print, reprint and importation of copies, it has an influence on establishment of modern copyright system. From the ancient privilege system to the modern copyright, see Kretschmer, Bently & Deazley 2010, 6-17. Bently, Suthersanen & Torremans 2010, 7-165.

⁹ Green Paper on copyright and the challenge of technology – Copyright issues requiring immediate action, COM (88) 172 final. (1988 Green Paper)

¹⁰ See originality (Chap.1 Sec.3.1.3), infringement test (Chap.2 Sec.2.1.1.1).

¹¹ Dinwoodie & Dreyfuss 2017, 3-4. A new copyright act was proposed, see Arnold 2015, 110-131.

¹² Goldstein & Hugenholtz 2019, 64. International conventions may continue to regulate the EU-UK relationship.

¹³ Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 was introduced and due to come into force on 1 January 2021. UK Government, ‘Changes to copyright law from 1 January 2021’ (published 30 January 2020, last updated 4 January 2021) <www.gov.uk/guidance/changes-to-copyright-law-after-the-transition-period>.

¹⁴ Zheng 2007, 8-15. Qu 2001. It may date back Song Dynasty (960-1279 DC) that the emperor banned on the unauthorized copying. However, it is not the same as the modern concept of copyright which originates from the west.

¹⁵ Li & Ng 2009, 767-788. Hennessey 2009.

¹⁶ Sun 2016, 472-473.

Law’ during that time was just a purely western concept ‘in the book’ without effective enforcement in practice, poorly rooted in China.¹⁷

It was around the 1980s that the drafting of CL started.¹⁸ The first driving factor was its fulfilment of the international obligation.¹⁹ The second trigger was the ‘Reform and Opening-up’ policy in 1978. China realized that IPR protection was the prerequisite of attracting foreign investment and involving in international trade.²⁰ It was not until 1986 that General Principles of Civil Law²¹ recognized copyright protection in law.²²

There are four CLs in chronological sequence: CL 1990, 2001, 2010 and 2020. The first modern Copyright Law only dated back to 1990, which was simple and short and did not contain any Internet-related provisions.²³ In 2001, CL was revised systematically to comply with TRIPs after accession to the WTO.²⁴ Subsequently, 2010 CL only amended two articles without a significantly substantial revision.²⁵ It might be briefly concluded that the copyright law provisions before 2020 had never been revised since 2001. In the meantime, six regulations²⁶ (a lower legal authority than CL) were promulgated in order to deal with specific issues and provide further explanation of articles in CL. CL and its regulations constitute the legal foundation of copyright protection in China.

On 11 November 2020, the third amendment was officially published and would be effective on 1 June 2021. 2020 amendment conducted a comprehensive revision concerning the subject matter, the content of rights, ownership, limitations, administrative bodies and damages.²⁷ The driving force behind this change was that

¹⁷ Feng 2003, 3.

¹⁸ Wu & Song 1995.

¹⁹ China joined WIPO on 3 June 1980. WIPO, ‘Country Profiles: China’ <www.wipo.int/directory/en/details.jsp?country_code=CN>.

²⁰ Agreement on Trade Relations Between the USA and the PRC (7 July 1979), Articles VI (1) and (5).

²¹ General Principles of Civil Law (GPCL) 1986 is the foundational legislation of Civil Law in China. For the emergence, characteristics and role of GPCL, see Tong 1989.

²² Two articles: ‘people shall enjoy copyright’ (Article 94) and ‘someone who infringes other’s copyright shall be liable’ (Article 118). They do not provide any detailed rules concerning copyright. For copyright law before 1990, see Sun 2016, 471-477.

²³ Ren 1995. Feaver 1996.

²⁴ Feng & Huang 2002.

²⁵ For the structure and detailed content of CL 2010, see Li Yufeng 2011, 78-105. For the translation of CL 2010, see WIPO <www.wipo.int/edocs/lexdocs/laws/en/cn/cn031en.pdf>.

²⁶ Provisions on the Implementation of International Copyright Treaties (effective on 30 September 1992), Regulation on the Protection of Computer Software (1 January 2002), Regulation on the Implementation of the Copyright Law of the PRC (‘CR’ 15 September 2002), Regulation on Copyright Collective Management (1 March 2005), Regulation on CIN Right Protection (1 July 2006), Interim Measures on Payment of Remuneration for Broadcast of Phonograms by Radio and Television Stations (1 January 2010).

²⁷ This thesis will mainly use the numbering of CL 2010 (if the related contents in 2020 CL are not revised) and indicate the difference between the old and new numbering of CL 2020 if necessary.

the old law had become unsuitable for the Internet age. Today, the Internet is engraved in every aspect of people's lives that is completely different from the days when Internet-related provisions were established.²⁸ The laws that were promulgated in the early days of the Internet are no longer applicable today.

In short, Chinese copyright law was established under pressure notably from the US, and then was developed to implement the obligation of international treaties.²⁹ It is inevitable for a country where no copyright industry or legislation exists, to transplant the copyright law from 'western' traditions at the outset.³⁰ It then develops its own characteristics under its legal, social, economic and cultural context,³¹ experiencing a process from 'legal transplant' to 'self-governance'.³²

This process involves a complex interaction between imported models and indigenous traditions. It creates a unique copyright system in China, by 'adding' common law copyright norms into Chinese civil law system which has inherited the continental European tradition.³³ It is reasonable that Chinese copyright law shall follow continental tradition. At first glance, the structure of CL seems lean to *droit d'auteur*; for example, it values moral rights³⁴ and adopts a unique 'related rights' regime.³⁵ However, if one takes a closer look at the judicial practice or understanding of provisions, common law doctrine is highly appreciated. Moreover, since the Internet develops and plays a crucial role in boosting the economy, there is a general tendency of treating copyright work as a commercial product,³⁶ orienting towards the common law tradition. In short, Chinese copyright law is neither in conformity with civil law nor common law entirely.³⁷

It is undeniable that China has fulfilled international obligation and promoted copyright protection in a short period by transplanting copyright laws from other

²⁸ In 1995, the first Internet-connected commercial computer network started to provide Internet services to the public. By June 2020, China had 940 million netizens and the Internet penetration rate reached 67.0%. CNNIC, 'Statistical Report on Internet Development in China (September 2020)' 13 <<http://cnnic.com.cn/IDR/ReportDownloads/202012/P020201201530023411644.pdf>>.

²⁹ Stoianoff 2012.

³⁰ WTO, 'Report of the Working Party' (1 October 2001), 50-51 & 54 <www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm>.

³¹ Wu Handong 2009, 63.

³² Lee, Bruun & Li 2016, 5-88.

³³ Yu 2004, 4-5. The majority of the first civil law code (1929) in China were transplanted from German and Swiss law.

³⁴ Since the establishment of 1990 CL, four types of moral rights were structured ahead of economic right(s) in law (four moral and one economic in 1990 CL).

³⁵ CL Chapter 2 focuses on 'copyright' while Chapter 4 concerns neighbouring rights. The overarching concept of 'neighbouring/related rights' in China refers to the rights of publishers (Chapter 4 Section 1), performers (Section 2), producers of sound and video recordings (Section 3) and broadcasters (Section 4). See Feng & Huang 2002, 927-931.

³⁶ Priest 2016.

³⁷ Sun 2016, 503.

countries. However, there are some drawbacks of this ‘mix’ law. Firstly, by incorporating several incompatible rules into one system, Chinese copyright law is not inherently logic in some cases. For example, although the neighbouring rights regime exists, it adopts a single approach to protect all photos under copyright.³⁸ Conversely, it adopts a dual approach of protecting cinematographic works as copyright and denies copyright protection on those non-original video recordings.³⁹ It creates an incoherent understanding of originality; that is, the threshold of originality is lower in photographic work while much higher for videos to get copyright protection.

Secondly, the transplanted concepts and provisions are abstract and ambiguous; thus, problems emerge in applying the law. Various provisions were ‘copied’ from international conventions in a general way, leading to the domestic law’s ambiguity and vagueness.⁴⁰ Vagueness in international treaty might be a compromise of different countries or an encompassing treatment for technological development.⁴¹ Direct transplanting those vague provisions might be effective and efficient for legislation to some extent; moreover, it is necessary to use general terms in law, especially in the copyright field where technology has affected and might continue to affect legislation. However, ‘general’ shall not be confused with ‘uncertain’, or otherwise, the ambiguous wording of law might easily result in an awkward situation that different judges have different understandings.⁴² It is reasonable that Chinese judges who studied in the US and the UK may hold ‘copyright’ understanding, and those who have studied in Germany and Japan may prefer to ‘*droit d’auteur*’.⁴³

In a simple word, the theoretical foundation and development of copyright law in both countries are entirely different. It is apparent that since the establishment of copyright, the UK values the economic and social dimension. Such an orientation still underpins CDPA. In contrast, CL was transplanted from foreign countries and international conventions thus embodying characteristics of both common law and civil law system. Although CL bases on the ‘author’s rights’ tradition, legislative and judicial

³⁸ Wang Qian 2012, 28-31. Almost all photos, irrespective of the creativity level, are granted copyright protection in China.

³⁹ Chap.1 Sec.3.1.5.

⁴⁰ Li Chen 2020. Some concepts and provisions may error in translation when incorporating international conventions into domestic copyright law. For example, ‘cinematographic works to which are assimilated works expressed by a process analogous to cinematography’ in BC, of which the word ‘expressed’ (表现) was translated into a more narrower wording ‘created’ (创作) in Chinese. Such an error in translation is adjusted in practice by directly applying BC.

⁴¹ Wang Qian 2014. The technique of translation concerning technology-related provisions at early stage may create problems in applying the law. For example, the direct but poor translation of BC Article 11 to CL Article 10(1) makes it difficult to read and understand the Chinese version of broadcasting right.

⁴² Feng & Huang 2002, 917. Hua 2014, 94.

⁴³ SPC, ‘News’ (25 December 2020) <<http://ipc.court.gov.cn/zh-cn/news/view-964.html>>. The IP Division of SPC has 38 judges and 44 judge assistants. All have master’s degrees or above, of which 42% hold PhD, 37% have majored in Science and Engineering and 21% have studied overseas.

attitudes tend to lean towards the common law tradition – considering works as commercial products.

2.2 The industrial background

The legislation and application of copyright law are, more or less, pushed by the development of technology and the copyright-based industry. As shown by statistics, there are big copyright markets in both countries. The high value of the copyright industry requires a sound legal environment, and in turn, effective and efficient enforcement of law will promote the development of the industry.

The Creative Industries in the UK were defined as ‘those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property’.⁴⁴ The Creative Industries contributed £115.9 bn in 2019, accounting for 5.9% of GVA, which has increased by 5.6% between 2018 and 2019 and by 43.6% between 2010 and 2019 in real terms.⁴⁵ Sectors estimated include publishing, software, film, tv, music, radio and art, most of which centre around the exploitation of copyright.⁴⁶

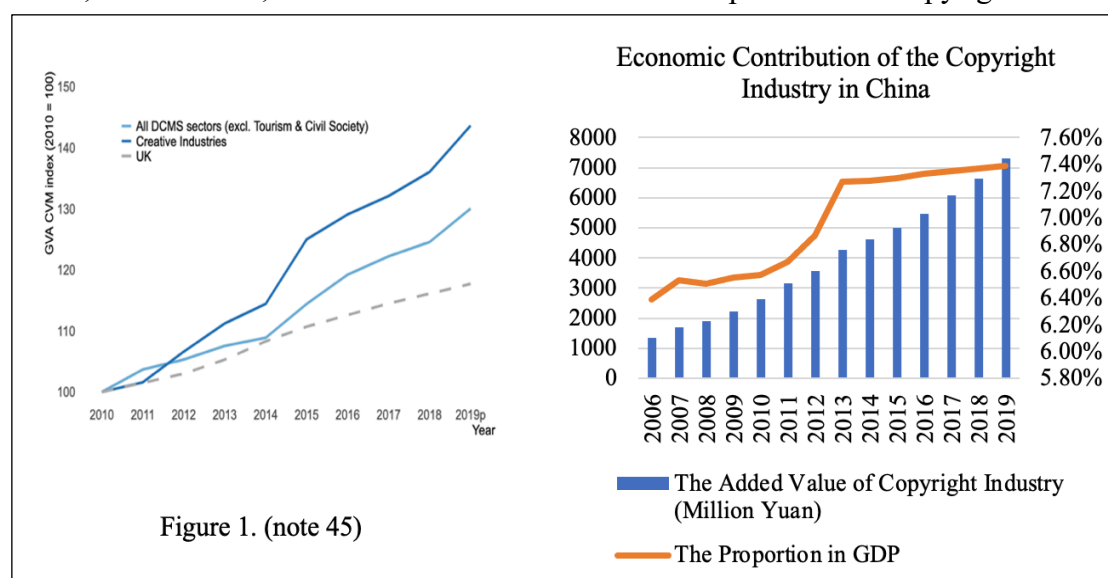


Figure 1. (note 45)

1.1 Economic contribution of copyright-oriented industry

Similarly, the copyright-oriented business model has emerged and developed dramatically in China. The research reveals that from 2006 to 2019, China’s copyright

⁴⁴ UK Government, ‘Creative Industries Mapping Documents 2001’ (9 April 2001) 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/183544/2001part1-foreword2001.pdf>.

⁴⁵ UK National Statistics: ‘DCMS Economic Estimates 2019 (provisional): Gross Value Added’ (10 December 2020) <www.gov.uk/government/publications/dcms-economic-estimates-2019-gross-value-added/dcms-economic-estimates-2019-provisional-gross-value-added>. See Figure 1.

⁴⁶ UK Government, ‘DCMS Sectors Estimated’ <<https://www.gov.uk/government/publications/dcms-sectors-economic-estimates-methodology/dcms-sector-economic-estimates-methodology>>.

industry has achieved rapid development, and its contribution to the national economy has continued to grow.⁴⁷ The added value of the copyright industry grew from ¥1,350 bn (2006) to ¥7,320 bn (2019); the proportion of contribution to GDP grew from 6.39% to 7.39%. As the economic value of copyright has been further accentuated, a content monetization model is established in China.

The dramatic increase is attributed to the exploitation of digital copyrighted content, such as online video, online literature, digital music, e-book and online films.⁴⁸ Consumers are willing to pay a premium for the content and subscription.⁴⁹ Exploiters and creators are paid generously to develop high-quality content. It thus creates a virtuous cycle of development in the copyright industry.

2.3 The Internet and copyright

The Internet is the global network of networks,⁵⁰ and has become engraved in our lives. As predicted by computer engineers, the evolution of the Internet will bring us new applications, and ‘new modes of access and new forms of service will spawn new applications, which in turn will drive further evolution of the net itself’.⁵¹ This dynamic interconnected medium is closely related to copyright law. Scholars argue that IP law’s stability is found in the process through which these addresses and relationships between owner and object change.⁵² In a word, copyright law shall be in line with technological development.

A new technology frontier has emerged, for instance, cloud computing and mobile devices. Cloud computing refers to storing and accessing resources over the Internet instead of the hard drive of one’s computer. It is the ‘on-demand access, via the internet, to computing resources – applications, servers (physical servers and virtual servers), data storage, development tools, networking capabilities, and more – hosted

⁴⁷ CPPRI, *The Economic Contribution of Copyright-Based Industries in China*. Since 2007, NCAC has cooperated with WIPO to conduct a study on the economic contribution of China’s copyright industry and published CPPRI report every year. This diagram is drawn by the author of this thesis in accordance with CPPRI reports from 2007 to 2020 respectively.

⁴⁸ For example, Tencent is one of the biggest Chinese multinational investment holding conglomerate whose subsidiaries specialize in various Internet-related services and products. It proposed a merchandising ‘Pan-Entertainment Cycle’ based on the exploitation of copyright in 2011. According to the official website of China Literature owned by Tencent, there were 13.4 million copyright works and 8.9 million authors, covering several hundreds of millions of Internet readers. See ‘Introduction Page’ <www.yuwen.com> accessed 10 February 2021.

⁴⁹ Financial Reports 2019 & 2020 of Iqiyi (one of the leading online video platforms in China). In the first half of 2020, its membership services revenue was ¥8.6 bn, up 26.5% year-on-year, accounting for 57.3% of total revenue.

⁵⁰ Zittrain 2006, 1975.

⁵¹ Leiner and others 2009, 30.

⁵² Ghosh 2012, 1024.

at a remote data centre managed by a cloud services provider (CSP)'.⁵³ Compared with traditional on-premises IT, it has several advantages including low cost and high efficiency. This cloud-based remote storage pattern provides the underlying infrastructure for online services, thus creating a potential problem in localising the 'infringer' or the 'infringing' place.

Moreover, the easy access technology might further loose the traditional control over copyrighted work. Since the mobile phone becomes smarter, people start to access digital content by mobile. In 2016, mobile users surpassed laptop users worldwide, but the desktop is still the primary mode of internet usage in mature markets such as the US and the UK.⁵⁴ In contrast, China mobile users have exceeded laptop users in 2012, and today mobile usage has dramatically increased to 99.2%, while computer users merely cover around 30%.⁵⁵ Mobile phones have become the most frequently used medium for people accessing online content in China.

In the copyright-based industry today, the exploitation of copyright tends to be established on easy access technology. As copyright work is more accessible on the Internet, the traditional control over those work has loosened. It has commonly occurred that infringement in one state (nowhere or everywhere) can create an effect extending outside the border. Since the Internet can cross borders, the enforcement of territorial copyright law becomes more complicated.

2.4 The unique situation in China

2.4.1 The initial administrative enforcement of copyright

China's copyright protection has undergone a fundamental transformation, mainly due to the administrative enforcement. China used to be the 'greenhouse' for copyright infringement. In order to eliminate rampant infringement, administrative measures as an efficient and effective way to protect copyright have been used extensively.

⁵³ Vennam 2020.

⁵⁴ Statcounter, 'Mobile and Tablet Internet Usage Exceeds Desktop for First Time Worldwide' (1 November 2016) <<https://gs.statcounter.com/press/mobile-and-tablet-internet-usage-exceeds-desktop-for-first-time-worldwide>>. In the UK, Internet usage via mobile and tablet covered 44.4% while desktop covered 55.6%.

⁵⁵ CNNIC, 'Statistical Report on Internet Development in China' <<http://cnnic.com.cn/IDR/ReportDownloads/index.htm>>. In the 46th report (December 2020), by June 2020, the proportions of Chinese netizens accessing the Internet through mobile phones, desktop computers, laptops computers, TVs and tablet computers were 99.2%, 37.3%, 31.8%, 28.6% and 27.5% respectively. According to the 29th (January 2012) report, 73.4% internet users access to Internet with desktop, while using mobile is up to 69.3%. The subsequent 30th report showed that in the first half of 2012, mobile phone had become the Internet access terminal with the greatest number of Internet users. The number of Internet users using mobile phones to access the Internet reached 388 million while that of desktop users was 380 million.

From 2005, National Copyright Administration of China (NCAC) has carried out the nationwide ‘Jianwang’ campaign once a year to combat copyright infringement.⁵⁶ Moreover, NCAC published many administrative regulations and notices to deal with infringement, especially ubiquitous online infringement.⁵⁷ For example, a severe notice to order ISPs to take down unlicensed musical works before 31 July 2015 pushed the music market on track.⁵⁸

Administrative measures reduce piracy and raise people’s awareness of copyright protection in China. As reported by the International Federation of the Phonographic Industry (IFPI) in 2018, 96% of the surveyed Chinese consumers were engaged with licensed music.⁵⁹ However, back to 2012 China had suffered from ‘an estimated 99% digital piracy rate’⁶⁰ and was criticized as ‘the largest physical pirate market and growing internet piracy’ in 2006.⁶¹ The administrative measures function well and fast towards online copyright infringement, especially compared with the long process of judicial judgment and legislation.

In addition, copyright holders can send proofs to NCAC to initiate administrative enforcement. After examining the proof, NCAC will allocate cases to the local administrative organ. Moreover, NCAC will urge and supervise major ISPs to remove the infringing content promptly. For example, NCAC regularly publishes the list containing recently released movies or TV series, and requests ISPs take adequate measures to prevent that material from illegal uploading onto their websites.

The Chinese approach to tackling digital piracy embodies an administrative characteristic. Compared with civil litigation, copyright owners, especially individual creators, prefer to adopt administrative remedy. However, it might be efficient and effective to tackle infringement within China, by requiring Chinese ISPs to remove the infringing content or by blocking foreign websites to prevent Chinese netizens from accessing the material within China. In lack of bilateral, regional or international cooperation, NCAC does not have the authority to tackle infringement abroad. The effective and efficient administrative measure might lead to the neglect of the fact that copyright infringement is a civil and commercial relationship. Moreover, the essential role of court in dealing with infringement might be ignored.

⁵⁶ Shen 1996.

⁵⁷ Various P2P file sharing platforms, where ubiquitous infringement exists seriously, have closed their business due to the strict filtering obligation by ‘NCAC Notice on Regulating the Copyright Order of Network Disk Services’ (14 October 2015).

⁵⁸ Flanagan 2015. In 2015, ‘NCAC Notice on Ordering Online Music Service Providers to Stop the Dissemination of Unauthorized Music Works’ was carried out and more than two million unlicensed music were taken down immediately from the digital music platform.

⁵⁹ IFPI Report 2018, 17.

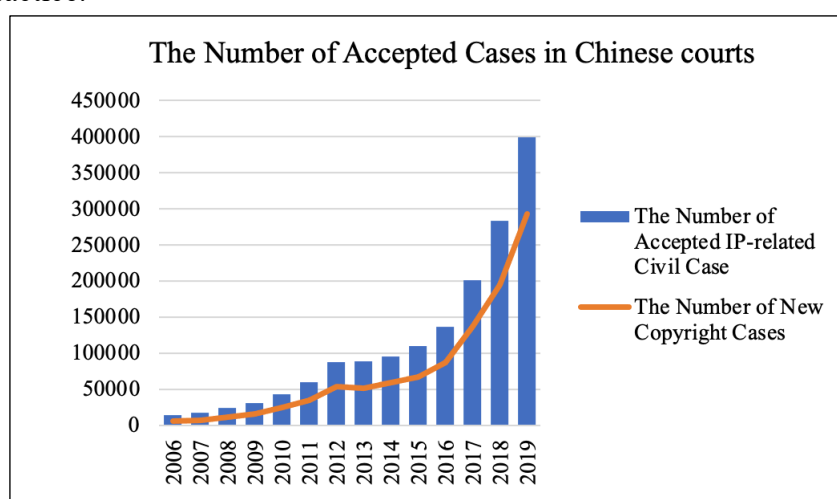
⁶⁰ IFPI Report 2012, 23.

⁶¹ IFPI Report 2006, 11.

2.4.2 The increase of judicial cases

During the past five years, the number of civil copyright cases dramatically increases. According to SPC, in 2006, courts nationwide received a total of 14,219 civil first IPR cases, including 5,719 copyright cases. In 2019, the total IP-related civil first instance case number grew to 399,031, of which 293,066 concerned copyright. The number of copyright cases in 2019 was approximately 51 times higher than that in 2006. The proportion of copyright to all IPR cases also rose from 40% in 2006 to 73% in 2019.⁶²

The massive number of judicial cases provides the basis to improve legislation. IP courts and Internet Courts are established to centralize the hearing of copyright cases and Internet-related copyright cases.⁶³ They provide a lot of reliable support for courts to summarise the trial experience. Moreover, as the free case database is available online,⁶⁴ the continuing openness provides valuable resources to improve legislation and enables participants and exploiters to foresee the result of their activities. Thanks to the abundant cases, it is helpful and a good time for this thesis to examine Chinese judicial practice.



1.2 The number of accepted cases in Chinese courts (2006-2019)

Compared to the numerous, even overloaded, domestic copyright cases, foreign copyright cases present a completely different picture. Not only is the number of foreign-related IPR cases low, but the number of foreign-related copyright cases is even

⁶² SPC, *Intellectual Property Protection by Chinese Courts* (People's Court Press, 2007-2020). The diagram is drawn by this author in accordance with SPC reports from 2007 to 2020 respectively.

⁶³ For example, Beijing Internet Court was established to address Internet-related copyright cases. From its first day (9 November 2018) to 31 March 2020, this court has received 54,844 cases in total, among which 42,080 cases concern copyright disputes, covering 77% of the total. See official statistics from Beijing Internet Court (22 April 2020) <www.chinacourt.org/chat/chat/2020/04/id/52410.shtml>.

⁶⁴ China Judgments Online: <https://wenshu.court.gov.cn/>. Since its establishment in July 2013, it has published over 114 million judgments (accounted and accessed 18 January 2021).

lower, far less than foreign patent and trademark case.⁶⁵ Recently, a new feature has arisen. There used to be a high proportion of cases involving ‘foreign v Chinese’,⁶⁶ but more cases involving domestic plaintiffs and ‘foreign v foreign’ emerge.⁶⁷

3. Creation and validity of copyright in the UK and China

The creation and validity issues are essential in copyright exploitation. In real life, if someone decides to exploit its work in a foreign country, the first task shall enquiry whether the work will be protected, under which regime and when the protection expires. Subsequently, if disputes unfortunately arise, the creation and validity of copyright might function as a way of defending or counterclaim in the court. The defendant might defend himself or raise a counterclaim by challenging the validity of disputed copyright.⁶⁸ For example, the defendant would argue that the plaintiff’s copyright has never been created because the essential requirement of creation is not satisfied, or its term of protection has expired. The existence of irreconcilable substantive legal conflicts might be troublesome for parties involved in a cross-border environment.

BC has harmonised basic requirements for copyright protection in both countries.⁶⁹ Firstly, unlike trademark and patent, there is no requirement of formality⁷⁰. Works are automatically protected at the time of creation. Secondly, it is generally agreed that copyrighted work need not be novel or unique.⁷¹ A derivative work originates from pre-existing work may be protected if requirements are satisfied. For

⁶⁵ Shanghai HPC, ‘Report on Foreign-related IPR Cases in Shanghai 2014-2017’ (25 April 2018) <<http://snsfbh.hshfy.sh.cn/css/2018/04/25/20180425152414239.pdf>>. From 2014 to 2017, the number of foreign IPR cases was 1,244 (received, 1219 concluded), accounting for only 3.3% of all civil IPR cases received. Among them, there were only 417 copyright cases. Beijing IP Court Judge Chen Jinchuan 2019:2. Since Beijing IP Court’s establishment (November 2014), 572 IPR foreign-related civil cases were received, of which half were patent cases, and the rest concerned trademarks, copyrights and unfair competition.

⁶⁶ Ibid, Shanghai HPC. Cases with foreign plaintiffs accounted for 96.3% of the total number of foreign-related cases.

⁶⁷ Chen Jinchuan 2019:2. Judge Chen summarized characteristics on foreign-related IPR cases adjudicated in Beijing IP Court: [1] the proportion of foreign-related cases increases, and the geographical area involved is wide; [2] most of cases involve new technologies and new products; [3] there are more cases involving internationally renowned trademarks and trade names; [4] there is an increase in foreign enterprises suing foreign enterprises; [5] ‘Chinese v foreign’ emerges and increases; [6] the number of cases involving ‘One Belt, One Road’ countries increased steadily.

⁶⁸ Fawcett & Torremans 2011, 3-4.

⁶⁹ BC was in force in the UK on 5 December 1887, while on 15 October 1992 in China.

⁷⁰ 2020 CL Article 12 adds that ‘copyright owner may apply for registration’, but it is neither a mandatory requirement nor a requisite for copyright protection in China. The registrar (China Copyright Protection Centre) does not conduct substantive examination on the applicant’s work.

⁷¹ BC, Articles 2(3) and 2(5).

example, copyright can subsist in complications, translations, abridgements and anthologies. Thirdly, no subjective enquiry is required into a works' aesthetic merit or cultural advantages.⁷² Judges do not have to appreciate those aspects of the work in question.⁷³

However, BC merely provides a minimum standard for copyright protection, and grants MS the freedom in some respects. For example, it allows MS to determine whether the fixation requirement is included in its national law.⁷⁴ Both copyright laws provide that works for protection should be fixed or recorded in a permanent material form,⁷⁵ which alludes to the idea-expression dichotomy.⁷⁶ Moreover, the list in BC is open for MS to add categories.⁷⁷ It merely provides an encompassing list of works to 'include every production in the literary, scientific and artistic domain'.⁷⁸ The principal differences, which have an implication on protecting foreign copyright, between the two countries mainly lie in three aspects: the categorisation of works, the concept of originality and the term of protection.

3.1 The flexible but convergent originality test

Originality is an essential substantive requirement for its role in shaping the breadth of copyright regime and the scope of copyright protection.⁷⁹ Moreover, it plays an important role in determining infringement.⁸⁰ It is also a practical strategy in infringement litigation. If the defendant could find the plaintiff's work non-original, then no infringement will be found.⁸¹ Furthermore, the level of originality closely relates to restricted acts. For example, in a drawing of a hand, the work itself has a low

⁷² WIPO, '1978 Guide to the Berne Convention for the Protection of Literary and Artistic Works' (1978 Guide) para 2.4 <www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf>.

⁷³ *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565 [31]. For the literary works with low aesthetic merit have been considered as original under English law, see Tappin 2018, 86-88. BG 2018, Article 2.1.

⁷⁴ BC, Article 2(2). It seems that EU is an exception because *Cofemel* harmonised the fixation requirement within EU (C-683/17 *Cofemel*, paras 53-56).

⁷⁵ CDPA, s 3(2); CR, Article 2. CDPA s 3(3) does not require the author to record the work and recording requirement would be satisfied when someone records the work. It is widely agreed in Chinese courts and academia that fixation is not a stringent criterion. For example, legislation does not require fixation of oral works (CR Article 4(2), impromptu speech, lecture and court debate). Guo 2017, 7.

⁷⁶ TRIPs, Article 9(2); WCT, Article 2.

⁷⁷ WIPO 1978 Guide, para 2.6. The use of the words 'such as' shows that the list is purely one of examples and not limitative.

⁷⁸ BC, Article 2(1).

⁷⁹ Rosati 2013, 59.

⁸⁰ Chap.2.

⁸¹ *Nike v Zhu* [2005] No.538. The disputed work is a simple black single man icon. The defendant argued that the plaintiff's black man was not original, thus did not commit infringement.

level of originality, leaving little room for the author to contribute; the protection granted on such works is therefore only to prevent others from the exact copying.⁸²

It was a clear dividing line between civil law and common law traditions concerning originality.⁸³ There are mainly two requirements for originality: first, the author's work is created independently and not copied from others; second, it shall contain some 'contribution' from the creator. The second point is where the differences between countries lie – what and how much contribution an author needs to make to be protected by copyright law.⁸⁴

One thing in common is that the originality test depends on the nature of work on a varying basis. However, unlike the UK long-standing skill and labour standard or a relatively higher civil law standard, the originality test in China seems to swing between the continental and common law system. This section will examine and compare the originality in both countries, mainly answering where the interpretation originates, how it evolves and where it might forward; whether a unified understanding has achieved or will achieve between two countries, if not, what is the implication for protecting foreign copyright.

3.1.1 The traditional English rule: a lenient test of originality

In the UK, originality is a changing concept affected by EU law.⁸⁵ CDPA provides that the work⁸⁶ must be 'original' but without specific definition.⁸⁷ Traditionally, the originality standard is relatively loose and flexible. A series of elements have tended to be considered by case law. Firstly, the work must originate from the author rather than a slavish copy from others.⁸⁸ Secondly, the author has exercised a sufficiently

⁸² Goldstein & Hugenholtz 2019, 285.

⁸³ Stamatoudi 2017, 58. (A relatively strict standard is adopted in civil law system, focusing on the 'author's personal imprint' or reflecting the author's personality.) Judge & Gervais 2009, 377-399. (Originality standards from the lowest to the highest: the UK skill and labour; Canada 'non-mechanical and non-trivial exercise of skill and judgment'; the US 'minimal degree of creativity' and European civil law tradition 'personal intellectual creation'.)

⁸⁴ Fisher 2016, 438.

⁸⁵ Rahmatian 2013, 4-34. (The CJEU cases may cause a limited adjustment to originality in UK copyright law, but it will not be a seismic shift.) Rosati 2013, 189-206. (UK copyright requires updating in order to be in line with EU law.)

⁸⁶ Originality is required in LDMA works, not in sound recordings, films, broadcasts and the typographical arrangement. Arnold 2011, 276.

⁸⁷ CDPA, s 1(1)(a). An exception is database, requiring that the selection and arrangement of the contents of a database must embody 'the author's own intellectual creation', in compliance with EU Database Directive Article 3(1) harmonised standard.

⁸⁸ 'What is worth copying is prima facie worth protecting.' *University of London Press v University Tutorial Press* [1916] 2 Ch 601. *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565 [31].

substantial amount of labour, skill, judgment or taste in creating the work.⁸⁹ It is not easy to determine the exact amount of skill, labour and judgment, as the level varies depending on the facts of the case.⁹⁰

Although the traditional threshold of originality is low, the mere skill, judgment and labour cannot confer originality. For example, copyright does not subsist in the single or even invented word.⁹¹ In addition, a work is not original if it is a mere copy from other's work, even if the act involves a considerable degree of skill, labour or judgment.⁹²

In short, 'what is worth copying is worth protecting' reveals that the protection over 'sweat of the brow' labour is the essence of UK copyright law, rather than creativity and personality. This low threshold of originality enables an intellectual creation to obtain copyright protection easily.

3.1.2 The EU rule: a higher standard of originality

Initially, EU directives define 'originality' as 'the author's own intellectual creation' (AOIC)⁹³ in software⁹⁴, database⁹⁵ and photographic work⁹⁶. Subsequently, originality was harmonised for all types of work in the landmark case *Infopaq* where the CJEU found 11 words original in the sense of being its author's own intellectual creation.⁹⁷

The CJEU then applied AOIC test in graphic user interfaces (*BSA*), football matches (*FAPL*), photographs (*Painer*), database (*Football Dataco*) and software (*SAS*), thus harmonising the test of originality and the notion of a 'work'.⁹⁸ It defines that 'an intellectual creation is an author's own if it reflects the author's personality',⁹⁹ as an

⁸⁹ *Ladbroke v William Hill* [1964] 1 All ER 465, 475 (Lord Hodson: 'work, labour and skill'), 478 (Lord Devlin: 'skill, industry, or experience'), 480 (Lord Pearce: 'labour or skill or ingenuity or expense'). *Cramp & Sons v Frank Smythson* [1944] A.C. 329. (The mere selection of commonplace information, for example certain tables of information printed in a pocket diary, in lack of room for taste and judgment, was found not copyrighted.) Bently 2018, 97.

⁹⁰ *Macmillan v K. and J.* [1923] UKPC 90, 10.

⁹¹ *Exxon Corp. v Exxon Insurance Consultants International Ltd* [1982] Ch. 119

⁹² *Interlogo AG v Tyco Industries and Others* [1989] 1 AC 217.

⁹³ Marie-Christine Janssens 'The Software Directive' (89); Gemma Minero 'The Term Directive' (248); Estelle Derclaye 'The Database Directive' (298) in Stamatoudi and Torremans (eds) *EU Copyright Law* (EE 2014).

⁹⁴ Software Directive, Directive 2009/24/EC (Council Directive 91/250/EEC).

⁹⁵ Database Directive, Directive 96/9/EC.

⁹⁶ Term Directive, Council Directive 93/98/EEC, replaced by Directive 2006/116/EC, and amended by Directive 2011/77/EU.

⁹⁷ C-5/08 *Infopaq*, paras 30-51. For the detailed examination and effects of *Infopaq*, see Rosati 2013, 97-128.

⁹⁸ *Ibid* Rosati 2013, 119-187.

⁹⁹ C-145/10 *Painer*, para 88, referring to Term Directive Recital 17.

expression of ‘his creative abilities in the production of the work by making free and creative choices’.¹⁰⁰ In a word, it is a combination of a matter of sense and sensibility, requiring the work demonstrating a personal touch with free and creative choices.¹⁰¹

If the production of work leaves no room for creative freedom, such a subject matter cannot be considered as ‘original’ to constitute a work protected. For example, the mere significant labour and skill required for setting up the database cannot justify copyright protection, because dictated by technical considerations, rules or other constraints, it leaves no room for creative freedom.¹⁰² Specifically, in the computer program, the court noted that the protection of functionality under copyright would be ‘to the detriment of technological progress and industrial development’,¹⁰³ and only the expression will be protected, thus enabling others to create similar or even identical programs.¹⁰⁴

In the case concerning military status reports, which constitute purely informative documents, the court noted that the content of such reports ‘is essentially determined by the information which they contain’; thus, information and expression become ‘indissociable’.¹⁰⁵ Those reports were ‘characterised by their technical function’, in which the author could not express their own creativity, thus precluding all originality.¹⁰⁶ These reports might be protected as long as they are AOIC reflecting ‘the author’s personality’ and expressed by ‘free and creative choices made by that author in drafting those reports’.¹⁰⁷

The AOIC test under EU law was restated in *Cofemel*. On the one hand, an original subject matter ‘reflects the personality of its author, as an expression of his free and creative choices’.¹⁰⁸ On the other hand, if ‘the realisation of a subject matter has been dictated by technical considerations, rules or other constraints, which have left no room for creative freedom’, that subject matter is not original.¹⁰⁹

3.1.3 Europeanisation or not in the UK?

The EU test has changed the UK test to some extent. For example, CDPA has incorporated AOIC in the database.¹¹⁰ As to judicial practice, some courts’ positions

¹⁰⁰ Ibid, para 89.

¹⁰¹ Rosati 2013, 5.

¹⁰² C-604/10 *Football Dataco*, paras 37-45.

¹⁰³ C-406/10 *SAS*, para 40.

¹⁰⁴ Ibid, para 41.

¹⁰⁵ C-469/17 *Funke Medien NRW* (Afghanistan Papers), para 24.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, para 25.

¹⁰⁸ C-683/17 *Cofemel*, para 30, citing *Painer*.

¹⁰⁹ Ibid, para 31, citing *Football Dataco*.

¹¹⁰ CDPA, s 3A(2).

used to be uncertain.¹¹¹ Some cases revealed that the UK criterion tended to adapt its traditional notion of originality in line with the higher standard of originality set up in *Infopaq*. In *NLA v Meltwater*, the High Court found that the test was ‘restated but for present purposes not significantly altered by *Infopaq*’,¹¹² which was supported by the Court of Appeal.¹¹³ In the subsequent red bus case, when determining whether copyright subsisted in a photograph, the court adopted the *Infopaq* test (rather than the Term Directive).¹¹⁴

In *SAS v WPL*, the court held that the UK originality standard was raised.¹¹⁵ It first summarised the essence of EU originality as ‘the person in question has exercised expressive and creative choices in producing the work’.¹¹⁶ After examining EU cases, it further concluded that the EU test is different from the traditional English test.¹¹⁷ The Court of Appeal viewed that if InfoSoc Directive changed the traditional domestic tests, ‘it has raised rather than lowered the hurdle to obtaining copyright protection’.¹¹⁸ The impact of this judgment is to ‘domesticate’ EU principles and to interpret CDPA subject to them.¹¹⁹

As examined, EU law has changed the UK originality, although the practical impact is hard to evaluate.¹²⁰ Since the Brexit agreement has been reached, it is interesting to see where the UK originality will go in the future.¹²¹

¹¹¹ *T & A v Hala & Ors* [2015] EWHC 2888 (IPEC) [16]. (The court held that the English test and *Infopaq* test is interchangeable. Both sides agreed that the works in question were to be treated as artistic works... and neither side suggested there was a material difference so far as originality was concerned between the AOIC test and the traditional UK ‘skill and labour’ test.) *Forensic Telecommunications v Chief Constable of West Yorkshire* [2011] EWHC 2892 (Ch). (EU test was adopted in [83]-[84] while UK test was adopted in [88]-[94].) *Martin & Anor v Kogan & Ors* [2017] EWHC 2927 (IPEC) [43]. (‘Here I use “skill” as a shorthand term for the intellectual creativity of an author required for copyright protection within the meaning discussed in *Infopaq*.’)

¹¹² *The Newspaper Licensing Agency Ltd & Ors v Meltwater* [2010] EWHC 3099 (Ch) [72], [78] & [81].

¹¹³ *Ibid* [2011] EWCA Civ 890 [19]-[20].

¹¹⁴ *Temple Island Collections Ltd v New English Teas Ltd and Another* [2012] EWPC 1 [27]

¹¹⁵ *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482, [2014] RPC 8.

¹¹⁶ *Ibid* [31]

¹¹⁷ *Ibid* [36]

¹¹⁸ *Ibid* [37]

¹¹⁹ Rosati 2013, 174-188. *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd & Anor* [2017] EWHC 2600 (Ch) [26]. (‘The requirement of originality under the CDPA is that the work must be an expression of the author’s own intellectual creation’.)

¹²⁰ Tappin 2018, 62-63.

¹²¹ UK, ‘Enforcement and Dispute Resolution – A Future Partnership Paper’ (23 August 2017) 2 <www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>: ‘respect the autonomy of EU law and UK legal systems while taking control of our own laws’.

3.1.4 China: a swing between civil law tradition and common law tradition

The definition of originality in China was not clear for a long time.¹²² Disagreements on the concept of originality exist in China, both in academia and judicial practice.

Scholars consider authorial creativity as the main element; however, with an inconsistent view on the required level.¹²³ Based on the continental standard, some scholars advocate a relatively higher standard of personal intellectual creation, that the work shall possess a creative element and reveal the authors' personality.¹²⁴ Others advocate 'two elements' approach – the work shall [1] be created independently, and [2] reflect a minimal degree of creativity.¹²⁵

Such different opinions exist in judicial practice as well. Judge Jiang has summarised that Chinese courts hold different opinions over originality on different types of work; even the standard of the same type of work is not unified.¹²⁶ The main reason for this diverse understanding in courts is that Chinese copyright legislation, as a norm taker, combines the author's rights and copyrights tradition as a whole.¹²⁷ If there is no concept of a transplanted term (i.e., originality) in law, it is natural for judges to apply different tests from different origins.¹²⁸ Such confusion may lead to legal uncertainty and unfairness for the parties involved.

In recent years, Chinese courts attempt to explore and ascertain the concept of originality in practice.¹²⁹ SPC confirms there is no one-size-fits-all standard of originality, depending on the nature of work and the fact.¹³⁰ Generally, originality is viewed as independent creation imprinting the author's personality and leaving a room for creative choice.¹³¹ The degree of creativity is not high, but the mere labour and independent creation are not sufficient to grant copyright protection.¹³² It seems that copyright is easy to obtain in China because it is rarely found something failing the originality requirement.¹³³

¹²² From the literal meaning of Chinese '独创性' (originality), '独' means 'independent' and '创' refers to creativity.

¹²³ Qiao 2011.

¹²⁴ Liu Chuntian 2000, 37-39.

¹²⁵ Li & Xu 2003, 31-32. Wang Qian 2015, 20-27.

¹²⁶ Jiang Ying 2004.

¹²⁷ Chap.1 Sec.2.1

¹²⁸ He 2016, 105.

¹²⁹ Fisher 2016, 446. Professor Fisher, citing the literature published in 2011, concludes 'the corresponding doctrine in China is difficult to pin down, in part because the pertinent law is quite recent, and in part because the Chinese courts do not often address originality.' This situation has changed during the past ten years.

¹³⁰ *Lego v Xiaobailong & Huayuanxidan* [2013] No.1269.

¹³¹ *Zhanglian v Guangdonggaojiao and Xinhua* [2014] No.46.

¹³² *Lego v Xiaobailong & Huayuanxidan* [2013] No.1269.

¹³³ He 2016, 101.

2018 Beijing HPC Guidance expressly states that courts shall consider two elements when determining originality: [1] whether the author creates the work independently, and [2] whether the expression reflects the author's choices and judgments.¹³⁴ The first element is similar to the element of traditional English rule, focusing on that the work shall originate from the author rather than copy from others.¹³⁵ Regarding the second element, the Guidance avoids clarifying whether the test is stringent or lenient. It merely suggests that common geometric forms, letters, phrases and the title of work are generally not protected.¹³⁶ Although the Guidance does not touch upon the degree of creativity, it can be inferred from unprotected objects provisions that a certain minimum of creativity is sufficient for protection.¹³⁷

3.1.5 A coherent originality is achieved in China?

Although the consensus of originality has been reached that a minimal creativity is sufficient, problems still exist due to the two-fold 'copyright and related rights' regime in China. This section will explore the inconsistent threshold of originality in audiovisual work and photographic works, which are typical examples of two-fold protection in civil law country. However, China adopts dual protection over 'audiovisual work (authorial work)/video recording (fixation)', but a single approach over all photos.

3.1.5.1 the dual test: audiovisual work and video recording

CDPA traditionally considered films (as defined in the UK) as entrepreneurial recording rights, or the right in the first fixation.¹³⁸ No originality is required for films, as it is signals which are different from the contents in LDMA works.¹³⁹ Now there is a trend of associating films with original works; for instance, the artistic creators of the film are treated as the authors, departing from the traditional 'entrepreneurial' producers.¹⁴⁰ Unlike the UK, which treats fixation and cinematographic work as a single type, CL differentiates those two to different protections.¹⁴¹ Cinematographic

¹³⁴ BG 2018, Article 2.2.

¹³⁵ *Maqi v Leshanchubanju* [2015] No.1665. The author in this case investigated cultural heritage sites and created a chart. SPC denied copyright protection because the author had no choices in the creation.

¹³⁶ BG 2018, Articles 2.4 and 2.5. One single Chinese word/character may be protected as artistic works, for example calligraphy and words combined with drawings. *Fengxuan v Tianshi* [2014] No 94.

¹³⁷ Pan 2018:1, 17-18.

¹³⁸ The duration of films was traditionally provided in the same section 13 (Duration of copyright in sound recordings and films) in CDPA before 1996.

¹³⁹ Arnold 2013, 272-279.

¹⁴⁰ CDPA, s 13B. The duration of films now is similar with original works.

¹⁴¹ CL Article 42, related rights include the right to reproduce, distribute, lease and disseminate online, which are far fewer than copyright rights.

works are protected under copyright, while video recordings are denied copyright because it is a mere recording with a limited room of creative choices.¹⁴²

The problem is where are the boundaries of the two in China. The law does not give a clue. It defines ‘video recording’ in a negative sense, as fixations of a connected series of related images or pictures, with or without accompanying sounds, other than cinematographic works.¹⁴³ In other words, non-cinematographic work is video recording.

The copyrighted ‘cinematographic work’¹⁴⁴ has been replaced by ‘audiovisual work’ in 2020 CL, but this revision still does not help to differentiate ‘audiovisual work’ and ‘video recording’. Since CL 2020 Regulation has not been published by far, it is not clear what ‘audiovisual work’ refers to and whether this concept is broadened or not.¹⁴⁵ Nevertheless, one thing is clear: the concept of originality plays a significant role in differentiating those two, and the line between the two will remain blurred.

Courts hold different opinions on the dividing line between ‘cinematographic work’ and ‘video recording’. The disagreement mainly concerns which approach is adopted – a quantitatively ‘high or low’ approach or a qualitatively ‘yes or no’ approach – when determining the originality.

Some courts stated that the criterion of differentiating these two should be the degree of originality, for the reason that works with higher originality should be granted greater protection.¹⁴⁶ Some courts adopted ‘yes or no’ approach: if the disputed video is original, it shall be protected by copyright law; if non-original, it is protected under related rights.¹⁴⁷

¹⁴² *Warner v Tangrenjie* [2004] No.156. The court stated that video recordings were the objects recorded by mechanical and simple method, merely recording performances, scenes, characters or sounds without creative elements. In this case, the disputed work is music video, encompassing the great amount of creative labour of director, actors, photographers, editors and other staff, thus constitutes copyrighted work.

¹⁴³ 2013 & 2002 CR, Article 5 (3); 1991 CR, Article 6(3).

¹⁴⁴ CL 2010, Article 3(6); 2013 & 2002 CR, Article 4(11); 1991 CR, Article 4(9), pursuant to BC Article 2(1).

¹⁴⁵ In the EU, film means a cinematographic or audiovisual work or moving images, whether or not accompanied by sound (Directive 2006/115/EC Article 2(1)(c)). The US audiovisual works refer to works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied (17 U.S.C. §101).

¹⁴⁶ *CCTV v Baofeng* [2015] No.1055. The court also admitted that it was not easy or appropriate for a judge to determine the level of creativeness in a ‘work’. If the quantitative approach was adopted, different judges might have different standards, thus resulting in legal uncertainty for rights holders.

¹⁴⁷ *Sina v Tianyingjiuzhou* [2014] No.40334; [2015] No.1818; [2020] No.128 (23 September 2020).

In the recent *SINA*¹⁴⁸, Beijing HPC made an evident attitude towards to qualitative approach. The outcome of this case was reversed and re-reversed during the five-year-long trial. It revealed the court's final attitude after careful deliberations and laid the foundation for future judicial interpretation.¹⁴⁹

In the retrial, HPC held that the qualitative approach should be adopted to differentiate between 'cinematographic work' and 'video recording' by conducting literal interpretation firstly. The court stated whether a work has originality and whether the author has engaged in creation were two sides to a coin. The creation is a matter of fact, so the determination of it shall adopt a qualitative approach. Similarly, the determination of originality shall be qualified, that is, whether the creation is original or not.

Secondly, HPC adopted a systematic interpretation. According to a strict systematic difference between 'copyright rights' and 'related rights' in the copyright law, the difference between those two works shall be understood and interpreted from this systematic view. Copyright is created automatically on the basis of the author's creation, while related rights in CL are designed to expand protection to those non-original 'seeds' sown by mere labour and investment. Although those two are expressed in a series of moving images, the substantial difference is whether the producer has created the 'work' and whether the series of continuous images is original. Therefore, the distinction shall be made based on the qualitative approach rather than the degree of originality or creativity.

HPC concluded that the originality of work should be based on the author's personal choice in the expression. Conversely, under related rights regime, the personal choice shall be embodied in the recording's technical process rather than the expression. The court analysed that for sports programmes filmed by multiple cameras, if the producer's camera settings, camera switching, picture selection and editing reflect the producer's unique ideas, individual choices and arrangements, they are intellectually creative. Comparatively, for sports programmes recorded mechanically through simple camera set-ups, they should not be regarded as cinematographic works as they do not reflect the producer's individual choices and arrangements in terms of camera

¹⁴⁸ Ibid. Beijing SINA Company was authorized exclusively to provide live streaming and matches video of the Chinese Super Football League (CSFL) online. The defendant, TYJZ, a website holder broadcasted live streaming of CSFL for two seasons from 2012 to 2014 without permission from SINA. SINA argued that the disputed football match live streaming and related video clips constituted a 'cinematographic work', thus the defendant infringed its copyright. The first trial found the disputed subject matter as a cinematographic work, then reversed by Beijing IP court, and finally supported affirmatively in the retrial by Beijing HPC.

¹⁴⁹ Such a long-time trial is rarely seen in copyright-related cases. IP House, 'Statistics of Beijing IP Court' <<https://www.iphouse.cn/report/index>>. In 2015 Report, the average trial time for civil cases concluded by Beijing IP Court was 94 days. For civil first instance cases, the trial time in descending order: patents, copyrights and trademarks; and for second instance in descending order: patents, trademarks and copyrights. In 2016 Report, Beijing IP Court concluded a total of 1,090 civil copyright cases. The average length of trial was 329 days for the first trial and 103 days for the second trial.

switching and picture selection. Therefore, in this case, the disputed football program, filmed by multiple cameras and edited with free and creative choices, shall be protected as cinematographic work.

In this 35-page judgment, the court confirms the determination of originality depends more on quality than quantity. In this author's view, both qualitative and quantitative approaches point to one question whether the work in question meets the originality threshold required by law. The threshold, as always, is of a certain height and also flexible depending on different subject matters. Then, regardless of the height, as long as the threshold is crossed, it can be considered original. Therefore, there is no sense in paying excessive attention to the wording '有无' (yes or no) and '高低' (high or low).

Nevertheless, one point is not disputed that the length of a video is not the determinative factor. Beijing court has acknowledged that seconds might suffice. It found an 18-seconds mobile video copyrightable, as long as it combined multiple elements (moving pictures and sound) with a complete and creative expression of the author's idea.¹⁵⁰ For now, even though it is still difficult to separate the two, a simple conclusion might be made that the originality level is different between cinematographic (audiovisual) work and video recording, that the former is relatively higher and stricter.

3.1.5.2 the single test: photos

There are differences concerning the protection of photos among countries because BC does not precisely define photographic works.¹⁵¹ Photography, in nature, is 'a copy of something or other', and also a combination of creative element and mechanical element.¹⁵² Photos share a similar dual nature with cinematographic work (audiovisual work)/video recording ('C/V'), embodying the combination of creativeness and technology. It seems reasonable that photo shall also be divided into original and non-original (or less original) in CL. However, in contrast with duality protection over C/V, an 'odd' single test in photos is adopted.

CDPA protects all photos irrespective of its artistic quality.¹⁵³ There are three aspects of photography leaving a room for originality: [1] residing in specialities of the angle of shot, light and shade, exposure and effects achieved with filters, developing techniques and so on; [2] residing in the creation of the scene to be photographed; [3]

¹⁵⁰ *KuaiShou v Huaduo* [2017] No.51249 ('10 Typical IP Cases 2018' by Beijing HPC).

¹⁵¹ Ricketson & Ginsburg 2006, 442-453. BC Article 2 defines 'photographic works to which are assimilated works expressed by a process analogous to photography'. Such a definition is to make sure changes in technology do not prejudice protection.

¹⁵² Tappin 2018, 268-269.

¹⁵³ CDPA ss 4 (1)(a) and 4 (2), 'photograph' means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film.

deriving from being in the right place at the right time.¹⁵⁴ The court also noted that [4] digital manipulation with an effect on the composition itself could be added as the fourth category.¹⁵⁵

EU adopts dual protection over photos. As long as a photo is original in the sense of comprising AOIC, it will be granted copyright protection, and the protection of other photographs should be left to national law.¹⁵⁶ In *Painer*, the court summarised three stages of producing a photograph: [1] the preparation phase, [2] when taking the photo, and [3] when selecting the photo. It is a question of fact whether the photo is the intellectual creation of the author reflecting the personality and express creative abilities by making free and creative choices.¹⁵⁷

It is peculiar that CL does not apply the dual standard of originality over photographs, as it does for C/V. The threshold of originality concerning photos tends to lower towards the traditional English rule.¹⁵⁸

CL categorises photographic works as artistic works.¹⁵⁹ From the literal interpretation, it seems that photos with a low degree of artistic merits shall be denied copyright protection since categorised as artistic works. It is justifiable that the test might apply a higher standard on photos in line with ‘artistic’ element. However, there is no express requirement for photos to reach a high degree of artistic merit and creativeness as other artistic works in law.

Additionally, a second protection regime concerning ‘non-original’ (or less original) photographs does not exist in CL. In order to protect photographers to the greatest extent, Chinese courts usually adopt a single lower standard. Almost all photos, irrespective of the level of originality, are granted copyright protection in China.¹⁶⁰

For example, in *Surgical Screenshot* case, the plaintiff was a doctor who used the endoscope camera to record the surgical operation into a video file. The doctor then took six screenshot images from the video. The defendant unauthorised used these six pictures. The court found six pictures as photographic works. It analysed that the pictures in the medical domain did not require a high level of artistic degree, therefore, the minimal degree of skill and effort was sufficient.¹⁶¹

This case reveals that originality of photographic works is minimal and easy to achieve. As long as a human being is involved in the creation (except for automatic photographed or slavish copying), the originality requirement is satisfied.

¹⁵⁴ Ibid.

¹⁵⁵ *Temple Island Collections Ltd v New English Teas Ltd & Anor* [2012] EWPC 1.

¹⁵⁶ Term Directive, Recital 16. For the ‘accident’ harmonisation of photographic work, see van Eechoud 2012, 62.

¹⁵⁷ *Painer*, paras 88-93.

¹⁵⁸ Wang Qian 2015, 104.

¹⁵⁹ CR, Article 4(10).

¹⁶⁰ Wang Qian 2012, 28-31. Professor Wang found Chinese courts rarely denied copyright protection over a photo due to the lack of originality.

¹⁶¹ *Zhuxiaoming v Wanli* [2006] No.35.

This single approach is criticised as inappropriate. Recently, Chinese courts attempt to explore the suitable threshold of original photos, instead of insisting on the traditional single approach over all photos.¹⁶² However, the five-years-long *Balloon*¹⁶³ Case has demonstrated that for now, without appropriate protection over non-original photos in law, courts have to protect all photos as copyright work. The first trial found the disputed photo not copyrightable, but Beijing IP Court recently overruled it.

The first trial adopted the similar *Painer* three-stage test: [1] In the preparation stage, the mere labour of attaching the camera to the balloon did not reach the degree of creativity. Although plaintiffs contributed to the idea of taking photos by balloon, such an idea was not sufficient to find a photo original. [2] In the shooting stage, plaintiffs just pressed the button and camera automatically recorded. As the balloon moved with the wind without control, the court found no human intervention in the shooting stage. [3] In the final stage of editing, the court found that plaintiffs' behaviour of screenshotting and removing shadow did not play a substantial role in creating the photo. Therefore, the court found the disputed photo non-original.

However, Beijing IP Court overruled the first trial and found the photo copyrightable. IP Court held that although the shooting of the video was automatic, it still reflected the author's selection and arrangement. As long as substantial human intervention was involved in the process of creation, the minimum degree of originality was satisfied.

Even though the first trial abandons the traditional lower test and requires the involvement of human creativity for a photo to be copyrighted, the final trial demonstrates again that the minimal originality is sufficient for a photo copyrightable in China. This author does not view this decision wrong. The major and awkward problem is that the standard of originality in China is incoherent. It seems that Chinese copyright law swings between higher and lower degree: at one end, the standard is higher in C/V, granting copyright protection over cinematographic/audiovisual works and neighbouring right protection on video recordings; at the other end, the standard of the photo is relatively lower that all photos are granted copyright protection. It amounts to the problem that Chinese law grants a broader scope of protection over simple photos compared with simple films, regardless of their similar duality nature.

3.2 The open categorization requirement

The second difference is categorization. It raises the question of whether a new form of work will be protected in a country. In this fast-developed technology world, it is difficult to predict what protection will be granted to those. International copyright convention has always been in a trend to expand protection to new forms of subject matter, such as architectural works added by 1908 Berlin text and cinematographic

¹⁶² Wang Qian 2012, 28-31.

¹⁶³ *Gao & Deng v QTD* [2015] No. 20524; [2017] No. 797 (2 April 2020). Plaintiffs attached a camera to the balloon and captured a video. Then they screenshotted an image from the video and removed the shadow from the disputed image.

works added by 1948 Brussels text.¹⁶⁴ For some types of work, it adopts the way of assimilating new forms to existing categories of works; for instance, the computer program, combining technology and contribution of co-authors, was used to be widely considered as ‘the natural object of sui generis protection’.¹⁶⁵ It became widely assimilated to literary works, not until the 1990s.¹⁶⁶

BC provides an encompassing list of works to ‘include every production in the literary, scientific and artistic domain’,¹⁶⁷ and requires MS to protect derivative works¹⁶⁸ and collections of literary or artistic works¹⁶⁹. The list is open for MS to add categories.¹⁷⁰ In this part, it will compare both copyright laws’ attitude towards new types of work.

3.2.1 UK: the closed list with open-ended categories

EU has challenged and changed the UK understanding of copyright.¹⁷¹ According to EU cases, it appears that EU categorisation might be intended as open-ended, as long as the subject matter is original.¹⁷² In addition to originality, the scope of work is limited by EU case law as expressed with precision and objectivity to ensure legal certainty.¹⁷³ Therefore, the subjective sensation of taste¹⁷⁴ cannot justify the taste of food, because it ‘cannot be pinned down with precision and objectivity’ as a work.¹⁷⁵

A peculiarity of CDPA is the categorization requirement. It has a system of categories for the protection of different subject-matter, including the original LDMA works and sound recordings, films, broadcasts or cable programs and the typographical arrangement of published editions. The categories are an exhaustive group, labelled as the ‘pigeon-hole approach’.¹⁷⁶ If a work falls outside the eight categories, it shall not

¹⁶⁴ Goldstein & Hugenholtz 2019, 184.

¹⁶⁵ Ibid, 174.

¹⁶⁶ TRIPs, Article 10(1); WCT, Article 4.

¹⁶⁷ BC, Article 2(1).

¹⁶⁸ BC, Article 2(3).

¹⁶⁹ BC, Article 2(5).

¹⁷⁰ WIPO 1978 Guide, para 2.6. The use of the words ‘such as’ shows that the list is purely one of examples and not limitative.

¹⁷¹ Rosati 2019, 179-181.

¹⁷² C-393/09 *BSA*, paras 28-51. Stamatoudi 2017, 65-66 & 81. van Gompel & Lavik 2013, 38-39 (suggesting other factors might be considered except for originality).

¹⁷³ C-310/17 *Levola*, paras 40-42 (‘must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in the permanent form’).

¹⁷⁴ The similar objectivity test is adopted in design, concluding that subjective sensation of beauty cannot justify a design to receive copyright protection in *Cofemel*.

¹⁷⁵ *Levola*, para 42.

¹⁷⁶ Philips & Firth 2001, 138. Pila 2010, 229-254.

be protected. For example, the helmet in Star Wars was held not categorised as a sculpture and thus not copyright protected.¹⁷⁷

It seems reasonable that the Infopaq test is adopted in the UK, and thus the harmonised notion of work shall be applied as well. However, it is not clear whether UK categorization requirement complies with EU law or not. Some scholars noted that UK categorization requirement contradicts EU law because the only requirement for copyright protection is originality under EU copyright law.¹⁷⁸ Some believe that it is arguable because no EU law prohibits or imposes that; nevertheless, EU cases demonstrate the trend of highlighting originality.¹⁷⁹ More importantly, the ‘closed’ list does not mean it leaves no room for protecting new creation, because many categories in itself are open-ended.¹⁸⁰

3.2.2 China: the traditional ambiguous list

The most controversial issue concerning the concept of work used to be whether the list was open-ended or not under 2010 CL Article 3(9).¹⁸¹ Literally, on the one hand, Item [9] provides that works not listed in CL might be protected; on the other hand, it sets out a limitation that only those provided by law and regulation can be protected.¹⁸² After searching for all Chinese laws and regulations, no new copyrightable works are found.¹⁸³ It means that there are nine categories in law; however, only the first eight items prescribed in Article 3 are eligible for copyright.¹⁸⁴

From the legislators’ perspective, the list is established open-ended to leave a room for the new work to be included. There are two reasons: firstly, with the development of culture and science, unpredictable new forms of expression of ideas may emerge, which might be included as copyrightable objects in the future. Secondly, legislation

¹⁷⁷ *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2011] UKSC 39. Another example is the arrangement of various objects, which is found not sufficient to be copyrighted as artistic works. The court finally made a decision on the basis of breach of confidence. *Creation Records Ltd. & Ors v News Group Newspapers Ltd* [1997] EWHC Ch 370.

¹⁷⁸ Stamatoudi 2017, 82. Rosati 2014:1, 1112-1118. UK approach may have to be adjusted (proposed before Brexit).

¹⁷⁹ Torremans 2019, 178.

¹⁸⁰ Mysoor 2019, 474-479.

¹⁸¹ 2010 CL Article 3(9): ‘other works provided by laws and regulations.’

¹⁸² Here ‘law and regulation’ not only refer to copyright law and regulations, but also include all Chinese laws and regulations.

¹⁸³ Wang Qian 2019.

¹⁸⁴ CL Article 3(1)-(8): [1] written works; [2] oral works; [3] musical, dramatic, quyi (traditional Chinese performance art), choreographic and acrobatic works; [4] works of fine art and architecture; [5] photographic works; [6] cinematographic works and works created by virtue of an analogous method of film production; [7] drawings of engineering designs and product designs, maps, sketches and other graphic works and model works; [8] computer software. CR Article 4 defines these terms in detail. WIPO translation of CR, <<https://wipo.int/zh/text/456390>>.

shall leave a room for the objects protected under the related regime or unfair competition field to be included as a copyrightable object.¹⁸⁵

In order to maintain certainty, legislation requires the decision of broadening copyrighted types shall only be made by ‘laws and regulations’, not even by governmental policies or documents. The court has no discretion to expand the list.¹⁸⁶ The list seems open-ended; however, in nature exhaustive.

Item 9 has never been revised since its first establishment in 1990. In the early days, the closed list did not encounter problems when there were a limited number and new types of works requiring protection in China.¹⁸⁷ Nowadays, not only the number of traditional copyrighted works increases dramatically, but also new types are created due to the fast-developing technology, such as online games, webcasting programs and live online sports games. Under the entirely different context from that of thirty years ago, the closed legislation and the restricted judicial interpretation have led to a massive gap for protecting the emerging ‘works’.

It creates a hot debate on whether the court shall be open-minded towards new types. There seems to be a perception in China that the protection of new types means an increased copyright protection level. Although some judges advocate courts shall deal with new works with particular care,¹⁸⁸ there is still a trend of finding new types protected in judicial interpretation.¹⁸⁹ Those affirmative decisions usually adopt two approaches: [1] if the subject matter in question satisfies the concept of ‘work’ defined by CR Article 2¹⁹⁰, even not listed in CL, it can be protected;¹⁹¹ or [2] courts construe the subject matter in question as one of the existing categories,¹⁹² viewing that courts have no power to add categories.¹⁹³ Those different attitudes among judges further the controversy in the judicial practice.

In 2018, Beijing courts made a ‘weird’ judgment which arguably caused a heated discussion. In *Fountain case*¹⁹⁴, the key issue related to this thesis is whether a water

¹⁸⁵ Hu 2002, 21.

¹⁸⁶ Wang Qian 2019, 10-26.

¹⁸⁷ Yan 2020. For example, twenty years ago, there were only around 600 published novels each year, but today, as many as 6 million online novels are created annually on Yuewen Platform alone.

¹⁸⁸ Chen Jinchuan 2018, 25-27.

¹⁸⁹ Pan 2018:2.

¹⁹⁰ CR, Article 2.

¹⁹¹ *Sina v Tianyingjiuzhou* [2014] No.40334; [2015] No.1818; [2020] No.128.

¹⁹² *Beijing Water Design v CSCA & Xihu* [2017] No.1404.

¹⁹³ *Sina v Tianyingjiuzhou* [2015] No.1818.

¹⁹⁴ *Beijing Water Design v CSCA & Xihu* [2016] No.15322; [2017] No.1404. The plaintiff Beijing Water Design is a company and the creator of the disputed musical fountain show for Qingdao Expo. The Management Office of West Lake (a famous spot in Hangzhou) obtained videos, design drawings and other related materials of the disputed show, and then asked another water design company CSCA to produce a show for West Lake using those materials. Beijing Water Design initiated copyright infringement against both defendants.

fountain show accompanied by the sound and light, not listed in the law, might be protected; if yes, under which category.

The first trial applied Item 9 and found the disputed work original and protected. The court admitted that there was no such statutory category in law to protect musical fountain show or musical fountain orchestrations. However, such works embodied originality in essence, thus should be protected.

In the second trial, Beijing IP Court supported this affirmative judgment, but found the first trial erred in using Item 9 to protect the new work and failed in clarifying which category the disputed work fell within. IP Court held that, from legislators' purpose, the application of Item 9 was prohibited in judicial practice.

Beijing IP Court agreed that as science and technology developed, not all types of works could be predicted by legislation, due to the inherent limitation of statutory law. But the new work should be categorized within one category, and the interpretation should be in line with legal logic. After examining the disputed work was not a cinematographic work, nor a computer software, the court finally found it within the artistic work.¹⁹⁵

The interpretation in *Fountain* is weird on categorizing the fountain show as artistic work, even inconsistent with common sense.¹⁹⁶ However, such an approach acts as the last resort to fill the gap between 'the closed list in essence' and the rapid-developing copyright industry. Because Chinese courts, without discretion, shall not go too far to expand the protectable list and must interpret the disputed 'work' within one categorization.

Fountain is considered to be the strong argument for criticizing the rigid law by scholars.¹⁹⁷ On the one hand, judicial judgments shall be in line with legislation and avoid judge-made law; on the other hand, the protection of newly emerging works shall be considered as well.¹⁹⁸ It is obvious that Chinese courts attempt to find an appropriate balance between law and practice, furthermore between certainty and flexibility.

¹⁹⁵ In the judgment, according to the definition of 'artistic work', '等' ('etc.') literally means this category is open-ended. Furthermore, Regulation requires four elements of constituting an artistic work: [1] it might be modelling artist work, which can express the idea by modelling; [2] lines and colours are the typical elements, however, not exhaustive; [3] artistic work shall embody the aesthetic feeling; [4] it can be expressed in a 2D or 3D form. Therefore, the court found the concept of artistic work without a limitation on form and duration of expression.

¹⁹⁶ The court analysed that the typical artist work, such as painting and sculpture, was undoubtedly an expression in a static and permanent fixed form. However, the law did not prohibit the modeling with a dynamic and short-length expression from being protected. The court found the disputed fountain show as a dynamic 3D modeling expression, with a combination of various lines and colours including beautiful music and water shape and colourful lights. Moreover, the show had aesthetic value. The court finally decided that, since the law did not require 'artistic works' must be static and permanent fixed, it would not violate legal interpretation rule to include the disputed show as 'artistic work'.

¹⁹⁷ Wang Qian 2019, 182. Yuan Feng 2019. Liu Wenqi 2017. Liu Yinliang 2019. Li Chen 2018.

¹⁹⁸ Beijing HPC, '2018 Ten IPR Cases' (24 April 2019) <www.chinacourt.org/article/detail/2019/04/id/3851555.shtml>.

However, not every time can the work in question be reluctantly interpreted as a particular statutory type in fact. With the increasing number of new ‘works’, it has posed difficulties for courts in China.¹⁹⁹

3.2.3 2020 CL: the open list

In 2020, Article 3(9) is revised to ‘other intellectual creations that meet the characteristics of works’. It reveals a significant shift from a closed category to an open list legislatively. In the old version, whether a new type is protected shall only be decided by legislation (law) and administration (regulation). Now it might be determined by courts and even the general public, as long as the disputed work is proved to meet the definition of work.²⁰⁰

Scholars, who support the open-ended list, advocate that it is neither necessary nor possible for CL to exhaust all protected forms of expression.²⁰¹ The provisions concerning protected types may only be exemplified because works are diverse and numerous new forms may appear in the future. Protection over new types is in line with the purpose of CL, to promote the creation and dissemination of works and further cultural and scientific development.²⁰²

However, this author concerns that the open legislative model would lead to the possibility of excessive use of discretion by courts. In the future, more and more creators would bring the lawsuit and ask courts to decide whether they shall be protected or not. It is a difficult task for Chinese courts. Firstly, the caseload surge is a heavy burden for the overburdened court, especially in Beijing and Shanghai.²⁰³ Secondly, judges located in different regions of China may have different opinions toward the same new work, thus amounting to irreconcilable judgments. Thirdly, originality may serve as the last line to defend excessive protection and limit the strong copyright within a proper scope of work for the public interest. However, due to the incoherent originality standard plus this overly flexible interpretation of works, it thereby may increase the uncertainty and unpredictability of Chinese law.

¹⁹⁹ The same problem exists in online games as well in China. According to the statutory type, online games cannot be categorized properly. It is reasonable for a court to conclude that online games shall not be protected under copyright law. If so, the inconceivable situation arises that copyright law denies protection over online games as a whole, however, might grant protection over its components respectively, such as images, music and literary words. *Zhuangyou v Shouxing (Qiji Shenhua)* [2015] No.529. *Zhuangyou v Langshi (Anye Qiji)* [2017] No.241.

²⁰⁰ 2020 CL, Article 3: ‘The works referred to in this Law are intellectual creations in the literary, artistic and scientific domain that are original and can be expressed in a certain form, ...’

²⁰¹ Cong 2020, 12.

²⁰² Lu 2020, 95.

²⁰³ Zhi Gao and Nan Zhang, ‘Average Annual Increase of 30% in IPR cases in Beijing in the Past Five Years’ (*Beijing Daily*, 26 September 2020). From 2016 to the first half of 2020, courts in Beijing received over 240,000 new IPR cases and concluded over 220,000 cases, with an average annual increase of more than 30%. Over 300 IPR cases are concluded per judge per year, ranking first nationwide.

It is suggested that courts shall adopt a prudent approach towards new types of work and prevent exorbitant expansion. The obsessive pursuit of expansion does not necessarily mean an increase in the level of protection. Moreover, in order to reduce the burden of courts in the developed area of China and achieve nationwide ‘the same fact, the same result’, it is suggested that SPC published case guidance or compilation on whether a (newly emerging) work shall be protected or not.

3.3 The complex term of protection

The term of protection concerns the validity of copyright and also the infringement litigation. As no formality requirement exists, the protection begins with the creation of the work. Infringement does not occur if the protection of disputed work expires. Although National Treatment in BC requires foreign copyright owner shall receive the same treatment as that given to its own nationals, the term of protection is one of the exceptions.²⁰⁴ In short, BC term of protection is not the ceiling.²⁰⁵ It is complex to compare the term of protection, especially for the ‘old’ works, because the minimum term of the international treaty has changed for several times.²⁰⁶

The duration of moral rights is less complicated. The minimum standard of paternity and maternity right shall maintain at least until the expiry of economic rights.²⁰⁷ CDPA, in line with BC, does not differentiate between economic rights and moral rights, that is, paternity and integrity rights endure for the duration of economic rights.²⁰⁸ China adopts a mixed approach. The disclosure right subsists until the expiry of economic rights (50 years PMA²⁰⁹); other three moral rights (the right of paternity, alteration and integrity) are protected perpetually.²¹⁰

This section will focus on the economic rights concerning different types of work. It attempts to propose the failure in fulfilling international minimal standard in 2010 CL and its continuing negligence in 2020 revision may result in a big problem concerning protection over foreign copyrighted works.

²⁰⁴ BC, Article 7(8).

²⁰⁵ BC, Article 7(1).

²⁰⁶ Goldstein & Hugenholtz 2019, 265, citing John N. Adams and Michael Edenborough, ‘The Duration of Copyright in the United Kingdom after the 1995 Regulations’ (1996) 11 EIPR 590, on how complex the determination of term may become.

²⁰⁷ BC, Article 6*bis*(2).

²⁰⁸ CDPA, s 12 and s 86(2), the right to object to false attribution last for only 20 years PMA.

²⁰⁹ PMA: *post mortem auctoris*, after the author’s death.

²¹⁰ CL, Article 20.

3.3.1 General standard

In respect of individually created work, both countries adopt the same calculation approach. Generally, the UK term²¹¹ is longer than that in China. For work created by the individual human being, both countries adopt the same approach ‘life plus a fixed period’,²¹² but with a different fixed period. In the UK, LDMA work expires 70 years PMA,²¹³ while China applies the shorter term of 50 years PMA²¹⁴.

For the terms which cannot be computed by the death of the human author, it usually adopts the year from publication or creation of the work. For example, in respect of copyright initially owned by the legal entity, it is natural that the calculation benchmark is not the life of a natural person. UK computer-generated work calculated based on the year when the work was made.²¹⁵ China measures the term from the year in which the work was first published.²¹⁶

In respect of the unknown authorship work, both countries adopt the same pattern of calculation. BC provides that the term of protection endures 50 years after the lawful publication of this work. If the author’s identity is disclosed, the normal rule of 50 years PMA applies. It is not required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for 50 years.²¹⁷ China adopts BC approach.²¹⁸ In compliance with the EU Term Directive,²¹⁹ the UK exceeds BC standard and calculated 70 years from the year of lawful publication.²²⁰ The protection will be terminated if the work has not published within 70 years from creation.²²¹

In respect of the collective work, the general calculation approach starts from the last author to die.²²² However, concerning the cinematographic or audiovisual work,

²¹¹ The UK duration varies depending on the work in question: sound recordings and broadcasts (50 years), performances fixated in a phonogram (70 years) and typographical arrangements (25 years).

²¹² BC minimum standard is 50 years PMA.

²¹³ CDPA, s 12(2). Term Directive, Article 1(1). Duration of Copyright and Rights in Performance Regulations 1995 (SI 1995/3297) regs 4 and 5(1). The term of LDMA works and films, used to be 50 years, has harmonised as a result of Term Directive.

²¹⁴ CL, Article 21.

²¹⁵ CDPA, s 12(7). Term Directive does not affect computer-generated works, so CDPA continues its term of 50 years, i.e., the duration of computer-generated works is 50 years from the end of the year in which the work was made.

²¹⁶ CL Article 21, the term covers the disclosure right (one type of moral right, Chap.2 Sec.4.3) and all economic rights.

²¹⁷ BC, Article 7(3).

²¹⁸ CR, Article 18. Once the author’s identity is identified, the term of protection is determined in accordance with the general standard provided in CL Article 21.

²¹⁹ Term Directive, Article 1(3).

²²⁰ CDPA, s 12(3).

²²¹ Term Directive, Article 1(6).

²²² BC, Article 7*bis*.

this approach converts to start from the year in which the work was made available to the public (with the author's consent) in BC.²²³ China adopts the BC approach.²²⁴ Unlike BC, the EU adopts a longer-term. Additionally, it relates the term to the lives of designated authors, as a compromise between Continental director right and traditional English producer right in the film.²²⁵ It expands the term to 70 years PMA of the last following persons to survive: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.²²⁶

3.3.2 Comparison of terms

Generally speaking, the UK standard is higher than the international minimum standard. How the UK treats foreign copyright work originated from a country with a shorter term? The rule of treating EU work and non-EU work is different. EU Term Directive Article 7 requires applying the rule of comparison of terms in non-EU subject matter, that is, such work from a third country will not receive the longer 70 years protection within the EU. In contrast, the non-discrimination principle does not allow MS to apply a comparison of terms to EU rightsholders.²²⁷

CDPA implements this comparison rule to all types of copyright work.²²⁸ If the term of the protecting country is longer than the country of origin²²⁹, the shorter-term shall be applied. For example, if a Chinese work with 50 years PMA seeks protection in the UK, the duration shall be 50 years rather than 70 years PMA. The comparison of the term seems simple in theory, however, unworkable in practice. It will be difficult to identify 'the country of origin' of a work decades years after the author's death with reasonable certainty, thus creating a business risk.²³⁰

3.3.3 A typical type: photographic work

In the UK, the calculation of duration is complex.²³¹ On the contrary, the duration was straightforward in CL because there were no frequent changes concerning the term

²²³ BC, Article 7(2).

²²⁴ CL, Article 21 (disclosure and all economic rights, n 216).

²²⁵ Torremans 2019, 215.

²²⁶ Term Directive, Article 2(2). This provision only addresses the calculation of term and does not affect the determination of ownership.

²²⁷ TFEU, Article 18.

²²⁸ CDPA, s 12(6) LDMA, s 13A(4) sound recordings, s 13B(7) films and s 14(3) broadcasts.

²²⁹ CDPA, s 15A. BC Article 7(8) defines the country of origin as the place where the work is first published, normally the nationality of the author.

²³⁰ Tappin 2018, 530-531.

²³¹ *Ibid*, 570-587. Different durations apply in works created on different periods: after 1 January 1996; 1 August 1989-1 January 1996; before 1 August 1989; before 1 July 1912.

of protection. It is also because of the lack of frequent changes in China that 2020 revision has ignored the revived situation concerning photographic works.

It is complicated to compute the term of photographic works, because international treaties have established entirely different terms of protection.²³² The intermediate BC approach allows national legislation to determine the term under the minimum standard of 25 years from the making of such a work.²³³ On the one end, by eliminating the unjustified discrimination against photographic works, WCT extends the term to life plus 50 years of protection.²³⁴ On the other end, UCC adopts minimum 10-year term.²³⁵ TRIPs excludes photographic works from the general term of 50 years PMA.²³⁶

EU grants 70 years PMA to ‘original’ (as defined in EU) photographs.²³⁷ For non-original photographs, it is left to national laws.²³⁸ CDPA grants 70 years PMA to all forms of photographs, whether fine art or snapshot.²³⁹

CL is problematic in the duration of photographic works. 2010 CL was inconsistent with WCT requirement (50 years PMA). WCT was officially effective in China on 9 June 2007, but CL did not amend the duration of photographic works until 2020. It wrote in Article 21 (2010 CL) rights²⁴⁰ of photographic works expire **50 years after the first publication**. If the work has not been published within 50 years after the completion of its creation, this Law will not protect it. 2020 CL extends the duration to **50 years PMA** according to WCT.²⁴¹ It seems it is a progress in protecting photographic work, however problems still exist, even worse in the cross-border context.²⁴²

First, the originality standard of photographic works is relatively low in China,²⁴³ therefore, 2020 CL creates a situation that the protection over almost all photographs would extend to a much longer term (50 years PMA).

Secondly, there might be a decrease in the duration under some circumstances. As shown from the chart, as long as the first publication occurred before 1 June 2021 and the author died before the publication date of his/her work, the duration of the work

²³² Ricketson & Ginsburg 2006, 563.

²³³ BC, Article 7(4).

²³⁴ WCT Article 9 obliges MS not to apply BC standard but apply general rules. Guide 2004 CT-1.24, 192 <www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf>.

²³⁵ UCC, Article IV.

²³⁶ TRIPs, Article 12.

²³⁷ Term Directive, Article 6.

²³⁸ Term Directive, Recital 16.

²³⁹ CDPA, s 4(1)(a) ‘irrespective of artistic quality’. Regulation (SI 1995/3297), reg 5 to amend CDPA s 12.

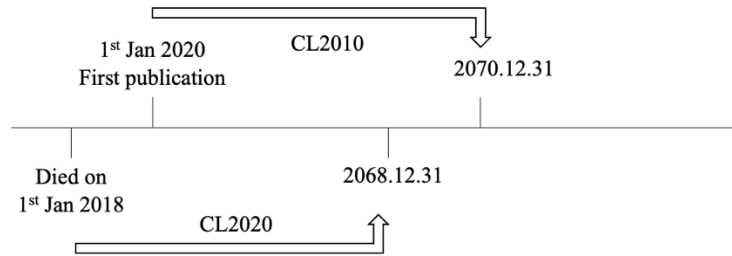
²⁴⁰ Disclosure right and all economic rights, n 216.

²⁴¹ 2020 CL Article 23(3) deletes the photographic work from exceptions and assimilates it to classical works. Hence the normal rule 50 years PMA will apply in photographic works.

²⁴² Chap.1 Sec.3.4.2.

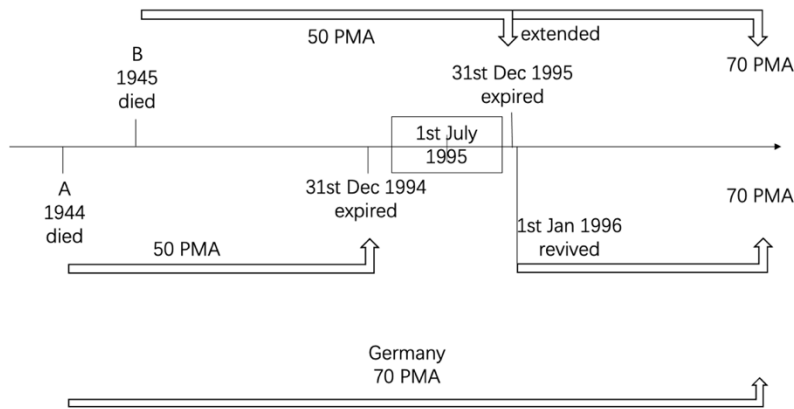
²⁴³ Chap.1 Sec.3.1.5.2.

will be decreased by 2020 CL. There is a need to add a detail that ‘the longer term shall be applied’ in the 2020 Regulation.



1.3 The decreased term of protection in 2020 CL

The third problem is the lack of revived copyright. In the UK, both revived and extended copyright are allowed due to Term Directive. As long as the work was protected in at least one MS (usually Germany 70 years PMA) on 1 July 1995, Term Directive will apply.²⁴⁴ The revived copyright is treated as a license by the rightsholder, subject only to the payment of reasonable royalty or other remuneration, which is agreed or determined in default of agreement by Copyright Tribunal.²⁴⁵



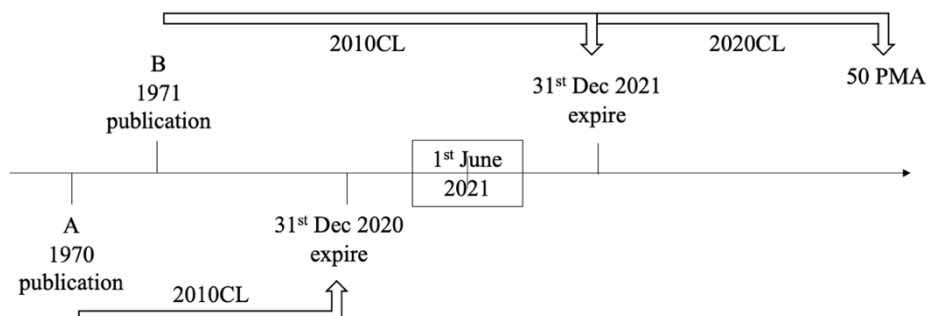
1.4 The revived copyright in the UK

However, China does not allow for the right to be revived. CL 2020 Article 65 provides that, if the copyright of a photographic work expires before 1 June 2021 (effective date of 2020 CL), the New Law will not protect it, even if the duration of such a work does not expire according to 2020 CL. The chart might be clearer that, as long as one’s work was published before 1 January 1971 (below the arrow line), the

²⁴⁴ Regulation (SI 1995/3297), reg 16(c).

²⁴⁵ Bently 2018, 182-183. Regulation (SI 1995/3297), regs 23 and 24.

copyright might be dramatically shorter than that published after 1971 (above the arrow line). In short, 2020 CL allows for the extended copyright, but in lack of revived copyright.



1.5 The extended copyright and the lack of revived copyright in 2020 CL

3.4 Problems concerning protection over foreign work in Chinese Copyright Law

3.4.1 Acrobatic work: the preferential treatment for foreign work

The difference in subject matter between China and the UK leads to an interesting issue of whether a foreign ‘work’, almost denied copyright protection in the rest of the world, might be protected by copyright law in the protecting state. A typical example is ‘acrobatic work’ in CL.

Rome Convention provides that the object of performance must be a ‘work’ in BC. The Guide takes an example of ‘variety and circus artists (jugglers, acrobats and clowns)’ to illustrate that Rome does not protect those who do not perform ‘copyright work’.²⁴⁶ In other words, the show performed by jugglers, acrobats and clowns is not copyrighted work for the purpose of BC. Additionally, Article 9 permits MS to decide whether to extend protection to artists ‘who do not perform literary or artistic works’. These reveal that variety and circus artists are protected as performers at most, and their ‘performance or shows’ are not copyrightable.

Uniquely in China, those ‘shows’ are explicitly protected by copyright. CR Article 4(7) defines acrobatic works as ‘works expressed through body movements and skills, such as acrobatics, magic and circus’. The legislative rationale is two-fold: Chinese acrobatics enjoy a high reputation worldwide, and the human body performance

²⁴⁶ Guide to Rome Convention 1981, para 3.2. ‘...the reference to “works” means that the Convention does not protect a number of people who, although undoubtedly performers in the accepted sense, do not perform works as this is meant in copyright. Examples are variety and circus artists (jugglers, acrobats and clowns).’ Ricketson & Ginsburg 2006, 1213.

embodies a degree of originality and creativity, thus shall be listed in the protected objects.²⁴⁷

The copyright protection over acrobatics, incompatible with international agreement, amounts to problems in the foreign-related situation in China. In 2010, an Israeli magician, permanently residing in the US, filed a copyright infringement lawsuit in Beijing for defendant's unauthorised use of his magic.²⁴⁸ The court stated that Israel, US and China were members of BC. According to NT, no matter whether or not the magic performance was protected in Israel and the US, it must be protected by CL in China. The court finally found the plaintiff's magic copyrighted in China.

This result is 'ironically' against the legislative purpose of protecting 'world-famous' Chinese acrobatics and magic.²⁴⁹ Those created by Chinese are not protected in foreign countries. On the contrary, foreign acrobatics works can be protected in China. The legislative purpose cannot be achieved in a cross-border situation, especially when no foreign countries grant copyright protection over acrobatics.²⁵⁰

Moreover, the legislator's reason is not justified for granting copyright protection. The substantial part of acrobatics (for instance, the gesture in order to keep balance) is functional rather than artistic. Furthermore, it is difficult to prove who the creator is because the magical art usually consists of fixed routines and secrets.²⁵¹ These characteristics do not fulfil the essential requirement of copyright works. As proposed, acrobatics shall be protected, however, not by copyright law.²⁵²

3.4.2 The term of photographic works: the failure of fulfilling international obligations

CL 2020 duration of photographic works will bring trouble in the cross-border context, mainly due to the delay in extending the duration of protection under WCT. As shown in the chart, C is a foreign national who published its photos in 1970 in X (WCT MS) and died in 2000. According to 2020 CL, the right has expired on 31 December 2020, which is before 1 June 2021. Under this circumstance, the right shall not revive; thus, the protection terminates on 31 December 2020 in China. This result does not comply with WCT 50 years PMA requirement.²⁵³ It means the expiration date has been brought forward from 2050 to 2020.

²⁴⁷ Angran Gu, 'Legislation Report' (24 April 2001) <www.npc.gov.cn/wxzl/gongbao/2001-12/06/content_5280828.htm>.

²⁴⁸ *Yigal Messika v JK* [2010] No.10067.

²⁴⁹ Wang Qian 2015, 87-88.

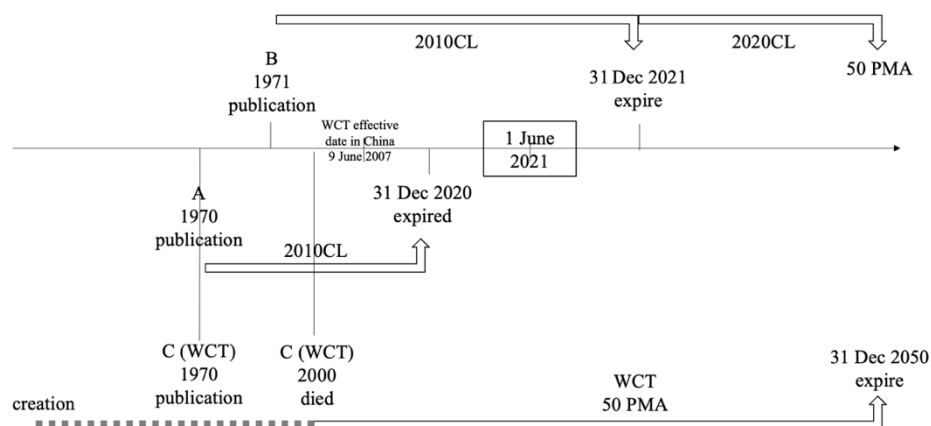
²⁵⁰ Wang Qian 2012, 35-38.

²⁵¹ Wang Qian 2015, 87-88.

²⁵² Yuan Bo 2013.

²⁵³ WCT Article 13 requires MSs to apply BC Article 18 to all protection provided for in WCT. According to BC Article 18, BC shall apply to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin through the expiry of the term of protection. On 9 June 2007 (WCT's effective date in China), C's work is protected in X under 50 years

In a simple conclusion, the duration of a foreign photographic work might be decreased dramatically from 50 years PMA to 50 years after publication in China, as long as the work was first published before 1971. In order to address it, it is suggested that the date of assessing whether the work has been expired or not in CL 2020 (1 June 2021) shall be changed to WCT's effective date in China (9 June 2007).



1.6 The term of protection of foreign photographic works

4. Ownership of copyright in the UK and China

The ownership issue usually functions as the preliminary point of infringement litigation and contractual agreement. Only the rightsholder has the right to sue against infringement and assign/license others to exploit the copyrighted work. In addition to that, the dispute concerning the first ownership of work always occurs in the litigation, such as, between employees and employers.

International treaties are silent on authorship, without defining the ‘author’ of a work.²⁵⁴ It leaves the question of first ownership to national laws. EU is also silent on the issue of ‘author’, excluding audiovisual works²⁵⁵ and computer programs²⁵⁶. Besides, there are no harmonised requirements concerning the transfer of ownership, either realised by automatic transfer under statutory laws or by contractual transfer through assignment or license contract.²⁵⁷

As no harmonised rule has been achieved, different approaches among national laws of determining ownership may amount to an opposite result in the cross-border

PMA, and also protected in China pursuant to CL 2010 (50 years after first publication). So this work fulfils WCT Article 13 and BC Article 18 requirement, and therefore shall be protected under WCT 50 years PMA.

²⁵⁴ Goldstein & Hugenholtz 2019, 228-229.

²⁵⁵ Term Directive, Article 2(1): principal director. MS is allowed to designate other co-authors.

²⁵⁶ Software Directive, Article 2: natural person or group of nature persons who created the program or, the legal person designated as the right holder by MS legislation.

²⁵⁷ Fawcett & Torremans 2011, 57-58 and 79-80.

situation. The following sections will compare typical differences²⁵⁸ between the UK and China, ranging from the ownership of the simple work to the complex work.

4.1 Individual authorship

4.1.1 Initial authorship: the actual author or the legal entity?

Both countries adopt the general principle of vesting first ownership of the copyright in the actual author or co-authors.²⁵⁹ Exceptions that grant initial ownership to entities are different.

The main exception of CDPA, that the actual author is not necessarily the first owner of the copyright, is the work made by employees. In the absence of an express agreement to the contrary, copyright initially vests in the employer.²⁶⁰ In CDPA, ‘employed’, ‘employee’, ‘employer’, and ‘employment’ refer to employment under a contract of service or apprenticeship.²⁶¹ In other words, the law declares the employer to be the initial owner.

There used to be a special provision on journalist-employees ownership,²⁶² governed by two sets of provisions: [1] favouring the employee, for the contributions made for the purpose of publication; [2] favouring the employer, the normal employment rules for all other works.²⁶³ There are no special provisions for journalist-employees now, viewing that the employer owns the copyright because s/he has paid for it, and there is no justification to treat journalists specially.²⁶⁴

Exceptions that legal entities might initially own the copyright of work are complicated in China. There are two sets of work: legal entity work (LEW) and work for hire (WFH). This table will help to clarify the complicated circumstances of vesting first ownership to the legal entities, where ①③④⑤ favour the employer while ② favours the employee.

²⁵⁸ Those differences have implication for the choice-of-law rule, because the outcome might be different if different copyright laws are applied (Chap.5 Sec.2.2.1).

²⁵⁹ CDPA, ss 9(1) and 11(1); CL, Article 11(1).

²⁶⁰ CDPA, s 11(2).

²⁶¹ CDPA, s 178.

²⁶² Copyright Act 1956 s 4(2), the copyright is spilt between the author and employer in the work made between 1 July 1957 and 1 August 1989.

²⁶³ Tappin 2018, 626.

²⁶⁴ Ibid 609.

Work	CL Article	Subdivision		Requirements of vesting copyright to the legal entities	Ownership		
					Legal Entity	Actual Author	
LEW (Legal Entity Work)	11		①	[1] organised by this legal entity [2] represented the will or intention of this legal entity [3] this legal entity shall be responsible for this LEW	all economic and moral rights	X	
WFH (Work for Hire)	(old) 16 18 para 1	General WFH	②	under employment		X (2 years priority right)	all economic and moral rights
	(old) 16 18 para 2	Special WFH	③		[1] mainly created with the material and technical resource of the legal entity [2] this legal entity shall be responsible for this WFH [3] drawings of engineering designs and product designs and maps, computer software and other works	other rights (except for authorship right)	authorship right (& remuneration right)
			④		circumstances provided by law and regulation	other rights (except for authorship right)	authorship right (& remuneration right)
			⑤		contractual agreement	other rights (except for authorship right)	authorship right (& remuneration right)
	2020 CL 18 para 2 (2)		⑥		Media-related	other rights (except for authorship right)	authorship right (& remuneration right)

1.7 Legal entity work and work for hire in China

4.1.2 A hybridity of *droit d'auteur* and copyright in China?

In China, one set is named as ‘work for hire’ (WFH). It is similar to English definition, referring to the work created under employment. However, the rule of ownership is not similar.

Unlike English **employer** approach, China adopts the general approach ② of treating the **employee** as the initial author.²⁶⁵ The employer only enjoys the priority right to exploit the work against the third party for the first two years after the completion of the work.

Additionally, there are three exceptions of WFH, applying more favourable **employer** approach (the employee only enjoys authorship right, other moral rights and all economic rights are entitled to the employer): [1] ③ when the employee mainly uses the material and resources of the legal entity (i.e. massive investment from the employer): for example, drawings of engineering designs and product designs and maps, computer software and other works created in the course of employment; [2] ④ circumstances provided by law and regulations²⁶⁶; [3] ⑤ contractual agreement.

²⁶⁵ CL, Article 16: ‘During the two years after the completion of the work, the author shall not, without the consent of the legal entity or other organization, authorize a third party to exploit the work in the same way as the legal entity or other organization does.’

²⁶⁶ Currently, only one circumstance is regulated in China: Local Chronicles Regulation (2006) Article 15, that the copyright of local chronicles or local gazetteers is owned by the entity who compiles it. The author who writes it only enjoys authorship right.

Another set is ‘legal entity work (LEW)’ ①, not included in CDPA. It designates the legal person as the original author, by way of legal fiction.²⁶⁷ CL prescribes that if the work is created under the organisation and intention of a legal entity responsible for the work, such a legal entity shall own all economic and moral rights. In other words, the actual natural person(s), who create or contribute to producing the work, do not even have the right of authorship. The government report is the typical example of such type, that is, the author of the report is the government rather than the actual author or co-authors who draft it.

4.1.3 Hybridity shall be understood under the social context

It shall be noted that ownership concerning works created under employment shall be understood under the social context in China. When copyright law was first established, the market economy had not been fully developed. At that time, there was even no clear definition of ‘employment’, let alone who the employer was and who the employee was. Hence, during the legislation of copyright law, there was a need to adopt an appropriate method to define the scope of works created by the staff and identify the ownership of such work. Legislators proposed that the proper approach shall be the one generally accepted by the public under the social context at that time.²⁶⁸

Therefore, it is natural that the ownership regime in China embodied the characteristics of ‘centrally planned’ economy system.²⁶⁹ On the one hand, the creation of human being shall be respected as a basic rule; on the other hand, the interest of state-owned firms might also be considered. Thus, 1990 CL finally upheld the ‘favouring actual author’ approach (②), by assimilating the ‘favouring legal entity’ approach to protect ‘employer’ interest (①③④⑤).²⁷⁰

4.1.4 Blurring line between LEW and WFH

With the development of economy and transformation of the market, the definition of employment is established in China. More and more works are created during the course of employment. This ‘once workable’ approach encounters problems in practice.

The difference between LEW and WFH is not apparent, so that the scope of these two types may overlap. The latter requires the employment relationship, and LEW may embrace the work created under employment as well. In other words, if a work is created by the author when performing the job duty, the ownership of this work might be arguable. The **employee** may claim for all economic and moral rights, in accordance with ② (the basic favouring-employee rule of WFH). On the contrary, the **employer**

²⁶⁷ CL, Article 11.

²⁶⁸ Liu Chuntian and Liu 1990.

²⁶⁹ For ‘planned economy’, see McMillan & Naughton 1992.

²⁷⁰ This approach has never been changed since 1990. In 2020, a new journalist-related circumstance was added (see ⑥ Sec.4.1.5).

may adopt ① to claim for all copyright rights or ③ to claim the majority copyrights (excluding authorship right).

A further difficulty lies in clarifying the distinction of LEW ① and WFH ③. The actual author may enjoy authorship right in ③ while enjoy neither moral nor economic rights in ①. The major difference between these two is whether this work represents the will or intention of this legal entity.²⁷¹ However, it is a vague question. The will is a ‘mental state’ to achieve a particular purpose, and the expression of will can be abstract and general. Any instructions or opinions of this legal person might be considered as ‘the will’ of this legal entity.

According to the legislators’ interpretation, the will is usually embodied in the course of management, when leaders or legal representatives perform their duties under the law and the company’s charter.²⁷² It can be inferred that, as long as the idea and expression of the employee-created work follow the general direction determined by the leaders, this work shall be considered as representing the will of the legal entity.²⁷³ In other words, it is hard to differentiate ① and ③ merely depending on whether the work reflects the will of the legal entity. In practice, it indeed creates the problem that similar cases result in different rulings.²⁷⁴

4.1.5 A leaning to the favouring employer approach?

Within the WFH set, another practical problem emerges, especially in journalist-employee context. Assumed in lack of contractual agreement,²⁷⁵ the journalist may seek protection based on the basic rule ② that the employee journalist initially owns

²⁷¹ The requirement ‘organised’ refers to that the legal entity is the leading party in the entire creation process, including the arrangement of preliminary investigations, human resources, funding, etc. It is also an element embodied in the course of employment in real life that the employer organises the whole creation process.

²⁷² Hu 2002, 70.

²⁷³ Wang Qian 2007, 30-37.

²⁷⁴ In *Yang Songyun v Lingtaban (Tibetan Pagoda Office, TPO)* ([1998] No.2), the artist Yang created the sculpture of the tenth Panchen Lama under the instructions of TPO. The court found this sculpture as LEW ①, thus TPO owned all moral and economic rights, while Yang did not own any rights. In a similar case *Football Fans Association (FFA) v Xu* ([2005] No.64), the artist Xu produced a sculpture instructed by FFA. The court found this work as Special WFH ③, thus Xu owned the authorship right.

²⁷⁵ It was quite commonly occurred in the 1990s when people lacked awareness of copyright. The journalist and the ‘employer’ rarely signed the agreement on the initial ownership of copyrights concerning articles or photos created during the ‘employment’.

articles/photos, because journalist-employee situation usually does not fulfil the exceptions ③²⁷⁶, ④²⁷⁷, ⑤²⁷⁸.

It is troublesome in real life. If the newspaper found a website illegally digitalised hard copy and then uploaded those, this newspaper might not be qualified as the single owner of all these articles to sue against infringement. Especially in lack of agreement, after the journalist leaves the newspaper, it is hard for the newspaper to seek protection against the third party without its former employees' permission. It might be potentially hundreds and thousands of individual owners in the litigation against that website. This inconvenience also affects the copyright contractual relationship if the newspaper plans to assign or license third parties to digitalise or exploit these articles.

In order to fix these problems, CL 2020 adopts a more favourable **employer** approach in the journalist-employee situation, similar to CDPA.²⁷⁹ Article 18 (old Article 16) adds the work created by journalists and similar creators in the media²⁸⁰ in the course of employment into 'Special WFH' ⑥. Employers thus initially own all rights except for authorship right.

From practical consideration, this added provision simplifies the process for the media to seek protection, and feasibly enables the exploitation of works which involve many contributors.²⁸¹ On the other hand, it reveals an expanding scope of 'Special WFH' favouring employer approach. It underlies the industrial need of protecting investment and exemplifies a leaning to common law rule, centring on the exploitation of work to boost the copyright industry in China. However, it is criticised as damaging the journalists' rights, scholars therefore suggest the contractual agreement between journalists and its employer shall prevail.²⁸²

4.1.6 A departure from its original purpose and the existence of uncertainty

Compared with English rule, CL provides mixed provisions concerning initial ownership. Fundamentally, both countries recognise the actual author's position as the basic rule, and entitlement to other entities is exceptional. In contrast with English 'actual author' basic rule, the legal entity can be deemed as the author by way of legal fiction (LEW) in China. Secondly, in the course of employment, CDPA adopts favouring **employer** approach. By contrast, CL divides into two sets of provision, either

²⁷⁶ ③ [1]: it requires a huge investment (material or technology assistance) from the employer, which can be argued not satisfied in writing newspaper articles or taking pictures using the personal camera. ③ [3]: the provided types do not consist of articles or photos. The miscellaneous 'other works' might be argued as including such written or artistic works by all means.

²⁷⁷ Local chronicles (n 267).

²⁷⁸ No contract is agreed in advance.

²⁷⁹ Feng 2020.

²⁸⁰ A broad scope is provided, including staffs in the newspaper, news agencies, broadcasting stations, tv stations and the affiliated media.

²⁸¹ Liu Xin 2020, 96-100.

²⁸² Zhu & Peng 2020, 81-87.

favouring **employee** (WFH general rule) or favouring **employer** (WFH exceptions). The scope of exceptions in China tends to expand for practical and industrial considerations.

Ownership in China is complicated. It combines ‘incompatible’ approaches of initial ownership into copyright law: LEW – **employer**; WFH generally favouring **employee** and exception **employer** approach. Although the rule of initial ownership is seemingly hybridity of common law and civil law system, it shall be understood based on social, cultural and economic context in China. For LEW, it embodies the characteristic of the planned economy.

As the copyright industry develops, Chinese employment ownership departs from its legislation purpose and orients towards common law rules. The original approach is vesting the actual author copyright with a perception of the author’s creativity, as basic rules with exceptions to legal entities. Currently, this creator-ownership approach seemingly shifts to more favourable **legal entities** approach. 2020 CL’s expansion of exceptions reflects this shift. It echoes the current rapidly growing copyright industry in China that most of works created under employment have constituted the mainstream of the copyright industry in China, especially in the cultural domain.²⁸³ At the same time, by way of expanding the scope of exceptions, it goes far contrary to the legislative purpose. The ‘author – legal entity’ relationship reverses, departing from the original purpose of protecting the actual author in WFH.

Moreover, Chinese ownership provisions are vague, and the dividing line among different types of work is not apparent. For example, legal entities and corporations are allowed to initially own and assert all moral rights in LEW, as long as this work reveals the will or intention of legal entities. However, due to the ambiguity of ‘will or intention’, it is not easy to ascertain the boundary of LEW. The confusion of determining ownership leads to uncertainty for parties involved, especially for the weaker party – the actual author. It also amounts to the judicial problem that similar cases may result in opposite decisions domestically. Even worse, this worldwide rarely seen mixed approach²⁸⁴ will lead to confusion and difficulty for foreign entities to understand. If no contract is agreed upon, it is hard to identify and predict the ownership of the disputed work, and the result might be opposite if different national law is applied.

4.2 Unknown authorship

There is no requirement on copyright registration, so problems emerge when the author cannot be identified and found by exploiters. It turns to be more controversial online where the author’s name is usually anonymous or a pseudonym. For instance, it usually occurs that the novel is published online under a pseudonym, or the photo/short video is downloaded and reuploaded after a million times without a name attached. BC provides that the publisher, whose name is on the work, shall be considered to represent

²⁸³ Jiang Ge 2014.

²⁸⁴ Fan 2018, 14-25.

the author to protect and enforce the author's right, in the absence of proof to the contrary ('publisher' approach).²⁸⁵

4.2.1 Licensing regime in the UK

CDPA implements EU Orphan Works Directive²⁸⁶, and adopts a further licensing regime.²⁸⁷ EU orphan works regime is quite narrow in scope, mainly concerning the non-commercial uses of orphan works by public libraries, museums and archives.²⁸⁸ Compared with EU, both commercial and non-commercial activities are concerned in the UK. Commercial entities are covered as potential licensees, and only domestic²⁸⁹ commercial uses can be authorised by the UK licensing regime.²⁹⁰ In short, the exploitation of orphan work in the UK bases on the compulsory system with strict requirements of diligent search and domestic use.²⁹¹

4.2.2 The owner of original copy approach in China

China does not adopt BC approach or EU licensing regime. It provides that 'in the case of a work of an unidentified author, the copyright, except the right of authorship, shall be exercised by the owner of the original copy of the work' ('owner of original copy' approach).²⁹²

In this researcher's opinion, Chinese 'owner of the original copy' approach is unworkable in real life, because the original copy cannot be easily reserved as time goes by. Moreover, it is even difficult to ascertain and prove whether a piece of digitalised work is the original copy.

Furthermore, this approach has an impact on the foreign-related issue. It amounts to the unfair treatment that the protection granted to foreign publisher exceeds that of the domestic publisher. For example, assuming a Chinese publisher A unauthorised translate a foreign unknown authorship work published by a foreign publisher B. As

²⁸⁵ BC, Article 15(3).

²⁸⁶ The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861.

²⁸⁷ The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, SI 2014/2863.

²⁸⁸ Directive 2012/28/EU ('Orphan Works Directive'), Article 1(1).

²⁸⁹ Orphan Works Regulations, SI 2014/2863, reg 6(2)(a).

²⁹⁰ The passing of licensing regime is considered rushed and unworkable at the time of entry into force. In January 2015, the UK IPO introduced an updated application procedure. Andrew Orłowski, 'UK.gov rushes out broken "Orphan Works" system as EU Directive comes in' (*The Register*, 29 October 2014) <www.theregister.co.uk/2014/10/29/govts_orphan_scheme_plops_out_broken_on_arrival/>.

²⁹¹ Lee, Bruun & Li 2016, 111.

²⁹² CR, Article 13.

long as the work subsists within the term of protection, B might apply BC²⁹³ representing the unknown author to file an infringement suit against A in China. In lack of similar domestic provision in China, if B is a Chinese publisher, B would have no rights to sue for infringement against A domestically. The foreign publisher is given preferential treatment concerning unknown authorship disputes.

4.3 Joint authorship

4.3.1 General rule: the relationship of contributors

Both countries require that contributors must contribute creative expression to the work for it is qualified as joint work. There is no need to be quantitatively or qualitatively equal for each contribution. The difference mainly lies in the requirement of the relationship among contributors.

CDPA requires that contributions of co-authors shall be closely connected.²⁹⁴ It adopts a stringent requirement on the close relationship. However, it is not a requirement in China, which adopts a two-type pattern of dividing joint work into separable and inseparable.²⁹⁵

For works that respective contributions can be exploited separately, each co-author shall be entitled to independent copyright in the part which s/he has created. However, the exploitation of each part shall not prejudice the copyright in the joint work as a whole.²⁹⁶ For example, in respect of a book of which chapters are written by several authors independently, there is no need for one of the authors to gain permission from other co-authors before exploiting his/her own work. Anyone of co-authors shall not exploit the whole work without others' authorisation.

Another type is the joint work that cannot be separately exploited. The typical example is a piece of music (without lyrics) written by two authors, provided that they modify the work jointly. Hence, it is not easy to identify individual contribution. It provides that copyright shall be enjoyed jointly by co-authors and exploited by unanimous consent. If co-authors do not reach an agreement, any party shall not obstruct exploitation in bad faith. The profits obtained from exploiting the work shall be distributed reasonably among all co-authors.²⁹⁷ The justification of this provision is that the primary purpose of copyright legislation is to make works available to the

²⁹³ Regulation of Implementation of International Copyright Treaties ([1992] No.15), Article 19: in the case of conflicts, international copyright conventions shall prevail over domestic copyright laws and regulations in China.

²⁹⁴ CDPA, s 10(1). For other collective works contributed by two or more authors, however, without the coalescence of elements required, contributors of such work will be granted copyright protection depending on the individual contribution.

²⁹⁵ Li Mingde 2008, 63.

²⁹⁶ CL, Article 13.

²⁹⁷ CR, Article 9.

public and promote culture.²⁹⁸ Therefore, the mutual agreement shall not be a strict restriction on exploiting joint work, which might hinder the dissemination of work.²⁹⁹

4.3.2 A typical type: cinematographic works

The ownership concerning cinematographic works varies among countries. BC provides that ‘ownership of the copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.’³⁰⁰

Both countries vest copyright to the producer, but CDPA adds principal director as initial owner. In the UK, traditionally, the producer of a film is the original owner and author. Under the influence of EU,³⁰¹ CDPA adds the principal director as the author and the initial owner.³⁰² In respect of moral rights, the director gets preference over the producer.³⁰³

In China, 2010 CL is similar to CDPA, which entitles copyright to the producer. The special rule is provided to balance all contributor’s interests, which vests authorship right to those individual contributors, such as the scriptwriter, director, cameraman, lyricist, composer and other contributors.³⁰⁴ It implies a presumptive transfer of all rights (except for authorship right) from other contributors to the film producer.³⁰⁵

The situation becomes a little complex in 2020 CL where cinematographic work is replaced by audiovisual work.³⁰⁶ The ownership of the ‘new’ audiovisual work is divided into two categories (the following chart, drawn by this author pursuant to new Article 17). The principal problem is how to differentiate [1] & [2]. Currently, there is no definite answer in law. This author believes such a distinction is unworkable in practice and make ownership issue more complicated.

²⁹⁸ CL, Article 1.

²⁹⁹ Wang Qian 2015, 235.

³⁰⁰ BC, Article 14*bis*(2)(a).

³⁰¹ Term Directive, Article 2 (1).

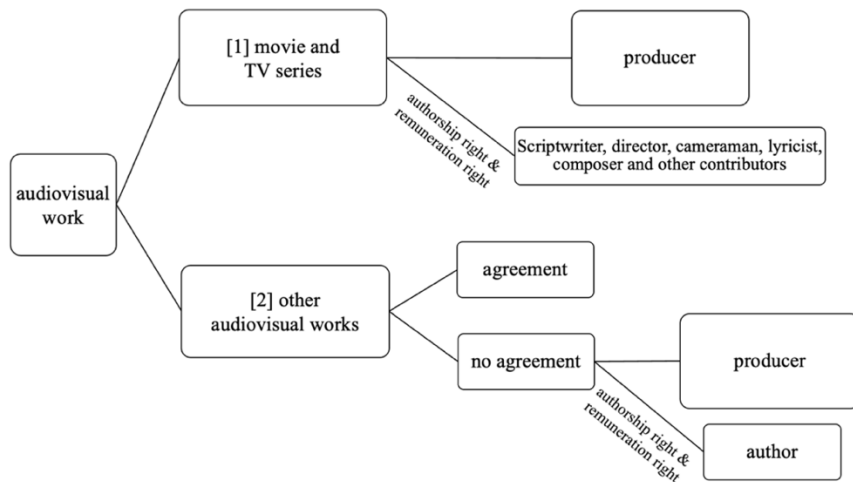
³⁰² CDPA, s 9(2)(a).

³⁰³ CDPA, s 77(6) The director of a film has the right to be identified whenever the film is shown in public or communicated to the public or copies of the film are issued to the public.

³⁰⁴ CL, Article 15.

³⁰⁵ It is unlike civil law tradition that the presumption of transfer does not affect moral rights, because they are inalienable. In lack of express provision in China, it is arguable that moral rights are waivable or alienable. Here concerning the ownership of film, the presumptive transfer, indeed involving three moral rights and all economic rights, from other contributors to the producer. It can be inferred that moral rights are not strictly inalienable in China (Chap.1 Sec.4.4.3).

³⁰⁶ Chap.1 Sec.3.1.5.1.



1.8 Audiovisual works in 2020 CL

4.4 Contractual transfer

Copyright transaction has to face the issue of transferability, that is whether the rights can be transferred or not. Copyright is divisible. There is no requirement to assign/license all rights to a single party, and the assignment/license can be limited within the scope of territory or a period of time. It includes various forms, such as a simple sale contract or a more restricted right to do something concerning the subject matter of the right.³⁰⁷

Similarly, both CDPA and CL consist of assignment and license.³⁰⁸ It is difficult to distinguish these two forms in practice, which are generally combined during the exploitation process. There is no need to make a clear distinction between the two in this thesis, because the nature of these two forms of contract is same, that is, a transfer of certain rights to do certain acts.³⁰⁹

Forms may vary depending on the author's capacity to negotiate. For example, in China, the 'newcomer' online novel author has no choice but to transfer overall copyright rights to Tencent for further distribution of his/her work on Tencent's online novel website, and the possible adaptation into movie, cartoon, online video and TV series. For the famous author, s/he might prefer to assign the individual right to a particular company for a limited time, such as the publication right to a book publishing house to transform digital content into hard copies; the right of communication to the public through the Internet to a popular online novel website to display its work; and the right of adaptation to a famous movie company to produce a film.

³⁰⁷ Torremans 2019, 299-301.

³⁰⁸ CDPA, s 90. CL Chapter III Copyright Licensing and Assignment Contract.

³⁰⁹ Fawcett & Torremans 2011, 80 & 745. The partial assignment in a limited territorial scope and time is similar to a license.

In short, if one party breaches the contract, he may be sued for violation of contractual obligation or copyright infringement. Both countries share a similar understanding of contractual agreement on economic rights, while major difference lies in moral rights.

4.4.1 Contractual transferability of moral rights

Moral rights protect the author's non-economic interests, reflecting the link between the author and the work. BC only provides the minimum protection on two moral rights: [1] the right to claim authorship of the work ('paternity right') and [2] the right to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honour or reputation ('integrity right').³¹⁰

Moral rights are quite different among countries.³¹¹ Usually, the civil law tradition separates moral rights from economic rights; while common-law countries consider those as part of general copyright protection.³¹² Although BC states that moral rights subsist independently of a transfer of economic rights,³¹³ MSs are permitted to choose its way of implementing moral rights protections. Additionally, BC does not expressly prescribe on the assignability of moral rights,³¹⁴ or the waiver of moral rights.³¹⁵ The vague language in BC does not provide an international consensus on whether moral rights can be contractually impaired.³¹⁶

³¹⁰ BC, Article *6bis*(1). Similarly, the subsequent treaty WPPT Article 5 also requires protecting the performer's paternity right and integrity right.

³¹¹ Rigamonti 2006. Three decisional rules in tort scenario and four in contractual scenario are rationalised, explained and justified differently among jurisdictions.

³¹² Bird & Ponte 2006, 213-214.

³¹³ BC Article *6bis* was drafted in a broad way that author shall have paternity and integrity rights even after the transfer of the economic rights.

³¹⁴ Ricketson & Ginsburg 2006, para 10.18. While the possibility of assigning the moral rights may be inconsistent with the very nature of such rights, the Convention might permit the transfer of the moral rights to an author's rights society to enforce them on the author's behalf.

³¹⁵ 'Part III' in Davies & Garnett 2016. Some civil law countries (France) forbid the waiver (444), while some civil law countries (Germany) consider moral rights inalienable and alienable at the same time (477-478). Goldstein & Hugenholtz 2019, 346-347: a few countries view moral rights as absolute inalienable; in most countries, moral rights might be subject to waiver, even if not alienable, and also regularly subjected to exemptions.

³¹⁶ Geller 2004, 378.

4.4.2 UK: can be waived, but cannot be assigned

In the UK, moral rights³¹⁷ cannot be assigned by the author,³¹⁸ but can be waived under some circumstances.³¹⁹ The only requirement of waiving is the waiver shall be in writing signed by the person giving up the right.³²⁰ Besides, if the person entitled to statutory moral rights has consented others to do an act, it is not an infringement.³²¹ The difference between waiver and consent is that the first refers to the author gives up his/her rights while the latter refers to the person who agrees to the action taking place.

4.4.3 China: ambiguity in law and uncertainty in practice

The moral right and economic right are independently provided in CL, however not completely separated in fact. The exploitation of economic rights usually involves the consideration of moral rights. CL has a broader scope of moral rights than CDPA, including: [1] disclosure right; [2] paternity (or authorship) right; [3] alteration right; [4] integrity right.³²² The first and third rights are not included in CDPA.³²³

CL provides that economic rights could be transferred, but without explicit provisions on whether moral rights shall be waivable or alienable.³²⁴ Theoretically, the moral right could not be waived, transferred and shall be permanently protected.³²⁵ However, the answer is not definite in fact.

There is no express statement on whether moral rights can be transferred, licenced or waived in CL.³²⁶ Generally speaking, copyright law is a private law, where if something is not forbidden by law, then it is permitted. So, according to law, it might be possible that moral rights in China can be transferred, licensed or waived.

In academia, there are many views. As Professor Zheng Chengsi, one of the Chinese IPR law founders, has proposed, moral rights cannot be transferred in the

³¹⁷ Chap.2 Sec.4.1, moral rights in the UK.

³¹⁸ Moral rights are not assignable between living people (s 94) but are on death (s 95).

³¹⁹ CDPA, s 87.

³²⁰ Davies & Garnett 2016, 323. CDPA, s 87(2). No other elements are required, such as formal or informal document, contractual or unilateral.

³²¹ CDPA, s 87(1).

³²² CL, Article 10 Paragraph 1 Items (1)-(4).

³²³ The definition of disclosure right and alteration right, see Chap.2 Sec.4.3 and Sec.4.4.

³²⁴ CL, Article 10: 'a copyright owner may wholly or partially transfer the rights provided in Items (5) through (17) of Paragraph 1 of this article and may receive remuneration as agreed upon in the contract or in accordance with the relevant provisions in this Law.'

³²⁵ He 2006, 78.

³²⁶ Civil Code Article 992 forbids personality right from being transferred or waived. For now, there is no clarification between personality rights and moral rights in Civil Code and Copyright Law.

commerce, but can be asserted (or transferred to) by the heirs. Furthermore, moral rights can be waived under a reasonable and limited context.³²⁷

Some argue that copyright law, as one part of civil law, shall be in line with the Civil Law. As personality rights (in Civil Law, the new Civil Code) cannot be assigned, licensed or waived, moral rights cannot either.³²⁸ Some suggest except for authorship right, other three rights can be assigned or waived.³²⁹ Some believe that paternity and integrity rights cannot be assigned while the other two moral rights can, as Dr Tang analyses that:

‘Based upon **art. 9** of the Interpretation on Copyright Disputes issued by the Supreme People’s Court in October 2002 and **art.1** of the NCA’s Opinion on Licensing and Trading Copyright, the rights of disclosure and alteration may be licensed or assigned via contracts, while the rights of paternity and integrity may be claimed by authors or performers only.’³³⁰

This researcher respectfully disagrees with this conclusion because the abovementioned two articles do not touch upon the transferability of moral rights.

The first ‘art. 9’ just provides a definition of disclosure right. It writes: ‘making a work available to the public’ prescribed in CL Article 10 Item (1) (disclosure right), means that the work is disclosed to unspecified persons by the copyright owner voluntarily or with the owner’s permission, not subject to the knowledge of the public.³³¹ This article merely sets up the necessary ingredient of disclosure right, that the availability of work to the public is sufficient. For example, if the author publishes his/her work on his/her blog, although nobody has ever read this article or visited the website, as long as the blog is open to the public, the act of uploading is disclosing the work.³³² There is not any content concerning whether disclosure right can be licensed or assigned via contract in this article.³³³

³²⁷ Zheng 1990, 71-78. This proposition bases on Professor Zheng’s opinion that moral rights can only be held by human authors, other than legal entities. Additionally, moral rights, reflecting the link between the work and the author, shall not be treated in a similar way as personality rights, which merely centres around the human. He gave an example: assuming author A was not famous, A asked B (a famous writer) to have B’s name on A’s work. After A’s book got published and generated in a great income, whether A could sue B for infringement of moral rights. If moral right cannot be waived, it means A can sue B with legitimate grounds, which is unfair for B; if the waive is recognized without any limitation, it is also inappropriate.

³²⁸ Wang Qian 2015, 146-147.

³²⁹ Yang Yanchao 2007, 337-347.

³³⁰ Tang 2016, 844.

³³¹ 法释[2002]31号第9条: 著作权法第十条第(一)项规定的“公之于众”, 是指著作权人自行或者经著作权人许可将作品向不特定的人公开, 但不以公众知晓为构成条件。

³³² Wang Qian 2015, 146-147. Professor Wang illustrates this article with this example.

³³³ The ambiguity may be found in the word ‘permission’, which has a similar literal meaning of ‘license’ in Chinese language. This author believes that from the purpose of this provision, it only defines the required elements of disclosure right, without the aspect of transferability of disclosure right.

In the second ‘art.1’³³⁴ mentioned above, no moral rights are involved also. It only states that the copyright owner can assign partially or entirely **economic rights** that prescribed in CL Article 10 items (5)-(17).³³⁵ Therefore, it cannot be inferred that moral rights can be licensed or assigned via contracts from this Article.

In short, from the wording of these two articles, they do not expressly allow for the alienability of disclosure right and alteration right. More importantly, the transferability of moral rights is the fundamental issue of copyright law. It must be prescribed by ‘Law’, rather than by the low authority level ‘Interpretation’ made by SPC and ‘Opinions’ issued by the administrative department NCAC. The answer about whether moral rights can be assigned or waived via contract remains open in CL.

In judicial practice, opinions remain uncertain as well. In *JCYT*, the disputed work is the writer’s novel titled ‘JCYT’. The plaintiff (the author) signed a contract with defendants for adapting the novel into a film. The plaintiff claimed that the movie created by defendants infringed his paternity and integrity right, for the reason that the author’s name was not attributed in the movie and his novel was treated derogatorily.

The first trial clearly stated two principles: [1] generally speaking, moral rights are not alienable due to its close relationship with the author’s identity, thus shall be exclusive to the actual author. [2] moral rights and economic rights can be separated. The author can still hold moral rights after assigning economic rights.

The court further analysed that it might be a threat for the assignee, who could not ascertain whether economic rights can be fully exercised, if the author still owned moral rights after assigning economic rights.³³⁶ Therefore, this court believed that during the performance of the contract, the author should have an ‘assistance obligation’ to ensure the safety and stability of the transaction, and actively assist the transferee in excising assigned economic rights, in accordance with the principle of good faith, thus ensuring the exploitation of the work.³³⁷

The second trial disagreed with the ‘assistance obligation’. The court agreed with the first trial’s opinion that moral rights and economic rights might be separated. The transfer of economic rights should not ensure the assignee to obtain moral rights from the assigner. Furthermore, the assignee should not be allowed to restrict the assigner to enforce moral rights. It should be the assignee’s obligation not to infringe the assignor’s moral rights. Additionally, the assignor’s assistance obligation does not exist.³³⁸ The

³³⁴ 国家版权局关于对著作权经营许可问题的意见（国权办[2003]22号）一、著作权买卖实际上是一种将著作权进行转让的法律行为。根据著作权法第十条规定，著作权人可以全部或者部分转让本条第一款第（五）项至第（十七）项规定的权利。因此，从事著作权买卖经营不需要经版权行政主管部门的批准。但经营者应遵守有关国家从事经营活动的法律法规。

³³⁵ Items (1)-(4) are moral rights.

³³⁶ The rationale of this decision is that some moral rights are closely related to economic rights, such as the disclosure right (moral) relates to the act of publishing or other acts of making available to the public. The author, in bad faith, might sue against assignee for violation of disclosure right, even though all economic rights are assigned to the assignee (Chap.2 Sec.4.3).

³³⁷ *Zhang Muye v China Film* [2016] No.83.

³³⁸ *Ibid* [2016] No.587 (8 August 2019).

second trial only responds to the second principle (moral rights and economic rights are separated); however, it avoids answering the assignability of moral rights.

This researcher agrees that on the one hand, the moral right is a civil right, which shall be in line with the basic principle of civil law. On the other hand, moral rights in copyright have its own characteristics. It is necessary to distinguish two levels when determining whether moral rights can be contractually agreed: [1] the ownership of moral rights; and [2] the exercise of moral rights. Generally speaking, the ownership of moral rights cannot be contractually transferred. However, both parties can contractually agree on how to exercise the moral rights. For example, A and B (the actual author) may agree to publish a work under A's name. It is a contractual agreement on exercising moral rights. As long as such agreement does not violate the public order, it is generally inappropriate to consider it invalid.³³⁹ This opinion is also reflected in Beijing Guidance Article 4.1, which clearly expresses that both parties may agree on the exercise of disclosure right via contract.³⁴⁰

Although in lack of express provisions on assignability, there are several conditions provided by law that moral rights are not owned by the actual author, implying a presumptive transfer of moral rights. Generally, the actual author has all moral rights, such as General WFH.³⁴¹ However, there are generally two conditions in CL that moral rights are 'transferred' to others: [1] all four moral rights are 'transferred': the actual author does not enjoy any one of moral rights in LEW;³⁴² [2] three moral rights are 'transferred': the actual author only has authorship right, while other three moral rights and all economic rights are entitled to others in film³⁴³, Special WFH³⁴⁴ and unknown authorship right³⁴⁵.

The transferability of moral rights shall be examined separately. In respect of disclosure right which could only be exercised once, it will not exist as long as the work is made available to the public. Therefore, there is no need to consider the transferability of disclosure right if the work is published. The problem lies in the unpublished works. If the author does not transfer disclosure right with other economic rights, the transferee could not exercise economic rights if the work is not allowed to be published. So, this author views disclosure right might be transferred along with economic rights.³⁴⁶

³³⁹ Li Zizhu 2018.

³⁴⁰ BG 2018 Article 4.1 provides that both parties can contractually agree on the exercise of disclosure right. If in the absence of agreement on the method of disclosure, it is presumed that the author content that the licensee can publish the work in any way of making available to the public. Under the circumstance that both parties have agreed on the disclosure means, if the licensee fails to perform in the agreed way, the author can choose to sue for infringement of disclosure right or breach of contract.

³⁴¹ Chap.1 Sec.4.1.1, the chart.

³⁴² Ibid. LEW regards the legal entity as the first owner and deprives the author from the right to exercise moral rights.

³⁴³ Chap.1 Sec.4.3.2. CL, Article 15.

³⁴⁴ Chap.1 Sec.4.1.1, the chart.

³⁴⁵ Chap.1 Sec.4.2.2. CR, Article 13.

³⁴⁶ Similar with n 216.

It is inevitable to authorize transferees to exercise alteration and integrity right, especially in the Internet copyright industry. For example, in the Pan-Entertainment Cycle, the copyright of an online novel is transferred to Tencent, who will produce other forms of works such as movie and video games on the basis of the original novel. If a million-word online novel is transformed into a two-hour movie, it is inevitable to alter or cut some part of the original literary works. The establishment of integrity right is to protect works against distortion or mutilation. The transferee who seeks economic benefits will not behave with bad faith towards the work. In addition, if these two rights cannot be exercised by others, when a third party distorts the copyrighted work, the transferee has no right to sue for infringement because the third party's act does not violate the transferee's right.

The transferability of authorship right involves the public interest. This author holds the opinion that this right might not be transferred because the general public shall know who the author actually is. If it can be transferred contractually, such behaviour is deceptive and goes against the basic principle of copyright law and civil law.³⁴⁷ To some extent, authors will feel a sense of recognition and honour to be known to the general public, which might be a mental stimulation for them to create more works since the mental act is the original trigger of the creation.

Furthermore, authorship right is important to the 'weak' actual individual author in particular. As the copyright industry develops, the actual author turns to be the weaker party and has less control over his/her works. If the authorship right could be transferred, the strong party or the big corporate will deprive the only right of the author, thus reducing author's creative passion and creating a vicious circle that the weaker they are and the less creative works they create.

CDPA has set up a waiver model and effectively enables the dynamic use of moral rights. The concept of 'waive' is translated into Chinese as '放弃', which might cause a misunderstanding that it equals to civil law concept 'abandon' (also translated into '放弃'). Therefore, the introduction of 'waive' might create confusion and be rejected firmly. Because 'abandon' in China always centres around the absolute right over tangible property, with the legal consequence that the rightsholder loses all control over the object. Such a situation may be hardly accepted under Chinese civil law tradition.

Therefore, this author suggests a contractual model to exploit moral rights, based on the party autonomy. It might enable the author to realise economic benefits by dealing with moral rights, and also serve the public interest to promote work's dissemination. Since no consensus has reached in China, this author suggests the exploiter shall avoid moral rights issue in the contractual relationship. Recently, the online novel authors complained that Tencent required authors to sign a standard contract with a clause that all copyrights³⁴⁸ shall be transferred to Tencent's for exploitation. Tencent later responded that 'moral rights are not transferable, which are

³⁴⁷ Liu Chuntian 2006, 40.

³⁴⁸ Author's right and copyright in Chinese are used interchangeably. For the literary Chinese meaning, it is arguable whether the transferred rights in this contract refer to 'economic and moral rights' or '(economic) copyright'.

exclusive to the writers. China Literature will never obtain those rights by any means.’³⁴⁹

5. Comparison and interim Conclusion

In relation to China-UK copyright laws, there is a systematic difference. China adopts dual ‘copyright and related rights’ system while the UK protects all under copyright. This fundamental difference further leads to differences in major aspects of copyright laws.

The **creation and validity** of copyright plays an important role in defining the scope of copyright protection. First of all, originality is the essential aspect of copyright protection, but the national standard varies depending on the nature of works and is a question of fact. Nevertheless, the test of originality tends to converge to a similar standard that creation shall reflect a minimal level of creativity or ‘the author’s own intellectual creation’, which echoes the convergence between common law and civil law tradition.³⁵⁰ Secondly, Chinese list is relatively open-ended than the UK categorisation. CDPA categorization group is exhaustive but the category itself is open-ended to some extent. Both laws leave a room for new works. Thirdly, the general term of the UK is longer than that in China. The difference might be dealt with the comparison of term that the shorter term shall apply.

Even though there is a tendency of converging, diversity still exists. Problems in protecting foreign copyright in China arise from those differences. First, as 2020 CL opens up the protected types, the ‘acrobatic work’ problem may arise in the future. If Chinese courts do not take cautious attitude over new types of work after 2020 CL enactment, it may easily occur that new types of work (such as ‘taste’) would be protected in China however not protected in other countries. Under the foreign-related context, the supranational treatment might arise that Chinese copyrighted work will not be protected in foreign countries while such works originated from foreign countries will be protected in China.

The second problem is brought by the loophole in 2020 CL concerning the extension over the duration of photographic works. The lack of revived copyright concerning photographic works continues to fail WCT obligation and might exacerbate the problem when protecting foreign photographs. The duration of foreign photographs in China might be dramatically decreased under certain circumstances.

Ownership of copyright matters especially in foreign-related situation. Since international conventions are silent on the authorship of copyright, different countries apply different rules. It might easily lead to a conflicting situation that copyright is owned by someone by X law but vested to another according to Y law.

In the UK, the work has always been considered as a commodity with economic value. The ownership therefore prefers the investor, that whoever undertakes the risk

³⁴⁹ Yuewen, ‘Notice related to Contract’ (6 May 2020) <<https://mp.weixin.qq.com/s/jEgiwXECN5tYd0nnv1qZ9w>>.

³⁵⁰ Fisher 2016, 437-468.

of exploitation shall have the right to receive economic benefits. On the contrary, the creator or the natural person, is less protected. It can also be concluded from the lack of moral rights protection in traditional English law.

In China, driven by industrial and commercial needs, there is a tendency to favouring legal entities, especially in works created by many contributors. This practical consideration might be far from the legislative purpose of protecting the author's rights and creative activities. For example, even though the general rule vests the initial ownership to the creator, the scope of exceptions favouring legal entities expands dramatically concerning the work under employment in CL 2020.

Moral rights can be waived in the UK, while it remains unclear in CL. There is an urgent need to clarify whether moral rights are waivable or alienable in China. Especially after the enactment of Civil Code³⁵¹, the relationship between personality right³⁵² and moral right shall be identified. Under the guidance of Civil Code, the question of how moral rights shall function in the commerce shall be answered. In order to ensure legal certainty, detailed provisions shall be reasonably and expressly provided in law, including whether moral rights are exclusive to the author and whether can be assigned, licensed or waived.

The clarification will benefit the cross-border exploitation. For example, the English author waives his/her moral rights under English law in a contract with a Chinese company, covering exploitation in China. If this Chinese company derogatorily modifies the work in China, it would be a question of whether CL protects this English author and whether the contract is recognised in China. It might be presumed from Chinese statutes and judicial opinions that the author may be able to waive moral rights (which can be exercised by legal entities). Contracts on the reasonable exercise of moral rights by someone except for the actual author are permitted in the judicial practice. But according to the deep understanding of treating 'waive' and 'abandon' equally in Chinese language, it is not the best choice of adopting waiver in CL. A contractual model to exercise moral rights might be acceptable.

³⁵¹ Civil Code Article 991 and 992 provide that the personality right is imprescriptible, non-waivable, inalienable and inheritable. Furthermore, Article 993 clearly states that the name, title and portrait can be exploited commercially, with detailed provisions concerning contractual agreement of using those personality rights in Articles 1021-1023.

³⁵² Civil Code codifies the personality right as a separate Book 'the law of personality right' which is rarely seen in the civil codification worldwide. Legislators explain it reveals Chinese civil system's purpose to promote protecting individual dignity. Ping Lin, 'The interview with the legislator: Professor Liming Wang' (*Pengpai News*, 19 May 2020) <www.thepaper.cn/newsDetail_forward_7448320>. For more discussion on personality rights in civil codification, see Chen Lei 2018, 31-56.

CHAPTER 2 COPYRIGHT INFRINGEMENT IN THE UK AND CHINA

1. Introduction

Copyright infringement is a civil issue in essence.¹ Infringement refers to an act that interferes with one of the exclusive rights of a patent, copyright or trademark owner.² Essentially, copyright is a right to make copies and therefore copyright infringement is considered to be an act of making copies of a work without authorization, generally, the unauthorized activity of violating any of a copyright owner's exclusive rights conferred by the law.³ In short, copyright is a 'negative right' that forbid others from conducting the activities exclusive to the copyright owner conferred by law.⁴

China relies on administrative measures frequently to deal with infringement. However, those methods can only deal with 'massive infringement' against public interests. Administrative bodies only have the power to cease the acts and confiscating the illegal income.⁵ Moreover, the usual administrative measure is technical blocking the website containing infringing content; thus, the mere function is forbidding the website from being accessed within China. It does not provide assistance for international participants to foresee the result in cross-border copyright disputes. In order to smooth international copyright work exchange, it is essential and helpful for parties to foresee how a domestic court is going to deal with disputes, especially important for a foreign party to know in advance before making a big investment.

There are two objectives in this chapter by comparing both copyright laws. **Firstly**, it will mainly compare what acts are restricted, especially in the context of the Internet. To be precise, it will answer how both courts determine copyright infringement. If differences exist in dealing with infringement, the possibility of cross-border copyright disputes may amount to PIL issues. **Secondly**, this chapter will also function as the background for analysing jurisdictional issues. It will examine whether the substantive laws provide any assistance in identifying the 'place'. Because both countries adopt the place of defendant(s) as the general jurisdictional ground, and the place of act and effect

¹ Both countries allow for criminal actions against infringer. CDPA, s 107; Criminal Law of the PRC, Article 217. The criminal issues fall outside the scope of this research, of which the focus is civil issues.

² Black's Law Dictionary (10th edn, Thomson Reuters 2014) 901.

³ Torremans 2019, 239. Wu Handong 2020, 97-99.

⁴ Wang Qian 2012:2, 9.

⁵ Chap.1 Sec.2.4.1. CL, Article 48.

as the special jurisdictional grounds.⁶ This chapter will explore whether substantive law has any indication on localising the ‘place’.

2. Infringement of economic rights

There is no definition of infringement in CDPA and CL. Nevertheless, two countries both require that only restricted acts specified in copyright law are committed, the action over such an infringement can be raised. Infringement occurs if a person conducts the restricted acts or authorises others to conduct those acts, whole or substantially appropriated works of a copyright owner without permission.

Although the basic concept of copyright infringement is similar, identifying the infringing act is dramatically different. Some acts might be seen as lawful performance in one jurisdiction but not in another. It is because the national copyright law regulates differently not only in the owner’s exclusive rights but also the rules of exception and limitation among different jurisdictions.

The premise of determining infringement is to clarify whether the alleged act in dispute is exclusive to the copyright owner. For example, the act of reading a pirated book is not copyright infringement because reading is not exclusive to the copyright owner. The rightsholder therefore has no right to stop others from doing this act. So, restricted acts play an essential role in determining infringement. It shall be clarified at the beginning: which rights are owned by the author, in other words, what acts are exclusive to the owner?

2.1 General remarks

2.1.1 The test to determine infringement

2.1.1.1 UK: the causal link and sufficient similarities

The UK adopts the test of ‘the causal link’ and ‘sufficient similarities’ to identify infringement.⁷ It requires that a sufficient causal link between the alleged infringement and original work shall be established to prove the author’s rights are infringed.⁸ The claimant shall prove the alleged infringer has taken the whole or substantial part of the disputed work and produced a new copy.⁹ The qualitative approach is applied to

⁶ Chap.4.

⁷ Bently 2018, 194. Torremans 2019, 240-249.

⁸ *Francis Day and Hunter Ltd v Bron* [1963] Ch 587, 624.

⁹ CDPA, s 16(3)(a).

determine ‘substantial part’¹⁰, rather than on a quantitative basis.¹¹ The quality test varies depending on the questioned work. Generally, it might be identified ‘by reference to the reason why the work is given copyright protection’.¹²

The traditional English test is affected by the EU to a minimal extent. *Infopaq* has dealt with the issue of reproduction in part, which is closely related to originality. CJEU stated that copyright could apply only in relation to a subject-matter which was its author’s own intellectual creation (original).¹³ In other words, as long as the various parts of a work contain the original expression, they enjoy copyright protection.¹⁴ The Court then held, if the part copied and reproduced is itself the author’s intellectual creation, then it is infringement.¹⁵ *Infopaq* was found against traditional English case law that copyright law does not protect slogans or titles.¹⁶ Moreover, this decision was regarded as inconsistent with English rules, that no liability arises concerning ‘the reproduction of an insubstantial part of a work’.¹⁷ UK courts did not fully accept the EU test.¹⁸

2.1.1.2 China: the substantial similarity and the possibility of prior access

In China, there used to be no consensus on the decisive elements of infringement. Because, in essence, copyright infringement is regarded as a civil tort in China. Fault, closely linked to civil liability, is an important issue in the field of tort law. Therefore, in determining tort liability, basic civil laws such as General Principles of Civil Law, General Rules of Civil Law and Tort Liability Law also need to be applied.¹⁹ But for plaintiffs, usually they need to prove [1] ownership of a valid copyright; and [2] defendant violates one or more of the exclusive rights granted by law directly or indirectly.²⁰

Currently there is a consensus concerning the test in practice: [1] whether the disputed work is identical or substantially similar to the plaintiff’s work; [2] whether

¹⁰ *Ladbroke v William Hill* [1964] 1 All ER 465. *Warwick Film Producers Ltd v Eisinger* [1969] 1 Ch 508. The alleged copied part must be the substantial part of the plaintiff’s work, and there is no need to constitute substantial part of the defendant’s work.

¹¹ CDPA, ss 16 and 17. The ‘substantial part’ is a matter of quality not quantity. It depends on the context, for example even a small part of (protected) expression extracted from a large work, if it is substantially and qualitatively important, it may be found infringement.

¹² *Newspaper Licensing Agency v Marks* [2003] 1 AC 551, 559.

¹³ C-5/08 *Infopaq*, para 37. Chap.1 Sec.3.1.2.

¹⁴ *Ibid*, para 39.

¹⁵ *Ibid*, para 48.

¹⁶ Derclaye 2014, footnote 80.

¹⁷ Griffiths 2013, 24.

¹⁸ Derclaye 2014, 20-21. Professor Derclaye found some UK cases stick to the traditional English rule and concluded that EU rule was rarely adopted in the UK.

¹⁹ Cong 2015, 12.

²⁰ Merges & Song 2018, 462.

the possibility of prior access exists.²¹ The prior access refers to that the alleged infringer has the opportunity to access the work in ordinary ways, which can be inferred from the fact that the work has already made available to the public, by ways of publishing, exhibiting, broadcasting and other similar methods.²² It does not require that someone has known or accessed the work in fact.²³

Furthermore, Beijing HPC provides a guiding list of elements that might be considered in the infringement case: [1] the defendant's activities; [2] whether the defendant conducted the activities; [3] whether the defendant was at fault; [4] whether the damage occurred; [5] whether the causal relationship between the act and damage exists.²⁴ This list is not mandatory.²⁵ Even though 'fault' is expressly provided for consideration, those factors merely relate to the determination of remedies and amount of compensation.²⁶ 'Fault' is not the decisive factor when determining whether an act constitutes infringement or not.

In short, the general test of determining infringement is similar in the UK and China. The substantial similarity relies on the judges' determination. Both agree that the psychological state is not a necessary element in the cause of action for primary/direct infringement. In other words, there might be infringement in the absence of 'knowledge'.

The following sections will examine the detailed restricted acts, mainly concerning infringement occurs online. Because compared with traditional infringement, online infringement may be more problematic in localising the 'place' referred in PIL discussion. It usually involves two types of acts: the act of reproduction, and the act of making works available online, correspondingly restricted by copyright law: [1] the reproduction right and [2] the right of communication to the public via the Internet.

2.1.2 Economic rights in both copyright laws

Primary infringement involves the unauthorised act of copying, by reproduction or performance of the work. The determination of direct infringement mainly focuses on whether the alleged infringer's acts are restricted by copyright law. Both countries expressly prescribe economic rights in law. There is a slight difference in the format and classification of rights.

²¹ BG 2018, Article 10.7.

²² *Qiongyao v Yu* [2015] No.1039.

²³ BG 2018, Article 10.8.

²⁴ BG 2018, Article 1.18.

²⁵ Beijing HPC also states that it is only a general guiding list and shall be determined case by case.

²⁶ Wang Qian 2006, 62. For example, suppose the publisher exercised reasonable care, but did not discover that the manuscript plagiarized and published it. In this case, the publisher's actions still constitute a direct infringement of reproduction right and distribution right. But this publisher could prove it is not at fault and might be exempted from paying compensation.

CDPA defines economic rights as relatively broad notions,²⁷ including [1] the reproduction right, [2] the distribution right, [3] the rental and lending rights, [4] the public performance right, [5] the communication to the public right and [6] the right to make an adaptation.²⁸

CL defines economic rights in a detailed way.²⁹ There are 12 economic rights prescribed by law, which might be divided into six types as well, correspondingly with CDPA: [1] the reproduction right (CL Article 10(5)); [2] the distribution right (Item 6); [3] the rental right (Item 7); [4] the public performance right: the right of the exhibition (Item 8), performance (Item 9), showing (Item 10); [5] the communication to the public right: the right of broadcast (Item 11), and the right of communication of information on networks (Item 12, ‘CIN right’); [6] the right related to derivative works: the right of making cinematographic work (Item 13), adaptation (Item 14), translation (Item 15), and compilation (Item 16).

To sum up, even though the number and name of rights are different, both countries share similarities defining the rights, which provide opportunities for comparative study. The following two sections will examine acts of violating the reproduction right and the communication to the public right.

2.2 Acts of violating the reproduction right

The reproduction right is the most basic right in copyright law, referring to the right to produce copies. International copyright convention has harmonised the reproduction right to some extent. BC Article 9(1) provides that ‘authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form’.³⁰ It later provides in Article 9(3) that ‘any sound or visual recording shall be considered as a reproduction’. Both two countries define the reproduction right in line with BC encompassing term, and restricted acts may vary depending on the nature of work.

Under the Internet context, there is no doubt that permanent copying (fixing works digitally) constitutes infringement, such as the act of uploading or downloading. However, technology has brought challenges to the reproduction right, that sometimes temporary or transient copies are unavoidable when transmitting the digital material online. The question thus arises, whether the reproduction right restricts temporary copying.

²⁷ CDPA, s 16(1).

²⁸ It should be noted that the rights conferred to copyright owners vary depending on which type the work is. A detailed table is illustrated in Bently 2018, 143.

²⁹ There are 12 one-sentence paragraphs in CL Article 10(5)-(16). Each paragraph defines one exclusive right.

³⁰ WIPO 1978 Guide, 54. It protects against unauthorised copying in any medium, which ‘are wide enough to cover all methods of reproduction: design, engraving, lithography, offset and all other printing process, typewriting, photocopying, xerox, mechanical or magnetic recordings (discs, cassettes, magnetic tape, files, microfilms, etc.), and all other processes known or yet to be discovered.’

WCT has drafted affirmatively that both permanent and temporary reproduction constitute reproduction.³¹ However, it was dropped in the end, for the reason that temporary copying has little contribution to economic value and control of these copies would hamper fluent Internet operations.³²

2.2.1 UK

Compared with BC, the scope in InfoSoc Directive is broader. Article 2 has harmonised the reproduction right as the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part. This provision is considered as giving no definition of ‘reproduction’ or ‘reproduction in part’.³³ In *Infopaq* and *FAPL*, CJEU stated that the term of ‘reproduction’ should be given an autonomous and uniform interpretation within the EU.³⁴ This concept shall be ‘having regard to the wording and context’ of InfoSoc Article 2, and also the overall objectives of that directive and international law.

CDPA regards copying as reproducing the work in any material form, including any medium by electronic means.³⁵ It provides that temporary digital copying is an act of copying,³⁶ implementing InfoSoc Article 2, but with a narrow scope of exception – mere conduit, caching and hosting. Article 5 qualifies rights concerning ‘temporary acts of reproduction’, which are ‘transient or incidental’ and function as ‘an integral and essential part of a technical process’, if copies are made to [1] enable a network transmission, or [2] for lawful use.³⁷ In other words, failing these mandatory requirements, those transient or incidental copies might be actionable.

³¹ WCT Proposal (1996), Article 7.

³² Goldstein & Hugenholtz 2019, 287.

³³ *Infopaq*, para 31.

³⁴ *Infopaq*, paras 27-29. *FAPL* (C-403/08 and C-429/08), para 154.

³⁵ CDPA, s 17(2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form. This includes storing the work in any medium by electronic means.

³⁶ CDPA, s 17(6) Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work.

³⁷ CDPA, s 28A. This exception applies in respect of LDMA (other than computer programs or databases), sound recordings, films, and typographical arrangement. InfoSoc Directive, Article 5 (1) Temporary acts of reproduction..., which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2.2.2 China

CL defines the reproduction right in a short sentence, with some illustrative examples of restricted acts.³⁸ 2010 CL defines it as 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, and so forth. Despite there is no express requirement of fixation or material form provided in this article, ‘copies’ written in this article presume the tangible objects involved.³⁹

‘Digitalisation’ is legislatively added into the list in 2020 CL. This new Article 10(5) does not bring substantial changes actually. NCAC 1999 regulation has provided that ‘digitization of existing works, regardless of the form in which they are expressed and fixed, shall constitute the act of reproduction.’⁴⁰ Moreover, Chinese courts have long accepted ‘digitalisation’ as one part of restricted acts by reproduction right.⁴¹ Therefore, 2020 revision is just a codification of the long-time judicial practice.

In contrast with CDPA, CL does not expressly prescribe whether temporary copying constitutes infringement.⁴² It was once arguable, in lack of express provision in law, that whether the reproduction right shall cover temporary copying.⁴³ Currently, in practice, it is generally adopted that all unauthorised activities of copying constitute infringement unless the temporary copying qualifies as exceptions. For example, JI 2012 explicitly states that the intermediary is not liable for infringement if the automatically generated temporary copies are used to promote transmission efficiency under certain conditions.⁴⁴

In short, the violation of reproduction right generally means that ‘work plus physical object’ is ‘fixed permanently, rather than transiently, in a material form’ in

³⁸ CL, Article 10 (5).

³⁹ WIPO, ‘WCT with the Agreed Statements of the Diplomatic Conference that Adopted the Treaty and the Provisions of the BC Referred to in the Treaty’ (20 December 1996) 10 <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_226.pdf>. Footnote 5: ‘...the expressions “copies” and “original and copies” ...refer exclusively to fixed copies that can be put into circulation as tangible objects.’

⁴⁰ NCAC Regulation on Reproduction of Digitalised Works ([1999] No.45), Article 2.

⁴¹ *MCSC v Konka* [2004] No.11835. The court held that the disputed song was fixed on an IC card; thus, the unauthorized use of disputed song as incoming call ringing constituted the infringement of reproduction right. *Daxuesheng v Li Xiang* [2000] No.18; [2001] No.51. The defendant unauthorized scanned articles in a magazine and uploaded digital ‘copies’ on a website. The court found those acts violating reproduction right.

⁴² PRC, ‘Opinion of Legislators’ (29 May 2006) <www.gov.cn/zwhd/2006-05/29/content_294127.htm>. CINRR 2006 did not expressly prohibit temporary copying.

⁴³ Wang Qian 2001. Luo 2004.

⁴⁴ Hu 2014, 81. Judicial Interpretation by SPC on the Application of Law concerning CIN Right Infringement (JI CL [2012] No.20). A snapshot copy is not copying if it is used by the service provider to speed up the indexing service.

China,⁴⁵ unless the copies qualify as exceptions, for example, the alleged infringer is an ISP and meets the requirements under safe harbour provisions.

2.2.3 The location of acts

Both countries share the same understanding of reproduction right. Generally, the act of illegal uploading and downloading are controlled by reproduction right. The determination of places where these acts occur is not difficult to pinpoint. In respect of unauthorized reproduction in the Internet context, it usually coincides with the act of making works available to the public via the Internet. Such an act is assimilated by the act of interactive communication via the Internet.⁴⁶ Unauthorized downloading, generally related to personal use and thus exempted, is rarely found copyright infringement. So, the main discussion will point to the act of violating the communication to the public right and its location.

2.3 Acts of violating the right of communication to the public

The making available right is becoming more and more important today in this digital world. The traditional copyright-based industry, which relies on publishing and distributing hard copies of work, has been replaced by online accessible copyrighted contents.⁴⁷ Readers online do not value the ‘copies’ and shift their attention on the transient content on the screen rather than the tangible work.⁴⁸

The most significant Internet-related legislative progress is the implementation of InfoSoc Directive in the UK.⁴⁹ DSM Directive is a reform and modernized rule fit for the digital age.⁵⁰ As influenced by Brexit, CDPA is not required to implement DSM Directive in full, which came into force on 6 June 2019.⁵¹ In China, the Internet-related provisions are modernized after joining WCT. In addition to CL, multiple special regulations and judicial interpretations were issued to tackle specific Internet issues.

⁴⁵ *Yinzhuixie (MCSC) v Zhilanyushu* [2017] No.20999; [2018] No.1885.

⁴⁶ Wang Qian 2011, 158.

⁴⁷ van Caenegem 1995, 325.

⁴⁸ Westkamp 2004, 1057.

⁴⁹ Directive 2001/29/EC. Copyright and Related Rights Regulations 2003, SI 2003/2498.

⁵⁰ European Commission, ‘Copyright Reform: The Commission Welcomes European Parliament’s Vote in Favour of Modernized Rules Fit for Digital Age’ (26 March 2019) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_1839>.

⁵¹ UK Parliament, (21 January 2020) <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-16/4371>>. The UK government has no plan to do so. ‘Any future changes to the UK copyright framework will be considered as part of the usual domestic policy process.’ So, DSM Internet related provisions, such as the online content-sharing service providers in Article 17, will not be discussed in UK part of this thesis but mentioned wherever necessary.

This section will first examine how treaties define this right and provide the background to identify the purpose of establishing such a right. Then, it compares different approaches in implementing it in both countries.

2.3.1 The international treaty – WCT

WIPO Copyright Treaty grants a ‘new’⁵² right or a sub-right to the communication right to protect works and rights in the digital environment in Article 8:

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 BC, 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.⁵³

According to the Notes on WCT, the former part of this article restates protection provided by BC, that is, radio and television broadcasting; the second part is the main achievement of WCT, requiring countries to control the interactive use of copyright work.⁵⁴ The negotiations reveal that the aim is to protect on-demand content distribution. This right is drafted ‘in broad, ambiguous and technology-neutral terms’.⁵⁵ WCT adopts an umbrella approach by granting MS the power to choose its mode of protection in compliance with Article 8, without requiring all members to establish the same right.⁵⁶

However, some issues are left unanswered by the treaty. Firstly, acts which could lead to infringement are not conceptualized in detail. It fails to define two elements: [1] an act of ‘making available’ to the [2] ‘public’. Secondly, no distinction is made between primary and secondary infringement. Nevertheless, some minimum points are clearly stated. The concept of making available right may extend not only to ‘the acts that are carried out by the “communicators” themselves’, but also the acts which make

⁵² ‘WCT and WPPT’ <www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct_wppt.pdf>. BC is considered in lack of protecting online communications.

⁵³ WCT was signed on 20 December 1996 and entered into force on 6 March 2002. EU signed on 20 December 1996 and entered into force on 14 March 2010. UK signed on 13 February 1997 (in force on 14 March 2010). China’s effective date was 9 June 2007. The total contracting parties is 109 (12 February 2021).

⁵⁴ ‘Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions’ (30 August 1996) paras 10. 09-10.10 <www.wipo.int/edocs/mdocs/diplconf/en/crn_dc/crn_dc_4.pdf>.

⁵⁵ Foong 2019, 53-79.

⁵⁶ Ficsor 2002, 204-206.

the work accessible to the public, even if ‘members of the public still have to cause the system to make it actually available to them’.⁵⁷

In other words, it suffices that someone has offered to transmit the content, rather than has transmitted the content to the public. The mere accessibility is sufficient to identify infringement. There is no need to prove that the actual transmission has occurred. The initial act of making the work available is counted, by providing access to it.⁵⁸ The subsequent acts shall not be included in this right. It means the place of act shall not cover the locations where the digital copyrighted work may go through, store or arrive.

2.3.2 Provisions in InfoSoc/CDPA/CL

Since MSs are free to implement this right in any form as long as it is protected substantially, both countries adopt different approaches.

The EU provision is similar to WCT Article 8. The making available right was harmonized under InfoSoc Directive Article 3(1). Recital 25 and 26 state that ‘legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission’ will be addressed and ‘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’. EU is broader in defining the act of communication.⁵⁹ Providing means or links to copyright content is sufficient.⁶⁰

UK adopts a general term to cover WCT Article 8. CDPA defines it within the right of communication the work to the public by electronic transmission, including the broadcasting of the work and on-demand transmission. The act refers to the making available to the public of the work by electronic transmission so that members of the public may access it from a place and at a time individually chosen by them.⁶¹

China defines it in a specific term⁶² – the right to communicate information on networks (CIN Right), mainly concerning the act of interactive on-demand communication via Internet (excluding broadcasting) and establishes a specific

⁵⁷ ‘Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms’ (2004) 208, CT-8.6 <www.wipo.int/publications/en/details.jsp?id=361&plang=EN>.

⁵⁸ Diplomatic Conference 1996 (n 54), para 10.10. ‘What counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals. It is irrelevant whether copies are available for the user or whether the work is simply made perceptible to, and thus usable by, the user.’

⁵⁹ C-610/15, *Stichting Brein*, para 22.

⁶⁰ *Ibid*, para 48: ‘the concept of “communication to the public” ... must be interpreted as covering ... the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata referring to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.’

⁶¹ CDPA, s 20, implementing InfoSoc Article 3.

⁶² Hu 2002, 56. Zhang Jianhua 2006, 92.

regulation on protecting this right.⁶³ However, a mistake was made when translating WCT Article 8 to CL Article 10(12).⁶⁴ It results in a big gap in governing Internet-related activities in CL compared with CDPA and WCT. The following section will focus on this gap and its effects on the international situation.

2.3.3 The deficiency in implementing the WCT in China

The flaw in translating WCT into CL left a gap that the act of cablecasting and webcasting cannot be found violating any one of statutory types of rights in 2010 CL. **First**, cablecasting and webcasting cannot be governed by **CIN right**. According to Article 10(12) CIN right, there is a prerequisite that the restricted act shall be interactive. It requires that users can choose the time and the place they like. For example, the act of making filmed match available online is interactive, thus controlled by CIN right.

However, the act of cablecasting or webcasting fails to meet interactive requirement. Because users cannot choose the time, even though the place might be chosen. In other words, if the rightsholder sues against the alleged defendant who conducted webcasting activities, by claiming the defendant violates the plaintiff's CIN right, the court must reject this claim.⁶⁵ In short, CIN right only covers the interactive act, excluding the fixed-time act of live streaming, webcasting and linear communication.

Moreover, the broadcasting right in CL cannot cover those acts as well. CL Article 10(10) (broadcasting right) is translated from BC Article 11*bis* (broadcasting and related rights). BC defines the broadcasting right as (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; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.⁶⁶

From literal meaning, neither cablecasting nor webcasting is involved in this article. In other words, the act of broadcasting of the work by means of a cable or Internet transmission, cannot be covered by CL broadcasting right. For example, in the

⁶³ CINRR was issued in 2006 and revised in 2013 (JI CL [2012] No.20).

⁶⁴ CL, Article 10(12), 'copyright owner has the right making available to the public of their works, by wire or wireless means, that members of the public may access these works from a place and at a time individually chosen by them.'

⁶⁵ *Anle v Shiyue* [2008] No.10396; [2009] No.3034. The court confirmed the disputed act did not violate CIN right. Because the defendant made the disputed movie available online through fixed time. Since users could choose the time individually, the disputed act did not satisfy the interactive requirement of CIN right.

⁶⁶ BC Article 11*bis*(1)(i)-(iii).

case where the defendant carried out the initial transmission by cable, the court held such an act was not governed by broadcasting right.⁶⁷

There used to be a problem then in a cross-border situation. Suppose a UK national sued in China and claimed the Chinese defendant had conducted unauthorized webcasting, Chinese courts shall not reject this suit just like what courts would do in a purely domestic case. Chinese courts shall not deny protection if the plaintiff resorts to WCT.⁶⁸ If it happens, a supranational treatment will arise, that a WCT national will get more protection in China than Chinese national. It also risky to recognize Chinese copyright law fails to meet the minimum standard by directly using the wider protected WCT.

In order to address this legislative gap, courts in practice might invoke Article 10(17) – a cover-all Item – ‘other rights which shall be owned by the author’.⁶⁹ However, this item might undermine the statutory nature of proprietary rights. Copyright rights are exclusive, thus must be stated expressly in law for people to know in advance.⁷⁰ The only justification for using Item (17) lies in eliminating the gap between national laws and international conventions.⁷¹ Therefore, courts had to adopt Item (17) to determine cablecasting and webcasting infringement. Even though this method solves the problem in judicial practice, it fails to define related acts under a contractual license or assignment.

This gap has been discussed thoroughly in China.⁷² There is no need in this thesis to restate further and conclude the gap shall be bridged. The broadcasting right in 2020 CL has been expanded to cover all non-interactive communication acts, thus including webcasting, cablecasting and broadcasting. CIN right remains to cover the interactive

⁶⁷ *Shengdengyong v Dongfang* [2018] No.16067. The defendant recorded the infringing video and broadcasted it on its TV Channel via cable. The plaintiff claimed that the defendant’s act of broadcasting the 35-second work violated the right of broadcasting. The court finally held that according to the definition provided in law, the disputed acts were not covered by the broadcasting right, thus the plaintiff’s claim was not supported. One point shall be noted here that, the plaintiff must choose the type(s) of rights from the law to sue for defendant’s alleged infringing act in China. If the plaintiff believed that the defendant violated the broadcasting right, and the court then found the alleged acts not violating that right according to Article 10, this claim would be rejected. If the defendant had made the initial transmission by radio, the court would of course find the defendant infringing the broadcasting right.

⁶⁸ GPCL Article 124 allowed the direct application of international conventions. Even though 2020 Civil Code has deleted this provision, it had no impact on this point because CL 2020 had bridged the gap.

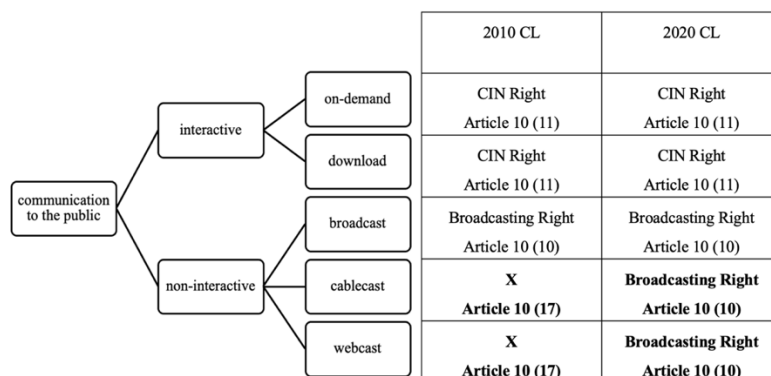
⁶⁹ BG 2018 Article 9.24 clearly states that the application of CL Article 10(17) shall be supported. For example, no statutory rights can be adopted in *Anle v Shiyue* ([2008] No.10396; [2009] No.3034), and both trials agree on using Article 10(17).

⁷⁰ Wang Qian 2008, 65. Liu Yinliang 2017, 109.

⁷¹ Kong 2012, 66-67.

⁷² There is a consensus in judicial and academic opinions that the broadcasting right and CIN right shall be reformed. Judges’ opinions: Su 2016; Li Zizhu 2012. Academic opinions: Jiao 2013; Chen Shaoling 2015, 41; Liu Yinliang 2017; Wang Qian 2020.

act. Those two rights constitute the comprehensive protection concerning the making available right to the public.



2.1 The right of communication to the public in 2020 CL

2.3.4 The location of acts

In the Internet context, it usually consists of a sequence of events from the initial uploading infringing material to the final reception by users.⁷³ The international treaty only requires the act of making available online but does not specify which is the infringing act of abovementioned acts.⁷⁴ It does not create a problem when this whole sequence locates within a territory. However, the Internet can easily cross the border immediately, thus leading to the problem of localizing where the infringement occurs in dealing with cross-border copyright infringement.⁷⁵ It is difficult to pinpoint the precise place where the activity has happened.⁷⁶

For the place related to the online infringing acts, international conventions (such as BC Article 11, 11*bis* and 14, or WCT Article 8) do not provide expressly where the act occurs.⁷⁷ In the UK, the territorial scope of applying copyright right is expressly

⁷³ For example, digitisation, storage of the digitised work, conversion from the digital work to the signal, transmission of the signal, reception of the signal, downloading (or storing the information on the machine), screen display and the possible print out of the digital content.

⁷⁴ Sec.2.3.1. It seems other locations, except for the initial act of making available, do not count.

⁷⁵ The localisation of acts matters in the jurisdictional stage. In the international copyright disputes, the court might consider the location of the alleged infringer, the place of damage, the place where the public might read or access the work, the place where the digital content locates, stores or transmits, the place of technological activation of making works available and other related locations.

⁷⁶ Fawcett & Torremans 2011, 538.

⁷⁷ CDPA, s 6(4). Directive 93/83/EEC, Article 1(2)(b). ‘The act of communication to the public by satellite *occurs solely* in the MS *where* ... the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth’.

stated that only the infringing acts occur within the UK shall be actionable in the UK.⁷⁸ On the contrary, Chinese copyright law is silent on the territorial scope of acts.

However, the interpretation of CIN right in the court has touched upon the location to some extent. It turns out it is closely related to the determination of jurisdiction domestically. Since China applies the domestic jurisdictional rule in the international situation, the location in domestic cases will be illustrated at first. It will examine where the domestic rule comes from (in this section) and then examine whether such an approach arising from domestic cases work well in the foreign-related situation (in Chapter 4).

CL 2010 provides the restricted act by CIN right is the act of ‘making **works** available’ online without authorization. As long as the work is uploaded to or placed on the webserver for potential reception, it constitutes the act of provision, even if no one actually has downloaded or browsed it.⁷⁹ 2020 CL deletes the ‘works’ and expands the scope of CIN right. In other words, the act of CIN right is no longer confined to making ‘works’ available; that is, the acts such as providing infringing **links** are included in the scope of CIN right.

For example, in respect of linking service, if the linked website deleted the illegal work, even if the link still exists, users cannot read the content. If the link is deleted, the work is still accessible by the general public. It means, the act of providing a link does not necessarily satisfy the old CIN right’s ‘making “works” available’ requirement. Therefore, the act of providing a link can be found not liable for infringement under 2010 CL.

Based on this context, Chinese courts traditionally adopted the server approach to determine CIN right infringement. That is, CIN right only covers the act of placing the ‘**work**’ on the webserver which is open to the public, by means of uploading or other similar ways.⁸⁰ This approach was acceptable in the early stage, when the act merely concerned the uploading. However, as technology develops, the ‘work’ can be transmitted without using or storing on servers, such as by file-sharing technology or cloud server.⁸¹ Therefore, SPC concluded that it was not accurate to define the act of

⁷⁸ CDPA, s 16(1): ‘...the exclusive right to do the following acts in the United Kingdom...’.

⁷⁹ *Zhengchengsi v Shusheng* [2004] No.12509; [2005] No.3463. The defendant uploaded the book written by Professor Zheng Chengsi without authorisation. The court found the act of uploading violating CIN right.

⁸⁰ *Kuaileyangguang (KLYG) v Tongfang* [2014] No.19960; [2015] No.559. Beijing IP Court summarized different approaches adopted by Chinese courts. It finally invoked WCT, where CIN right came from, and concluded the act of CIN right referred to the initial act of making available, i.e., the act of uploading the work to the server. Therefore, the Court insisted on the server test as the only test to determine CIN right infringement. Similarly, Beijing IP Court rejected the adjusted approach proposed by the lower court and restated the server test shall be applied in *Tencent v E-Link* ([2015] No. 40920; [2016] No.143).

⁸¹ Chap.1 Sec.2.3.

CIN right by server criterion and proposed a broad interpretation of CIN right-related acts.⁸²

Accordingly, different approaches are adopted by courts to assess what acts are restricted by CIN right. In addition to the objective server test, some subjective tests are proposed by courts, including the user's test,⁸³ the substantial replacement test,⁸⁴ the new public test⁸⁵ and the substantial presentation test.⁸⁶ These subjective tests are mostly rejected by Beijing IP Court due to their uncertain and unpractical characteristics, and also the potential excessive obligations on intermediaries.⁸⁷

This author holds the opinion that the criteria for determining CIN right infringement should be viewed both historically and dynamically, in accordance with legal requirements, technological development and facts case by case. In respect of direct infringement, the server test is an important operational criterion for determining whether an infringement of CIN right is committed. However, it shall not be considered as the only criterion. As long as someone exercises the rightsholder's CIN right without authorisation, or directly destruct the rightsholder to control the communication of this work via Internet, such acts shall be determined as a violation of CIN right, no matter whether such an act is initial or subsequent.⁸⁸ The identification of the act shall not solely base on or derived from the server test.

To sum up, Chinese courts used to adopt the objective server test to identify the act of CIN right based on factual analysis. The 'server' here is defined in a broad sense, including all hardware that can store information: web servers, as well as any storage media, such as personal computers and mobile phones, and other similar devices that may appear in the future.⁸⁹ Even though several alternative approaches are proposed, the server test remains the most important test. The heated debate over the identification of CIN right infringement also illustrates once again the difficulty of pinpointing the acts constituting online copyright infringement. But in any case, the status of server test

⁸² Wang Yanfang 2013, 16. SPC Judge Wang illustrates SPC's opinion on the server test and its inappropriateness in the fast-developing technological world.

⁸³ The user test focuses on the perception of users. If the alleged act enables the Internet users to believe that the disputed content is provided by the alleged infringer, then such an act done by this alleged infringer shall be found liable for CIN right infringement. This test relies on the external manifestation of the act complained of, regardless of whether the content complained of is stored on the infringer's server. (see summary in *KLYG v Tongfang*)

⁸⁴ It refers that if the disputed act will also result in a damage to the copyright owner and a gain of benefit to the perpetrator, same with the act of making works available to the user directly, then such an act shall be found infringing CIN right. In short, if the result arising from the disputed act and the act of direct provision of works is substantial similar, it means the alleged act in question can substantially replace the act of directly providing works online, thus found infringement. (see summary in *KLYG v Tongfang*)

⁸⁵ Similar with EU New Public Test (Koo 2019, 93-106). (see summary in *KLYG v Tongfang*)

⁸⁶ Cui 2016, 3-19.

⁸⁷ Wang Yanfang 2017:1, 456-479.

⁸⁸ Ibid, 479.

⁸⁹ *Tencent v E-Link* [2015] No.40920; [2016] No.143.

as a major determinant remains unchanged; thus, accordingly, the place of ‘server’ is essential in determining the location of such act. It is the origin from which the jurisdictional rule based on the location of server comes.

3. Liabilities and immunities of intermediaries

There is no uniform definition of ‘intermediary’, and it is also difficult to define it.⁹⁰ It might include multiple models, such as client-server, peer-to-peer file sharing, world wide web service, search engines and indexing, email, Usenet, linking and hyperlinking, and cloud services.⁹¹ Their activities normally would not constitute an infringement of reproduction and communication rights, but they may obtain economic interests from providing the service or platform.

Liabilities of intermediaries is debated. This thesis does not intend to discuss different approaches comprehensively. The purpose is to contour the complex situation concerning liabilities and immunities of intermediaries, that not all acts conducted by ISPs will be found infringement. Furthermore, the same act might be found illegal in one state, but lawful in another state.

3.1 The division of primary/direct and secondary/indirect infringement

Online copyright infringement usually involves contribution or aid from third parties. If a work is made available online, usually there are two parties involved in this act: [1] the content provider, who provides the ‘work’; [2] intermediaries, who provide the storage, conduit and related services. For example, the act of transmission of the infringing copyrighted material online prevalently amounts to secondary/indirect liability. These third parties (secondary/indirect infringers) play the subsidiary role and are not responsible for strict liability, unlike primary/direct infringers.

In respect of those intermediaries’ liability, although there is no agreed secondary liability theory across the world, the national court normally considers the following factors: the actual knowledge, the intent and material contribution of intermediaries.

In the UK, concerning primary infringements, the alleged infringing party is liable for infringement, whatever his/her state of knowledge.⁹² By contrast, the person will be held secondary liable if he has the requisite knowledge.⁹³ Secondary infringement is for providing protection against those who assist the primary infringer and occurs when a person facilitates the primary infringing acts or deals in infringing copies of a work. For example, the act of importing the infringing copy, possessing or dealing with the copy and providing the means to make infringing copies.⁹⁴ The act of ‘mere assistance, even knowing assistance’ does not suffice to render someone liable as a joint

⁹⁰ Dinwoodie 2017, 4-6.

⁹¹ Tappin 2018, 1124-1127.

⁹² Torremans 2019, 242.

⁹³ Ibid 257.

⁹⁴ CDPA, ss 22-26.

tortfeasor with the primary party. Further action is required, for example, conspiring, procuring or inducing, or joining in the common design.⁹⁵

Similarly, a distinction exists between direct and indirect infringement in China.⁹⁶ Indirect infringement refers to the behaviour which does not directly amount to damages. In other words, damage is not the direct and inevitable result of the indirect infringing acts.⁹⁷ Such intermediaries shall be held joint-labile with the direct infringer because of a particular and close relationship between those acts and direct infringing acts.⁹⁸ The legal basis of such division is joint-liability theory originating from Chinese Civil Law and Tort Liability Law.⁹⁹ Even though secondary liability theory, such as contributory, vicarious or inducement theories, does not exist in Chinese civil system, same factors are considered when identifying infringement: the knowledge of the infringement, its intent, the ability to control and stop the infringing act, financial benefits obtained from the infringement, and contribution to the infringing activity.¹⁰⁰

In a nutshell, although both countries adopt different theories, both agree on the factors to be taken into account: [1] psychological state [2] the occurrence of primary/direct infringement is the premise of indirect infringement [3] the acts conducted by secondary/indirect infringer may not be expressly restricted by exclusive rights granted by copyright law. The following sections will examine what acts conducted by third parties, especially intermediaries, might be found liable for copyright infringement.

⁹⁵ *L'Oreal v eBay* [2009] EWHC 1094 [350], quoting *Credit Lyonnais Bank v Export Credit Guarantee Department* [1997] 48. 'What he does must go further. He must have conspired with the primary party or procured or induced his commission of the tort (my first category); or he must have joined in the common design pursuant to which the tort was committed (my third category).'

⁹⁶ Li & Xu 2003, 223.

⁹⁷ Qu 2012, 202.

⁹⁸ Wu Handong 2016, 7.

⁹⁹ JI CL [2012] No.20 also proposes the joint liability for intermediaries. Article 4 provides that if the ISP is proved to have provided any copyrighted work, performance or audio or video recordings jointly with others, by means such as cooperation, the court shall find such an ISP jointly liable. If the ISP can prove it only provides automatic connection, automatic transmission, information storage space, search, link, file sharing technology and other internet services, the court shall support ISP's counterclaim of non-infringement.

¹⁰⁰ *Zhongkai v Shulian* [2008] No.7. Shanghai HPC found the defendant jointly liable for copyright infringement, by providing its users with P2P software to download copyrighted movies without authorization and directing users to the movie section on its website which enables users to illegally download the copyrighted movie. *Apple* cases: the court found Apple jointly liable for copyright infringement by providing apps containing the infringing books in its App Store, based on the fact that App had a strong control over the apps (Sec.3.2.2).

3.2 Acts conducted by the third party

Many countries have established specific theories on the liability of intermediaries. Unlike the separated secondary liability in the UK, China adopts the general ‘joint liability’ theory. In essence, both point to that the defendant may be found responsible for the harm or damage arising from a third party’s wrongful act.¹⁰¹ This section will examine what acts conducted by intermediaries might be found liable for infringement.

3.2.1 UK

The acts conducted by the third party involve three types generally. Firstly, the act of inducement and contributory is found infringement under CDPA, including the act of providing means for making infringing copies, permitting the use of premises for infringing performance and provision of apparatus for infringing performance.¹⁰² Therefore, intermediaries who conduct these actions may found secondary liable.

Secondly, the preparatory acts might be relevant.¹⁰³ Some activities might not directly infringe the rights of rightsholders, nor be identified as inducing or contributing, but might amount to infringement or furthering the damage arising from others’ infringing acts. For example, the act of importing infringing copies falls within this group. According to CDPA, the right of importing is not an exclusive right to the holder, thus importing infringing copies into the UK is not primary infringement. However, such an act is preparatory for the sale of infringing copies to the public, which leads to infringement. Moreover, the provision of means for making infringing copies may also be regarded as preparatory.¹⁰⁴

Thirdly, the act of authorising another to do restricted acts constitute infringement as well.¹⁰⁵ The copyright owner has the right to prevent anyone, without the owner’s consent, authorising another to conduct any acts which constitute primary infringement. Similar to other copyright rights, it is also a negative right. ‘Authorise’ means the grant or purported grant of the right to do the act complained of. It is copyright infringement if the user copies the work by unauthorised downloading it. Furthermore, it is also an infringement for someone to authorise users to do such activities.

In the Internet context, such an act of authorising might point to the ISPs’ act of authorising users to upload infringing copies. For example, in *20th Century Fox*, the court found the website liable, if the website provided means for users to ‘identify, download, reassemble multiple files which, when so reassembled, contain the copyrighted work, authorises the infringement.’¹⁰⁶ Moreover, ISPs might also be held

¹⁰¹ Dinwoodie 2017, 10.

¹⁰² CDPA, ss 24-26.

¹⁰³ CDPA, s 22.

¹⁰⁴ CDPA, s 24.

¹⁰⁵ CDPA, s 16.

¹⁰⁶ *Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd* [2010] EWHC 608 (Ch) [85]-[102]. But not extending to mere enablement, assistance or even encouragement [90].

liable for joining the common design with users to commit copyright infringement. It is of little difference whether the liability is regarded as primary or secondary.¹⁰⁷

3.2.2 China

Since Chinese law does not expressly recognize a contributory or vicarious liability, any liability is a joint liability if it is not a direct tort.¹⁰⁸ Both countries share a similar understanding of acts actively inducing or contributing to the infringing act of another person. In China, the inducement or contributory is not provided by CL, but by Civil Law and Tort Law. According to the general tort principle, the instigators and accomplices are joint tortfeasors.¹⁰⁹

Similarly, in China, the ISP who provides search or linking service shall be held liable, if it has known or reasonably knows the linked work infringing other's copyright.¹¹⁰ In other words, with knowledge of linking to infringing content, the ISP provides means (linking service) to expand or further the damage of someone's direct infringing acts, thus constituting indirect infringement.

The feature of this type of acts is that such acts do not change the occurrence of direct infringement. No matter whether the intermediary conducts those acts or not, the damage may arise from direct infringement. For example, when the illegal copies have been uploaded on the Internet, the status of being infringed occurs. In the case of knowing or reasonably knowing that these illegal copies are unauthorized uploaded, intermediaries still set or retain the deep links to these copies.¹¹¹ Such acts are considered to expand the spread of online infringement.

Chinese courts adopt the differentiating approach in determining whether the acts of ISPs constitute infringement: [1] the act of communicating work to the public; [2] the act of providing service, that is providing technology, equipment, the platform for transmission.¹¹² The first type is restricted by CIN right according to CL, thus unauthorized provision of copyrighted works online might be found direct infringement of CIN right, unless otherwise exempted by law. For the latter type, although not restricted by old CIN right¹¹³, the alleged actors might be held jointly liable, as long as their acts fulfil elements required by CL.

As technology develops, the frequent usage of mobile applications brings the App Store run by Apple and Android into the copyright stage. Compared with the website, these mobile platforms have special characteristics. Apps shall be designed and coded with the programming language. In addition, the platform has a determinative role in

¹⁰⁷ Dinwoodie 2017, 16.

¹⁰⁸ Hu 2014, 84.

¹⁰⁹ GPCL, Article 148; Tort Liability Law, Article 9.

¹¹⁰ CINRR 2013, Article 23.

¹¹¹ *Busheng Music v Baidu* [2005] No.14665 (the first case of finding the search engine infringement in China).

¹¹² *Tencent v E-Link* [2015] No.40920; [2016] No.143.

¹¹³ Sec.2.3.4.

deciding whether an app could be published and whether mobile users could use this app. The closed app store is different with the open architecture of the Internet.¹¹⁴ Since the platform runner has great control over its apps, it might be held liable for copyright infringement even though it does not directly make copyrighted works available online.

3.3 Immunities from liability

As shown in the above examination of primary/direct or secondary/indirect infringing acts, ISPs can be usually sued for copyright infringement because their services are capable of being used by a third party to infringe copyright. From a practical view, it is efficient and effective for the rightsholder to sue the single ISP, instead of millions or unknown wrongdoers.¹¹⁵ Even under the circumstance when infringer(s) could be identified, the infringing act might be promptly stopped, and the compensation might not be sufficiently awarded. It will be useful to sue ISPs as one defendant and seek the preliminary injunction to prevent the furtherance of damage and the continuing loss, even if ISPs might be exempted from liabilities in the end.

There is no doubt that copyright protection shall guarantee a sufficient relief by incurring intermediaries liable for the damage. However, the overly harsh liability might hinder the technological and industrial development.¹¹⁶ In order to achieve a balance, the immunities of intermediaries are provided in copyright law. The general principle is that ISPs will be immune from liabilities if they function as the technical, automatic and passive service, without knowledge of nor control over the transmitted or stored content.¹¹⁷

The rule of immunities originates from the US ‘safe harbours’, which include four types of activities: mere conduit, system caching, hosting and linking.¹¹⁸ Both countries adopt the method of providing circumstances when intermediaries will be immune from liability, centring on the question of whether the act of intermediaries satisfies the legal conditions for immunity. China transplants abovementioned four types of immunities from the US.¹¹⁹ Those legal conditions do not function as identifying infringement, but just the circumstances when intermediaries might be immune from liability.¹²⁰ CDPA, under the influence of EU (also comes from the US),

¹¹⁴ Zittrain 2006, 2022-2023.

¹¹⁵ Fawcett & Torremans 2011, 545-546. Dinwoodie 2017, 16-17.

¹¹⁶ Wang Qian 2011, 144-145.

¹¹⁷ E-Commerce Directive, Recital 42. JI CL [2012] No.20, Articles 1 and 4.

¹¹⁸ § 512 of Copyright Act, enacted in 1998 as part of DMCA.

¹¹⁹ CINRR 2013 established the safe harbour provisions in Articles 20-23. Wang Qian 2011, 209.

¹²⁰ Chen Jinchuan 2014, 264.

provides liability privilege for providers of mere conduit¹²¹, caching¹²² and hosting¹²³. For linking providers, CJEU developed its liability immunities by cases, following a flexible approach on adequate duties of care for linking providers.¹²⁴

3.3.1 Notice and take-down

It was generally accepted that if the ISPs have the actual knowledge of the infringing content and do not act expeditiously to remove it or disable access to it, those ISPs will be not exempted from liability.¹²⁵ In order to save time and cost for the copyright holder, the ‘notice and takedown’ was established, originating from the US and had a worldwide influence. There is no need for rightsholders to resort to litigation if infringing material is removed with delay. However, the function of this method is disputed. According to US copyright recent report, creators and rights owners claim that it fails to protect them from online infringement, while ISPs declare it works.¹²⁶

3.3.2 Adjusted measures

Several adjusted measures have been taken by both countries to re-achieve a balance among parties involved, particularly addressing whether ISPs shall be responsible for the infringing content uploaded by its users, and what actions shall be taken by ISPs to tackle online copyright infringement?

In the UK, the High Court has the power to grant an injunction against a service provider with the actual knowledge of another person using their service to infringe copyright. The determination of ‘the actual knowledge’ relies on whether the service provider has received a notice of an infringement, consisting of the full name and address of the sender, and details of infringement in question.¹²⁷ But this method might be useful dealing with infringement within one territory. For example, the court issued an injunction of preventing users from accessing the infringing website by way of

¹²¹ Directive 2000/31/EC (E-Commerce Directive), Article 12; Electronic Commerce Regulations Order 2002, SI 2002/2013 (E-Commerce Regulations), reg 17: transmission of content in a communication network.

¹²² E-Commerce Directive, Article 13; E-Commerce Regulations, reg 18: where the information transmitted is stored, for technical purposes, in an automatic, intermediate and temporary way.

¹²³ E-Commerce Directive, Article 14; E-Commerce Regulations, reg 19: the storage of information provided by a recipient of the service.

¹²⁴ C-160/15 *GS Medias*; C-527/15 *Stichting Brein*; C-610/15 *Stichting Brein*.

¹²⁵ E-Commerce Directive, Recital 46. CINRR 2013, Article 23.

¹²⁶ US Copyright Office, ‘Section 512 of Title 17: A report of the Register of Copyrights’ (21 May 2020) 73-82 <www.copyright.gov/policy/section512/section-512-full-report.pdf>.

¹²⁷ CDPA, s 97A, inserted by Copyright and Related Rights Regulations 2003, SI 2003/2498.

blocking in *20th Century Fox v BT*. The weakness of this legal remedy is if the website moves offshore, the blocking can only prevent UK users from accessing the website.¹²⁸

China adopts a flexible approach that the notice shall be sufficiently accurate,¹²⁹ but the duty is relatively strict. The notice triggers a duty for ISPs to identify and remove the infringing content and furthermore to prevent the same infringing content from being accessible on its website. For example, in *Universal Music v Alibaba*, the plaintiff found 33 infringing songs on ‘Yahoo.cn’ (owned by Alibaba) and sent a notice to the defendant with 33 URL addresses. The defendant removed songs according to those 33 addresses. The first and second trial agreed that the defendant failed in fulfilling the duty of reasonable care. The defendant should have known other identical songs on its website were infringing copies because the plaintiff had already sent the notice of declaring ownership concerning 33 songs. Therefore, the mere deletion of the noticed 33 addresses did not prevent other infringing copies from being accessible. The court finally found the defendant knowingly facilitating others to conduct the direct infringement and at fault to incur liability.¹³⁰ To sum up, the ‘notice and takedown’ is not sufficient in China. Chinese courts adopt the ‘notice and further prevention’ method that the ISP shall ensure other identical works not embedded on its website after receiving the notice from the rightsholder. Otherwise, the ISP’s liability is incurred because of its act of knowingly facilitating other’s direct infringement.

3.3.3 A reform?

As technology develops, safe harbour and takedown notice are considered unbalanced today. National and regional efforts are devoted to discussing the ‘reform’ of traditional immunities of ISPs from liability.¹³¹ Recently, the US published the first report evaluating the impact and effectiveness of section 512 since its enactment over 20 years ago.¹³² It recommends the adjustment of the current operation of section 512 in order to balance the rights and responsibilities of intermediaries and copyright holders.

DSM Directive also has addressed the balance between copyright holders and intermediaries. For example, in order to make sure holders obtain appropriate

¹²⁸ *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch) [2] ‘the operators of the Newzbin2 website are unknown, but the operation appears to have moved offshore. It is thus effectively beyond the reach of this court.’

¹²⁹ JI CL [2012] No.20, Article 14.

¹³⁰ *Universal Music v Alibaba* [2007] No.1188.

¹³¹ Dinwoodie 2017. Nordemann 2017. Koo 2019. The reformed communication to the public right within EU framework is also suggested.

¹³² US Copyright Office, ‘Section 512 of Title 17 a report of the register of copyrights’ (21 May 2020), <www.copyright.gov/policy/section512/section-512-full-report.pdf>.

remuneration from online exploitation of their works, the licensing market is proposed between rightsholders and online content-sharing service providers.¹³³

China updates the takedown notice to ‘notice – takedown and transfer the notice to the alleged infringer – counter-notice to the complaint’ in 2020 Civil Code (Articles 1194-1197). In addition, the administrative measures are adopted to combat copyright infringement online, such as blocking. However, it could only prevent Chinese users from accessing the infringing content and could not adequately address the cross-border situation.

3.4 The location of acts

There is a closed relationship between direct and indirect infringement in the traditional context, such as the act of reproducing books and its aid by providing sufficient material or distribution tunnel. However, this link becomes weaker under the Internet. Most of the time, the ISP just provides technology assistance and makes the infringement possible. For example, the act of providing Internet service is just making the work available. The theory of secondary/indirect infringement is adopted to deal with the liability of intermediaries. Although there is no secondary liability theory in China, both courts would examine similar factors in their legal reasoning, including the ISP’s knowledge of the infringement, its contribution to the infringement and so forth.

In order to balance the protection of rightsholders and the development of technology, both countries set up immunities for intermediaries in law, which originate from US safe harbour and takedown notice established 20 years ago. Both countries are facing the question of whether reform or adjustment is needed to re-achieve balance. Influenced by Brexit, it is not clear whether the UK would consider DSM reformed provisions since the government has made statement not to implement DSM. In China, 2020 CL has refined Internet-related acts restricted by law and obligations of intermediaries are enhanced in 2020 Civil Code, thus ensuring the balance among participants. The debate continues as to what liability ISPs should bear.

CL does not give clue in the location of intermediaries’ acts, but the place of intermediaries is used to create a jurisdictional connecting factor. Even if intermediaries might be exempted from liabilities for copyright infringement substantively, it does not exempt them from the possibility of being sued. This concern has been proved by the recent report of Beijing Internet Court.¹³⁴ Many commercial companies are established to represent individual copyright owners to initiate infringement cases. The routine of these companies is searching the infringing content on a website and then suing this website as a co-defendant. Even though previous similar cases have already found this

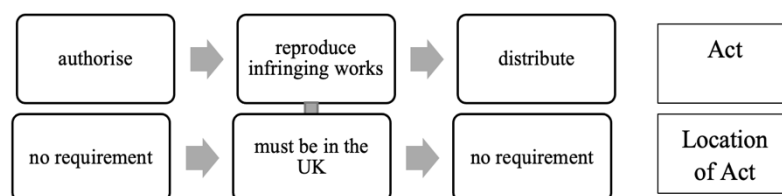
¹³³ Directive 2019/790/EU, Recital 61 and Article 17. This article triggers controversy, Quintais 2020, 28-41.

¹³⁴ Beijing Internet Court (official account), ‘Report on Protection of Photographs’ (7 July 2020) <https://mp.weixin.qq.com/s/dyXQMW_z_09TPNTkRVUpFA>. Cases in Beijing Internet Court increased dramatically because many plaintiffs listed online platform (most of intermediaries domiciled in Beijing) as co-defendants.

intermediary not liable for infringement, the plaintiff still lists it as the defendant with the apparent intention of creating a jurisdictional connecting factor and initiating the lawsuit in Beijing Internet Court.

It seems CL does not require the territorial scope of (direct and indirect) infringing acts. As stated by SPC, Chinese courts may base on the place of the plaintiff's equipment to hear the case when the infringing act was conducted abroad.¹³⁵ In short, as long as the plaintiff may suffer loss within China, the suit can be initiated no matter whether the infringement occurs inside or outside China.

CDPA might provide a little assistance in the location of acts by the third party, that there is no territorial scope concerning the act of authorising.¹³⁶ For example, it is an infringement to authorise abroad a reproduction act which occurs within the UK. As long as the reproduction is committed in the UK, no matter whether the infringing work is distributed abroad or not, the litigation is actionable in the UK. However, if the act of reproduction is conducted in a foreign country, such litigation is not actionable under CDPA even though the authorisation is made by an English company.¹³⁷



2.2 The location of acts under CDPA

4. Infringement of moral rights

Except for the international harmonised rights, moral rights in CDPA and CL are considerably different.¹³⁸ Moral rights were included in CDPA as a compromise based on international conventions.¹³⁹ It is suggested to go further, but the presence of moral rights in the English law is an 'important sign of progress'.¹⁴⁰ On the contrary, CL recognized economic (property) and moral (personal) rights since its establishment, under the influence of continental tradition.¹⁴¹

¹³⁵ Chap.4 Sec.4.2. JI CL [2012] No.20, Article 15.

¹³⁶ *ABKCO Music & Records Inc. v Music Collection International Ltd. & Anr.* [1995] R.P.C.657, 660.

¹³⁷ Fawcett & Torremans 2011, 130.

¹³⁸ There is a formality difference. The UK right to be identified is not automatically asserted according to CDPA s 78(1) while there is no relevant requirement in China.

¹³⁹ Dworkin 1994, 237-238. Before enactment of moral rights in CDPA, limited protection over moral aspects was granted by law of defamation, passing off, contract and s 43 of Copyright Act 1956 (false attribution of authorship). In addition, the rights of publication and adaptation might protect the related aspects of disclosure and integrity rights respectively.

¹⁴⁰ Torremans 2019, 244. For example, employees have no or very limited moral rights in works created during the course of their employment (Chap.1 Sec.4.1.1).

¹⁴¹ Tang 2016, 825. Chap.1 Sec.2.1.

Another major difference lies in the scope of moral rights. There are four types in CDPA: [1] paternity right,¹⁴² [2] integrity right,¹⁴³ [3] the right to object to false attribution,¹⁴⁴ and [4] the right to privacy of certain photographs and films.¹⁴⁵ Strictly speaking, the first two are moral rights, and the latter two are ‘hybrid in nature’ because no rights are conferred to the creator.¹⁴⁶ The third right is sometimes treated as the converse of the paternity right, that anyone can complain he is not the author; and the fourth is in nature a right of the commissioner.¹⁴⁷

CL includes four categories: [1] disclosure right; [2] authorship right; [3] alteration right; [4] integrity right.¹⁴⁸ The first and third type are not provided in CDPA, even rarely seen worldwide. The further discussion over these two unique rights will be conducted after examining the harmonised authorship and integrity right. Correspondingly, the place of moral rights infringement will be examined.

4.1 Paternity Right

The paternity right refers to the right to be named, either positively allowing the author to claim or negatively allowing the author to remain anonymous.¹⁴⁹ Both countries agree with the basic concept of paternity right – the right to be named. Unlike the third right of CDPA – the negative aspect of paternity right – to object to false attribution, can be exercised by anyone falsely attributed as the author. CL lacks such a provision.¹⁵⁰ There is no such a negative right – the wish to remain anonymous in CDPA.¹⁵¹

A unique aspect in CDPA is infringement of paternity right only occurs after the right has been asserted in writing.¹⁵² If asserted, any commercial publication¹⁵³, public performance or Internet-related exploitation must identify the name, or otherwise, the infringement of this right arises.¹⁵⁴ This right may apply to Internet-related activities,

¹⁴² CDPA, ss 77-79.

¹⁴³ CDPA, ss 80-83.

¹⁴⁴ CDPA, s 84.

¹⁴⁵ CDPA, s 85.

¹⁴⁶ Torremans 2019, 228.

¹⁴⁷ Dworkin 1994, 246-247. ‘Part II Moral Rights under UK Law’ in Davies and Garnett 2016, 82.

¹⁴⁸ CL Article 10(1)-(4).

¹⁴⁹ WIPO Guide 1978, 41. Paternity right may be exercised by the author as he wishes; ‘it can even be used negatively, i.e., by publishing his work under a pseudonym or by keeping it anonymous, and he can, at any time, change his mind and reject his pseudonym or abandon his anonymity’.

¹⁵⁰ Zheng 1990, 71-78. Professor Zheng suggests that the negative aspect shall be inferred by logic.

¹⁵¹ Davies & Garnett 2016, 229-230.

¹⁵² CDPA, s 78(1).

¹⁵³ CDPA, s 175(2)(a) issuing copies of the work to the public at a time when copies made in advance of the receipt of orders are generally available to the public, or (b) making the work available to the public by means of an electronic retrieval system.

¹⁵⁴ CDPA, s 77(1).

but not apply to digital works such as computer programs or computer-generated works.¹⁵⁵ The negative aspect of paternity right might be infringed when the individual exhibits, performs or communicates to the public which there is a false attribution.¹⁵⁶

4.2 Integrity right

4.2.1 UK: the objective test

CDPA defines integrity right as the right not to have the work subjected to derogatory treatment.¹⁵⁷ The treatment is derogatory if it amounts to distortion or mutilation.¹⁵⁸ ‘Treatment’ means any addition to, deletion from, or alteration to or adaptation of the work.¹⁵⁹ However, it is not certain what amounts to derogatory treatment. ‘Distortion’ and ‘mutilation’ come from BC. However, CDPA fails to implement the third aspect of BC integrity right – the derogatory action concerning a work.¹⁶⁰

The right is infringed by a person who exploits a derogatory treatment of the work. Infringement occurs when the distorted or mutilated work is published, performed or communicated to the public.¹⁶¹ Three steps are considered: [1] there must have occurred a treatment of the work amounting to distortion, mutilation or some other act; [2] any such treatment must be prejudicial to the honour or reputation of the author or director; [3] the defendant must have done one of the specified acts concerning such treatment.¹⁶²

According to the limited case law, this test is objective in line with BC.¹⁶³ The wording that the treatment is derogatory if it is prejudicial suggests a subjective test using the adjective ‘derogatory’. However, the test is more objective due to the objective concepts of honour and reputation.¹⁶⁴ For the element ‘prejudicial to the

¹⁵⁵ CDPA, s 79.

¹⁵⁶ CDPA, s 84.

¹⁵⁷ CDPA, s 80(1).

¹⁵⁸ CDPA, s 80(2)(b).

¹⁵⁹ CDPA, s 80(2)(a).

¹⁶⁰ Davies & Garnett 2016, 244-245, 258: table comparing BC and CDPA. It seems no good reason why this aspect is not included in CDPA statutory right. This aspect covers possible cases which did not strictly constitute either a distortion, mutilation or alteration of the work, but which were nonetheless prejudicial to the author.

¹⁶¹ CDPA, s 80(3)(4).

¹⁶² Davies & Garnett 2016, 234.

¹⁶³ Ricketson & Ginsburg 2006, para 10.29. ‘The standard of assessment of prejudice is an objective one, akin to the evaluation of defamation. This is an important safeguard against overreaching by compensative authors. It is not enough that the author does not like what was one to their work, the action taken must also reflect badly on her in the public eye.’

¹⁶⁴ *Pasterfield v Denham* [1999] FSR 168. The court held that to find an infringement of the integrity right, the artist must establish that the treatment accorded to his work was either a distortion or a

honour or reputation’,¹⁶⁵ CDPA is consistent with BC.¹⁶⁶ It is confirmed by the High Court as a necessary ingredient.¹⁶⁷

4.2.2 China: the case-by-case test

The concept of integrity right in China is vague. CL defines as the right to protect one’s work against distortion and mutilation, which originates from BC as well. However, ambiguity exists. Firstly, the degree of distortion and mutilation is not required. Impairment to the honour and reputation is not required as the decisive factor to determine infringement. Secondly, CL does not provide whether it refers to the act of treating work or the result of such an action.

Compared with the objective test in the UK, there are generally three views concerning the test in determining ‘distortion’ and ‘mutilation’, including [1] the subjective test: the mere fact of alteration against author’s original view constitutes infringement; [2] the objective test: the derogatory treatment is brought before the public leading to objective impairment to author’s honour and reputation; [3] a mixed approach: when the work is first published before the public, author’s spiritual interest shall be protected. In this period, the alteration may jeopardize the author’s freedom of expression, so subjective test shall be adopted. After the work is published, the public will know that the author does not conduct modification. So, this behaviour does not amount to damage of honour and reputation. Under such circumstance, the objective test is adopted; that is, even the alteration is against the author’s view, such an act shall not be identified as an infringement.¹⁶⁸

Beijing HPC states that tests above are reasonable but not comprehensive. The subjective test is deemed as overly enforcing the protection of rightsholder’s spiritual rights, thus deviating from the requirements of distortion and mutilation. The objective test reduces the protection of copyright owners, thus deviating from BC requirements. The dividing line (before and after publication) of the mix test lacks sufficient legal basis. Therefore, HPC does not adopt any of three tests but merely lists some

mutilation that prejudiced his honour or reputation as an artist. It is not sufficient that the artist is himself aggrieved by what has occurred. Nor is distortion or mutilation alone enough – it must be prejudicial to the artist’s honour or reputation.

¹⁶⁵ For the definition of honour and reputation corresponding to the notions under defamation law, see Davies and Garnett 2016, 261.

¹⁶⁶ Ricketson & Ginsburg 2006, para 10.07. UK objected to use the ‘vague’ moral interests when considering BC revision in 1928 at Rome conference.

¹⁶⁷ *Confetti Records v Warner Music* [2003] EWHC 1274 (Ch), para 150. ‘The word “otherwise” itself suggests that the distortion or mutilation is only actionable if it is prejudicial to the author’s honour or reputation.’ ‘the mere fact that a work has been distorted or mutilated gives rise to no claim, unless the distortion or mutilation prejudices the author’s honour or reputation.’

¹⁶⁸ Su 2018.

considering factors in determining infringement, emphasising the decision shall be made case by case.¹⁶⁹

4.3 Disclosure right in China

4.3.1 Definition

The disclosure right refers to the right to decide whether and how the work is publicly disclosed. By contrast, there is no such right in CDPA which considers general copyright protection sufficient. The right of preventing disclosure of work is also an aspect of copyright which can be only exercised by the owner of economic right.¹⁷⁰

Beijing court states that the disclosure right is the foundation for the rightsholder to exploit and protect other copyright rights. The work can only be disclosed once. If the author makes the work available to the public, the disclosure right exhausts. It further means the rightsholder cannot initiate disclosure right infringement against the unauthorised third-party exploiter, if that work has been made available to the public.¹⁷¹ But it shall not impede the rightsholder to claim for protecting other rights.¹⁷²

Infringement occurs when the work is disclosed illegally. Once disclosed, the rightsholder cannot prevent others from conducting subsequent acts, such as reproduction, distribution and other restricted activities. The test of disclosure is objective. It is sufficient to identify a work as ‘published’ as long as it can be accessed or known by the public via common methods. For example, the defendant’s unauthorised act of putting the private letters written by celebrities which have never been published for auction violates the disclosure right.¹⁷³

4.3.2 The confusion between disclosure and distribution in practice

Compared with the other three moral rights, the disclosure right is considered most closely related to the commercial exploitation of the work and enforcement of economic rights. For example, the term of protection concerning disclosure right and economic rights is identical (50 years PMA) while other three moral rights are protected perpetually in CL.¹⁷⁴

Due to the close relationship between the moral disclosure right and economic distribution right, the co-existence of those two rights in China amounts to practical problems, especially concerning the exploitation of unpublished works. For example, CL provides that the transfer of an original copy of artistic work is not deemed as the

¹⁶⁹ BG 2018, Article 4.8. Factors include whether the use of work is authorized, the degree of alteration and whether the impairment of honour and damage occurs.

¹⁷⁰ Davies & Garnett 2016, 83.

¹⁷¹ BG 2018, Article 4.3.

¹⁷² Su 2018.

¹⁷³ *Yang Jikang v Sungari Auction* [2013] No.9727 (2013 SPC 10 Typical Cases).

¹⁷⁴ Chap.1 Sec.3.3.1, n 216, 224, 240.

transfer of copyright.¹⁷⁵ The problem is if such an artistic work has never been disclosed, after the transfer of the original copy, whether the author can exercise disclosure right to prevent the transferee from displaying this work. Chinese law does not set limitations on disclosure right.¹⁷⁶

In order to fix this problem, 2018 Guidance Article 4.2 states that provided the author has transferred the unpublished original copy of the artistic work to others, it can be inferred that the author permits this transferee to exhibit it, unless parties agree otherwise.¹⁷⁷

This researcher agrees that disclosure right might be assigned by contract if the author assigns all economic rights to a third party or license others to exploit economic rights. It can be presumed that the author agrees to disclose the work.¹⁷⁸ In practice, it is not reasonable to forbid the third party to publish work, for the reason that there is no contractual agreement on whether the scope assigned/licensed rights include disclosure right.

4.4 Alteration right in China

4.4.1 Unique definition of the alteration right

The alteration right is the right to alter or authorise others to alter one's work. According to the legislator, it refers to the trivial modification, for example, editorial changes on the word or format.¹⁷⁹ Modification of the substance is the restricted act of the adaptation right (economic rights). The reason for establishing this right is that the author's view might change; thus, s/he might someday correct or change opinions in the work.¹⁸⁰

In the judicial practice, SPC confirms the alteration shall be a minor correction, which does not reach the level of distortion.¹⁸¹ The acts such as modification of the

¹⁷⁵ CL, Article 18.

¹⁷⁶ Su 2018.

¹⁷⁷ There are three requirements: [1] it only applies to original works of art that have not been publicly published, as there is a dispute in practice as to whether or not works of art include photographs; [2] the disclosure method is limited to exhibition; and [3] the copyright owner and the owner of the original work may agree, either to an agreement prohibiting the publication of the work by exhibition or to an agreement agreeing to the owner of the original work of art to publish the work by other means.

¹⁷⁸ Wang Qian 2015, 148.

¹⁷⁹ Hu 2002, 43. CL, Article 34: publisher and newspaper shall obtain permission from the author when conducting editorial corrections and revisions.

¹⁸⁰ Ibid Hu 2002, 44.

¹⁸¹ *Wang Qingxiu v PPSUC Press* [2008] No.25; [2010] No.25; [2010] No.621; [2010] No.166. The defendant publisher changed the title of the book. SPC found the defendant infringing the alteration right, but not the integrity right. It analysed that the alteration right focused on the correction of the content, rather than the distortion or falsification. The latter concerned a revision to a greater extent than the former, thus shall be governed by the integrity right.

title or phrases, minor textual modification, and paragraphs change are restricted by the alteration right. Infringement occurs when these acts are conducted, regardless whether the editorial correction in question has created a positive effect. For example, the court refuses to accept the defence that the editorial changes might enable the audience to understand the original content in an easy way.¹⁸²

However, it is hard to differentiate the rights of alteration and integrity. During the 2020 CL draft process, it took a long time to discuss whether the alteration right shall be deleted or not. Drafts combined these two rights into a new ‘integrity right’, referring to the right to authorize others to alter one’s work and protect the works from being distorted and mutilated.¹⁸³ The justification is the rights of alteration and integrity are the two sides of a coin: alteration is positive that the author has the right to modify his/her work; integration is negative that the author has the right to forbid others from modifying his/her work.¹⁸⁴ However, 2020 CL remains unchanged because the alteration right is rarely asserted in practice. Moreover, the deletion might not be acceptable by the general public and it is hard to explain to them why a right is reduced.¹⁸⁵

4.4.2 The necessity of the alteration right in CL

The alteration right is rarely seen in other jurisdictions.¹⁸⁶ A similar right of withdrawal or revocation exists in civil law countries, referring to the right to withdraw their work from circulation, typically in situations when the work no longer accurately reflects the author’s view.¹⁸⁷

It seems that the justification of alteration right and withdrawal right is similar; that is, when the author’s view change, s/he shall have the right to make some correction. However, the contents of those two rights are entirely different. The revocation right combines modification and retraction,¹⁸⁸ while the alteration right only includes the

¹⁸² *Chen Jie v Shilidianchuan* [2020] No.2880. The defendant changed the title of the disputed literary letters ‘Sanmao Jiashu’, deleted some long sentences and changed the sequence of paragraphs. The defendant did not revise the content substantially nor distort the emotion expressed by the author.

¹⁸³ Draft 2012 (31 March 2012), Article 11(3) <www.ncac.gov.cn/chinacopyright/contents/483/17745.html>. Draft 2014 (10 June 2014), Article 13(3) <http://www.gov.cn/xinwen/2014-06/10/content_2697701.htm>.

¹⁸⁴ Li & Xu 2003, 79. Li Chen 2004, 69-75. Liu Youdong 2010, 176-183. Luo 2011, 103-106. Yang Dejie 2017, 12-18. Wang Qian 2015, 153-155.

¹⁸⁵ Chen Jinchuan 2019:1, 16-17.

¹⁸⁶ This researcher found no equivalent right in the 22 countries examined in Davies & Garnett 2016.

¹⁸⁷ Goldstein & Hugenholtz 2019, 345.

¹⁸⁸ Davies & Garnett 2016. France (438-440), the right to reconsider (repentance) or (retraction) to put an end to the exploitation of his work by withdrawal of the right, even after it has been published and the rights of exploitation transferred. Repentance entails a modification of the work, while retraction involves bringing any form of exploitation to an end. Repentance is the initial decision subsequently leading to the retraction. Germany (474-475), the right of revocation for changed conviction. It

modification act. The withdraw right normally subjects to an obligation to protect affected parties against financial losses after the author brings the exploitation to an end. By contrast, there is no such purpose in Chinese alteration right.

In this researcher's opinion, copyright right is the negative right to forbid others from doing the restricted acts, rather than a positive right to grant the author a right to conduct an activity. From the restricted acts of alteration right, is there a need to forbid others to modify the author's work without permission? This researcher believes not. Under the current legislation, the integrity right can protect the author's reputation from being jeopardised by others' distortion and mutilation; the adaptation right can prevent others from creating a new work by way of modifying the original work. The rights of integrity and adaptation are enough to protect the author's work from being modified without authorisation. The rarely occurred practice of finding someone infringing the alteration right also exemplifies the function of it in copyright system needs improvement. Since 2020 CL retains the alteration right, the essence of this right shall be explained that the author's alteration shall not be hindered, especially after publication or assignment.

4.5 Interim conclusion and the location of acts

Both countries protect the two world-wide harmonised moral rights. But differences concerning moral rights remain immense and irreconcilable, which also exist within the EU where there is no harmonised law of moral rights.

The unique alteration right is considered not necessary in CL. However, 2020 CL does not delete it, on the basis that rights might not be unduly diminished in law and the alteration right infringement is rarely seen in practice.

For the place of infringement, both laws do not provide indication. There is no equivalent territorial provision concerning the place of infringement as CDPA s 16 requires.¹⁸⁹

5. Exemptions and Remedies

5.1 The three-step test in determining exceptions and limitations

Exceptions and limitations are set out to achieve a fair balance between rightsholders and users.¹⁹⁰ BC Article 9(2) and TRIPs Article 13 have proposed the three-step test: [1] confine to certain special cases; [2] do not conflict with a normal exploitation; and [3] do not unreasonably prejudice the legitimate interests of the right

conditionally entities an author to revoke contractual engagements so as to protect his personal and intellectual interest. This right is an extension of disclosure right, when publication has taken place, but the work may be withdrawal from circulation.

¹⁸⁹ Davies & Garnett 2016, 157 and 274. Only acts occurred within the UK that can infringe.

¹⁹⁰ InfoSoc, Recital 31.

holder. InfoSoc Directive provides an exhaustive list of exceptions and limitations to the rights of reproduction and communication to the public.¹⁹¹

As Justice Arnold has noted that exceptions and limitations must be construed [1] strictly, [2] in the light of InfoSoc Directive Article 5(5), which requires the application of the three-step test contained in BC Article 9(2); and [3] in the light of the need for legal certainty for authors with regard to the protection of their works. Moreover, they shall be interpreted [4] so as to enable the effectiveness of the exception to be established and permit observance of the exception's purpose.¹⁹² In CDPA, there are statutory exceptions that acts permitted in relation to copyright works.¹⁹³

The Chinese continental civil tradition requires exceptions and limitations of a private right (copyright) shall be provided in law expressly. In other words, if there is no express provision, there shall not be an exception or limitation. Related provisions in 2010 CL originate from BC.¹⁹⁴

However, 2020 CL revises the traditional strict approach into a more flexible approach in interpreting exception and limitations.¹⁹⁵ It expressly adopts the three-step in law and gives judges more discretion. The purpose is to encourage innovation and protect the author's interest, simultaneously considering the protection over the exploitation of the work. This researcher supports the codification of the three-step test into copyright law but concerns judges might interpret it in a broad sense. Without a national guidance, the similar situation which has occurred in understanding old Article 3(9) might occur in determining exceptions and limitations in the future.¹⁹⁶

5.2 Civil remedies and its territorial scope

In copyright infringement, civil remedy mainly includes two types: damage and injunction. Civil remedies in China include preliminary and permanent injunctive relief, such as monetary compensation, apology, ceasing the infringing act and eliminating the effects of the act.¹⁹⁷ Recently, Chinese courts tend to demonstrate a positive attitude towards provisional measures in the field of IPR,¹⁹⁸ including preliminary injunction

¹⁹¹ InfoSoc, Recital 32. Some exceptions or limitations only apply to the reproduction right where appropriate.

¹⁹² *Forensic Telecommunications v West Yorkshire Police & Anor* [2011] EWHC 2892 (Ch) [108].

¹⁹³ CDPA, Chapter III Part I.

¹⁹⁴ The first six types originate from BC, including personal use (BC Article 9), quotation (BC Article 10(1)), newspaper article and current event (BC Article 10*bis*), speeches (BC Article 2*bis*) and teaching (BC Article 10(2)).

¹⁹⁵ CL 2020, Article 24(13). A new provision 'other circumstances provided by laws and regulations' is added. In 2010 CL, there are only 12 categories exhaustively.

¹⁹⁶ Chap.1 Sec.3.2.2.

¹⁹⁷ CL, Article 47.

¹⁹⁸ Traditionally, it is difficult to obtain copyright protection through provisional measures in China. SPC issued Provisions on Several Issues Relating to the Application of Law in the Review of Cases of

and evidence preservation, if the applicant's evidence satisfies the prescribed elements.¹⁹⁹

In the UK, in order to prevent the damage from occurring, the action can be brought and may result in an injunction.²⁰⁰ The injunction may include blocking access or impeding access to the website.²⁰¹ Several requirements shall be satisfied that the relief must be [1] necessary, [2] effective, [3] dissuasive, [4] must not be unnecessarily complicated or costly, [5] must avoid barriers to legitimate trade, [6] must be fair and equitable and strike a 'fair balance' between the applicable fundamental rights and [7] must be proportionate.²⁰²

The fundamental relief in China is ceasing the infringing act. In online infringement, ceasing the infringing act may include removing the infringing content from the website. Requirements shall be satisfied that if the ceased infringing act might amount to [1] a contrary to public order and morality or [2] violating proportionate principle.²⁰³

In short, under the Internet context, the **injunction** method is flexible, including blocking, removing or impeding access. The blocking might have a territorial effect, that the domestic users may not access the content. On the contrary, the decision such as removing or impeding the link may have a worldwide reach. **Damages** can be awarded under both laws. The assessment is flexible, including the actual prejudice suffered, such as the economic lost profits and unfair profits, and also moral prejudice caused by the infringement; and also, the damage can be awarded based on the royalties or fees that a willing licensee would pay for the willing licensor under a license.²⁰⁴ It might not be easy to determine the local damages, in particular under the Internet context.

Acts of Preservation in Intellectual Property Disputes (JI [2018] No.21), in compliance with TRIPs Article 50.

¹⁹⁹ JI [2018] No.21, Article 7: [1] Whether the applicant's request has a factual basis and legal basis, including whether the IPRs sought to be protected are of stable validity. [2] Whether the applicant's legitimate rights and interests will be irreparably damaged, or the enforcement of the decision will be difficult without the adoption of the preservation measures. [3] Whether the damage caused to the applicant without the preservation measures exceeds the damage caused to the respondent by the adoption of the preservation measures. [4] Whether the adoption of the preservation measures is detrimental to the public interest. [5] Other factors that should be considered.

²⁰⁰ Fawcett & Torremans 2011, 136-137. The unjustified threats are provided for designs (CDPA, s 253 and crossheading substituted by Intellectual Property (Unjustified Threats) Act 2017 (c.14), ss5(2)).

²⁰¹ CDPA, s 97A, implementing InfoSoc Article 8(3).

²⁰² *Cartier International & Ors v British Sky Broadcasting & Ors* [2014] EWHC 3354 (Ch) [158].

²⁰³ BG 2018, Article 8.1.

²⁰⁴ Intellectual Property Enforcement Regulations 2006, SI 2006/1027, reg 3.

6. Comparison and interim conclusion

Traditionally, copyright infringement occurs occasionally, because rightsholders have strong control over their works. Compared with the traditional mode of exploitation, the control over works decreases in the cyberspace. Infringement easily crosses the border and becomes ubiquitous. It is a challenge for copyright protection due to the decreasing role of physical distribution.

Accordingly, the mode of the relationship becomes more complex as well. In the digital world, it ranges from 'B to B' to 'P to P', and usually involves ISPs. It amounts to an increase of small-value disputes involving multiple parties, which may cross borders. Participants may encounter [1] ubiquitous infringement in various jurisdictions. Due to differences in identifying infringement worldwide, [2] the act may lead to different liabilities and also may be immune from liabilities. Different courts may adopt [3] different approaches to enforcing remedies. These complicated situations may create the unreasonably foreseeable result for participants in international copyright exploitation.

Both countries recognize that copyright is a negative right and infringement refers to the unauthorised acts of violating the rights owners' exclusive rights conferred by law. When determining whether one's acts constitute infringement, the requirement is similar between the two countries. In respect of acts restricted by law, both copyright laws prescribe in a general and encompassing way. Copyright laws do not specify what the **act** of infringement is.

Damage is not the determinative factors for identifying infringement. In fact, there might be more than one causal relationship in a copyright infringement. Primary/Direct and secondary/indirect activities interact with each other and amount to a harmful result to the copyright holder.

Copyright laws do not indicate the **place** of infringement. The choice of forum and law is vital in international copyright disputes. The localisation of infringement is helpful in determining the court's competence²⁰⁵ and the applicable law.²⁰⁶ Traditionally, the place of act and effect coincides within a territory; thus, there is no need to locate the physical position. In the digital age, the alleged infringing act can be conducted nowhere or everywhere, and effect can occur everywhere. Therefore, the traditionally useful factual analysis cannot work well online where a series of Internet-related activities are involved.

It is difficult to identify or select a single place to adjudicate the cross-border case. It shall also answer which law shall be applied to determine substantive issues if different laws relate. Since there is no harmonised copyright law worldwide, some activities may be found infringement in one place, while not in another place. The selection of court and the applicable law matters in foreign-related copyright disputes. However, copyright laws do not provide much help in localisation of the 'place' concerning economic or moral rights infringement.

²⁰⁵ Chap.4, the place of act and effect.

²⁰⁶ Chap.5, the place of tort and the place where the protection is sought.

Intermediaries might be easily attacked in the litigation (or as one of the defendants), however, not all their acts infringe. Online intermediaries are the platform through which the infringer commits direct infringement. From a substantive view, the determination of whether the intermediary is liable for infringement is complicated. During the digital transmission of works, ISPs mainly conduct two types of activities including the provision of copyrighted work and the provision of Internet service (i.e., the support of technology, equipment and intermediary service, such as linking, caching and storing). These activities are highly involved in copyright infringement, but not all acts infringe copyright. Certain circumstances are required by law which may exempt ISPs from liable for infringement.

CHAPTER 3 PRIVATE INTERNATIONAL LAW ISSUES EXIST IN COPYRIGHT INFRINGEMENT

1. Introducing concepts

1.1 Territoriality Principle: territorial limitation in copyright

The history of ‘territory’ is long. ‘Territoriality’ becomes prominence since the fall of the tribal society.¹ Generally, the territoriality principle (TP) means that a state has no competence to prescribe legal rules to govern activities that take place outside its territory.² TP is more pronounced in IPRs than in other legal fields. As Dr Lundstedt noted in the thorough examination of TP, IPRs are limited to the territory of the state where they have been granted.³

TP was widely accepted initially when the copyright was regarded as the printing privilege. No foreign laws or authority shall prescribe it.⁴ In other words, Chinese copyright exists only in China not in the UK, and vice versa. As the international trade develops, states started to protect its nationals’ copyright by signing bilateral agreements.⁵ As more and more nations were involved, the multilateral copyright conventions were established.

In spite of a liberalizing trend concerning copyright-related trade, international copyright conventions still preserve TP. This is demonstrated by the requirement of National Treatment and the minimum standard provided by BC. In addition, MS is allowed to implement and adjust its national laws in accordance with its economic and technological context.⁶ Even in the EU single market with the aim of harmonising copyright, it does not purport to detract from TP.⁷ The territorial nature is still the internal component of copyright law, even though the copyrighted works can cross borders through the Internet.⁸

TP enables each nation to exercise freedom pursuant to domestic needs, albeit to a limited extent. Those needs vary greatly among industrialised, newly industrialised and developing countries, and also significantly differ between exporters and importers

¹ Svantesson 2016, 7-10.

² Goldstein & Hugenholtz 2019, 87.

³ Lundstedt 2016, 91.

⁴ Goldstein & Hugenholtz 2019, 14-17. Lundstedt 2016, 73-74.

⁵ Lundstedt 2016, 85.

⁶ TRIPs, Articles 7 and 8.

⁷ C-192/04, *LAB*, para 46.

⁸ van Eechoud 2009, Chapter 9.

in the IPR-related trade.⁹ The differences between CDPA and CL echo it. The evolution of copyright law from transplanting to self-governing in China reflects TP as well.

However, TP does not mean the application of Chinese copyright law in the UK will be in all cases wrong; similarly, it might not always correct to govern activities within China by Chinese copyright law.¹⁰

1.2 National Treatment: copyright protection for foreign nationals and works

The National Treatment (NT) is provided in BC Article 5. It is a rule of non-discrimination to guarantee an author A of state X will get the same protection as Y's copyright law is given to Y's national within the territory of Y.¹¹ For example, JK Rowling's Harry Potter (a UK copyrighted work) will receive the same protection in China as a Chinese author's work would receive in China. Suppose there is an international copyright law worldwide where each nation adopts the same law, NT is not necessary in this case because the creator A will get the same protection over her/his work wherever s/he is.

NT does not necessarily mean A will not get more protection in Y than A is supposed to get in its home country X. The typical example is acrobatic works, which is protected in China but not in the UK.¹² If a UK artist created an acrobatic work, he would not obtain copyright protection in the home state UK but can be protected in China. Conversely, it does not mean A will get the same protection in Y as A is supposed to get in its home X. The same example illustrates that a Chinese acrobatic artist would not be copyright protected in the UK and may think his/her copyright rights are derogated in the UK.

NT might not be construed as a jurisdictional rule. According to the purpose of NT in BC, it does not point to a place where the plaintiff shall bring the lawsuit. The main purpose is to ensure foreign nationals subject to the same copyright law with the nationals in the protecting state during the applicable law stage.¹³ In other words, NT might not be a strict choice-of-law rule but functions alike in practice; that is, both foreigners and nationals are subject to the law of protecting country.¹⁴ There is no finding that international copyright conventions provide any jurisdictional rules.

⁹ Kur & Dreier 2013, 13.

¹⁰ Goldstein & Hugenholtz 2019, 88.

¹¹ Requirements: A is a national or habitual resident of a MS (BC Articles 3(1)(a) and 3(2)); or A's work is first or simultaneously published in a MS (Article 3(1)(b)).

¹² Chap.1 Sec.3.4.1.

¹³ Fawcett & Torremans 2011, 13. NT is traditionally regarded as a strict territorial approach towards jurisdiction, thus exclusive jurisdiction shall be given to the court which grants national treatment and under whose laws the IPR was granted or created.

¹⁴ Goldstein & Hugenholtz 2019, 86.

1.3 The protecting country: the applicable law rule or not?

There is another concept in BC that may relate to PIL: the country where the protection is claimed.¹⁵ It is believed that *lex loci protectionis* (the applicable law rule concerning IPR infringement) is derived from BC Article 5(2). For example, French *Cour de Cassation* has adopted BC Article 5(2) to determine the law applicable law to copyright infringement, considering the law of the country for which protection is claimed as the law of the place where copyright is protected.¹⁶

There used to be various positions of interpreting this article: [1] it is not an applicable law rule; [2] it implements *lex fori* as a principal applicable law rule; [3] it explicitly or implicitly formulates *lex loci protectionis*; and [4] it provides guidelines for the applicable law rule.¹⁷ Currently, it is generally accepted BC does not contain a choice-of-law rule. This conclusion is exemplified by law and practice across the world, where different states (although bound by BC) adopt various approaches to determine the applicable law, in particular concerning the initial ownership of copyright.¹⁸

2. The interaction between Copyright Law and Private International Law

2.1 Conflict of laws exists in copyright disputes

As noted by scholars, there was no interaction between IPR and PIL decades ago.¹⁹ As CLIP, ALI and Japan-Korea proposals were proposed and cases had emerged, it is now believed that PIL may interact with IPR. The reasons of applying PIL in territorial copyright are four-fold generally.

Fundamentally, there is no concept of ‘international copyright law’ and substantive differences exist. Initially, the divergence was huge between the copyright in the common law system and *droit d’auteur* in the civil law system, thus setting the different directions in which copyright law would develop. International copyright conventions have harmonised national copyright laws, but only to a limited and minimum standard. It also can be proved by EU experience that it is not easy to achieve a full harmonisation even in a single market. The evolvement of CL also reveals that the copyright legislation stemmed from international consensus may develop into unique features driven by internal needs and take a different path from its origin. The substantive differences have existed for long and might not be eliminated in the recent future. Even if national copyright laws are harmonised, it could only exempt the

¹⁵ BC, Article 5(2): ‘... the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.’

¹⁶ De Miguel Asensio 2020, para 4.99.

¹⁷ Matulionyte 2011, 28-33.

¹⁸ CLIP 2013, 245. Chap.5 Sec.2.2.1.

¹⁹ Dinwoodie 2001, 429.

application of different substantive laws at the choice-of-law stage, but do not provide assistance in determining the adjudicative jurisdiction.

Moreover, the development of international IPR trade provides opportunities for the application of PIL, as numerous foreign-related civil and commercial relationships might emerge from the international exchange. This is particularly evident in the country where the copyright-based industry is developing or has developed. In other words, the application of PIL might be necessary especially in those countries where the copyrighted work is treated as the commercial product. If such a copyright exploitation involves foreign elements, problems might arise when different states have different answers to the same question. Neither all works are protected, nor all acts infringe across the world. Therefore, it will benefit participants to foresee the result of their multinational behaviours under the guidance by PIL.

Furthermore, the recognition of foreign national's legal status as its nationals further provides a foundation for the existence of a foreign-related relationship. If the national law does not allow foreigners to enjoy the same copyright rights as its nationals, or in other words, if the national copyright law excludes protecting foreign copyright owners, the civil and commercial relationship with foreign elements might not exist and will not lead to legal conflicts. It allows the extraterritoriality of foreign civil and commercial relationship within its own territory.

Finally, the Internet enables foreign-related copyright relationships to occur easily. From a purely technology perspective, the digital content can across the borders, thus creating an extraterritorial reach. Internet-related copyright activities may involve two processes generally: [1] the local process related to the physical device (such as installing, executing, reading and writing); [2] the transmission process (an act of downloading when the data is extracted from the Internet and an act of uploading when the data is supplied to the Internet).²⁰ These activities might cross the border easily via the Internet and so might the exploitation of copyright.

The derogation of territorial copyright is not a new problem. The same issue has emerged when the broadcasting technology was invented. Courts that time had started to deal with multinational copyright disputes. However, it is the first time that copyright faces a global and transient phenomenon.

Internet has many characteristics, including borderlessness, geographical independence, limited language dependence, one-to-many, a low threshold of information distribution, widely used, portability, limited utilisation of geographical identifiers, reactive, lack of central control, convergence and the essential role of intermediaries.²¹ These characteristics not only make the traditional copyright law encounter difficulties in defining key concepts, but also impact the settlement of copyright disputes.

Firstly, the traditional strong control over copyright works decreases and copyright issues become cross-border. Borderless means the dissemination of territorial copyright work can cross borders easily. It promotes the cultural exchange but amounts to the

²⁰ Tappin 2018, 1122-1123.

²¹ Svantesson 2016, 56-78.

decrease of rightsholders' control over copyrighted work. Moreover, the language barrier is no longer a 'safeguard' of limiting literary works within a controllable scope thanks to the translation tool online. In addition, the widely used Internet enables everyone to be the user. The traditional national exploitation has been replaced by the cross-border exploitation nowadays.

Secondly, the Internet increases the difficulty and expense of addressing disputes. The high-speed, easy and ubiquitous access to the Internet might be a high-cost, inefficiency and unfair legal situation in dealing with foreign-related disputes. The traditional PIL rules based on physical places may not function well under the Internet context, since the geographical independence of the Internet has made the physical presence of individuals irrelevant. Moreover, the reactive nature of Internet activities involves multiple places into consideration, thus exacerbating the complexity of copyright enforcement.

Summing up, under the globalization of copyright exploitation, the territorial copyright disputes might cross borders. In particular, claimants might be confusing how to localize the dispute arising from the delocalised medium (Internet) and fear for the remote court or the unfamiliar law. Accordingly, the territorial nature may also result in the possibility that disputes might be heard in every court, adjudicated by multiple laws and awarded merely based on the local damage. The territorial nature of copyright poses a major obstacle to the effective enforcement and exploitation of copyright, when the copyright industry becomes globalised.

2.2 How the jurisdictional problems arise?

Jurisdiction is the first important issue faced by parties and courts in foreign-related civil and commercial litigation. From the practical perspective, if the copyright owner finds someone infringing his/her copyrighted work, the rightsholder might initiate the litigation in the court. The question therefore is, where can this rightsholder file the lawsuit? If the court has been selected by the plaintiff, then the question goes to the court. It shall be answered whether this court can adjudicate this dispute, and under what grounds? Whether the court has the power to decline and under what consideration, and moreover should this case be declined?

From the perspective of determining jurisdiction, the court shall examine the connecting factors. The question of how the connecting factor is interpreted would determine whether a court is competent to hear a case. The links may be examined by the court, for example, where the alleged defendant located physically or where the harmful event occurred. If the court is competent to hear the case, the court shall determine the scope of competence, since the copyright in question is territorial.

The territorial nature of copyright creates problems in the jurisdiction stage. The first practical problem might be, if the infringement occurs outside the country where the case is seized, whether this seized court has jurisdiction over this dispute, and based on what grounds? The second practical problem is, since multiple participants are usually involved in the copyright exploitation, whether a single court can hear all cases

when defendants are located in multiple places. Whether some sort of relationship among those defendants needs to exist if consolidated in one court?

The most complicated problems in determining jurisdiction arise when the ubiquitous Internet encounters with the territorial and automatically protected copyright. The Internet crosses the border, thus creating ubiquitous connections with multiple states. However, copyright is intangible. The physical presence of Internet-aware devices does not necessarily mean the copyrighted work exists in the same place. As data representing literary (text), artistic (graphics, videos) and musical works can be extracted, transmitted and downloaded, numerous copies can be produced simultaneously and invisibly.

Furthermore, it is difficult to pinpoint the relevant place among multiple locations, which might include the location of the actor, the location of the copyright holder, the location of the server, the location of the ISP, the location of uploading or downloading, the location where the infringing content is transmitted, the location of access, the targeted location or the location of activating the technical process. Since the locations concerning online activities are ubiquitous, how the jurisdictional rule locates an appropriate place to hear the case?

Moreover, an act may amount to the ubiquitous effect, due to the automatic protection over territorial copyright. If the illegal content is found on a ubiquitous platform, shall the plaintiff have to go everywhere in order to claim for the whole damage? Whether the ubiquitous case can be consolidated in a single court? If the single court can hear the ubiquitous case, whether this jurisdiction can achieve a worldwide reach? Shall the scope of competence be limited within a geographical scope under the Internet context? As intermediaries might be found not liable for infringement, should the place of intermediaries be considered in the jurisdictional stage?

2.3 How the applicable law issues arise?

There is no need to study the choice-of-law rules in the cross-border copyright context if the copyright laws of all countries are the same. Currently, the international or regional harmonization of copyright law only provides minimum standards and shall not be ‘mistaken for a trend toward a universal copyright’.²² Diversity still exists among national copyright laws. Therefore, the study on how to address these conflicts remains necessary because substantive differences in copyright laws will lead to different results.

For example, if a foreign party A decides to exploit its work in State Y, the first question would be whether A’s work would get copyright protection in Y, that is, whether the law of Y grants copyright protection over a particular (or new) work.²³ If A’s work is protected, the further question may be what is the scope and depth of

²² Goldstein & Hugenholtz 2019, 86.

²³ Chap.1 Sec.3.1 (originality) and Sec.3.2 (categorization).

protection, for example, when the protection expires,²⁴ who owns the right,²⁵ whether the right can be assigned to a party in Y for further exploitation,²⁶ what rights are owned by A,²⁷ what constitutes infringement,²⁸ and what remedies²⁹ are granted if infringed?

The issue of validity is essential in foreign-related situation. The question of whether foreign copyright will be protected shall be answered. Moreover, the validity issue always serves as the preliminary issue in the infringement case. If the copyright does not exist, it is impossible to infringe the right. For example, in China, the term of protection is 50 years PMA, while the UK is 70 years. The English company cannot infringe the copyright in a work in China when the creator passed away for 60 years, because such a work' copyright does not exist in China at that time.³⁰ The question would be whether this preliminary issue – the validity of the copyright, shall be adjudicated by English or Chinese laws?

The applicable law issue matters in determining ownership as well. Which law determines the first ownership? For example, when the work is created under employment, an English employee of an English company creates work. The first owner is not a dispute. If an English company employs a Chinese citizen in China who creates a work, the first ownership is complex under CL.³¹ It is hard to foresee who is the first owner because if different copyright laws are applied, the answers might be completely opposite.

The applicable law issue is also important when determining whether an act would infringe copyright or not. It is particularly challenging to answer which law shall be applied to identify infringement and exemption from liabilities,³² when the activities in question involve more than one jurisdiction.

3. Legislative background of private international law

3.1 International harmonisation of private international law?

International cooperation in respect of copyright and other IPRs is highly supported by practitioners and governments. On the contrary, the harmonisation of PIL faces difficulties and has achieved little success, even though the Hague Conference has been dedicated to promoting the international consensus. It seems the international

²⁴ Chap.1 Sec.3.3 (the term of protection).

²⁵ Chap.1 Sec.4.1-4.3 (ownership).

²⁶ Chap.1 Sec.4.4 (contractual transfer).

²⁷ Chap.2 Sec.2.1.1 (the infringement test), Sec.2.1.2 (economic rights) and Sec.4 (moral rights).

²⁸ Chap.2 Sec.2 (infringement of economic rights), Sec.3 (exemptions of ISPs), Sec.4 (infringement of moral rights) and Sec.5.1 (exceptions and limitations).

²⁹ Chap.2 Sec.5.2 (remedies).

³⁰ Chap.1 Sec.3.3 (the term of protection).

³¹ Chap.1 Sec.4 (ownership).

³² Chap.2 (infringement).

cooperation concerning the conflict of laws is more valued by scholars, especially in the field of IPRs.

Compared with the arbitration, the international unification of jurisdiction rules is slow and within a limited scope.³³ Since the jurisdictional rules relate to judicial sovereignty, the differences and contradictions between countries make the integration of international jurisdictional rules even more difficult.

The Hague Conference started its harmonisation process from the least controversial and disputed area – propagated jurisdiction – and finally reached the Convention on Choice of Court Agreement in 2005.³⁴ The scope of this convention excludes several matters concerning IPRs.³⁵

Recently, the Hague Conference has attempted to include IPR issues in the draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.³⁶ However, Article 2(1)(m) of the 2019 official version excludes IPRs in the end.³⁷ Currently, there is no widely accepted governmental cooperation on the jurisdiction, the choice-of-law rule, the recognition and enforcement of foreign judgments concerning IPR issues, which are primarily left to the regional or bilateral agreement and national laws.

³³ There are 166 contracting parties in the New York 1958 Convention (on the Recognition and Enforcement of Foreign Arbitral Awards), while there are only 36 contracting parties in the Hague Conference 2005 (Convention on Choice of Court Agreement). UNCITRAL, ‘Contracting parties: 166’, <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>. HCCH, ‘Status Table’ <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98#legend>>. Both websites were accessed on 10 February 2021.

³⁴ EU approved it to enter into force on 1 October 2015. EU has exclusive authority to conclude PIL agreement with the third state (TFEU, Article 3(2)). China signed it on 12 September 2017.

³⁵ Article 2(2)(n) and (o). The validity of IPRs other than copyright and related rights; infringement of IPRs other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights or could have been brought for breach of that contract.

³⁶ Garcimartín Alférez & Saumier 2018.

³⁷ Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>>.

3.2 UK: the complex regime of traditional English rules and EU rules

The jurisdictional rules in the UK are complex, including two different regimes in conferring jurisdiction: European regimes³⁸ and traditional English rules.³⁹ The primary difference between those two regimes lies in the base of jurisdiction. The basic rule of English conflict of laws is the personal jurisdiction, which focuses on the connection between the defendant and the court. In other words, ‘where there is service, there will be jurisdiction’. However, the statutory EU rule considers ‘where there is jurisdiction there may be service’.⁴⁰

The application scope of the two regimes is different. Provided that the defendant domiciled in one of the MSs, BBR is applied. If a China plaintiff and a UK defendant are involved in a copyright dispute before a court of EU Member State, the judicial competence is determined by the EU rule. However, if the plaintiff is a UK national, whereas the defendant is Chinese, under this circumstance, the UK national conflict of laws is applied rather than the EU rule.

Accordingly, the analysis on the UK concerning jurisdictional rules in Chapter 5 will be divided into two parts: the defendant domiciled in the EU (EU rules) and outside the EU (English rules). The rules examined in the latter section of English rules are unaffected by EU rules and applied in non-EU disputes.

In respect of the choice-of-law rules, EU Rome II Regulation has harmonised the applicable law issues concerning IPR non-contractual obligation.⁴¹ EU Rome II will be retained as the law of the UK unless any further legislation is made.⁴²

3.3 China: the neglected legislation on private international law

In order to better understand the rationale of Chinese private international law, there is a need to briefly introduce the history of China because its special and dramatic

³⁸ The principal source of EU rules is Brussels I Regulation Recast (1215/2012, ‘BRR’). It is the amendment of Brussels I Regulation (44/2001, ‘BIR’), which originates from the Brussels Convention 1968. BIR and BRR lived alongside each other for some time, because BIR applied in cases initiated before 10 January 2015. This thesis will use the text and the numbering of BRR. For some decisions of cases which use the old version BIR, this thesis will indicate the differences between the original and the new text or numbering. For the legislative history from Brussels Convention to Brussels Regulation, see Briggs 2014, 175-178. For the detailed overview of BRR, see Dickinson & Lein 2015.

³⁹ Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479, Part 5. On the Exit Day, EU instruments will be revoked.

⁴⁰ Briggs 2014, 168-169.

⁴¹ Dickinson 2010. Rome II Regulation (864/2007). If a civil or commercial matter arising from the events which occurred on or after 11 January 2009, the conflicts rules are those provided in Rome II. Rome I Regulation (593/2008) governs the contractual obligation arising from copyright assignment or license.

⁴² The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/834.

social changes with foreign countries have shaped the establishment and application of PIL in China.

In the Tang Dynasty, when determining the applicable law in the litigation with foreign elements, the principle of *lex personalis* and *lex loci* are considered. Because many foreigners lived and engaged in commercial activities within China at that time; thus, the rules to deal with legal conflicts emerged.⁴³ Tanglv Yonghuilv (Code of Tang Dynasty, AD 653)⁴⁴ firstly provides that the law of the place where involved foreign parties come from is adopted (*lex personalis*) when these two foreign parties are from the same region or country. If the two parties come from different foreign regions or countries, or if one is a Tang national (Chinese) and the other is a foreigner, the law of Tang (Chinese laws) is applied (*lex loci*).⁴⁵ These two rules are inherited by the subsequent Song Dynasty in China.

Tang and Song laws reveal that foreign laws might be adopted in the Chinese history, under the circumstance when both parties are foreign nationals, in order to smooth the trade and foreign cultural exchange. However, an absolute territoriality principle was adopted after Ming Dynasty, when the emperor closed off the access to the rest of the world. At that time, all foreign disputes within the territory were solved by Chinese laws.⁴⁶

Around the middle of the 19th century, when China burst into chaos and wars, the government started to lose control of the territory. The court turned to be nominal without jurisdiction towards any foreign-related cases. Foreign cases that time were adjudicated by the foreign counsels who would apply the laws of their own countries. Since there were no foreign cases in Chinese courts, no choice-of-law rules existed. Not until 1978, decades after the PRC had founded, Chinese scholars started to realize the importance of studying private international law in order to meet the requirements of the ‘Reform and Opening-up Policy’.

This brief examination of Chinese history concerning foreign relationships reveals that there is no sign of PIL within the Chinese legal system for thousand years due to the extreme exclusion of foreign laws and foreign cases. Especially due to the decades of losing sovereignty, it has shaped the legal thinking mode and consciousness of people to some extent, that Chinese courts shall and must adopt Chinese laws to adjudicate the case in China.

Until today, Chinese law has not paid enough attention to PIL.⁴⁷ There is no specialized legislation on the international jurisdictional rule. Related articles are

⁴³ Han 2000, 82-83. Professor Han states the earliest conflicts rule emerged in Tang Dynasty and finds those rules the same legal underpinnings with the modern private international law.

⁴⁴ Code of Tang Dynasty refers to the law issued in Tang Dynasty. For more detailed English literature about legal documents in Tang Dynasty, see Ho 2017, 584.

⁴⁵ Ancient Chinese version: 《永徽律》《名例律》：诸化外人同类自相犯者，各依本俗法，异类相犯者，以法律论。

⁴⁶ Du 2018, 13.

⁴⁷ He 2019, 24-33. There is also a considerably lack in PIL research and education in China. According to Professor He’s research, the study of PIL has become increasingly marginalized compared with other

contained mainly in the specialised chapter in Civil Procedure Law (CPL).⁴⁸ For those international jurisdictional rules which are not prescribed in law, domestic jurisdictional rules will be applied in the cross-border situation.⁴⁹ In relation to the choice-of-law rule, CLFCR was established in 2011. It is the first and only one law by far in the field of private international law, which has not been revised for 10 years since its establishment.⁵⁰ Even though there are only three simple articles concerning IPRs, they are regarded as milestone legislation for determining the applicable law in IPR issues.⁵¹

These three articles provide different rules in accordance with different aspects of IPR. [1] Article 48: *lex loci protectionis* shall govern the ownership and contents of IPRs. [2] Article 49: the law applicable to the IPR contractual relationship might be chosen by the parties. If without an agreement, the general principle of the law applicable to the contract shall be applied. [3] Article 50: *lex loci protectionis* shall be adopted to determine liabilities of IPR infringement. Parties might choose *lex fori* by agreement after the infringement takes place. A simple conclusion might be drawn from these three articles that *lex loci protectionis* is adopted primarily, exemplifying the territorial principle of IPRs.

Summing up, international copyright or PIL related conventions provide no assistance in establishing jurisdiction and determining the applicable law in foreign-related copyright disputes. The EU regional agreement Brussels Regulation and Rome Regulation provide jurisdictional and choice-of-law rules. There are also some relevant provisions in the national laws of the UK and China. The next two chapters will focus on the existing frameworks concerning jurisdiction and choice of law, and also their application in practice.

legal disciplines in China, as reflected in the extremely low quantity of CLSCI journal publications and academic publications. The number of journal articles in CLSCI has declined from 2010. In addition, compared with foreign scholars, the academic journal articles or books written by Chinese scholars (mainland) in English only covers 1% of the total from 2008-2017. For example, in the year 2017, 56 books on PIL published worldwide in English, 0 by Chinese scholars; 265 articles published worldwide, 3 by mainland scholars. (Professor He's statistics base on Professor Symeon Symeonides, 'Private International Bibliography: U.W. and Foreign Sources in English', Am.J.Comp.L. 2008-2017).

⁴⁸ CPL Chapter 4, special provisions of civil procedures for cases involving foreign elements.

⁴⁹ CPL, Article 259. The provisions of this Chapter 4 shall be applicable to civil proceedings within the territory of the PRC in regard to cases involving foreign elements. Where it is not covered by the provisions of this Chapter, other relevant provisions of this Law shall apply.

⁵⁰ There are 8 chapters and 52 articles in CLFCR concerning the applicable law rule in relation to marriage, family, inheritance, creditor's right, IPRs and so forth. IPR issues are provided in Chapter 7 Articles 48-50.

⁵¹ Chen Weizuo 2012, 444.

CHAPTER 4 THE JURISDICTIONAL RULES CONCERNING CROSS-BORDER COPYRIGHT INFRINGEMENT IN THE UK AND CHINA

1. Introduction

Jurisdiction has various meanings in different contexts.¹ PIL uses this term narrowly, referring to the issue of whether a court has the right to hear a transnational dispute.² In this chapter, jurisdiction refers to the court's judicial competence to hear a case arising out of the cross-border copyright infringement (adjudicative jurisdiction), distinct from the focus of Chapter 5 – the choice-of-law rule (legislative jurisdiction).

The determination of jurisdiction is not part of the substantive judgment, but it may substantially impact the outcome of the case.³ Compared to domestic disputes, the settlement of international disputes is bound to involve different legal systems. Participants are more likely to obtain procedural and substantive advantages in their home courts: they are more familiar with the local judicial system, and the expense of attending proceedings in foreign courts can be reduced; in addition, the choice of the court determines which country's choice-of-law rule shall apply subsequently to determine the substantive law applicable to the case. Even if the choice-of-law rule points to the application of foreign law, the application of the procedural rule of this court might not be avoided.

As discussed above, copyright is territorial, and the harmonization of national copyright laws has not changed it. Therefore, the international exploitation of copyright works may result in a complicated situation that copyright dispute crosses the borders.⁴ For example, if a UK copyright holder finds the infringing content distributed in the Chinese market and plans to bring a lawsuit in China, the first question is whether the Chinese court is competent to hear such an international dispute. It shall be answered according to the jurisdictional rules of China, the state where the court is located, or related international or regional instruments.

This Chapter will examine and compare the international jurisdictional rules in the UK and China. Subsequently, it explores whether current rules in both countries work well in the Internet copyright context and proposes a proper method. Each section will generally analyse in three steps: the rule, the application and interpretation of the rule by the court, and problems.

¹ Lundstedt 2016, 27-38.

² Briggs 2014, 168. 'At a general level 'jurisdiction' describes the legal power of a court to adjudicate a claim or matter, typically, though not invariably, brought by a claimant against a defendant.'

³ Han 2007, 469-470.

⁴ Fawcett & Torremans 2011, 125.

2. Factors related to defendants

Legal doctrines worldwide accept a general jurisdictional rule: the principle of *actor sequitur forum rei*. It is a common approach that the court where the defendant domiciled is competent to hear the case. Both the UK and China allow a court to exercise jurisdiction if the defendant domiciled in the forum state. It is a general rule, for the purpose of balancing the two parties that the plaintiffs may choose to sue, and the defendants shall be given the advantage of defending themselves in their places.⁵ The only basis is the domicile of the defendant, regardless of whether the dispute involves any connection to the forum state.

2.1 EU rules

2.1.1 Overview

BRR Article 4 adopts the general jurisdiction that a defendant domiciled in a MS shall be sued before the court of the domicile of that Member State, regardless of the nationality. This rule permits an EU defendant to be sued in a MS forum for a civil and commercial claim, though such a dispute does not have any other connection with this place. The domicile of the defendant is a sufficient basis for the jurisdiction purpose.

The rationale of favouring defendants ensures convenience in the conduct of litigation. The defendant's domicile is presumably considered as the place where the defendant has the most assets. Since adjudication of the merits and enforcement of the judgment located in the same country, it might avoid unnecessary procedural complications.⁶ Moreover, it is considered to be a fair approach balancing the interest of two parties. It enables the defendant to defend himself easily in the place where he is familiar with and reasonably foresees, thus ensuring legal certainty and protection of persons within the EU.⁷

The application of the general jurisdictional rule is mandatory. As stated by Recital 15, 'jurisdiction should always be available on the grounds of the defendant's domicile'. Defendants domiciled in the EU must be sued in the MS of domicile, unless there is an exception provided explicitly in the BRR that grants the authority to another MS court.⁸

In short, it is sufficient that the domicile of the defendant located within the EU for a court to exercise jurisdiction. There is no requirement that the dispute must have any other connection to MS, that is, the dispute can have a relation to a non-EU state. The connecting factor of general jurisdiction under the EU regime is limited and mandatory, in order to ensure legal certainty and sound administration. In a copyright

⁵ For the detailed discussion on the standing of *actor sequitur forum rei* principle in practice, see von Mehren 2007, 153-165.

⁶ Stone 2014, 53.

⁷ Jenard Report, 14-15.

⁸ BRR, Article 5 (1) 'Persons domiciled in a MS may be sued in the courts of another MS only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

case, it allows the court where the alleged infringer domiciled to hear the case, which the defendant can reasonably foresee.

2.1.2 The definition of domicile

The concept of domicile is subject to Articles 62 and 63, with a distinction between natural and legal persons. There is no autonomous definition for the domicile of natural persons under the EU regime, providing that the domicile of a party shall be determined in accordance with the law of the forum.⁹

By contrast, BRR provides three criteria to determine the domicile of legal persons, including the statutory seat, the central administration and the principal place of business.¹⁰ It is easy to determine the statutory seat because it might be found in the articles of association and the registry, thus creating a degree of certainty.¹¹ The identification of central administration is not always easy. It relies on the factual situation where the essential decisions are made by management organs, which are internal to the company.¹² The principal place of business is easier to verify, that is the place where the company conducts a significant amount of business.¹³ According to this broad interpretation, a legal person may have more than one domicile. So, the legal person might be sued before a court with a significant connection.¹⁴

2.2 The traditional English rule: presence

According to BRR Article 62, the domicile in the UK is defined by the statute.¹⁵ An individual is domiciled in the UK if he is a resident, and this residence indicates he has a substantial connection with the UK, which might be presumed from that he has been so resident for the last three months or more.

For the domicile of the company and legal person, the statutory seat in the UK referred to the registered office or, where there is none anywhere, the place of incorporation or, where there is none anywhere, the place under the law of which the formation took place.¹⁶

If the defendant does not domicile within the EU, the national rule will be applied. In the Common Law system, the jurisdictional claims are founded on the writ system. The basic understanding is when a party is physically present within the territory of an English court, it means that it may be validly served with a writ and shall be subject to

⁹ BRR, Article 62. Fawcett & Torremans 2011, para 8.15.

¹⁰ BRR, Article 63. The criteria are independent. As long as one of them exists in a MS, the defendant might be sued in that place.

¹¹ Pocar Report, para 29.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid, para 30.

¹⁵ The Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Schedule 1, para 9.

¹⁶ Briggs 2019, 56.

the jurisdiction of such a court.¹⁷ Therefore, a temporary presence is sufficient for a party being served with the writ.¹⁸ In other words, the presence of the defendant, even transient in the UK, is sufficient for an English court to adjudicate a copyright dispute, on the basis that the defendant was served with proceedings during a brief visit to the country.

The presence originates from the service process. As the frequency of global travel increases, this ground is considered to be exorbitant. It allows the UK court to exercise jurisdiction over third-state defendants in relation to disputes with which they have little or no connection.¹⁹ It is not predictable for a potential defendant to foresee its act in country X will be adjudicated by an English court just because s/he transfers a flight at Heathrow airport. Such an effect brought by ‘temporary presence’ is not reasonable for that party.

It is not a high relevance of discussing ‘presence’ in this thesis, particularly under the Internet context. It merely reveals the idea that a non-EU defendant might avoid travelling or any other temporary presence in the UK if s/he does not want to be subject to the jurisdiction of an English court. Moreover, this exorbitant jurisdictional basis has not been used against third state defendants with respect of the infringement of foreign intellectual property rights.²⁰

2.3 China

2.3.1 Overview

The principle of *actor sequitur forum rei* is also the general jurisdictional rule in China, both for domestic and international cases, thus applied in all cross-border copyright disputes.²¹ In other words, if the alleged defendant domiciled in China, the Chinese court is competent to hear the case. This rule is established because such a place has a close relationship with the defendant’s act, thus preventing the plaintiff from forum shopping and making it easier for defendants to defend themselves in a relatively familiar judicial environment, and furthermore balancing the two parties.²²

2.3.2 The outdated definition of domicile in China

The scope of the ‘domicile’ is a matter of domestic civil procedural law, determined by Chinese laws under the principle of *lex fori*.²³ Compared with the EU/UK concept of domicile, there is not a big difference concerning the scope of legal

¹⁷ Briggs 2014, 168-169.

¹⁸ Collins 2012, 414.

¹⁹ This rule is not applied on EU defendants (BRR, Article 5(2)).

²⁰ Fawcett & Torremans 2011, 282. The *forum non conveniens* doctrine is adopted to address it.

²¹ CPL, Article 21.

²² He 2015, 105-106.

²³ Li Wang 2010, 62-65. Wang Xiaoyan 2009, 62-93.

persons' domicile. However, the scope of the domicile of the natural person in China is outdated and embodied with a Chinese characteristic.

The determinative factor concerning the domicile of corporate and other legal persons is the principal place of business.²⁴ If it is not known or does not exist, the place of registration shall be deemed as the domicile. In addition, if the actual place of business is not identical to the registered place, the place of registration prevails.²⁵ In a word, the principal place of business is to make sure the dispute has a close relationship with the place of the court. As a supplementary connection, the place of registration is preferred to make it easier for parties to foresee the forum's place with certainty.

For the domicile of natural persons, it is complicated in China. It provides in law that the domicile refers to the place where the person registers his/her permanent residence regardless of nationality.²⁶ It shall be understood under a context that China has implemented the 'Hukou' system since the foundation of the PRC. Hukou refers to a mandatory family registry system, that an individual must register to the police department after birth and update the information if he moves to another place.²⁷ Hukou indicates a long-standing contact with a place. The address registered in Hukou may be useful to locate the defendant's domicile in the old days when people do not travel a lot.

However, the Hukou-based concept of domicile is no longer compatible with the current situation. It cannot provide assistance in identifying the domicile. For example, a Chinese natural person, although 'Hukou' located in China, may study or work in foreign countries or regions for a long time. Similarly, if a foreign national works in China for many years without Hukou, the domicile of him could not be identified under this Hukou-based concept of domicile.²⁸ In order to fix the problems mentioned above, legislators introduce habitual residence as a supplementary factor.

²⁴ JI CPL [2015] No.5, Article 3. GPCL, Article 39. Company Law of the PRC, Article 10.

²⁵ *Bangbang v COL* [2006] No.13999 (the first case concerning online e-books copyright infringement in China). The defendant rejected the jurisdiction of Court H based on the fact that its principal place of business located in District X (Xicheng) even though its registered place located in District H (Haidian). The court finally rejected the objection and exercised jurisdiction based on the general ground 'domicile', considering the registered place as its domicile.

²⁶ JI CPL [2015] No.5, Article 3.

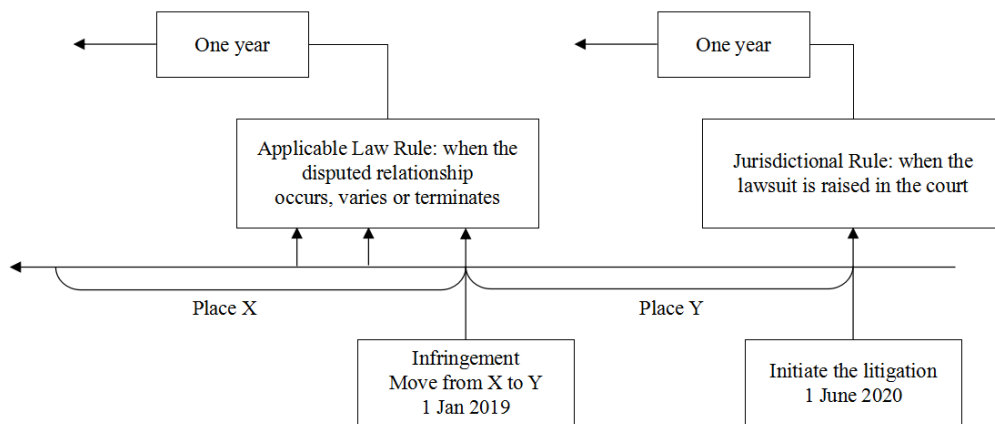
²⁷ After registering, a piece of paperwork 'Hukoubu' is issued by the local police station, containing the information of each individuals living in the same home address. This paperwork is of great importance, as it is required when a child enters kindergarten, primary school and so forth. In other words, if the child would like to obtain education, parents shall register the information for their child in the police station.

²⁸ There is no requirement for foreign nationals to register Hukou.

2.3.3 Habitual residence: an inconsistent concept between jurisdiction and choice of law in China

In CPL, habitual residence refers to ‘the place where a citizen has continuously resided for one year or more after leaving his/her registered place when the suit is brought, except for the place for hospitalization.’²⁹ It can be presumed from one-year or more residence. However, the concept of habitual residence is not consistent in laws. There are statutory differences between jurisdictional rules (prescribed in CPL) and choice-of-law rules (prescribed in CLFCR).

Firstly, the ending point of the calculated 1-year period is different. The JI of CLFCR (the choice-of-law rule) provides that it should be one year or more before the occurrence, variation or termination of the disputed relationship.³⁰ However, CPL (the jurisdictional rule) requires one year before initiating the lawsuit.³¹ To be specifically, suppose A and B have signed a contract concerning copyright license. B breached the contract and constituted an infringement of A’s copyright on 1 January 2019, and on the same day, B moved from X to Y. A brought the lawsuit on 1 June 2020. Under such a situation, the habitual residence of B in the stage of determining jurisdiction shall be Y, while in the stage of choice-of-law rule, it shall be X (see the chart).



4.1 The calculation of habitual residence

Secondly, the exception clause is also different. The hospitalization, labour dispatch and official duties are excluded in CLFCR, whilst hospitalization is the only

²⁹ JI CPL [2015] No.5, Article 4.

³⁰ JI CLFCR [2012] No.24, Article 15. The place where the natural person has resided continuously for more than one year at the time when the foreign-related civil relationship arises or is changed or terminated and which serves as the centre of his or her life, the court may determine that it is the natural person’s place of habitual residence under the law applicable to foreign-related civil relationships, except in the case of medical treatment, labour dispatch and official duties.

³¹ JI CPL [2015] No.5, Article 4. A citizen’s habitual residence is the place where the citizen has resided continuously for more than one year from the time of leaving the place of domicile to the time of initiating the lawsuit, except where the citizen is hospitalized for medical treatment.

one exception in CPL. The inconsistent scope of habitual residence between the jurisdictional rule and the applicable law rule might create legal uncertainty in practice.

This inconsistent concept may have little impact on copyright infringement. Since in the choice-of-law stage, it rarely adopts the law of the defendant's domicile or habitual residence in a copyright infringement case. Therefore, usually there is no need to interpret the domicile or habitual residence in determining the applicable law in copyright infringement. Nevertheless, this author suggests that, as a series of interrelated rule, the basic concept shall be unified in the jurisdiction and the applicable law rule.

2.4 Domicile or habitual residence?

Generally, domicile focuses on the permanent place, whilst residence is more flexible referring to the continuous connection to one state to some degree. Habitual residence is a fact-specific concept compared with the domicile. As noted by scholars, the comparison between domicile and habitual residence shows the last factor is more appropriate, especially when the purpose is to achieve cooperation. Because habitual residence is 'an old standby' in Hague Convention with an over 100-year history.³² However, the abandon of domicile will not improve the law too much.³³

In China, the abandon of 'Hukou' based domicile will be useful in the cross-border context. What if the place of 'Hukou' (Chinese meaning of domicile) and habitual residence are different? GPCL stipulates that if the two places of 'Hukou' and habitual residence are not the same, the habitual residence shall be deemed as the domicile.³⁴ In practice, this rule may lead to a more complicated scenario.

The first scenario is, what if the party has more than one domicile (i.e., positive conflicts of having various domiciles)? The Notice of SPC clarifies that if the participant has more than one domicile in accordance with the law, the place with the closed connection to the dispute shall be deemed as the domicile in the case.³⁵

The second question is, what if the person has no domicile or habitual residence (i.e., negative conflicts of having no domicile)? There is no answer in Chinese jurisdictional rules. For example, it is hard to determine the domicile of a foreign defendant who does not register in Chinese 'Hukou' system and also lives in China for less than one year. CLFCR provides a clear-cut answer that the law of present residence should be applied when the habitual residence is hard to locate.³⁶ However, this provision prescribed by CLFCR could not be adopted at the jurisdictional level because jurisdiction shall be governed under CPL. According to CPL, no provisions are found to provide answers for the situation mentioned above. It reveals once again that the

³² Svantesson 2016, 426.

³³ Briggs 2019, 56. In some difficult cases, for example, an individual resides in one state but hides his ownership and movements. The change from domicile to habitual residence would not bring easiness.

³⁴ GPCL, Article 15.

³⁵ SPC [1988] No.6, Article 183.

³⁶ CLFCR, Article 20.

international jurisdictional rule shall be separated from the domestic rule and combined with the choice-of-law rule, thus ensuring the PIL concepts are interpreted identically.

Summing up, both domicile and habitual residence have advantages and disadvantages. A broad interpretation of the general basis may lead to the situation that an individual or company may have several domiciles/habitual residences for the plaintiff to choose. It will benefit the plaintiff to claim for all damage in copyright infringement involving foreign elements. The practical problem mainly centres around the fact and proof.

This author points out that the Chinese traditional Hukou-based domicile concept is not appropriate in a foreign-related relationship. Moreover, the concept is not interpreted identically between the jurisdictional rule and the applicable law rule, thus creating legal uncertainty in cross-border disputes. This author therefore suggests a unification of basic concepts in the field of PIL in China.

2.5 Infringement involving multiple defendants

As examined in Chapter 2 of this thesis, copyright infringement, especially under the Internet context, always involves multiple parties with or without a relationship. Since copyright is still territorial, it will lead to parallel rights in different states.³⁷ It would be easy for the plaintiff to choose one court among those defendants' domicile to sue against all defendants.³⁸ Then the cross-border exploitation of copyright might lead to a question: whether there is a rule to consolidate those claims, if yes, under what requirements?

2.5.1 BRR legislation and its application

2.5.1.1 Legislation

BRR Article 8(1) (old Article 6(1)) is a special jurisdiction rule and does not apply if one of the defendants domiciled in a non-EU state.³⁹ It provides that 'a person domiciled in a MS may also be sued: where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are **so closely connected** that it is expedient to hear and determine them together to **avoid the risk of irreconcilable judgments** resulting from separate proceedings.'

According to the provision, the purpose of consolidation is to avoid the risk of irreconcilable judgments. As illustrated as an example by Professor Torremans, A (domiciled in X) and B (domiciled in Y) conducted an authorized act in Z and violated someone's copyright. According to the general jurisdictional rule, the court of X and Y

³⁷ Fawcett & Torremans 2011, 143-145.

³⁸ BRR Article 4 allows for the separate claims against each defendant in the place of domicile.

³⁹ van Calster 2016, 164-165.

are both competent to hear the dispute occurred in Z, over A and B respectively. There might be a risk that the disputed acts may found infringement in X, while lawful in Y.⁴⁰

2.5.1.2 The requirement of ‘same law and same fact’: from strict to flexible

Article 8 requires that the claims must be closely connected, that is, ‘all elements of the case’ shall be considered.⁴¹ The case law interprets it as the ‘identical law and same fact’ requirement initially.⁴²

Roche: same law and same fact

In *Roche*,⁴³ Primus and Goldenberg obtained a European patent as a bundle of national patents. The disputed acts were conducted by Roche’s branches in each country and coordinated by Roche’s central body. P&G then sued against Roche for infringement of the EU patent. The court held that (old) Article 6(1) requires a risk of irreconcilable judgments resulting from separate proceedings, which might exist when two judges from two states make irreconcilable decisions on the same fact and the same law.⁴⁴

In this case, the court first ruled that the requirement of ‘same fact’ is not satisfied, for the reason that the disputed infringing acts were conducted differently in each country where each branch located respectively. All those activities were territorial and national.⁴⁵ Secondly, the court believed that ‘same law’ is not met as well. Each of this bundle of national patents was granted by each domestic law. So, the patent right was independent, and the infringement of each right should be determined by each national law rather than ‘same law’.⁴⁶ Therefore, the court held (old) Article 6(1) should not be applied because there would be no risk if requirements were not satisfied.⁴⁷ Apparently, the court’s strict requirement is not good news for the plaintiff because the plaintiff has to sue in multiple places to claim for overall damage.

Freeport: converging legal situation and same fact

The same law factor is loosened in *Freeport*. The court analysed that (old) Article 6(1) did not require the identical legal basis of claims.⁴⁸ It means it is no longer required that the national provision on patent infringement in *Roche* shall be identical. Moreover, the different legal basis of patent infringement in one state or unfair

⁴⁰ Torremans 2014: 1.

⁴¹ C-145/10 *Painer*, para 83. C-98/06 *Freeport*, para 41.

⁴² The same law and same fact have been criticized a lot. See generally van Calster 2016, 167-168. Fawcett & Torremans 2011, 611-620. Larsen 2017.

⁴³ C-539/03 *Roche*. The first IPR case concerns the application of Article 8(1) (old Article 6(1)).

⁴⁴ *Roche*, para 26.

⁴⁵ *Roche*, paras 27-28

⁴⁶ *Roche*, paras 29-31

⁴⁷ *Roche*, paras 34-35.

⁴⁸ C-98/06 *Freeport*, para 38.

competition in another country would not make a difference.⁴⁹ The rigid ‘same law’ factor becomes flexible in *Freeport*.

***Painer*: two softened requirements**

In *Painer*, the publishers in Australia and Germany acted independently without the authorization of the copyright owner. The importance of ‘same law’ is reduced because the harmonization of national laws increases.⁵⁰ Moreover, the difference in legal basis does not preclude the application of Article 8(1).

For the act, the close relationship between claims shall be proved by ‘same fact’, thus ensuring the predictability for the defendant.⁵¹ However, the strict *Roche* ‘same fact’ test was not passed in *Painer* because defendants acted independently. *Freeport* and *Painer* made the two strict requirements of *Roche* softened.⁵² The harmonization of EU copyright law opens up perspectives for the application of Article 8(1) under Internet copyright cases involving several defendants.⁵³

2.5.1.3 CLIP approach: ‘essentially same fact and essentially same law’

The strict *Roche* approach causes troublesome for plaintiffs. The flexible approach after *Painer* may lead to the loss of legal certainty and predictability for the defendant. CLIP proposes a balanced approach which may reduce those problems, by insisting ‘a risk of incompatible judgments’ rather than ‘a risk of divergence’.⁵⁴ CLIP suggests a spider of web doctrine⁵⁵ and sets the limits of consolidation that the court where the anchor defendant domiciled shall have jurisdiction.⁵⁶

The adapted ‘same law and same fact’ requirements are proposed as the guidance for the court to evaluate: [1] the essentially same fact: [a] defendants act in an identical or similar manner, which refers to the same use of an IPR; [b] defendants act in line with a common policy. The presumption of a common policy might be sufficient, such as all defendants belong to a corporate group, or conduct joint infringement, or act in a chain of infringing acts.⁵⁷ For example, a consensus agreed by all is sufficient. [2] the essentially same law: the EU harmonized copyright law meets this requirement. In addition, primary and secondary liability also fulfil the same legal bases for the actions.⁵⁸

⁴⁹ Torremans 2014:1. Tang 2009.

⁵⁰ Torremans 2014:1. *Painer*, para 82. ‘substantially identical’.

⁵¹ Opinion of A.G. Trstenjak in *Painer*, para 92.

⁵² Torremans 2014:1, 9.

⁵³ Torremans 2017, 573.

⁵⁴ CLIP 2013, 104-105. Article 2:206 changed the Brussels Regulation terminology ‘irreconcilable judgment’ to ‘incompatible judgment’, the risk of which refers the divergence in the outcome.

⁵⁵ Developed by Dutch court, *Expandable Grafts Partnership and Others v Boston Scientific BV* [1999] FSR 352, 360.

⁵⁶ CLIP 2013, 114-115.

⁵⁷ *Ibid* 106-110.

⁵⁸ *Ibid* 110-113.

Summing up, the yardstick of CLIP is foreseeability. The rationale is that the defendant shall reasonably foresee the jurisdiction if his/her right of being sued in his/her home state is taken away. Moreover, CLIP criterion is flexible, by providing a non-exhaustive list of considerations for the court to evaluate case by case. Although a completely same law and fact is not required, a minimum alignment between claims shall exist to ensure foreseeability and legal certainty.

2.5.2 China: the overly flexible approach

There is no specialised international jurisdiction rule concerning multiple defendants in China. In most of the foreign-related copyright cases that have been adjudicated in Chinese courts, the occasion of foreign defendants is rarely seen.⁵⁹ As multinational companies, especially ISPs, develop and tend to substantially locate its branches or subsidiaries in many states, relevant cases have occurred in China recently. The typical example is the series of cases against Apple.

Apple. Inc is a US company. It establishes Apple China Co., Apple Beijing Co., Apple Trading (Shanghai) Co., Apple Computer Trading (Shanghai) Co. and many branches in China.⁶⁰ In *COL v Apple (US) & Apple (Beijing)*⁶¹, both defendants rejected the jurisdiction of the Chinese court. Apple US held the opinion that the operator of the App Store containing the alleged infringing content was iTunes S.à.r.l. (Luxembourg), and Apple US only dealt with the sale of iPhone. Apple Beijing argued that no evidence had been provided that Apple Beijing had been involved in the alleged infringing act, neither joint infringement nor alignment existed.

Beijing IP Court stated that procedural examination was sufficient in determining jurisdiction. It was a substantive issue of whether Apple (US) and Apple (Beijing) had conducted infringement. According to the evidence⁶² provided by COL, it could be *prima facie* proved that there was a connection between both defendants and the infringement. Therefore, the objection of jurisdiction was dismissed.

There is a common characteristic in the recent cases against foreign defendants, that its Chinese branch is involved in the suit. Since there is no special international jurisdictional rule concerning multiple defendants in China, the court have to adopt the ‘domestic rule’⁶³ to ascertain the competence. According to the ‘domestic’ rule

⁵⁹ Chap.1 Sec.2.4.2.

⁶⁰ According to this author by searching ‘Tianyancha.com’, the open access database of company information in China.

⁶¹ *COL v Apple (US) & Apple (Beijing)* [2016] No.149. See also Chap.4 Sec.4.3.4 and Chap.2 Sec.3.2.2.

⁶² The evidence in this case included: [1] people could purchase and download the App containing disputed copyright work through website ‘www.apple.com.cn’ [2] Apple Beijing is the operator of this website after checking in the ‘ICP/IP address/domain name system’ [3] the bottom of the alleged App purchasing invoice: ‘Copyright @2011 Apple Inc.’ (Apple US)

⁶³ CPL, Article 21: if the multiple defendants locate differently, all those courts are competent to hear the case.

concerning multiple defendants, as long as one of the defendants domiciled in the place X (China), that X court (Chinese) court has the competence to hear the case.

The Chinese approach seems more flexible than CLIP. Chinese legislation does not require the court to consider whether an irreconcilable judgment might occur in the jurisdictional stage. The current international harmonised copyright situation is sufficient as the ‘same law’, and the proof that multiple defendants belong to one parent company is sufficient as the ‘same fact’. Even more flexible, as long as one branch locates in China, it is sufficient for the plaintiff to sue against the foreign parent company and other foreign branches in China. Furthermore, Chinese court does not conduct a substantive examination of whether these defendants have done infringing acts in the jurisdictional stage.

This overly flexible approach without limitation may result in exorbitant jurisdiction. Since many multinational companies have branches in China, the plaintiff can sue a foreign branch or the foreign parent company in the Chinese court, as long as listing its Chinese branch as a co-defendant. It enables the plaintiff to obtain procedural advantage to sue in the home country. Even worse, it can be used by ‘big’ plaintiff with bad faith to harass foreign companies in China. Since the Chinese court does not require substantial proof in the jurisdictional stage, the situation of being sued cannot be avoided even though the defendant might be found not liable for infringement in the end.

This flexible approach is understandable because it originates from the domestic rule. It is natural and reasonable that the legislator does not need to consider whether an irreconcilable judgment might occur within China.⁶⁴ The problem of adopting this domestic approach in the cross-border case to ascertain the Chinese court’s competence reveals the necessity and importance of establishing international jurisdictional rule again.

Factors related to the dispute

In order to provide alternative options for the plaintiff to seek protection, the exception of the general rule is established, that is special jurisdiction. The difference between special and general jurisdiction shall be noted first. Special jurisdiction grants the adjudicatory authority to another court other than that place where the defendant domiciled. Compared with the general jurisdiction, this special rule concerns the connection between the dispute and the court, whereas the general rule focuses on the relationship between the defendant and the court.

Special jurisdiction provides an alternative ground for the court to hear the case in some situations. In copyright infringement, it is helpful under some circumstances, for example, when the defendant is not identifiable or hidden in the dark. It is particularly

⁶⁴ Actually, irreconcilable judgments have occurred among different national courts in respect of domestic copyright cases in China. As Chinese courts are given more discretion under new Copyright Law 2020, this author concerns it might be worsened without a nationwide unified guidance. see Chap.1 Sec.3.2.3 the traditional open list, Chap.1 Sec.4.1.4 (for example n 274) and Chap.2 Sec.5.1.

useful for granting another court, other than the court where the defendant domiciled, to adjudicate the copyright infringement case. However, it is arguable whether the traditional jurisdictional rule works well, especially in relation to online copyright infringement.

The objective of the following Section 3 (the UK) and Section 4 (China) is twofold: firstly, introducing and comparing the special jurisdictional rules of both countries. There is no consensus regarding the special jurisdictional rule across the world. Different jurisdictional rules will lead to different results. Secondly, it will analyse respectively how cross-border copyright cases challenge and affect the conventional special jurisdictional rules, and whether the current rules may provide an appropriate solution in the practice when dealing with copyright infringement.

3. Factors related to the dispute: UK

3.1 EU rule: the mere accessibility approach

The EU special jurisdictional rule is provided in BRR. The rationale of establishing special jurisdiction is that the close connection between the dispute and the court shall be guaranteed, in order to ensure legal certainty and reasonable foreseeability for defendants.⁶⁵ Accordingly, this section will first examine the rule and the CJEU's interpretation. Moreover, the purpose of establishing special jurisdiction will serve as the criterion to determine whether the current rule is appropriately applied in copyright infringement. Subsequently, this section will explore the problems and finally propose an alternative approach.

3.1.1 Special jurisdictional grounds in BRR

The special jurisdiction is established in Article 7(2) (old Article 5(3)): 'A person domiciled in a Member State may be sued in another Member State: ... (2) in matters relating to tort, delict, or quasi-delict, in the courts for the place where the harmful event occurred or may occur.'⁶⁶

The rationale of establishing special jurisdiction is for the purpose of facilitating 'the sound administration of justice', ensuring 'legal certainty' and avoiding 'the possibility of a defendant being sued in a court of a MS which he could not reasonably have foreseen'.⁶⁷ This rationale will be mentioned occasionally throughout this section to analyse whether the current EU rules and CJEU interpretations in copyright cases satisfy it.

Before analysing how this rule applies in copyright case, several fundamental questions shall be answered in advance. The first question is whether this rule is applied

⁶⁵ BRR, Recital 16.

⁶⁶ Fawcett & Torremans 2011, 153. This article is applicable to the harmful event 'may occur', which provides the jurisdictional basis for preventative measures to prevent a 'threatened wrong'.

⁶⁷ BRR, Recital 16.

in the transnational copyright infringement case. The text of this article concerns matters relating to ‘tort, delict or quasi-delict’, without mentioning whether copyright infringement is included in such matters. In accordance with the court’s decision, by examining the scheme and objectives of the Convention, tort encompasses ‘all actions which seeks to establish the liability of a defendant and which are not related to a contract’.⁶⁸ Therefore, there is no doubt that this rule shall be applied in the copyright infringement.

Secondly, there is a premise of applying this EU rule that the defendant shall domicile in a MS. If the defendant domiciled in a non-EU state, the national jurisdictional rule shall be applied according to BRR Article 6. For example, if a UK plaintiff sues for a Chinese domiciliary national for copyright infringement, the EU article 7(2) shall not be applied.

Thirdly, special jurisdiction is adopted for the purpose of providing alternative options for the plaintiff to seek protection. It does not mean that the claimant shall not bring the action in the place of the defendant’s domicile. One point shall be clarified again that the general basis of jurisdiction is mandatory and shall not be undermined.⁶⁹

3.1.2 The two limbs of ‘the place where the harmful event occurred’

According to Article 7(2), the place ‘where the harmful event occurred or may occur’ serves as the alternative place for the plaintiff to claim. As stated in the landmark *Bier* case, it is widely accepted that it shall include two components: [1] the place where the damage occurred (hereinafter ‘the damage limb’) and [2] the place of the event giving rise to the damage (hereinafter ‘the casual event limb’).⁷⁰ In other words, the plaintiff may choose either of these two places as the forum to hear the case, and jurisdiction arises at both places.

The justification of granting authority to these two places is that both places can constitute a significant connection between the dispute and the court, which is helpful in collecting the evidence and the conduct of proceedings.⁷¹ It will be beneficial for defendants to foresee the jurisdiction, thus ensuring the sound administration of justice and the efficacious conduct of proceedings, in line with Recital 16.⁷²

On the other hand, it is efficient and low-cost to allow the plaintiff to sue in the place of damage, because it is easy to acquire the evidence of his/her loss, prove and calculate his/her damage, and the plaintiff can claim in the home country without the need of hiring an interpreter. In addition, the purpose of special jurisdiction is to provide another option for the plaintiff to sue other than the mere choice of suing in place of the defendant’s domicile. In practice, the place of the harmful act is usually the same as

⁶⁸ C-189/87 *Kalfelis*, paras 15-17. The UK case has confirmed that copyright infringement falls within this scope. *Pearce v Ove Arup Partnership Ltd and Others* [1997] 3 All ER 31, 37.

⁶⁹ C-281/02 *Owusu*, para 37.

⁷⁰ C-21/76 *Bier*, para 25.

⁷¹ C-509/09 and C-161/10 *eDate*, para 41. C-68/93 *Shevill*, paras 20-21.

⁷² BRR, Recital 16. C-21/76 *Bier*, para 11. C-523/10 *Wintersteiger*, para 31.

that of the defendant's domicile, so the place of damage ensures the claimant another choice.⁷³

For non-material or non-pecuniary damage, *Shevill*⁷⁴ defamation case held that *Bier* (physical damage) distinction should also be applied. The court concluded that the distinction made in relation to physical or pecuniary loss or damage, must equally apply in the case of non-material or non-pecuniary damage for the same reasons. So, the plaintiff shall have the options to choose: [1] the place where 'the publication is distributed, when the victim is known in these places'⁷⁵ (the damage limb); or [2] the place 'where the publisher of the newspaper in question is established'⁷⁶, the place where defamation happens (the casual event limb).

However, the Court found it not justifiable to grant the authority to an English court to deal with the whole case, merely based on the fact that only 230 copies of the disputed French newspaper were sold in England, while 237,000 copies were sold in France. It must stay fair between the two parties. Therefore, the Court further made a decision that there should be a difference on the extent of juridical competence vested in the two places of act and damage. For the court based on the casual event limb, such a court has jurisdiction over the whole dispute and all damage caused by this event, whereas the court based on the damage limb only has jurisdiction over the local damage arising in that state.⁷⁷ Such an approach is labelled as 'mosaic principle'.⁷⁸

These two cases, which do not involve copyright, are presented here because they are the prototypes of the dichotomy from which subsequent interpretations of copyright have been derived. An overwhelming authority in favour of two-limbs interpretation was established after *Bier* and the mosaic approach was adopted after *Shevill*.⁷⁹

3.1.3 The interpretation of the two limbs in relevant cases

There is a difference between 'the damage' (the damage limb) and 'the event which is the cause of that damage' (the causal event limb), that liability in tort, delict or quasi-delict can arise only on the condition that a causal connection can be

⁷³ C-21/76 *Bier*, paras 20-24. Fawcett & Torremans 2011, 154-155.

⁷⁴ C-68/93 *Shevill*, paras 17-32. The plaintiff Shevill is an English national domiciled in England. The defendant, a press company registered in France, published an article saying the plaintiff was involved in a drug smuggling case, which was alleged to damage the reputation of Shevill. The plaintiff sued in England claiming damages for libel from the defendant's publication of newspaper in France.

⁷⁵ *Ibid*, para 29.

⁷⁶ *Ibid*, para 24.

⁷⁷ *Ibid*, para 33.

⁷⁸ Dickinson & Lein 2015, 169-170.

⁷⁹ Fawcett & Torremans 2011, 156-158. Before *Shevill* case, there are English cases which refuse to adopt *Bier* definition but define 'the place of the harmful event' merely as 'the place where the act of infringement occurred' and suggest that the court of the place of damage shall not have the jurisdiction, for example in *Mölnlycke AB and Another v Procter & Gamble Ltd and Others* [1992]1WLR1112. After *Shevill*, it is no doubt that the *Bier* definition is applied in the special tort case – IPR infringement cases.

established between those two elements.⁸⁰ The latter refers to the place ‘where the event which may give rise to liability in tort, delict or quasi-delict resulted in damage’.⁸¹

In respect of **the causal event limb**, CJEU adopts a factual analysis, granting jurisdiction to **the place where the defendant was established**. *Shevill* case suggests that when determining the place of harmful act, the court of ‘the place of establishment of the defendant’ may have jurisdiction over the dispute for all the harm caused by the unlawful act, since that is the place where ‘the harmful event originated and from which the libel was issued and put into circulation’.⁸² The approach in *eDate* largely follows the traditional approach in *Bier* and *Shevill*, that is, the plaintiff might sue in the place where the publisher is established.⁸³

In a trademark-related case *Wintersteiger*⁸⁴, the *Bier* and *Shevill* causal event limb was applied as well. CJEU held that the harmful act for jurisdiction purpose was the physical activation of the technical process, not the display of the advertisement (the allegedly infringing act under substantive trademark law).⁸⁵ Therefore, the jurisdiction shall be established in the place where the defendant was established, neither the place where the advertisement was displayed or nor the place of server.⁸⁶

Concerning **the damage limb**, CJEU applies various interpretation approaches **based on the nature of the alleged infringed right**. The localization of the place where the alleged damage occurred may vary in accordance with the nature of the right allegedly infringed.⁸⁷

For the infringement of **personality rights** online, ‘the centre of interests’ approach is established in *eDate*⁸⁸. The Court distinguished the infringing content distributed universally (Internet) and regionally (such as printed media: newspaper). The traditional *Shevill* ‘distribution’ approach is not helpful in deciding jurisdiction under Internet context, because the scope of distribution is ubiquitous, and the content can be read instantly by an unlimited number of people. In addition, it is not technically possible to quantify such a distribution with certainty and accuracy in relation to a particular MS, thus the local damage could not be assessed.⁸⁹

⁸⁰ C-21/76 *Bier*, para 16.

⁸¹ C-189/08 *Zuid-Chemie*, paras 26-27.

⁸² C-68/93 *Shevill*, para 24.

⁸³ C-509/09 and C-161/10 *eDate*. The German plaintiff sued against an Austria established website for personality rights violation (the content placed on that website).

⁸⁴ C-523/10 *Wintersteiger*. A German company reserved the keyword ‘Wintersteiger’ in the advertising system developed by Google, which is identical with the Austrian trademark owned by the Austrian company Wintersteiger. When the user typed the keyword ‘Wintersteiger’ in the Google search engine, the link to the German company was appeared. The plaintiff therefore brought the lawsuit in Austrian court.

⁸⁵ *Ibid*, para 34.

⁸⁶ *Ibid*, para 36

⁸⁷ C-170/12 *Pinckney*, paras 31-32. C-618/15 *Concurrence*, para 30. C-441/13 *Hejduk*, para 29.

⁸⁸ C-509/09 and C-161/10 *eDate*.

⁸⁹ *Ibid*, para 46.

Therefore, CJEU adapted *Shevill* ‘distribution approach’ and proposed ‘the centre of interests’ approach. The court believes this place generally corresponds to the habitual residence of the victim. If not, the place, for example, the pursuit of a professional activity, which the victim has a particularly close link with shall be interpreted as the centre of interests.⁹⁰

The reason for adopting ‘the centre of interests’ approach is that it is the best place to access the impact and harm brought by the online material for the purpose of the sound administration of justice.⁹¹ Moreover, this criterion enables both parties to foresee in which court the plaintiff may sue and the defendant may be sued, because when placing the harmful content online, the defendant shall know the place of the plaintiff’s centre of interests.⁹²

Therefore, the plaintiff has two options: [1] based on *Shevill* mosaic approach, the court of the place where the infringing content placed online is or has been accessible, has jurisdiction over local damage.⁹³ [2] to claim for all damage, the litigation shall be brought in the court of the centre of interests (the damage limb) or the place of publisher’s establishment (the casual event limb).

In the recent *Bolagsupplysningen* case, CJEU extends ‘the centre of interests’ basis of jurisdiction to legal persons under Article 7(2) concerning personality rights infringement online.⁹⁴

However, in *Wintersteiger* (online **trademark**), the court rejected ‘the centre of interests’ approach applied in IPR infringement and held it could only be applied concerning personality rights.⁹⁵ The damage limb in this case was interpreted as the place where the trademark was registered, according to the principle of territoriality. The justification is that such a place is definite and identifiable, which will be easily known to the right holder and the alleged infringer, thus fulfilling the requirement of foreseeability. In addition, the place of registration is also the place where this right is protected. It is the best forum to assess whether the right has been infringed or not, for the purpose of the sound administration of justice. The scope of the jurisdiction, based on the place of registration, covers all (i.e., territorial) damage allegedly caused to the proprietor of the protected right.

Another decision that might be relevant in the following discussion on copyright cases shall be examined here. In *Football Dataco*⁹⁶ (**online database**), the question referred to CJEU was where the act of re-utilisation occurred.⁹⁷ The court adopted the

⁹⁰ Ibid, para 49.

⁹¹ Ibid, paras 40, 48.

⁹² Ibid, para 50.

⁹³ Ibid, para 51.

⁹⁴ C-194/16 *Bolagsupplysningen*.

⁹⁵ C-523/10 *Wintersteiger*, para 50.

⁹⁶ C-173/11 *Football Dataco*, the transfer of the database contents from German based server to the UK users.

⁹⁷ The first question is whether the sending of the data is an act of extraction or re-utilisation of the database contents and the court concludes it is an act of re-utilisation.

opinion of AG Cruz-Villalón,⁹⁸ as a result of a series of acts in several MSs, the localization of re-utilisation act shall base on the evidence of targeting intention.⁹⁹ In other words, the mere fact that the server is accessible from that state is not enough. Although this case did not deal with the jurisdictional rule in Article 7(2), it proposes an indication that the mere accessibility of data is not sufficient to find infringement.¹⁰⁰ This analysis provides a possible method for the following discussion concerning copyright infringement.

3.1.4 The interpretation of the two limbs in copyright infringement

In the copyright case *Pinckney*¹⁰¹, a French resident and musician, Peter Pinckney, is the author, composer and performer of a number of songs. The Austrian company Mediatech reproduced those songs on CDs without authorization from Pinckney. Subsequently, two UK companies marketed the CDs online, the hard copies of which could be delivered to France. Pinckney brought a lawsuit in France against the Austrian company, for the place of damage locates in France where he should have been paid for the copies sold in France. The Austrian company raised an objection to French jurisdiction.

The French court asked: [1] which connecting factor, or some other factors are needed for establishing jurisdiction: [a] the online content is or has been accessible in that state or [b] needs to be directed to the public of that state; [2] whether would the answer to question '[1]' differs, if the disputed infringement arise from the online sale of a material copy (CD) and not from the placing digital content online. Austria submitted that questions were hypothetical, for the reason that the question related to the act by UK companies (distribution), rather than the act by the defendant (reproduction).¹⁰²

The essence of question in this case is whether Article 7(2) shall be interpreted that the court seized (place X) has the competence to adjudicate a copyright infringement case where a company established in another state (place Y) reproduced illegal copies which were sold online by a third-country company (place Z) if the website is accessible in the place of the seized court (X).

By citing *Wintersteiger* and *eDate*, the court summarized three considerations concerning the damage limb: [1] the place of damage might vary according to the nature of the disputed right;¹⁰³ [2] the damage may occur in the place where the disputed right is protected;¹⁰⁴ [3] the determination of the place of damage shall be in line with the

⁹⁸ Opinion of AG Cruz Villalón in *Football Dataco*, paras 49-60.

⁹⁹ C-173/11 *Football Dataco*, para 39.

¹⁰⁰ *Ibid*, para 37.

¹⁰¹ C-170/12 *Pinckney*.

¹⁰² *Ibid*, para 16.

¹⁰³ *Pinckney*, para 32. *Wintersteiger*, paras 21-24.

¹⁰⁴ *Pinckney*, para 33. *Wintersteiger*, para 25.

purpose of establishing jurisdiction: the court shall be the best place to determine the disputed infringement.¹⁰⁵

CJEU clearly stated that copyright was territorial and protected automatically, thus the approach applied in the personality right (not territorial) and the trademark (registered protection) should not apply in a copyright case.¹⁰⁶ Moreover, CJEU rejected the directing approach.¹⁰⁷ By comparing with consumer-related provisions,¹⁰⁸ the court was not willing to substitute the legislator to make laws of ‘targeting’ requirement.¹⁰⁹

Furthermore, the court insisted that the scope of such jurisdiction was territorial, because the copyright protection was limited within each state. If the court of country X adjudicates the damage occurred in Y, Z and so forth, it would substitute itself for other courts. Courts Y and Z should have the jurisdiction to determine the damage caused in the respective territories, because they are the best places to determine, firstly, whether the copyright is protected and infringed within their states; secondly, the nature of the harm caused. In other words, a court, based on the damage limb, could not have jurisdiction over all damage arising from infringement.¹¹⁰

Finally, the question was answered affirmatively that the French court might establish jurisdiction over the defendant who reproduced tangible copies, even those copies were sold by a third-state party online which was then accessible within the territory of the court seized. In other words, an EU defendant might be sued in the place of damage, even though it did not conduct any activities within that place.

In a similar case *Hi Hotel*¹¹¹ concerning several perpetrators, the question was whether the jurisdiction might be established in the place where the act of making disputed work available online and reproduction (France) or the place of the subsequent infringing act (Germany). In short, the question is whether the court of the place where the defendant did not act shall hear the case.

The court held that Article 7(2) did not allow jurisdiction to be established, based on the casual event limb, in the place where the alleged perpetrator did not act, in the case involving multiple perpetrators. However, it did allow the jurisdiction of that court to be established on the basis of the damage limb, but only limited to the territory of that state. In other words, it allows the court of the place of damage to adjudicate the

¹⁰⁵ *Pinckney*, para 34. *eDate*, para 48. *Wintersteiger*, para 27.

¹⁰⁶ *Pinckney*, paras 36-37, 39. IPR is different from personality right. Registered IPR is different from unregistered copyright which is protected automatically.

¹⁰⁷ Opinion of AG Jääskinen in *Pinckney*, paras 61-68.

¹⁰⁸ BRR, Article 17(1)(c), old Article 15(1)(c).

¹⁰⁹ *Pinckney*, para 42.

¹¹⁰ *Pinckney*, paras 41-47.

¹¹¹ Same decision is made in C-387/12 *Hi Hotel*, para 40. A German photographer Spoering who was commissioned by Hi Hotel to take photographs of rooms located in France. Those photos were authorized for use in brochures and Hi Hotel’s website. Spoering found those photos were published in a book by a German publisher and sued copyright infringement against Hi Hotel.

case, even though several perpetrators have acted in other different states and may conduct no activity in the place of the court seized.

In the real cyber-related *Hejduk* case, the ubiquitous copyright infringement dispute, the court cited *Pinckney* and reconfirmed the ‘accessibility’ approach was sufficient to confer jurisdiction. The photos of the plaintiff, an Austrian photographer, were authorized for use by the German defendant in a conference. Then the defendant made disputed photos available on its website without providing an authorship statement. These pictures could be viewed online by users everywhere including Austria.¹¹² Hejduk sued against the German defendant for copyright infringement in Austria. The defendant objected to the jurisdiction of the Austrian court that the website (.de) did not target Austria and the ‘mere accessibility’ was not sufficient to grant jurisdiction.¹¹³

The question is whether jurisdiction concerning online copyright infringement might be exercised in the place of establishment of the alleged infringer and the place where the website is directed. In relation to the causal event limb, CJEU found it as the place where the site owner had its seat, because it was the place where the activation of the process for the technical display of disputed photos online was located.¹¹⁴ In relation to the damage limb, the Court asserted that the mere accessibility was sufficient, without requiring the acts directed to the place of the court seized. Still, such a jurisdiction was territorial in scope.

3.1.5 The problems of applying the traditional test in ubiquitous copyright infringement

After examining the cases above, the basic and long-standing interpretation of special jurisdictional rule is adopted by CJEU that ‘the place where the harmful event occurred’ shall be interpreted in two limbs. In respect of the causal event limb, the factual analysis is adopted which points to the place of the defendant’s establishment. For the damage limb, the interpretation approaches vary according to the different nature of rights, thus creating a series of complex rules. In the online copyright case, the causal event limb continues to be interpreted as the place of establishment of the defendant; the damage limb is interpreted as ‘mere accessibility’ with a territorial scope of jurisdiction. Problems thus arise.¹¹⁵

3.1.5.1 The causal event limb

‘The place of the event giving rise to the damage’ implies the active conduct in the forum state which amounts to infringement.¹¹⁶ In most infringement cases, for

¹¹² C-441/13 *Hejduk*, paras 10-11.

¹¹³ *Ibid*, para 13.

¹¹⁴ *Ibid*, para 24.

¹¹⁵ Torremans 2017, 556-573.

¹¹⁶ C-360/12 *Coty Germany*. For the list of cases, see Fawcett & Torremans 2011, 158.

jurisdictional determination, the place of causal event may coincide with ‘the place where the act of infringement occurred’ defined under the substantive copyright law.¹¹⁷ However, it does not necessarily mean that the harmful act for determining jurisdiction shall be identical with the substantive infringing act, as indicated by EU case law. For example, in *Wintersteiger*, the place of the defendant’s establishment (the casual event limb) may be granted jurisdiction, rather than the place of the infringing act (the substantive perspective). Even though the trademark is territorial in nature, it does not exclude the international jurisdiction of courts limited within the place of registration (the damage limb).¹¹⁸

This interpretation also reveals that the territorial principle does not limit the jurisdiction only to one state where the right is protected, if based on ‘the casual event limb’. By attributing jurisdiction to ‘the casual event limb’, the evidence gained in this place is also helpful in proving an infringement in another place. Therefore, even though copyright is substantively territorial protected, from the jurisdictional perspective, it does not prohibit the possibility of a casual event occurred outside the place where this right is protected.

However, it is not advisable of applying ‘the place of establishment’ in IPR cases. The place of establishment approach originates from personality rights case. In essence, defamation is different from IPR infringement. This approach is useful in the defamation case because the defamatory comment was normally made by the defamer in the place of his/her establishment. In contrast, infringement originates from the illegal act, not necessarily generated from the place of establishment.¹¹⁹

The factual analysis of ‘the casual event limb’ is proposed, because it provides an easy solution in the context of territorial protected copyright. It is useful when the defendant’s domicile cannot be identified. If the plaintiff would claim for overall damage, the casual event is his/her only choice. The factual analysis enables the court of the place of the event giving rise to the damage has the authority to adjudicate the whole case, as long as the casual event occurred within its territory.

Another point shall be noted that the place based on the causal event limb shall not be equally interpreted as the place of the defendant’s domicile. The previous cases have shown that the causal event limb might point to the place of the defendant’s establishment or the place where the site owner has its seat. Under the fact of those cases, the places are identical to the places of the domicile of the defendant. Nevertheless, the causal event limb will have a different meaning in the negative declaration. It allows the alleged infringer to claim for non-infringement at its place.¹²⁰

¹¹⁷ Fawcett & Torremans 2011, 158, 168-169, 173.

¹¹⁸ *Wintersteiger*, para 30.

¹¹⁹ Fawcett & Torremans 2011, 167-168.

¹²⁰ C-133/11 *Folien Fischer*, para 54. The action of negative declaration shall not be excluded from the scope of (old) Article 5(3).

3.1.5.2 The damage limb

Compared with the casual event limb, the problems of interpreting the damage limb are numerous, both theoretically and practically.

The **fundamental or theoretical question** of the current interpretation concerning the damage limb is: **what is the connection** between the dispute and the court? After examining the above IPR cases, the rationale seems consistent in the CJEU: the best court to adjudicate IPR cases is the court that recognises the disputed right and can offer protection against the alleged infringing act due to the territoriality principle.¹²¹

Compared with a registered trademark – ‘the place of registration’,¹²² CJEU grants jurisdiction to the place where the copyright is protected – ‘the place of protection’ in copyright cases.¹²³ Due to the automatic protection, copyright in essence lacks a ‘connection’ with equal function as ‘registration’. If ‘protection’ is regarded as the ‘connection’ between the dispute and the court, it is apparent that the scope of ‘protection’ in copyright is worldwide, much broader than the single state of ‘registration’ in trademark case.

Moreover, in the ubiquitous infringement, CJEU adopts the ‘mere accessibility’ approach to determine jurisdiction. This author would like to ask which one is the connecting factor exactly, ‘protection’ or ‘accessibility’? It is apparent that the scope of those two factors is different. The digital content can be accessed worldwide but may not be protected worldwide. Such an excessive interpretation of the place of protection as ‘mere accessibility’ under the Internet context will lead to a conflicting situation that every state has jurisdiction. In addition, due to the lack of the close link (like ‘registration’ in trademark), it may amount to the forum shopping by the plaintiff and also unforeseeable results for the defendant. Therefore, legal certainty is not ensured.

The **second problem** concerning the damage limb is the current EU approach might amount to **attribution of effects**, due to the lack in taking the substantive characteristics of copyright infringement into consideration. In other words, the current approach might create a situation that defendants might be sued in the place where they did not domicile nor did act, as *Pinckney* and *Hi Hotel* have shown. The ‘damage’ here is the damage arising from a third-party’s subsequent act, rather than the defendant’s direct activities.

AG Jääskinen in *Pinkney* suggests that the distinction shall be made between the defendant’s act of reproduction and subsequent acts (distribution and communication to the public) by the third party.¹²⁴ The questions referred to the Court concerns the act of distributing CDs online, which the defendant has not involved in.¹²⁵ In lack of links

¹²¹ *Wintersteiger*, para 28. *Pinckney*, para 46. *Zuid-Chemie*, para 26.

¹²² *Wintersteiger*, para 29.

¹²³ *Pinckney*, para 39: it states that copyright is subject to the principle of territoriality, same as the trademark. *Hejduk*, para 29: ‘the likelihood of damage occurring in a particular MS is subject to the condition that the right whose infringement is alleged is protected in that MS.’

¹²⁴ Opinion of AG Jääskinen in *Pinckney*, para 25.

¹²⁵ *Ibid*, paras 36-38.

between the defendant and the third party, these questions referred are hypothetical and irrelevant to the result of the proceedings, thus the case shall be held inadmissible.¹²⁶

As agreed by scholars and labelled as ‘attribution of effects’, *Pinckney* extends the scope of special jurisdiction by attributing effects, which were caused by others, to the defendants.¹²⁷ It results in a confusing situation that the act of the third party cannot be attributed to the defendant, but the effect of the third party’s act can.¹²⁸ Although it might be justified by the joint tort, the lack of explanation by CJEU is problematic.¹²⁹

AG Jääskinen has pointed out before CJEU’s affirmative position over ‘attribution of effects’ that it might result in a question which approach is appropriate: quantitatively or qualitatively?¹³⁰ The UK suggested that the link, between the defendant’s act and the third party’s act, should be sufficiently clear and direct.¹³¹ AG held the opinion that it might require a substantive determination over the facts and merits of the case, which was not appropriate to be assessed in the jurisdictional stage.

This author agrees that no substantial substantive issues shall be considered in the jurisdictional step. The same opinion was proposed in *Melzer* that the determination of jurisdiction shall be in accordance with facts.¹³² Only if the court’s competence is determined, shall this court adjudicate the substantive issues subsequently.¹³³ Otherwise, it will lead to an unpredictable and uncertain situation by combining the EU jurisdictional rule and the national substantive law into one stage.

However, one question shall not be ignored initially in the stage of determining jurisdiction, that is, whether the plaintiff has ‘a reasonable chance of winning the case on substance’, or otherwise it makes no sense of attributing jurisdiction to the place where no legal consequences may arise.¹³⁴ If the link is not required at all, it may provide unfair opportunities for the plaintiff in a practical scenario. For example, the giant transnational company rightsholder, with great power and knowledge that the alleged defendant’s act in a foreign state is not substantively liable for the infringement in the place of the court seized. The attribution of effects may be used to harass a weak party by bringing the lawsuit in a foreign country.¹³⁵ In this author’s opinion, the assessment to a minimal extent shall be conducted. A defendant shall not be sued in a court which he could not reasonably foreseeable, or otherwise, it will amount to legal

¹²⁶ Ibid, paras 39-40.

¹²⁷ Husovec 2014, 371.

¹²⁸ Šrámek 2015, 170.

¹²⁹ Husovec 2014, 371.

¹³⁰ Opinion of AG Jääskinen in C-360/12 *Coty Germany*, para 59.

¹³¹ Ibid, para 60.

¹³² C-228/11 *Melzer*. German civil law concept is not applied in the jurisdictional stage. The court, by adopting the simple and direct factual analysis approach, finds the place of harmful act locates in the place where the money disappeared.

¹³³ Torremans 2016:1, 1633.

¹³⁴ Kur 2015, 472-473.

¹³⁵ Torremans 2016:1, 1634.

uncertainty. Furthermore, the assessment shall not be overly substantive. A preliminary and quick look into the fact is sufficient.

Finally, practical problems might arise if the **mere accessibility** approach is insisted on determining jurisdiction of a copyright infringement case, in particular under the ubiquitous context.

AG has suggested that (old) Article 5(3) shall exclude ‘the damage limb’ in the ubiquitous copyright infringement disputes. Because it is impossible to localize and quantify the damage, thus inconsistent with the sound administration of justice.¹³⁶ CJEU rejected this opinion and reaffirmed the *Pinckney* approach. The court found it irrelevant whether the website in *Hejduk* targeted the place of seized court.¹³⁷ CJEU insisted that the place where the right was protected and alleged infringed was the best place to determine whether the right at issue was infringed.¹³⁸

The court further analysed that ‘the occurrence of damage and/or the likelihood of its occurrence’ might arise from the accessibility of the works on the Austrian website. It is not relevant in the jurisdictional step to answer the question of the extent of damage (substantial or potential damage), which shall be considered in the substantial examination. Therefore, CJEU held that ‘the occurrence and/or the likelihood of occurrence of damage’ linked the dispute to the forum state, and ‘accessibility’ of a protected copyright work was a sufficient basis to establish jurisdiction.¹³⁹ For the scope of jurisdiction, CJEU followed *Shevill* approach of limiting jurisdiction to the local damage within its territory.

Both *Pinckney* and *Hejduk* explicitly stated that there must be an occurrence of damage and/or the likelihood of its occurrence in the forum state.¹⁴⁰ The reason for proposing it is that compared with trademark, copyright is protected automatically, thus a connection, which serves the same function as that the place of registration, is needed.¹⁴¹ However, the definition of ‘occurrence of damage and/or the likelihood of its occurrence’ is much broader than ‘the place of registration’ in relation to the trademark case. It means, each MS which protects copyright, may have jurisdiction.

The mere accessibility approach evolved by *Pinckney* and *Hejduk* encounters problems when the automatically protected copyright encounters the ubiquitous Internet. On the one hand, this territorial limitation may lead to an exhausting situation that the **plaintiff**, who is actually suffered from infringement, is required to bring

¹³⁶ Opinion of AG Cruz Villalón’s in *Hejduk*, paras 41-47.

¹³⁷ *Hejduk*, para 33.

¹³⁸ *Ibid*, para 37.

¹³⁹ *Ibid*, paras 33-35.

¹⁴⁰ *Pinckney*, para 43, stating that jurisdiction is already established in favour of the court seized, if the state where this court located protects the copyrights relied on by the plaintiff and the harmful event alleged may occur within the jurisdiction of this court. *Hejduk*, para 34, stating that the occurrence of damage and/or the likelihood of its occurrence arise from the accessibility in the MS of the referring court, via the website of the defendant, of the photos to which the rights relied on by the plaintiff pertain.

¹⁴¹ *Pinckney*, para 39.

numerous separate actions before each state for the purpose of claiming every local damage and the defendant thus shall defend himself in these separate proceedings.

Even problematic, it may also give rise to an unexpected situation that, plaintiffs can sue even in the places where they are unlikely to succeed. An ‘accessible’ place does not necessarily mean copyright exists or infringement occurs. At the jurisdictional stage, it is not appropriate to examine every aspect of the substantive issues. The disputed case may finally be found not violating the copyright law, or the damage in the seized country is minimal or non-existent. This approach can be used in bad faith, that a world-wide giant copyright holder, a big company, to harass and sue against a defendant of weaker position everywhere in the world with access to the Internet.¹⁴²

From the perspective of the **defendant**, the mere accessibility amounts to an unforeseeable situation. The overly broad interpretation of ‘accessible’ in the context of automatic protection and the national treatment principle of transnational copyright protection could easily result in an unforeseeable situation that all MSs having jurisdiction over the case. The defendant therefore is at risk of being sued in all EU states. It would be burdensome for the defendant. Even worse, it will damage the ‘attack and defend’ balance between the plaintiff and the defendant.

It has been argued that the rationale for ‘ubiquitous’ jurisdiction in online copyright infringement cases lies in the fact that the defendants involved are mostly ISPs or content distributors. Their principal business is to use the Internet for spreading their content to a broader group of internet users. Therefore, they should not complain about the consequences of facing multi-national jurisdiction.¹⁴³

The author of this research holds the opinion that this rationale does not justify a derogation from the required balance between the plaintiff and the defendant. As a fundamental and mandatory principle of foreign civil and commercial jurisdiction, the plaintiff already has the freedom to initiate a lawsuit or not and where to bring it. In order to balance the rights of both parties, the defendant is granted the right to defend in the home court.¹⁴⁴ Therefore, it shall be more careful about the establishment of special jurisdiction, which is regarded as derogating from the general rule. In other words, the defendant should not be deprived of the right to be heard in a reasonably foreseeable place. Even though as national copyright laws integration progresses, the stage of application of the law may offset the defendant’s passive position in the plaintiff’s court. This does not relieve the defendant of the procedural burden of defending in numerous places.

The **court** will also face tricky issues of determining civil remedies¹⁴⁵ brought by the mere accessibility approach. First, the *eDate* difficulty in quantifying the damage will arise as well in online copyright cases. Even if the plaintiff claims for monetary loss, the court still has to determine local damage caused by the delocalised Internet. It is difficult to operate ‘mere accessibility plus territorial damage’.

¹⁴² Torremans 2014.

¹⁴³ Svantesson 2014, 350.

¹⁴⁴ Chap.4 Sec.3.1.1.

¹⁴⁵ Chap.2 Sec.5.2.

Secondly, if the court can determine the local damage, the question will be whether the court can make a worldwide injunction over the disputed local damage. For example, in *Bolagsupplysningen*, the claim to remove or correct online content is a single worldwide remedy, which cannot be separated. If such a decision can be made, it means the territorial jurisdiction can result in worldwide effect. Some propose that it can be addressed by discretion through the national procedural law.¹⁴⁶ However, this author disagrees respectfully because it does not solve the conflicts of jurisdiction and creates a further issue in enforcement and recognition. For example, suppose an infringement is found in X while not in Y, if such worldwide injunction can be made by territorial jurisdiction, it means X's decision will be enforced in Y without Y's recognition.

3.1.5.3 Moral rights?

CJEU refuses to adopt 'the centre of interests' basis over the damage arising from economic rights of copyright¹⁴⁷ and trademarks¹⁴⁸. The justification in (economic) copyright case is the damage locates everywhere and it is not appropriate to grant jurisdiction to one single court to adjudicate all territorial-protected rights and all damage, inconsistency with the objective of the sound administration of justice. The court only permits the victim to sue for personality infringement at home in contrast to the general rule of suing at the defendant's home in *eDate*. It reveals the cautious attitude of the Court.

CJEU has not addressed the moral rights infringement by far.¹⁴⁹ Since there are common characteristics between personality rights and moral rights,¹⁵⁰ shall the *eDate* approach might be adopted?

Moral right is independent of economic rights of copyright, for protecting the reputation and honour of authors.¹⁵¹ The reason for attributing the jurisdiction to the victim's centre of interests concerning personality rights also support the application of this criterion in moral rights infringement. Moral rights represent the reputation and honour of the author, centre around the author, and concentrate at the home of the author. Thus, the place of the author's centre of interests is the best place to gain evidence and prove the damage of the author's reputation. There is a possibility for a natural person

¹⁴⁶ Bigos 2015, 617-618. Bogdan 2011.

¹⁴⁷ *Pinckney*, para 46.

¹⁴⁸ C-523/10 *Wintersteiger*. In this case, concerning online trademark infringement, the court localizes the place where damage occurred as 'the place where trademark is registered'. It does not follow the 'the centre of interest' criteria or 'accessibility' criteria, which shall be best applied in relation to infringement of personality rights rather than all IPRs, for the reason that firstly, personality rights are protected in all MS while the protection of trademark is territorial limited; secondly, for the purpose of foreseeability and sound administration of justice, the place of registration shall be regarded as the place of damage.

¹⁴⁹ *eDate*, para 46. In the original French version of the *Pinckney* judgment, 'droits patrimoniaux d'auteur' only refers to the economic rights of authors.

¹⁵⁰ Davies & Garnett 2016, 16-21. Elizabeth 2006, 25-29. Hansmann & Santilli 1997, 102 & 109.

¹⁵¹ Chap.1 Sec.4.4.1 and Chap.2 Sec.4. BC, Article 6bis.

to sue for moral rights infringement before the court of the place of his/her centre of interests.¹⁵²

However, the drawback of using this approach in moral rights is significant. Firstly, if moral rights and economic rights are treated differently in the jurisdictional stage, an infringement case may be litigated in different forums. Secondly, the centre of interests is a special rule to tackle the Internet context, as the relationship between online and offline activities is becoming closer and closer, it is not easy to separate those two activities and apply different approaches respectively.¹⁵³

3.2 UK: the targeting approach

The ‘targeting’ approach is considered to be a relevant factor in the English court. It adopts a ‘targeting’ approach to decide whether the unauthorized act of communication occurred within the UK. If yes, such an act performed within the UK is found infringing UK copyright. It is regarded as a jurisdictional requirement in essence.¹⁵⁴

3.2.1 The evolvement of the targeting approach

The main issue in the following cases is whether the act is targeted at the public in the UK.¹⁵⁵ *EMI v Sky*¹⁵⁶ cited the illustration of the concept ‘public’ in *SCF*¹⁵⁷, referring to ‘an indeterminate number of potential listeners’ which ‘implies a fairly large number of persons’.¹⁵⁸ As observed from the WIPO glossary, the ‘indeterminate’ nature of the public means ‘making a work ... perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group’.¹⁵⁹ In respect of ‘a fairly large number of people’, the term ‘public’ excludes

¹⁵² Lundstedt 2018, 1035-1036. De Miguel Asensio 2020, para 4.66.

¹⁵³ Svantesson 2016, 52-53.

¹⁵⁴ *Argos v Argos* [2018] EWCA Civ 2211 [48]. ‘Targeting is not an independent doctrine of trade mark law. It is, in essence, a jurisdictional requirement. Because trade marks are territorial in effect, those who are doing business exclusively outside the United Kingdom should not have their dealings subjected to the trade mark law of the United Kingdom. Failure to recognise this principle is a failure to give effect to the territoriality of the underlying rights. Moreover the fact that a website is accessible from anywhere in the world, and therefore may attract occasional interest from consumers there when this is not intended, should not give rise to any form of liability.’ Considering the similarities between the infringement of copyright and trademark, the UK court combined the principles of these two areas and concluded the trademark case might provide some guidance in Internet-related copyright cases.

¹⁵⁵ *EMI Records Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch) [48]. *Omnibill (Pty) Ltd v Egpsxxx Ltd & Anor* [2014] EWHC 3762 (IPEC) [11].

¹⁵⁶ *EMI Records Ltd. v British Sky Broadcasting Ltd.* [2013] EWHC 379 (Ch).

¹⁵⁷ C-135/10 *SCF*.

¹⁵⁸ *Ibid*, para 84.

¹⁵⁹ *Ibid*, para 85.

the small and insignificant groups of persons.¹⁶⁰ To determine that number, the court took account of the cumulative effects of potential audiences when making works available.¹⁶¹ It concluded two relevant considerations, including [1] how many persons have access to the same work at the same time and [2] how many of them have access to it in succession.¹⁶²

In *1967 Ltd v British Sky Broadcasting Ltd*¹⁶³, the court found the websites targeting the UK because [1] the websites were in English; [2] the number of UK visitors covered a large and significant proportion of the total; [3] a large number of UK Top 40 albums were available on the websites and [4] advertisements and additional features displayed on the websites were targeted at the UK.¹⁶⁴

The English court further found the determination of targeting was a multi-factorial question which should rely on all the circumstances, including [1] things that can be inferred from looking at the content on the website itself, and [2] elements arising from the inherent nature of the services offered by the website.¹⁶⁵ Furthermore, the court emphasized on the context of English language websites as it might possibly target at more than one country.¹⁶⁶ The court also highlighted that the website's entire contents would not necessarily have to be treated in the same way, and those contents might not all be targeted at the same state.¹⁶⁷

3.2.2 The non-exhaustive list of considering factors

In the 'test case' *TuneIn*¹⁶⁸, the court pointed out the targeting approach when assessing the applicability of UK copyright law, in a copyright infringement concerning sound recordings for violating the right of communication to the public via the Internet.¹⁶⁹

It is a case concerning the act of TuneIn (an American technology company) via website and app, which provides service for users to access over 100,000 radio stations worldwide. In order to assist with searching, browsing and playback of the content, TuneIn collected and stored metadata of content transmitted by radio stations. It did not collect, transmit or store any content of these third parties, but only provide a platform to connect the user to the stream of these radio stations. The claimants, the copyright

¹⁶⁰ Ibid, para 86.

¹⁶¹ Ibid, para 87.

¹⁶² Ibid, para 87.

¹⁶³ *1967 Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3444 (Ch).

¹⁶⁴ Ibid, [21].

¹⁶⁵ *Omnibill (Pty) Ltd v Egpsxxx Ltd & Anor* [2014] EWHC 3762 (IPEC) [12].

¹⁶⁶ Ibid, [13].

¹⁶⁷ Ibid, [15].

¹⁶⁸ *Warner Music and Another v TuneIn Inc* [2019] EWHC 2923 (Ch) [1].

¹⁶⁹ Justice Birss noted that in para 15, 'Although in argument the parties always put this point near the end, I will address it first because if TuneIn does not target the UK then UK copyright is not engaged at all.'

owner of recorded music covering more than half of the total in the UK and 43% globally in the market, submitted that TuneIn should require a license from them. The defendant argued that it did not transmit or store any music and merely provided hyperlinks to works which had already been made freely available online without any geographic or other restriction.¹⁷⁰

The court first reviewed the legal principles set up in previous cases. [1] The mere existence and accessibility of a website by the local consumers is never enough to establish a territorial link.¹⁷¹ [2] It shall be considered from the perspective of the public in the UK when determining the issue of targeting. In the case concerning the communication to the public right, the question focuses on the public.¹⁷² [3] The test is objective, rather than the subjective intention of the alleged infringer. In other words, a party's subjective intention could not turn a website or page which was objectively not targeted at the UK into one which is.¹⁷³ [4] All relevant circumstances shall be evaluated, that is, all clear expressions of the intention to solicit the custom of that State's consumers.¹⁷⁴ [5] The enquiry of targeting shall vary from case to case, that is,

¹⁷⁰ *TuneIn*, [5]-[11].

¹⁷¹ Justice Birss cited two trademark cases: [1] *Merck v Merck* [2017] EWCA Civ 1834 [168] '... the mere fact that a website is accessible from the UK is not a sufficient basis for concluding that an advertisement displayed there is targeted at consumers in the UK' and [2] EU case *L'Oreal v eBay*, para 64. It stated that mere accessibility in the UK is not sufficient to conclude it is targeted in the UK. 'It must, however, be made clear that the mere fact that a website is accessible from the territory covered by the trade mark is not a sufficient basis for concluding that the offers for sale displayed there are targeted at consumers in that territory. Indeed, if the fact that an online marketplace is accessible from that territory were sufficient for the advertisements displayed there to be within the scope of Directive 89/104 and Regulation No 40/94, websites and advertisements which, although obviously targeted solely at consumers in third States, are nevertheless technically accessible from EU territory would wrongly be subject to EU law.' See also *Dearlove v Combs* [2007] EWHC 375 (Ch) [25]. 'The fundamental question is whether or not the average consumer of the goods or services in issue within the UK would regard the advertisement and site as being aimed and directed at him.'

¹⁷² Justice Birss clarified trademark case refers to 'consumers or average consumers', and in copyright case refers to 'the public' by citing two copyright cases *EMI* and *OmniBill*. See also Sec.3.2.1.

¹⁷³ A trademark case *Argos v Argos* [2018] EWCA Civ 2211, [51] was cited. See also, *Stichting BDO & Ors v BDO Unibank, Inc & Ors* [2013] EWHC 418 (Ch), [105].

¹⁷⁴ C-585/08 and C-144/09 *Pammer*, paras 80-84. For example, it is offering its services or its goods to one or some states, the disbursement of expenditure on an internet referencing service to the operator of a search engine in order to facilitate access to the trader's site by consumers, the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the MS in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.eu'; the description of itineraries from one or more other MSs to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various MSs, in particular by presentation of accounts written by such customers. The language or the currency used are not relevant, but if the website

it may be appropriate to treat a website as a whole, but it may be appropriate to conduct a more fine-grained analysis in another case.¹⁷⁵

In addition to those principles, the court recapitulated a non-exhaustive list of factors which shall be weighed differently on a case-by-case basis.¹⁷⁶ The list includes: [1] the appearance of the website: for example, the statements of an intention for providing goods or services to the public in the UK, the highlighting of the UK in the lists or maps. [2] other aspects of the website: for example, language(s), currency(ies), telephone numbers and the use of national top-level domain names. [3] the nature and size of the service provider's business, the characteristics of the goods or services offered and provided, and the number of visits made by the public from the UK.¹⁷⁷

3.3 Problems and interim conclusion

The problems arise after CJEU has developed the mere accessibility approach after *Pinckney* and *Hejduk*. It means the court shall exercise jurisdiction over an Internet-related copyright case merely based on the fact that the disputed content can be accessed in this state, even the defendant has done nothing or no relationship with this state. Since it is widely accepted that copyright is automatically protected, the current EU jurisdictional rule might be abused.

The targeting approach is proposed occasionally in the UK case law and the EU *Football Dataco*. Supported by some scholars, targeting can ensure legal certainty and foreseeability by decreasing the possibility of suing in the place where damage is insignificant or non-existent.¹⁷⁸ If someone's act did not target one state or did not act in this state, it is unlikely that the copyright owner may suffer damage there.¹⁷⁹

If the case is infringement over foreign copyright, English courts can exercise subject matter jurisdiction over this case, based on the personal jurisdiction over the defendant.¹⁸⁰ It means the courts are competent to hear the case concerning acts restricted by foreign copyright law, which may be conducted by ISPs. Summing up, in addition to hearing the cases concerning the act of targeting the UK, English courts can also adjudicate acts restricted by foreign copyright law.

allows consumers to choose a different language or currency, those two factors might be considered as evidence for directing.

¹⁷⁵ *Argos v Argos* [61]. *Omnibill* [15]. The entire contents of a website will not necessarily have to be treated in the same way. They may not all be targeted at the same country. No doubt many websites are targeted at only one country but there is no reason in principle why some parts might be targeted differently from others. It is a question of fact. The example discussed in argument was the finding in *Thomas Pink v Victoria's Secret* [2014] EWHC 2631 (Ch) that certain pages on Facebook were not targeted at the UK. That was not a finding about other pages available on facebook.com.

¹⁷⁶ *Warner Music v TuneIn, Inc.* [2019] EWHC 2923 (Ch) [16]-[17].

¹⁷⁷ *Ibid*, [17].

¹⁷⁸ Matulionyte 2015, 136.

¹⁷⁹ Torremans 2017, 565.

¹⁸⁰ *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2011] UKSC 39 [105].

Some disagree with the targeting approach, arguing that multiple factors shall be considered to determine ‘targeting’. Most of these factors cannot identify the targeting place, which means all states are directed.¹⁸¹ For example, the language (the use of Chinese) cannot guarantee it directs to China, other than millions of Chinese living worldwide, let alone English. In addition, can ‘.de’ guarantees its website target Germany, rather than Austrian who also speaks German. For the website without a domain name, the problem turns to be how to find out its target quickly. Even complicated, as online platforms vary, whether a set of criteria in line with different business model shall be proposed. If the court shall consider all factors, it means parties have to provide a lot of substantial evidence, which is not expected in the jurisdictional stage. Even finally the targeting state is identified, it cannot exclude the possibility that infringement exists outside this country.¹⁸²

This author agrees with the purpose of each approach, that is how to limit the jurisdiction within a reasonable and appropriate scope. The merits of both approaches might be combined. As proposed by CLIP, **firstly, the place of infringement is sufficient**, rather than the two limbs. CLIP Article 2:202 stated that ‘in disputes concerned with infringement of an IPR, a person may be sued in the courts of the State where the alleged infringement occurs or may occur’.¹⁸³ IPR infringement is a special tort which is different from the general tort. For most torts, if there is no damage, there is no actionable tort. To take the simple fact from *Bier* case as a typical tort example, the act of pouring waste in Country X gives rise to the damage in Country Y. It is a single tortious case even though the event and damage locate in two different countries.

However, copyright infringement is different. The infringing act refers to conducting unauthorized activities over the copyrighted work, which shall be exclusive to the copyright owner. There is no need to prove damage arises from the infringing act, thus on the one hand, the damage itself can be regarded as a separate factor giving rise to jurisdiction. On the other hand, if the event occurred in one place, the court of that place shall be competent to hear the dispute.¹⁸⁴

Secondly, in order to prevent malicious litigation from occurring, **a *de minimis* rule shall be established as a limitation**, thus ensuring foreseeability. In CLIP Article 2:202, ‘unless the alleged infringer has not acted in that State to initiate or further the infringement *and* her or his activity cannot reasonably be seen as having been directed to that State’.¹⁸⁵

Finally, concerning **the scope of jurisdiction under the Internet context**, the court seized **shall be granted a worldwide jurisdiction**. It will promote the efficiency of addressing cross-border copyright disputes. Since this approach requires other states concede their judicial sovereignty, such a limitation shall be defined within a minimal scope. As CLIP Article 2:203(2) states that the territorial principle might be

¹⁸¹ Ohly 2005, 241-256.

¹⁸² Matulionyte 2015, 136-137.

¹⁸³ CLIP 2013, 70-74.

¹⁸⁴ Torremans 2016:1, 1632.

¹⁸⁵ CLIP 2013, 74-76.

reconsidered. An alternative forum is proposed to hear the online copyright case: if [1] ‘the activities giving rise to the infringement have no substantial effect in the state, or any of the States, where the infringer is habitually resident’¹⁸⁶ and [2] [a] ‘substantial activities in furtherance of the infringement in its entirety have been carried out within the territory of the State in which the court is situated’, or [b] ‘the harm caused by the infringement in the State where the court is situated is substantial in relation to the infringement in its entirety’. The alternative forum shall be the place of the substantial act or the significant harm. This provision raises the threshold for the plaintiff to sue in the home state, in order to eliminate exorbitant jurisdiction and prevent the defendant from being sued unreasonably under the ubiquitous and unrollable context of distribution.

4. Factors related to the dispute: China

Chinese legislation adopts the unitary approach that provisions of domestic civil procedure are extended by analogy to international situations. In other words, some rules can be applied both in domestic and international disputes. Relevant rules might be found in two laws: Civil Procedure law (CPL, the tort-related general rules) and CL (the copyright-specific rules).

4.1 Special jurisdictional grounds in Civil Procedure Law

CPL is the primary source for international jurisdictional rules, mainly stipulated in Chapter 4 Article 265¹⁸⁷ and Article 266 (exclusive jurisdiction over three types of Sino-foreign investment contracts)¹⁸⁸. Literally, those provisions are general and simple which cannot cover all foreign-related matters in statutory law. In practice, most civil and commercial disputes involving foreign elements apply the same jurisdictional rule as that of pure domestic cases, unless otherwise stipulated by CPL.¹⁸⁹ At first, this part will explore whether CPL provides assistance in identifying the jurisdictional grounds concerning cross-border copyright infringement.

¹⁸⁶ CLIP 2013, 88. This section is to tackle with the situation when someone established the server in the infringers’ heaven.

¹⁸⁷ The content of this article has not been revised since its first establishment in CPL 1991, but the article number changed slightly: Article 243 [1991], Article 241 [2007], Article 265 [2012] & [2017].

¹⁸⁸ CPL, Article 266: The litigation arising from disputes of a Sino-foreign equity joint venture contract, a Sino-foreign cooperative joint venture contract or a contract for Sino-foreign cooperative exploration and development of natural resources, which are performed in China, shall be adjudicated by Chinese courts.

¹⁸⁹ Chap.3 Sec.3.3. CPL, Article 259.

4.1.1 The deficiency of the traditional international jurisdictional rule: the single rule without classification

Unlike Brussels regime, Chinese law does not structure the special jurisdiction rule by subject categories. There is only one special jurisdictional rule which may be applied in copyright infringement:

Article 265 Where an action is brought against a defendant without a domicile within the territory of the PRC concerning **a dispute over** a contract or **rights and interests in property**, if *the contract was signed or performed within the territory of the PRC, or the subject matter of the action is located within the territory of the PRC, or the defendant has assets within the territory of the PRC, or the defendant maintains a representative office within the territory of the PRC*, the action may come under the jurisdiction of the Chinese people's court of the place where the contract was signed, the place where the contract was performed, the place where the subject matter is located, the place where the asset is located, the place of tort or the place where the representative office is domiciled.

Accordingly, three conditions shall be satisfied when applying this article. The first requirement for applying this article is 'the defendant domiciled abroad'. This article, in nature, establishes special jurisdictional grounds for cross-border disputes. For defendants domiciled in China, the Chinese court would exert the general principle of the defendant's domicile promulgated in (domestic) Article 21 rather than (international) Article 265.

Secondly, it is required that 'a connection' shall exist, which is prescribed in italic wording. In other words, the prerequisite of applying this article is that either one of the following locations shall locate within China, including the place of signing or performing the contract, the place of the disputed subject matter, the place of defendant's assets and the place of defendant's representative office.

Thirdly, there is a clear scope of applying this rule – matters concerning foreign-related contract and other property rights and interests, namely international commercial disputes. In other words, literally this article does not establish rules of determining the competence of the court in respect of personality rights or other non-property rights (for example, defamation and moral rights).¹⁹⁰

The next question is whether this Article 265 might be applied in determining the jurisdiction of cross-border copyright infringement, under what grounds and whether problems exist.

First, this article can apply in the infringement over economic rights, while not applicable in moral rights, from the perspective of literal meaning. Obviously, copyright infringement can be considered within the scope of 'dispute over ... rights

¹⁹⁰ Tang, Xiao & Huo 2016, 80-81. The literal interpretation of this article suggests that grounds in Article 265 shall not be applied in tort concerning personality rights, however, it is not consistent with international commercial practice and its legislative purpose. So, authors suggest that this article shall be interpreted as the special jurisdiction rule over all tort if such a tort occurs in China.

and interests in property'. Although this article does not clearly state it might be applied in IPR infringement, the answer is affirmative from the literal interpretation.

However, it cannot be directly adopted in moral rights related cases. Moral rights focus on the author's personality and reputation, thus failing meeting the third requirement aforementioned and falling outside the scope of this article. Then the question would be, if a copyright infringement case involves moral rights, which jurisdictional rule shall be applied? Pursuant to the principle that domestic civil procedural provisions can be applied internationally,¹⁹¹ Article 28 (domestic jurisdiction provision concerning tort) shall be adopted.¹⁹² Therefore, both domestic and international moral rights infringement case, as a special type of tortious case, shall be adjudicated based on the identical criteria 'the defendant's domicile' or 'the place of tort'.

Secondly, this article is too general and combines multiple connecting factors together, which might lead to a potential expansion of jurisdiction. The scope of this article is broad, which does not make a distinction between contractual and non-contractual liability.¹⁹³ From the literal meaning of this article, it does not indicate which connecting factor shall be applied in which kind of dispute. In lack of limiting the scope of applying these factors, it provides multiple alternative choices for plaintiffs.¹⁹⁴ It means, as long as one of those connections locates in China, Chinese courts will have jurisdiction.

For example, there is a possibility that '**the place of subject matter**' may serve as the connecting factors in cross-border copyright disputes. According to Article 265, copyright infringement might be adjudicated in the forum where the subject matter is located. Copyright is intangible, but most of the times, it is fixed to some tangible material. Therefore, there is a possibility of treating the place of these tangible materials (painting, architecture) as the place of disputed objects. If the object locates in China, the Chinese court will hear the case.

Furthermore, in the context of copyrighted work online, it is commonly believed in judicial practice that once the work is uploaded online, it embodies the characteristic of being copied, which shall be deemed as the subject matter of the dispute. As long as the copyright owner browses and finds the infringing work online in China, such a place is considered to be 'the place of the subject matter'.¹⁹⁵ In other words, the place where the infringing content is accessible may be interpreted as 'the place of the subject matter'. Provided that the alleged infringing content is accessible via the Internet in

¹⁹¹ Chap.3 Sec.3.3. CPL, Article 259.

¹⁹² CPL, Article 28: The court of the defendant's domicile or the place of tort shall adjudicate the litigation arising from tort. In nature, the connecting factor of Article 28 is the same with that of Article 265 in respect of tortious case, pointing to the place of tort.

¹⁹³ Sun 2015, 176.

¹⁹⁴ Gan 2017, 103.

¹⁹⁵ Xu 2015, 112.

China, the location of the disputed subject matter is deemed as within China.¹⁹⁶ Thus, Chinese courts may be competent to hear the case based on this ground.

In other words, the plaintiff may resort to the place of subject matter as the connecting factor to sue against foreign defendants over copyright infringement. However, it is inconsistent with the original aim of establishing ‘the place of subject matter’. The original aim of considering ‘the place of subject matter (or object)’ as a connection is to facilitate enforcement concerning real estate due to the possession of the object in the place of the seized court. In contrast, the enforcement of copyright protection does not rely on the return of the object, but mostly focuses on the compensation of monetary loss, injunction and moral damage. Therefore, the value of recognizing the place of the object in the copyright context ‘decreases’ at the same rate as the possibility of enforcement independent of the object of dispute increases.¹⁹⁷

Moreover, not all tangible copyright works locate in a single place. For example, books may be distributed to multiple places, then multiple courts are competent to hear the cases. In addition, copyright is intangible in nature, thus the possession of the tangible material does not necessarily mean the legitimate ownership of the copyright. If someone is not the copyright owner, but just the owner of a copyrighted work, it is not appropriate to grant the court of the disputed work the competence to hear the case. In particular, the place of disputed subject matter in the Internet context may amount to exorbitant jurisdiction.¹⁹⁸ It means the Chinese court can hear all the cases as long as the disputed content can be accessible in China.

There is also a possibility that the defendant may be sued under the ground that his/her **assets locate** in China, according to Article 265. The justification of establishing the place of the defendant’s assets is to facilitate enforcement in China. Traditionally, foreign judgments are not easy to be enforced and recognized in China, due to its relatively restrictive approach under de facto reciprocity.¹⁹⁹ Usually, the party has to file a new litigation in China for foreign judgment to be enforced in China. Then, the Chinese court can exercise jurisdiction over this new suit based on the connection that the defendant has assets in China. It is believed that by adding the place of assets as the jurisdictional ground, it is useful to prevent concurrent proceedings and save costs for the plaintiff.²⁰⁰ However this ground is criticized as excessive, not only in copyright cases, but also in all cross-border commercial and civil disputes.²⁰¹

Summing up, Article 265 combines several connecting factors in an unstructured manner. The content of this article is too general and does not classify the subject matter

¹⁹⁶ Li & Chen 2004, 5-7. Xu 2015, 112.

¹⁹⁷ Svantesson 2016, 439.

¹⁹⁸ Clermont & Palmer 2006, 504-505. The concept of exorbitant jurisdiction is slightly different among countries, but the main core is similar, that ‘nations incline to disregard defendant’s interests in order to give their own people a way to sue at home, if the home country will be able to enforce the resulting judgment locally.’

¹⁹⁹ Tang, Xiao & Huo 2016, 140-172.

²⁰⁰ Ibid, 86-87.

²⁰¹ Li & Chen 2004, 5-7.

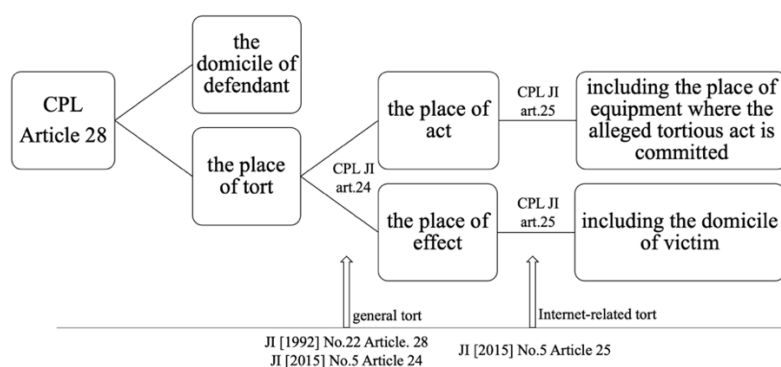
of disputes. It may create confusion or misinterpretation in identifying the connecting factor among different types of disputes. If the place of subject matter and the place of assets are allowed to act as the connecting factors in cross-border copyright infringement, it will amount to exorbitant jurisdiction, because both factors cannot establish a close or substantial relationship between the dispute and the court in an infringement case. This author suggests that Article 265 shall be divided into several paragraphs and clarify which kind of dispute shall apply which connecting factor. Specifically, for infringement or tortious case, the place of tort shall be applied solely, rather than the place of subject matter or assets.

4.1.2 Problems of CPL definition ‘the place of tort’ in the copyright case

4.1.2.1 The evolvement of interpretation concerning the place of tort in law

It was widely accepted that the place of tort might serve as the ground in copyright infringement. The concept of ‘the place of tort’ is not provided in the foreign-related Chapter of CPL but defined in domestic jurisdiction provision.²⁰² It is interpreted as ‘the place where the tort is committed’ (the place of act) or ‘the place where the result of a tort occurs’ (the place of effect). By analogy, this domestic rule will be applied in international situation. The duality approach of defining the place of tort works well in practice for a long time in China. But nowadays, the traditional duality approach encounters the problem of localizing the two places of act and damage online, because specific geographic locations could not be found on the Internet.²⁰³

In order to deal with Internet-related problems, the Judicial Interpretation of CPL revised and established several new rules in 2015. It provides in JI Article 25 that on the Internet-related tort context, the place where the tort is committed includes the location of the computer and other equipment by which the tortious act is committed; the place of effect includes the domicile of the injured party.²⁰⁴



4.2 Jurisdictional rules in Chinese Civil Procedure Law

²⁰² JI CPL [2015] No.5, Article 24. This provision was first established in 1992 and last revised in 2015.

²⁰³ He 2015, 120.

²⁰⁴ JI CPL [2015] No.5, Article 25.

4.1.2.2 The criticism over the newly established jurisdictional grounds concerning Internet-related issues

The first question is whether this 2015 rule can be applied in determining jurisdiction of cross-border copyright infringement case.

From the wording – ‘the Internet-related tort context’ – of this article, the scope is broad covering all tortious disputes online, for example, tort in respect of online personality rights, unfair competition online, an online sale contract, copyright infringement online and so forth.²⁰⁵ Although this 2015 rule is a domestic jurisdictional rule, pursuant to the unitary approach of treating domestic and international jurisdictional rule equally, it can be applied in cross-border cases as well.²⁰⁶ In short, this 2015 rule might be applied to determine whether Chinese court has authority to hear the foreign-related online copyright infringement case.

Next, it shall be answered what does the place of tort refers to in the Internet case? What does ‘包括’ (‘including’) in 2015 rule mean? Whether the list of factors is exhaustive or not?

In fact, the understanding of ‘including’ in Chinese varies. From a literal meaning, the use of word ‘including’ might suggest a non-exclusive definition. In other words, it might include other connecting factors, which might be relevant and interpreted as the place of act and the place of effect. On the contrary, some judges hold different opinions and suggest it is a closed list. Beijing IP Court has illustrated that, pursuant to JI Article 25, the place of victim is the *only one* connecting factor when determining the place of effect.²⁰⁷ Since there is no ‘等’ (‘etc.’, or ‘and so forth’) in this article, this author agrees with the court’s understanding that the list is exhaustive.

After clarifying those preliminary questions abovementioned, the following section will explore whether the connecting factor prescribed in 2015 rule is appropriate in cross-border copyright infringement. This author holds the opinion that both limbs have flaws.

The act limb: The place of equipment? CPL JI Article 25 defines the place of act as the place of equipment where the infringement is conducted. It is similar with approach defined in Copyright Law. The inappropriateness of adopting the place of equipment will be discussed further in CL section 4.2.2.2. Since CL does not define the damage limb, this section will focus on the interpretation of effect limb in CPL.

The effect limb: the victim’s domicile? In this author’s view, the 2015 rule is problematic in online copyright infringement, even incompatible with IPR judicial practice in China. IPR infringement is not identical with the general tort. According to copyright law, if the restricted act is conducted, then infringement may occur. The effect limb shall be understood as the place where the direct result of the infringement occurred, rather than the place where the plaintiff suffered damage. SPC held this opinion steadily for over 20 years that, in IPR infringement case, although the domicile

²⁰⁵ Wang Yanfang 2017:2, 55-56.

²⁰⁶ Chap.3 Sec.3.3. CPL, Article 259.

²⁰⁷ *Zhongliang v Changcheng* [2016] No.2217; [2016] No.68.

of the plaintiff might coincide with the place of effect, it could not be necessarily assumed that the place of plaintiff's domicile might be interpreted as the place of effect.²⁰⁸

This opinion is also upheld in several IPR-related judicial interpretations published by SPC. The provisions deliberately avoid using the place of damage as the link to determine jurisdiction over the trademark case²⁰⁹ and the copyright case²¹⁰. In short, the effect limb in 2015 JI Article 25 is incompatible with the legal logic of identifying copyright infringement and relevant IPR judicial experience.

4.2 Special jurisdictional grounds in Copyright Law

Some subject-specific civil or commercial laws may provide PIL rules. For example, there is one chapter in Maritime Law dealing with foreign-related maritime matters.²¹¹ The following section will explore whether Copyright Law provides any indication in determining jurisdiction in international copyright infringement.

4.2.1 Copyright Law provisions

Since 2000, SPC has published several judicial interpretations centring around Copyright Law to provide detailed guidance on the determination of jurisdiction in online copyright infringement.²¹² In 2012, a new JI replaced the previous three judicial interpretations and assimilated the previous jurisdictional rule. Moreover, a new exception clause was added, that if both the domicile of defendant and the place of infringement located abroad, the place of equipment where the plaintiff found the infringing content should hear the case. This new exception clause is considered as a

²⁰⁸ SPC, 'The summary of the Symposium on the IPR judicial practice' (20 July 1998) <http://zscq.court.gov.cn/dcyj/201205/t20120509_176747.html>. SPC stated that 'In the practice, some courts are confused about the understanding of "effect limb". Some courts hold the opinion that 'effect limb' shall be interpreted as the domicile of the injured plaintiff or the place where the infringing object is distributed. The discussants in this meeting have reached a consensus that in IPR infringement case, the 'effect limb' shall be interpreted as the place where the direct result arising from the infringement occurs. The location of the plaintiff cannot be interpreted to be the place of result, just because the plaintiff has suffered damage.'

²⁰⁹ JI Trademark Law ([2002] No.32, [2020] No.19), Article 6: Trademark infringement case shall be heard by the court where the infringing act was committed, the place where the infringing goods were stored or seized, or the place of defendant's domicile.

²¹⁰ Chap.4 Sec.4.2. For example, Article 1 of JI CL [2000] No.48 with its amendments [2004] No.1 & [2006] No.11; and its replacement in JI CL [2012] No.20, Article 15.

²¹¹ Maritime Law of the PRC (effective on 1 July 1993), Chapter 14.

²¹² JI CL ([2000] No.48; [2004] No.1; [2006] No.11) concerns the application of law in adjudicating cases involving copyright infringement via the Internet. These three JIs adopt the same jurisdiction grounds. In 2012, JI CL [2006] No.11 was replaced by JI CL [2012] No.20, which concerns the application of law in hearing civil cases involving CIN Right infringement.

jurisdictional rule in dealing with foreign-related copyright infringement, thus will be examined in detail.

	Article 1 JI [2000] No.48, [2004] No.1, [2006] No.11	Article 15 JI [2012] No.20
Scope	The Internet copyright infringement case	Civil disputes concerning CIN Right infringement
General principle	shall be subject to the jurisdiction of the court of the place of infringement or where the defendant is domiciled.	shall be subject to the jurisdiction of the court of the place of infringement or where the defendant is domiciled.
Interpretation of the place of infringement 'the infringer's equipment approach'	The place of infringement includes the location of the internet server, computer terminal and other equipment used to commit the alleged infringing act	The place of infringement includes the location of the internet server, computer terminal and other equipment used to commit the alleged infringing act
Exception	Provided that it is difficult to identify the place of infringement and the domicile of the defendant,	Provided that it is difficult to identify the place of infringement and the domicile of the defendant, <u>or both two places are located outside the territory of the PRC.</u>
Interpretation of the place of infringement 'the plaintiff's equipment approach'	the location of the computer terminal and other equipment , by which the plaintiff finds the alleged infringing content accessible, may be deemed as the place of infringement.	the location of the computer terminal and other equipment , by which the plaintiff finds the alleged infringing content accessible, may be deemed as the place of infringement.

4.3 Jurisdictional rules in Chinese Copyright Law

4.2.1.1 The primary act limb and supplementary effect limb

Compared with CPL duality approach of defining 'the place of tort' (JI [2015] Articles 24 and 25), it is avoided in the CL jurisdictional provision (JI [2012] Article 15). In Copyright Law Judicial Interpretation, it directly defines the place of 'the infringer's equipment' as 'the place of infringement', indicating that the place of infringing act is the primary connecting factor. It treats 'the place of finding the infringing content', that is the place of result arising from illegal activities, as the supplementary factor under limited circumstances.²¹³ It is apparent that the wording of the JI [2012] Article 15 puts more value on the place of the act and neglects the place of result.²¹⁴

4.2.1.2 The basic connecting factor: the place of equipment

As shown from the chart, 'the place of equipment' is regarded as the basic connecting factor in online copyright infringement. Specifically speaking, 'the place of infringement' refers to the location of equipment by which the infringer commits the alleged infringing activities (hereinafter referred as 'the infringer's equipment'). If that place and the domicile of the defendant are not known or abroad, the location of plaintiff's equipment by which the plaintiff finds the infringing content (hereinafter

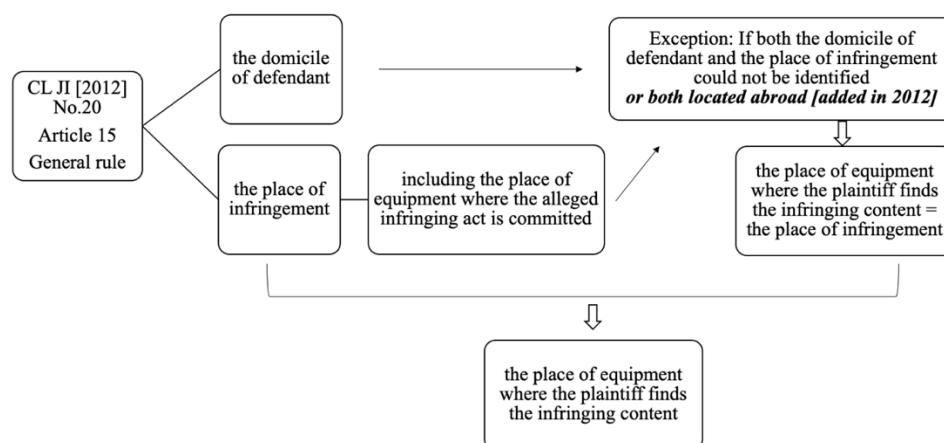
²¹³ Sun 2015, 182.

²¹⁴ Tang, Xiao & Huo 2016, 83. Huang & He 2003, 148-150.

referred as ‘the plaintiff’s equipment’) will serve as the connecting factor for the court to exercise jurisdiction.

Therefore, one point shall be clarified. From the wording of this article, ‘the place of infringer’s equipment and the domicile of the defendant’ shall prevail in determining jurisdiction. Only under a limited or exceptional circumstance when both two places could not be identified or located abroad, ‘the plaintiff’s equipment’ approach shall be applied.

It is necessary to see what the purpose of the legislator is of using ‘the plaintiff’s equipment’ approach. According to Judge Jiang, in Internet-related cases, it commonly occurs in China that the infringer and its activity could not be located, and in most cases, the infringer locate abroad controlling the equipment to conduct illegal activities.²¹⁵ If the law only stipulates two connecting factors (the place of equipment to conduct infringing act and the domicile of the defendant) in Internet copyright infringement context, it is not helpful to protect copyright from being infringed, and the plaintiff would not have chance to seek for protection in Chinese courts.²¹⁶ So another connecting factor in favour of the plaintiff shall be established. Moreover, to ensure the general *actor sequitur forum rei* principle, the legislator deems ‘the plaintiff’s equipment’ as ‘the place of infringement’, for avoiding the misunderstanding of treating it as the ‘the domicile of the plaintiff’.²¹⁷



4.4 The connecting factors in Chinese copyright judicial interpretation

²¹⁵ Even up to the present time, it is still the most serious copyright infringement that infringer, domiciled outside China, illegally upload copyright work by the server located abroad. For example, in 2017, a copyright infringement case was investigated that the infringer rent a server located abroad and illegally distributed the 70,000 unauthorized copyright work via website, with the daily visit of internet users amounting to 100,000. Especially when a new movie or TV series is distributed, the unauthorized copies would be accessible through unregistered website of which the server located outside China. See NCAC Report 2018.

²¹⁶ Jiang & Zhang 2001, 9.

²¹⁷ Jiang Zhipei 2004, 4.

4.2.2 Problems of CL jurisdictional provisions in foreign-related copyright infringement

4.2.2.1 Whether it is an international jurisdictional rule?

According to CPL Article 259, it clearly states that the foreign-related disputes adjudicated within China shall apply the provisions in Chapter 4 of CPL. If it is not provided in this Chapter, the provisions in other Chapters of *CPL* shall be applied. It does not write that provisions in *other Laws* shall be applied. In other words, from the legal binding view, this author holds the opinion that the provisions in copyright law do not have legislative power to govern international jurisdictional rule.

According to SPC Judge Wang, the reason of adding foreign elements into the CL JI [2012] Article 15 is to deal with the increase of copyright infringement where defendants domiciled and acted abroad, but the result occurred within China. In order to protect Chinese copyright holder's rights, the new JI establishes this new ground for Chinese courts to adjudicate cases concerning the infringing act conducted abroad by a foreign domiciliary.²¹⁸

From the purpose of this jurisdictional rule, it turns out that this article is to deal with Internet-related copyright infringement, especially when the defendant and infringing act both locate abroad. However, this provision is provided in the copyright law field. According to CPL Article 259, only Civil Procedure Law and CPL-related legal binding legislation can prescribe international jurisdiction ground. This author is doubtful that whether the provision in Copyright Law has the power to establish the international jurisdictional ground.

This revision reveals that SPC has realised the copyright is not strictly territorial in the digital world and foreign elements have to be considered. However, the drafter of this JI did not realise it should be an international jurisdictional rule. In other words, PIL methodology shall be considered when drafting this 'added' provision, however, SPC did not.

4.2.2.2 The equipment approach

Article 15 of JI [2012] No.20 clearly provided two places as example: the place of server and the place of computer terminal. This equipment approach might be originated from the substantive copyright law in China. When identifying the infringing act, the court adopts the 'equipment standard' that if the alleged act is making the content available to the public by the server or any other related equipment.²¹⁹ Therefore, in the case concerning CIN right infringement, the location of server or equipment is relevant in determining jurisdiction. The plaintiff shall provide the proof

²¹⁸ Wang Yanfang 2013, 21.

²¹⁹ Chap.2 Sec.2.3.4.

of those locations. If the plaintiff could not prove where the location of server or equipment is, the court usually infer the defendant's domicile as the place of act.²²⁰

However, the connecting factors are problematic. **Firstly, the place of server is not practical no matter domestically or internationally.** Judge Jiang from SPC illustrates the reason of adopting 'the equipment approach': there is no real location in the cyberspace, it might be everywhere, or even nowhere. The location of the infringer and the infringing act is variable whereas the equipment underlying the Internet used by the infringer is relatively immovable and easily identifiable, thus providing a physical presence to the infringing activity. Therefore, it is convenient for the victim to locate one court to sue for protection.²²¹

However, such a purpose cannot be satisfied as technology develops. Today, there is no need for a website to establish its server in a physical place or permanent place.²²² In addition, for big companies, the distributed servers are set up in multiple places to meet huge computing demands. It means the server containing the infringing content may locate in a third place or multiple places, where plaintiff may not reasonably know.

It has to be admitted that the open online database, run by Ministry of Industry and Information Technology, may be helpful for the plaintiff to prove the location of server more easily.²²³ The court considers the research result of this database as admitted evidence of an IP address and the location of server.²²⁴ However, this system provides limited assistance in identifying the location of server, since not all websites are required to register. Furthermore, the search result of the private IP identification service provider is not accepted by court to prove the location of server.²²⁵

²²⁰ *Wanbo v Hairun* [2003] No.9020. According to the evidence provided by the plaintiff, the provider of the IP address used by the allegedly infringing website is 'CHINA-BJ'. The plaintiff did not provide any evidence to show the exact address of the location of the network server, so it cannot prove that the location of the network server of the infringement is located within the jurisdiction of this court. The plaintiff also did not provide evidence to prove that the location of the computer terminal and other equipment of the infringement was within the jurisdiction of this court. As five defendants was domiciled in Shenzhen, in the absence of evidence to the contrary, it should be presumed that the location of the computer terminal and other equipment used to conduct infringing act was located in Shenzhen.

²²¹ Jiang 2004, 4.

²²² Chap.1 Sec.2.3.

²²³ An open online database contains information and IP address of websites operating within China. According to Administrative Measures for Internet Information Services, the website operated within China shall be registered and get license from the governmental departments. China establishes a licensing system for profitable Internet service and a registering system for non-profitable Internet service.

²²⁴ *Zhongkai v China Netcom* [2008] No.1154.

²²⁵ *Youdu v Wangshang* [2010] No.471-1. The plaintiff checked the IP address of the infringing website, through an IP identification service provider (168ip), and got the feedback from 168ip that the defendant's website IP address located in Hangzhou. The court did not admit the evidence because 168ip was not an official recognized institution for providing IP data information and geolocation. In addition,

In fact, the place of server is rarely adopted in judicial practice, since it is difficult for plaintiffs to provide evidence of location of the server, as stated by Judge Yang from SPC.²²⁶ It is also the reason why the subsequent JI [2014] No.11 concerning Personality Tort Online deleted the place of server as a connecting factor. The reason why JI [2012] No.20 retains this connecting factor is not clear. A possible answer would be since it is rarely adopted by plaintiffs in practice, this approach has not amounted to huge problems domestically.

However, from an international context, it is criticised as rendering copyright enforcement more difficult. Criticism over ‘the place of server’ is commonly seen in the treatises or the determination of international jurisdictional rule. For example, EU case law explicitly forbids jurisdiction to be established based upon the geographic location of servers and the infringer’s computing equipment, because the server is difficult to locate thus creating an impact on the effectiveness of IPR protection.²²⁷ In short, the place of equipment is not certain, easy to be manipulated and ubiquitous, thus resulting in unpredictable outcomes of determining jurisdiction in international cases.

Secondly, it is not logical to define an act-based ground using the tool-based approach. Although it is helpful to locate the place of infringement by the relatively immovable and identifiable equipment, it is a logic defect that ‘the place of tort’ be interpreted as ‘the place of a tool’. The determination of a connecting factor in an infringement case shall adopt act-based analysis, which presupposes some conduct.²²⁸ In other words, the connecting factor shall be the location of an act, including the place of the action and the place of effect arising from that act, rather than the place of an objective matter like an Internet-linked computer or server, which is a tool or equipment to commit infringing acts.²²⁹

Thirdly, treating the place of equipment as the sole connecting factor is inconsistent with the technology neutrality principle. According to the wording of Article 15 JI [2012], the place of infringement ‘includes the place of server, computer terminal and other equipment’. The list of equipment might not be exhaustive, but the connecting factor ‘equipment’ is the single criterion.²³⁰ It shall be avoided to base jurisdiction on the specific technology, because it may quickly become outdated.²³¹

Since there are so many problems in adopting the equipment approach, why has it not been deleted so far, just like other JIs?²³² As concluded by scholar, there might be

the 168ip website clearly declares at the bottom of the page: ‘All data is provided for reference only. This website is not liable for the accuracy of IP data information.’

²²⁶ Yang, Yao & Jiang 2014, 23.

²²⁷ C-523/10 *Wintersteiger*, para 36. C-604/10 *Football Dataco*, paras 45-46.

²²⁸ Chen Qian 2001, 271.

²²⁹ He 2015, 120-121.

²³⁰ *Youdu v Wangshang* [2010] No.471-1. The court held that the name of website or the contact number were not grounds to determine jurisdiction over copyright infringement online.

²³¹ Sun 2015, 182.

²³² JI [2014] No.11 concerning Personality Tort Online has deleted the place of server from the list of connecting factors.

two reasons that the place of equipment is retained in JI: [1] this rule is appropriately applicable in the current juridical practice. [2] the number of Internet copyright infringement cases is not large enough to testify whether this rule is appropriate or not.²³³

The second reason can be excluded, because the number of cases is large enough to test this approach in judicial practice.²³⁴ In fact, the equipment approach successfully deals with the allocation of jurisdiction concerning Internet-related copyright cases within China since its establishment.²³⁵ It indeed enables the plaintiff to locate the defendant easily. However, it must be pointed out that this ‘successful’ conclusion is made on the basis of adjudicating domestic cases.

This author agrees with the above statement that the place of equipment is not proper in the cross-border situation. However, the applicability of this rule in foreign-related cases is open to question. As the rule is set out in the Copyright Law, it is unclear whether the JI of Copyright Law has the legislative effect of establishing a foreign-related rule.

4.2.2.3 The confusing plaintiff’s equipment approach

The exception clause confuses participants easily and is even more problematic in a cross-border situation.

The condition that ‘both places could not be identified’ may confuse the parties involved and lead to the misuse of the ‘plaintiff’s equipment approach’. The requirement of ‘unidentified’ may amount to the dissatisfaction of initiating the litigation in China. According to CPL²³⁶, one essential requirement of initiating a lawsuit is that the defendant shall be specific, and the name and the domicile of the defendant shall be set forth clearly when submitting the complaint. Even if the defendant cannot be found, the legislation set up a notice by publication system to serve the document to the missing or unknown defendant. So, there is seldom occasion that the defendant is absolutely unknown if a legal proceeding has been initiated.²³⁷ If it occurs, the legal requirement of initiating a lawsuit is not satisfied, thus such cases shall not be accepted by the court.

Moreover, the confusion might arise in practice. For example, in a real case provided by Judge Jiao, two companies both located in the same city in Shandong Province and found infringing content in each other’s website. The two companies

²³³ He 2015, 122-123.

²³⁴ Wang Yanfang 2013. In the nationwide, the number of seized first trial copyright cases was 35,185, of which 60% was Internet-related copyright dispute in 2011.

²³⁵ *Wanbo v Hairun* [2003] No.9020. *Wenxiantang v Qingdao Daily* [2003] No.6428. *Xinli v Chongqing Weipu* [2004] No.668. *Xishan v Hongbiantian* [2005] No.86. These cases do not involve foreign elements and facts are simple, so the jurisdictional issue can be addressed properly based on the equipment approach.

²³⁶ CPL, Article 119(2).

²³⁷ Jiao & Dong 2006, 92-93. He 2015, 120-121. Tang, Xiao & Huo 2016, 83.

invoked this article and brought a series of lawsuits in different cities and provinces, based on the fact that they find various infringing content online continually via the equipment located in different cities, thus leading to the conflicts of the jurisdiction of various local courts.²³⁸

This situation seems inconceivable. In the above case, the jurisdiction should not be a problem because it is easy to locate the domicile of the defendant, in the same city as that of the plaintiff. Thus the ‘unknown’ requirement is not met, and the plaintiff’s equipment approach shall not be adopted. However, in fact, these suits are brought in different cities and provinces, leading to a complicated conflict of jurisdiction.

In the researcher’s opinion, it reveals a common situation that this article brings confusion to the general public involved, who may misunderstand the purpose of the article and neglect the premise that both places of defendant’s domicile and infringement are unknown. This understanding has been agreed by judicial practice. If the parties’ location is known and identified, the court will refuse to adopt the plaintiffs’ equipment approach and decline the jurisdiction, and then transfer the case to the court where the infringement is committed or the place of domicile of the defendant.²³⁹

In a cross-border situation, the problem arising from the misuse of ‘plaintiff’s equipment’ will exacerbate. The approach ‘plaintiff’s equipment’ does not meet the foreseeability principle in PIL. Although it is convenient for the copyright owner to claim for protection in the Chinese court and helpful to promote the copyright protection environment in China, it may amount to exorbitant jurisdiction over online copyright infringement.

The jurisdictional rule cannot give plaintiffs alternative choices on the basis of diminishing the reasonable expectations of foreign defendants. It is uncertain and unpredictable for the non-domiciliary defendant who is alleged to conduct the infringement abroad. Due to the ubiquitous characteristics of the Internet, the ‘defendant’ has limited control over the spread of website. If the defendants do not take technological measures to ‘control the reach of a website’ in advance, it then means the plaintiff can certainly find the alleged content or whatever the plaintiff would like to sue in China.²⁴⁰ The defendant will be jeopardized into an unforecastable situation and similar problems with the EU ‘mere accessibility’²⁴¹ will also occur in China. Even problematic, since there is no express territorial scope requirement of the current jurisdictional rule in China, the decision, such as removing the illegal content from the website, will reach a worldwide relief.

PIL scholar also raises concern that Article 15 of Copyright JI may result in the exorbitant jurisdiction and an unpredictable situation that as long as a copyright owner access the infringing content within China, the Chinese court may hear the case

²³⁸ Jiao & Dong 2006, 92-93.

²³⁹ Domestically, Chinese courts decline jurisdiction and transfer the cases to the place where the defendant is domiciled. For instance, in *Wanbo v Hairun* [2003] No.9020; *Yang Chunbao v Xinhua* [2002] No.166; *Bangbang v COL* [2006] No.13999.

²⁴⁰ Tang, Xiao & Huo 2016, 84.

²⁴¹ Chap.4 Sec.3.1.5.2.

regardless of whether there is an actual connection between the dispute and the place of the court.²⁴² For example, if a French national travelled to China on business and found the infringing content written in French online which was illegally uploaded by a website located in Canada. Although most Chinese could not read French and the website did not target Chinese Internet users. The French copyright owner is allowed to bring the lawsuit in China for copyright infringement in accordance with this article.

Furthermore, the place of plaintiff's equipment is fortuitous. This approach is considered as failing to meet the requirement of the international convention.²⁴³ It is not fair for a defendant to foresee its activity will be attacked in a state without any connection with the dispute but only based on a random surfing online and transient presence of the plaintiff.²⁴⁴

On the contrary, some scholars support to adopt this exorbitant approach, in particular under reciprocity circumstance. It is considered an effective method to protect judicial sovereignty. The scholar advocates to retain this approach in order to exert jurisdiction over the defendant of which the state adopts a similar excessive jurisdictional rule.²⁴⁵

This author holds the opinion that 'the plaintiff's equipment approach' is acceptable within one state. Although it has amounted to a problem that plaintiffs might create the connecting factor to initiate the lawsuit particularly in Beijing,²⁴⁶ it does not relate to sovereignty and territoriality. For the cross-border copyright infringement, there is no justified foundation to provide the plaintiff with excessive choices. The scope of 'the place of equipment by which the plaintiff finds the infringing content' is potentially ubiquitous. As long as that location links to the Internet, the court of that place could hear the dispute regardless of considering whether there is a connection or not. 'The plaintiff's equipment approach' creates an exorbitant jurisdictional ground and is significantly pro-Chinese plaintiff in dealing with online copyright infringement.

As seen from the evolution of 'the plaintiff's equipment' approach, the scope of this approach expands from 'unidentifiable' to 'unidentifiable or abroad'. It reveals that the initial purpose of establishing this approach is to allocate domestic jurisdiction within China. After adding foreign elements into this provision, the result of using this approach internationally will amount to an unforeseeable result for foreign defendants

²⁴² Zhang Jing 2019.

²⁴³ Huang 2019, 202. Huang argues that 'the plaintiff's approach' is not consistent with the United Nations Convention on the Use of Electronic Communications in International Contracts, Article 10(3) and Article 6(4)(a). This convention concerns contract but provides implications on tort. 'Article 10(3) An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.' 'Article 6(4) A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located.'

²⁴⁴ Tang, Xiao & Huo 2016, 84. Cong 2007, 345. Huang 2019, 201.

²⁴⁵ Xu 2015, 73.

²⁴⁶ Chap.4 Sec.4.4.1. Apple cases.

to be sued in China. It is troublesome for those foreign defendants with good faith or reasonable care. This author is certainly still doubtful whether the JI of copyright law has a higher effect of granting court grounds to hear the foreign-related case. But this approach indeed would deal with foreign-related relationships, when the defendant or activities locate abroad. It indeed achieves the aim of protecting Chinese copyright holder, but the legislators once again forgot to take PIL methodology and principle into consideration.

This author also concerns if ‘the plaintiff’s equipment’ approach is abandoned in the cross-border copyright infringement, it may enable foreign copyright infringement, which targets Chinese copyright holder, more rampant. For example, the infringer located on a small island X and uploaded the infringing Chinese books to the website whose server locates in State Y, assuming that plaintiff knew who the infringer was and where X and Y located. The defendant’s domicile locates abroad, and the place infringer’s equipment locates abroad. According to the current CL JI, Chinese court shall not exert jurisdiction over this case. Thus, Chinese rightsholder has to go to the foreign forum and Chinese court has no grounds to hear the case, even though infringement targeted China.

4.3 The application of rules in the judicial practice

In respect of judicial organs in adjudicating foreign cases, two issues might be considered: first, whether the court in a country has jurisdiction; if yes, which court in this country has jurisdiction. However, the two issues are conflated in Chinese courts.

4.3.1 Initial Stage: when the Internet is not ‘ubiquitous’, the duality approach based on ‘equipment’ works well

In the field of online copyright infringement, ‘the place of tort’ was first illustrated in the domestic case *Ruide* by the Beijing court.²⁴⁷ The plaintiff *Ruide* is a Beijing company and designs its official website, whereas the defendant *Dongfang*, locating in Szechuan, is accused of copying the website of the plaintiff. *Ruide* brought the lawsuit against *Dongfang* in Beijing for its act of illegally copying the plaintiff’s website design.

The judge held the opinion that two conditions should be satisfied simultaneously if someone planned to conduct infringing act via Internet: [1] using the computer; [2] accessing the server which stored the infringing content. The disputed infringing content – the website of the plaintiff – is stored in its hard disk and distributed through its server in Beijing. If anyone decides to access, obtain and then copy the design and content of the website without authorization at any place or time, these actions must be conducted through the hard disk and server located in the domicile of the plaintiff (Beijing).

²⁴⁷ *Ruide v Dongfang* [1999] No.64. It is regarded as the first Internet-related case in China. Even though it does not involve foreign elements, it illustrates the reasons why ‘the equipment approach’ is adopted in determining jurisdiction.

The court further stated that at that time, the Internet was not spread widely across China and mainly used by high-tech companies domiciled in Haidian District of Beijing. It reasonable that result occurred where people could access the infringing website, mainly in Haidian. Therefore, considering all factors, the place of infringement is Haidian of Beijing.

In the first stage of hearing Internet copyright case, Chinese court adopts the traditional duality approach ('act' and 'effect') to determine jurisdiction. The equipment criterion (computer and server) is adopted because it is easy to localize the activity online. For determining the place of effect, due to the fact that around 2000 Internet was not technically ubiquitous within China, the court adopted accessibility analysis and concluded the court where users could access the infringing content should hear the case.

4.3.2 The confusion of whether domestic rules shall be applied internationally

During the period when the legislation did not state expressly that the copyright law approach might be applied in the foreign-related situation (before JI [2012] entry into force), the court's analysis tended to adopt 'the plaintiff's equipment' approach. However, the purpose of 'the plaintiff's equipment' is to allocate the national court's jurisdiction. Thus, at the early stage around 2000, the determination of international jurisdiction mainly based on the sovereignty protection principle.

For example, in *Billich*, the plaintiff Beijing Billich company accessed the website 'http://www.billich.com.au' in Beijing and found that the illegal copies of the painting owned by Beijing Billich were sold on this website.²⁴⁸ The plaintiff brought the lawsuit of copyright infringement in Beijing. The Australian defendant, Charles Billich, objected to the jurisdiction for the reasons that he was a foreign national who did not have a domicile, assets or representative offices within China.

The court of first and second trial both agreed that although the defendant domiciled abroad, the website could be accessed in China, and moreover, illegal copies could be purchased online. Therefore, the place of the computer, located in Beijing, by which the plaintiff accessed the infringing content shall be the place of infringement, thus the court of the first trial shall be competent to hear the case.

The judge of *Billich* case then illustrated in a journal article that a distinction should be made between (old) Article 243 (new Article 265) of CPL and (old) Article 1 of Copyright JI. The purpose of JI Copyright Law is to provide a concrete connecting factor in accordance with the characteristics of the Internet, thus avoiding the conflict of jurisdiction, maintaining justice and promoting copyright enforcement in good order within the territory of China. In contrast, CPL Article 243 (new 265) acts as an international jurisdictional rule. The determination of international jurisdiction must adhere to protecting state sovereignty. Thus, the Chinese court shall exercise

²⁴⁸ *Beijing Billich v Charles Billich (Australian)* [2003] No.03814; [2004] No.36.

jurisdiction over all cases as long as they have an actual connection to China to some extent.²⁴⁹

The purpose and focus of these two rules are different, so it is not appropriate to solve international disputes according to the domestic jurisdictional rules. Therefore, for cases involving foreign elements, especially when the defendant is a foreign national, the court shall first use CPL to decide the Chinese court's competence and then adopt JI of Copyright to determine the jurisdiction of local courts.

Accordingly, in this case, the court first adopted CPL JI [1991] (old) Article 243 to access whether the Chinese court had jurisdiction. In determining international jurisdiction, the court did not interpret the place of infringement, but based on the principle of sovereignty protection. The court finally concluded the illegal copies might be distributed to China and the shopping website could be accessible in China, thus satisfying the actual connection criterion. Therefore, the Chinese court shall adjudicate the case.

In respect of 'the plaintiff's equipment' approach, it is just a method to allocate national courts' jurisdiction within China. In this case, the computer by which the plaintiff found the illegal content located in Beijing, thus the Beijing court had jurisdiction, rather than Shanghai and other domestic courts.

This case presented the opinion that 'the plaintiff' equipment' approach was established to solve domestic jurisdiction. Even though it might be adopted in foreign-related case, it is not an international jurisdictional ground. The international jurisdictional ground can only be granted by CPL. At that time, Chinese courts insisted on the sovereignty protection principle, that is, as long as the case had an actual connection with China, the Chinese court must hear the case.

However, if one only looks at the contents of *Billich* judgment, it presents a highly misleading understanding that the court adopted 'the plaintiff's equipment' to access whether Chinese courts were competent. The assessment of jurisdiction was short, even though *Billich* involved foreign elements, the judgment failed to provide any analysis on the international jurisdictional rule in writing. If someone did not read the journal article written by Judge Chen, it is reasonable for people to misunderstand the court's decision and believes 'the plaintiff's equipment approach' is an international jurisdictional ground. In fact, it is just a domestic jurisdictional rule allocating the court's jurisdiction within China.

It is commonly seen in copyright judgments in China, that no distinction is made between domestic and international jurisdiction grounds. *Wang v Yahoo (US)*²⁵⁰ was regarded as the seldom occasion that Chinese courts adopted CPL first to assess whether Chinese courts had jurisdiction and subsequently adopted CL to determine which court in China was competent.²⁵¹

²⁴⁹ Chen Jinchuan 2006, 59.

²⁵⁰ *Wang Lu v Yahoo* [2006] No.1365.

²⁵¹ Sun 2015, 174. According to the research of Professor Sun, the majority of cases involving foreign elements neglect analysing the international civil jurisdictional rule in the judgment.

In this case, the plaintiff Wang domiciled in China found his work on the website of Yahoo without authorization. The court concluded that the Chinese court should have jurisdiction in accordance with (old) Article 243 of CPL based on the fact that China was the place of tort. The judgment further illustrated that Wang accessed the website of Yahoo via a computer located in a notary office in the Haidian District of Beijing; thus, Haidian court was the place of infringement and should hear the case.

This author agrees with the court on the sequence of using relevant provisions, that is, CPL first to determine whether the Chinese court has jurisdiction and then CL second to assess which courts in China shall hear the case. It is correct to write different stages of determining jurisdiction in decision. However, the court fails to provide an illustration of why China is the place of infringement. The underlying reason might be similar to Judge Chen's opinion that as long as the dispute has an actual connection with China, the Chinese court shall hear the case.

In a simple conclusion, as more foreign-related cases emerged, the court started to realize the importance of making a distinction between international and domestic jurisdictional rule. However, for most courts, it is a common situation that the analysis of international jurisdictional rule is neglected or written in simple words stating that 'China is the place of infringement' without further analysis. It creates confusion and misunderstanding that CL 'the plaintiff's equipment approach' is directly adopted as the basis of international jurisdiction. In fact, the sovereignty protection principle was insisted by the court in assessing international jurisdictional rule, provided that there was a connection between the dispute and China, the Chinese court would hear the case.

4.3.3 The attempt to interpret the place of infringement in the ubiquitous context

Around 2010, the Chinese court started to interpret the concept of the place of infringement in the Internet copyright case involving foreign elements. *Google* case is the first one (according to this researcher) with a detailed explanation on whether the Chinese court has jurisdiction over foreign-related copyright infringement case under ubiquitous context. In *Wang v Google (China) and Google (US)*²⁵², the Chinese writer Wang found segments of his work on Google Books without authorization. Wang therefore brought the lawsuit in China, against Google (US) for violation of the right of reproduction and against Google (China) for violation of CIN right.

The court first clarified that according to CPL (old) Article 243, the determination of jurisdiction might base on several connecting factors. The place of tort is one of them. In fact, the tort may occur in a single place or several different places. According to CPL, the place of tort is interpreted as the place of act and effect. In other words, if one of both places (act and effect) locates in China, the Chinese court would adjudicate the case.

In this case, the plaintiff claimed that the two defendants committed two infringing acts: [1] reproduction right: scanning and digitalizing the disputed book without

²⁵² *Wang v Google (China) and Google (US)* [2011] No.1321; [2013] No.1221.

authorization, by Google US; [2] CIN right: making the disputed book available online via the website of Google China, by Google China.

In determining the jurisdiction over the violation of CIN right, the court believed that the unauthorized making the illegal copies available to the public online was conducted by Google China, of which the website was registered in China. In the absence of evidence to the contrary, the court considered the place of infringement located in China.

For the violation of reproduction right, the court held that the defendants did not provide any evidence suggesting that the act of scanning the Chinese book was conducted in the US. The court further assumed that even though the activity of scanning was conducted in the US, the result of this act located in China. Because the defendants confirmed that the disputed book in Google China's website was provided by Google US, it was reasonably believed that the act of scanning and the act of distributing online constituted a series of acts. In other words, the disputed content was first reproduced as a digital form by Google US, and then sent to Google China, and finally made available online targeting Chinese audience by Google China. Therefore, the result of the alleged act of reproducing (scanning and digitalizing) finally occurred in China, and the Chinese court thus had the jurisdiction to adjudicate the violation of reproduction right.

Based on the two-fold analysis, the court finally concluded that the Chinese court would adjudicate the case over the two infringing acts. Google US appealed, claiming that it registered in the US and the act of scanning took place in the US. In addition, the digitalization of the disputed book did not violate the law of the US; thus, the Chinese court shall not adjudicate this case.

The court rejected Google US's opinions. First, the court resorted to CPL (old) Article 243. It analysed the place of tort occurred in China; thus, Chinese court might have jurisdiction over the infringement conducted by a foreign domiciliary defendant. In other words, the Chinese court would not decline to adjudicate the case based on the fact that the defendant domiciled abroad.

Secondly, the court illustrated that no evidence had been submitted to prove Google US's act of scanning occurred in the US. Even though the defendant could prove that, this court agreed with the first trial that the result of the scanning and digitalising occurred in China. It had no relevance where the initial act of scanning or digitalising took place.

Thirdly, the court stated that it was not the issue in the jurisdictional stage to determine whether the alleged infringing act was legitimate or not in foreign countries. Therefore, in this case, whether the scanning activity was legitimate or not in the US, it did not affect the determination of jurisdiction.

Summing up, *Google* case establishes the fundamental principle that **in the first stage of determining jurisdiction, the court would not touch upon the substantive issue**, for example, whether the alleged act infringes copyright or not. This principle is

restated in cases against Apple.²⁵³ Apple US appealed that the plaintiff did not provide any proof suggesting that Apple had conducted the infringing act. The court rejected and held the opinion that in the determination of jurisdiction, it was sufficient to provide preliminary proof suggesting that a link exists between the defendant and the alleged infringing act. It is not relevant whether the defendant commits the infringement in the procedural jurisdiction stage, which shall be addressed in the second substantive stage.

It is commonly accepted in Chinese courts, in the stage of determining jurisdiction, there is no need to prove all defendants have committed infringement. For example, in *Google* case, the final judgment found Google US violation of copyright, while Google China constituted fair use and should not be liable for infringement. It is not a big problem in *Google* case under the Chinese context. Due to the website registration requirement in China, Google China has registered, thus can be inferred to locate its server in China and have acted via the server within China. The jurisdictional ground based on the close connection – ‘registering’ in the governmental body which means its service is operated within China. A connection between the dispute and the Chinese court exists indeed.

For those foreign websites which are not required to apply for the state-issued permit²⁵⁴, no substantive assessment in the jurisdictional stage will lead to the same problem as this author has illustrated in this thesis.²⁵⁵ Even though the result may be the ISP is not liable for infringement, the high cost and time-consuming of being sued may amount to unrecoverable loss, especially if the defendant is a weak party, such as a small and medium-sized company.

Furthermore, the court interprets the place of infringement as the place of act and effect pursuant to CPL based on **the factual analysis**. [1] For determining the location of act restricted by CIN right, the court adopts the ‘registration’ criterion.²⁵⁶ If the website containing illegal content has registered in China, thus China shall be the place where the infringing act is conducted. [2] For determining the location of act restricted by reproduction right, the court applies factual analysis, [a] that the defendant must submit evidence to prove the reproduction act is conducted abroad to object Chinese court’s jurisdiction. [b] Suppose defendants could prove the infringing act is conducted abroad; if the result arising from the foreign (series of) act(s) occurred in China, Chinese courts would also be competent to hear the case. It is not too difficult to assess

²⁵³ *COL v Apple (Beijing) and Apple (US)* [2013] No.2079. The Chinese company COL found apps in AppStore containing unauthorized works owned by the plaintiff. COL brought a series of copyright infringement cases in China against Apple Beijing and Apple US for infringing the CIN right. The court exercised jurisdiction based on that one of multi-infringers domiciled in China and the plaintiff may choose any one of the places of defendants’ domicile to initiate the legal proceedings pursuant to CPL Article 21. (Chap.4 Sec.2.5.2.)

²⁵⁴ If the website is built under a Chinese server, it is required to register. If the website is built using a Hong Kong or foreign server, there is no need to register.

²⁵⁵ Chap.4 Sec.3.1.5.2 attribution of effects.

²⁵⁶ The administrative requirement for profitable websites to operate service within China (n 223).

whether the result occurs in China in this case, since the disputed book is written in Chinese and distributed via ‘google.cn’, thus presenting a purpose of targeting China.

4.3.4 The place of victim’s domicile is regarded as the jurisdictional ground in the copyright infringement

After Article 25 of 2015 JI CPL (‘2015 rule’) was enacted,²⁵⁷ the court started to adopt the place of effect criterion to determine the jurisdiction in the following series cases of *COL v Apple*.²⁵⁸

Firstly, the court stated that the place of infringement or the place of the defendant’s domicile should be adopted. Subsequently, the duality approach was adopted to interpret the place of infringement, including the place of the act and the place of effect. Finally, the court applied CPL 2015 rule, thus concluding the place of victim’s domicile was the place of effect in this copyright infringement case. Therefore, Beijing Dongcheng District court, where the plaintiff domiciled, shall hear the case. The defendant Apple appealed and objected the jurisdiction. The second trial dismissed the objection and confirmed the first trial decision.

In a similar case, *Gong v Apple*²⁵⁹, the plaintiff Gong domiciled in Chongqing, brought the lawsuit in Beijing Dongcheng court based on the fact that the plaintiff found the infringing content via a computer of a notary. The notary located in the Dongcheng district of Beijing. The court reaffirmed that ‘the plaintiff’s equipment’ approach was applied in a limited situation that the place of tort (both the place of the act and the place of damage) and the domicile of the defendant were not identifiable or outside China. The place of damage should include the place of the victim’s domicile. In this case, the domicile of the plaintiff located in Chongqing²⁶⁰, and the plaintiff could not prove that the place of act and damage located in Dongcheng, so this court shall not hear this case. Therefore, this case shall be adjudicated by the Chongqing court, where the plaintiff domiciled.

The court explains why ‘the plaintiff’s equipment’ approach of copyright JI shall not be applied in this case. The requirement of adopting ‘the plaintiff’s equipment’ is that the place of infringement (including the place of damage and act) and the place of the defendant’s domicile locate abroad. In accordance with JI CPL [2015] Article 25, the place of damage refers to the domicile of the victim. In this case, the victim COL locates in China. Thus, the requirement that three places (the place of act, damage and

²⁵⁷ JI CPL [2015] No.5, Article 25. Chap.4 Sec.4.1.2.1. ‘The place of effect’ is interpreted as the domicile of injured party concerning Internet-related tort pursuant to Article 25.

²⁵⁸ Chap.4 Sec.4.3.3. *COL v Apple* [2016] No.149; [2017] No.1396.

²⁵⁹ *Gong Wenjun v Apple* [2016] No.20567.

²⁶⁰ The court provides detailed address of the plaintiff in the city Chongqing, without mentioning the ‘China’. From the wording of the judgment, the court compares the adjudicated jurisdiction between Dongcheng and Chongqing court, which relates to the national civil procedure, rather than to determine whether Chinese court has the jurisdiction over this foreign-related case.

the defendant's domicile) shall all locate abroad is not fulfilled. Therefore, the plaintiff's equipment approach shall not apply.

In these domestic cases, it seems that the court adopts 'the victim's domicile' approach to interpret the place of infringement in IPR infringement.²⁶¹ But there will be two problems in dealing with foreign situation. It is on the one hand incompatible with the SPC's understanding which has been insisted for two decades.²⁶² On the other hand, this understanding may be adopted in the international condition, because CPL has the legal binding effect to govern the international relationship. If the domicile of plaintiff can be interpreted as the effect limb in a copyright case, it means the domicile of the plaintiff can serve as the connecting factor in foreign-related copyright infringement.

4.4 Problems and interim conclusion

As examined, the Chinese special jurisdictional ground in copyright infringement has evolved from the place of infringement, to the place of act and effect, and then expanded to 'the location of plaintiff's equipment' (under limited circumstances), and finally the domicile of the plaintiff is included. All evolvments in law however fail to take PIL methodology into account.

In addressing the cross-border dispute, the Chinese court has experienced a process starting from the neglect in differentiating the international and domestic jurisdictional rule. Most cases directly use domestic rule to determine jurisdiction in cross-border disputes, without mentioning international jurisdictional rule.²⁶³ Even if some cases adopt the international rule prescribed in CPL Article 265 (old 243), the court does not provide an interpretation of the place of tort, just writing simply that the place of tort takes place in China.²⁶⁴

²⁶¹ *Zhongliang v Changcheng* [2016] No.2217; [2016] No.68. In this case, the court analysed the relationship between (JI CPL [2015] No.5) Article 25 and (JI CL [2012] No.20) Article 15 in allocating domestic jurisdiction. The difference between the two provisions is not a conflicting relationship. The participant may choose in accordance with the dispute from: the place of act (JI CPL Article 25, interpreted as the infringer's equipment); the place of effect (JI CPL Article 25, interpreted as the domicile of plaintiff) and the place of infringement (JI CL Article 15, the infringer's equipment and the plaintiff's equipment). See the charts in Chap.4 Sec.4.1 and Sec.4.2.

²⁶² Chap.4 Sec.4.1.2.2, the criticism over 'effect limb' in CPL.

²⁶³ *Xijie (Korean) v China Telecom* [2009] No.211. *Xijie (Korean) v Shijilong* [2009] No.58. Both cases apply domestic rules to determine international jurisdiction directly.

²⁶⁴ *Wang Lu v Yahoo* [2006] No.1365.

4.4.1 The lack of attention on PIL methodology in designing jurisdictional rules in CPL and CL

First of all, this author holds the opinion that the judicial interpretation of Copyright Law has no legal binding effect to govern the cross-border issue. If someone must consider CL JI [2012] Article 15 as an international jurisdictional ground, the failure of taking PIL methodology into consideration in designing this article will result in exorbitant jurisdiction and legal uncertainty for foreign defendants. Neither ‘the infringer’s equipment’ nor ‘the plaintiff’s equipment’ shall be interpreted as ‘the place of infringement’ in foreign copyright infringement.

Secondly, the CPL unitary approach of applying domestic rule internationally shall be abandoned. There is a need to take international jurisdiction out of Civil Procedure Law. The purpose of allocating jurisdiction within the territory is to provide convenience to the parties involved, promote the effectiveness and efficiency of litigation and limit the judicial resources at a reasonable cost within this country; thus, a compete of jurisdiction may not exist within a state. On the contrary, in international civil litigation, a dispute may involve different connections with different countries. For example, parties may have a different nationality, assets may locate in various countries, and the damage and act may locate differently. Such a conflict of jurisdiction involves judicial sovereignty, which is not similar in essence to that of domestic context. Therefore, the principle of PIL shall be considered thoroughly in defining the international jurisdictional rule.

Since Chinese scholars have started the discussion on PIL Code, it will benefit the refinement of international jurisdictional rule and promote further study. The current ‘inaccurate’ study on Chinese international jurisdictional rule also indicates a drawback of adopting domestic jurisdictional rule internationally, that many PIL scholars would take pure domestic law or cases to illustrate the international rule.

When this author read some PIL articles, some examples in the argument do not involve foreign elements in fact. For example, Dr Huang states China tend to strengthen the territorially based jurisdiction rule, by taking JI CL [2006] Article 1 (current JI [2012] Article 15) as a typical example to illustrate that a Chinese court would hear the case over a foreign defendant if the server used for committing the alleged tort is situated in China.²⁶⁵ Dr Huang then examines *Sunning v Taobao*²⁶⁶ to illustrate further how the international jurisdictional rule works in the context of the Internet, and finally

²⁶⁵ Huang 2019, 190-195.

²⁶⁶ Ibid, Dr Huang writes ‘Sunny v Taobao (2014) Ning Zi Min Xia Zhong Zi No.7’ in the footnote. There are two errors: the plaintiff is ‘Sunning’, and the case number is No.8 actually. ‘the judgment of sunny explains why personal jurisdiction can be based on the location of a non-resident defendant’s server. The infringer connects his or her computer or other terminals with a server to upload, download and disseminate information. The terminal is essential because the infringer sends him or her infringement order from there. However online infringement does not occur until the order reaches the internet server. Therefore, the location of the terminal or the server is where the online tort is committed.’

concludes that such an approach of adopting the location of the server as the connecting factor is territorialism.

After checking *Sunning v Taobao* in the case database, the author of this thesis found it was merely an online trademark case without any foreign-related elements. It is a pure national case. The rule based on the server is adopted to allocate the jurisdiction of national courts within China, instead of determining whether the Chinese court can exercise jurisdiction.

The critics over ‘the plaintiff’s equipment’ approach also base on domestic cases. Dr Huang took several cases in relation to Apple, for example *Mai v Apple*, *Han v Apple*, *Li v Apple* and *Kong v Apple*. Dr Huang concluded that those cases were adjudicated in Beijing, because the plaintiff’s attorney conducted a trap purchase in Beijing.²⁶⁷ According to the fact of those cases, all plaintiffs did not reside in Beijing. Their attorney bought an Apple product and downloaded the app containing the infringing content notarized in a Beijing notary office. Then the attorney claimed the plaintiff’s equipment where the infringing content was found located in Beijing, thus Beijing courts shall hear the case.

This author agrees with Dr Huang that the attorney deliberately creates a connecting factor and achieve a result that Beijing court can hear the case. But in this author’s view, it is not an international jurisdiction issue.²⁶⁸ For example, in *Gong v Apple*²⁶⁹, Beijing courts put emphasis on the premise of applying ‘the plaintiff’s equipment’ approach.²⁷⁰ The court found that the defendant domiciled in the city Chongqing; thus, it failed the requirement that ‘the defendant’s domicile shall be unidentifiable or abroad’. Therefore, ‘the plaintiff’s equipment’ approach shall not be adopted to determine jurisdiction. It means the Beijing court has no jurisdiction, and this case shall be transferred to the Chongqing court. According to the judgment, ‘the

²⁶⁷ Huang 2019, 197-199.

²⁶⁸ Since the first case against Apple in China, where Apple was found liable for copyright infringement, many Chinese writers filed suits in Beijing local court. For example, *Mai v Apple* [2012] Jing Er Zhong Min Chu No.5279; [2013] Jing Gao Min Zhong No.2619; [2015] Gao Min Zai No.1298. *Han v Apple* [2012] Jing Er Zhong Min Chu No.1560; [2013] Jing Gao Min Zhong No.2085; *Hao v Apple* [2012] Jing Er Zhong Min Chu No.1557; [2013] Jing Gao Min Zhong No.2081; *Li v Apple* [2012] Jing Er Zhong Min Chu No.2336; [2013] Jing Gao Min Zhong No.2080; *Li v Apple* [2012] Jing Er Zhong Min Chu No.2334; [2013] Jing Gao Min Zhong No.2261; *Kong v Apple* [2012] Jing Er Zhong Min Chu No.1660; [2013] Jing Gao Min Zhong No.2084. *Kong v Apple* [2013] Jing Er Zhong Min Chu No.7744; [2014] Jing Gao Min Zhong No.1321. This author agrees that the attorney has the intention to create connection to enable Beijing court to hear the case and make sure the plaintiff will win. And also, Beijing courts erred in excising jurisdiction based on the ‘plaintiff’s equipment of finding infringing content’ located in Beijing. However, it is just a domestic jurisdiction issue. The court just made a mistake in determining domestic jurisdiction, rather than international jurisdiction. These mistakes were made around 2013 and had been corrected in the subsequent cases, for example in 2016 *Gong v Apple*.

²⁶⁹ *Gong Wenjun v Apple* [2016] No.20567.

²⁷⁰ Chap. Sec.4.2.1 chart and Sec.4.2.2.3. One of the premises of applying the plaintiff’s equipment approach is the defendant’s domicile is unidentifiable or locates abroad.

plaintiff's equipment' approach was used to answer why the *Beijing* court had no jurisdiction, rather than answering whether *Chinese* court shall hear the case.

Professor Svantesson²⁷¹ recited a case *Yuanhang v Tencent*²⁷² and illustrated that the approach of copyright was broader than that of trademark in the international jurisdiction chapter.²⁷³ The point is also neglected that this cited case is a pure national case. The domestic jurisdiction rule of copyright and trademark is indeed different.

This researcher respectfully disagrees with some PIL scholar's opinion that Chinese copyright infringement is pro-Chinese plaintiff 'by neither containing the targeting' factor nor considering the interactive level of a defendant's website.²⁷⁴ Dr Huang states that Chinese court allows the plaintiff (i.e., the victim of the infringement) to bring a case in his or her domicile against an infringer in order to deter infringement and enhance IPR protection in China. Then Huang concludes that this approach is pro-Chinese plaintiff. This author of the thesis respectfully disagrees with that conclusion. Because such a conclusion is based on the analysis of cases without foreign-related elements.²⁷⁵ The examples illustrated in Huang's argument can only point to the Chinese approach is in favour of *plaintiff* in relation to domestic copyright infringement, rather than *Chinese plaintiff* concerning foreign-related infringement.

In this researcher's opinion, it is a misunderstanding of the function of the old Article 1 of CL JI [2000]. The purpose of legislating 'equipment' approach is to allocate the jurisdiction within China. As examined by the author of this research, JI of copyright does not have the authority to deal with foreign-related issues. The interpretation of international jurisdictional rule (the place of tort) can only be addressed by CPL and CPL JI. Moreover, in JI [2001] No.24 concerning the domain name, it clearly stipulates a provision dealing with the foreign-related situation.²⁷⁶ On the contrary, in JI [2000] No.48, there is no statement that this Article 1 shall be

²⁷¹ Svantesson 2016, 309. Fitzgerald & Shi 2008, 390-391.

²⁷² *Yuanhang v Tencent* [2007] No.23; [2007] No.25.

²⁷³ The first trial, when deciding an online trademark case, applied jurisdiction rule of Internet-related copyright infringement rule by way of analogy. And the second trial disagreed with the reason and found it was not appropriate to apply copyright rule in trademark case. The author concludes that 'it seems that trademark law will not be guided by the broad approach taken in relation to copyright infringements.'

²⁷⁴ Huang 2019, 200-202.

²⁷⁵ *Zhongliang v Changcheng* [2016] No.2217; [2016] No.68. See (n 261) Both parties are Chinese companies.

²⁷⁶ JI [2001] No.24, Article 2: The domain name infringement shall be heard by the Intermediate People's Court of the place where the infringement act is committed or the place of defendant's domicile. If either of those two places cannot be localised, the place where the computer terminal or other equipment by which the plaintiff found that domain name, are located may be regarded as the place where the infringement act is committed. Cases involving foreign elements include the cases of disputes over domain name in which one or both of the parties are foreigners, stateless persons, foreign enterprises or organizations, international organizations, or the domain name is registered in foreign countries. The jurisdiction of foreign-related domain name case shall be determined pursuant to CPL Chapter 4.

interpreted as an international jurisdictional rule. It reveals the legislator of JI [2000] does not intend to make this article applied in an international situation at that time.²⁷⁷

The ambiguity and vagueness in legislation and the avoidance of judicial practice concerning international jurisdiction rule thus amount to the misunderstanding by PIL scholars, who criticize the international jurisdictional rule in China. This confusion mainly results from the fact that there is no codification of PIL or Law on International Jurisdiction, and most international jurisdictional rules originate from national civil procedural law. Moreover, PIL scholars have never been invited to draft these domestic rules.²⁷⁸ These rules are in nature designed to solve jurisdiction within China. If these domestic rules applied internationally, problems inevitably arise from the fact that domestic legislators fail to consider PIL principle legislatively.

The failure of taking PIL methodology into account also exists in Copyright Law field. Copyright legislation and judicial practice in China have a long tradition of territoriality and construed all terms from the nationwide (rather than worldwide) perspective. In addition, the territoriality principle is more deeply imprinted on copyright disputes by ‘blocking’ measure. The administrative registration requirement over some foreign ISP like Facebook and YouTube has built a wall, an intangible territorial boundary between China and other states. It has deepened the understanding of the territorial nature of copyright disputes in China, thus amounting to the neglect of designing jurisdictional rules from PIL perspectives.

4.4.2 The lack of considering copyright characteristics in designing international jurisdictional rules

Since 1999, ‘the place of tort’ has been continuously used to determine the jurisdiction of Chinese court over foreign-related copyright infringement case, including in the context of the Internet. However, the interpretation of ‘the place of tort (infringement)’ is ambiguous and sometimes confused with the domestic concept. In the copyright field, the general rule concerning foreign-related tort fails to focus on the special characteristics of copyright infringement.

In order to facilitate the international trade and exchange, it is necessary to tailor rules depending on the characteristics of different matters to deal with increasingly occurred cross-border situation, thus providing a certain and predictable result for foreign national or company to foresee the result of its activities.²⁷⁹

For the time being, when the CPL may not change dramatically and the establishment of a special law solely concerning international jurisdictional rule is not realistic, the function of the court shall be attached great importance. Chinese judges are willing to be appliers of statutory rules and are not granted much discretion. Since the interpretation of the place of infringement is vague in law, the judicial interpretation

²⁷⁷ Sun 2015, 182.

²⁷⁸ He 2019.

²⁷⁹ Zhang Jing 2019, 47.

or judicial guideline published by SPC shall provide a further illustration on the criterion of identifying jurisdiction in a cross-border situation.

Generally, the position of protecting sovereignty in respect of foreign-related civil and commercial cases shall be reconsidered. It has been a long tradition that legislation and judicial practice attach great importance to protecting the sovereignty and interests of China.²⁸⁰ Dominated by the deep-rooted fear of losing sovereignty, there is a general trend in Chinese PIL rules protecting Chinese citizens.

It shall be noted that the basic principle and content of foreign-related civil jurisdictional articles originate from the trial version of CPL in 1982, with an extremely difficult economic situation and isolated from the world.²⁸¹ Nowadays, the international exchange in China expands dramatically; however, the jurisdictional rule governing cross-border dispute remains at the same level as forty years ago. The excessive protection of sovereignty and national interest may jeopardize the private civil and commercial activity.²⁸²

In the field of IPR, the principle of protecting national interests is the central core in China as well. It is reasonable concerning registered IPRs, for example, trademark and patent, which relate to the administrative department in a State. However, the excessive protection of sovereignty and national interest shall not be adopted to deal with a private right as copyright.

Specifically, the concept of ‘the place of infringement’ in the Internet context requires clarification. It is apparent that the equipment-based approach shall be abandoned to define the place of act. The place of infringement shall be interpreted on an act-based analysis, instead of the place of tool.

Moreover, the effect limb shall not be interpreted as the domicile of victim or even the place of equipment where the plaintiff finds the infringing content. Effects may occur everywhere; it shall be interpreted within a reasonable and limited scope, based on the substantial connection between the forum place and the dispute. Otherwise, it will amount to an unpredictable result for the defendant, thus endangering legal certainty.

The plaintiff’s equipment approach equals to the plaintiff’s home court. It enables the plaintiff to bring the (whole) case in the home court in China. Such an approach upsets the fundamental balance of rights in litigation between the plaintiff and the defendant and tilts the balance entirely in favour of the plaintiff.

This approach will further endanger the balance between plaintiffs and defendants. As shown in Chinese cases, initially, the plaintiff is the weak writer against a foreign company. The most convenient method for these writers is to sue in its state for damage. So, during that period, Chinese legislation tends to protect its sovereignty and national’s

²⁸⁰ Liu Jingdong 2016, 10-16. He 2017, 138.

²⁸¹ National Bureau of Statistics, <<http://data.stats.gov.cn/english/easyquery.htm?cn=C01>>. According to the data of NBS in China, in 1982 the GDP was ¥537 bn and reached ¥98,651 bn in 2019; the total value of Imports and Exports was ¥77 bn in 1982 and ¥31.5 trillion in 2019. In respect of GDP per capita, the number was ¥533 RMB in 1982 and ¥70,581 in 2019.

²⁸² He 2019, 39.

rights against foreign infringement, by establishing exorbitant jurisdictional grounds such as the plaintiff's equipment.

Recently, many big companies in China have become the giant copyright holder, by signing a copyright contract with the actual author.²⁸³ In addition, as the collective management system improves, lots of writers choose to be represented to seek protection in legal proceedings. There are more and more cases showing that disputes arise between companies, rather than a weak party against a big company.

The Chinese plaintiff nowadays is not as weak as an author. Suppose Chinese laws and judicial practice insist on protecting sovereignty and its national without a certain, fair and predictable jurisdiction ground; in that case, it may lead to the dangerous position that someday, the big party would attack or even harass, the small and medium-sized foreign company, merely by submitting preliminary proof suggesting that the defendant may be linked to the dispute. Regardless of whether the activities conducted by these foreign companies violate the copyright or not, the foreign defendant, especially small and medium-sized ISP, will be overwhelmed by the cost of this cross-border lawsuit.

5. Interim conclusion

It is commonly accepted the court shall have jurisdiction over cross-border copyright case based on the general jurisdictional ground. Both countries regard domicile as a connecting factor instead of nationality, but the concept is slightly different. Due to the special social context of China, the meaning of domicile is relatively outdated. Habitual residence is not adopted in the UK or EU, but as a supplementary factor in China. Even though there is a difference between the concept of domicile and habitual residence, both of them have disadvantages in common.

For the purpose of being predictable and legal certainty, the broad interpretation over general jurisdiction's connecting factor shall be avoided. Moreover, the interpretation of the basic concept shall be clear and precise, since it is a mandatory rule worldwide. In China, the interpretation of domicile or habitual residence is complicated and outdated, even not identical between jurisdiction rule and applicable law rule. It may give rise to an unpredictable situation for the parties involved to foresee in which the court may sue or be sued.

As many multinational companies and intermediaries are involved in the cross-border copyright exploitation, the jurisdictional rule concerning multiple defendants needs refinement in the copyright field. According to the current rules, the multinational company may face the exorbitant challenge of being sued in China, thus creating legal uncertainty. The reason is that those rules are derived from the domestic jurisdictional rule, or stated more precisely that domestic rules are applied internationally under Chinese law. Due to the lack of taking PIL methodology into legislation, factors related to the defendant(s) are incompatible with cross-border situation.

²⁸³ For example, China Literature owned by Tencent (Chap.1 n 48).

Both countries encounter problems in interpreting the special jurisdictional grounds. The current approaches cannot guarantee the legal certainty and foreseeability for defendants.

The problems of Chinese laws mainly lie in the lack of attention on PIL methodology in designing jurisdictional rule in law and applying the rule in practice. Moreover, the lack of considering copyright characteristics in designing international jurisdictional rules brings the similar problems as occurred within the EU. In short, the exorbitant jurisdictional rule shall be avoided in cross-border copyright disputes. Too much focus on sovereignty will discourage international copyright transaction. The CJEU's interpretation has evolved into a wrong direction, which was inconsistent with copyright, especially ubiquitous infringement characteristics, thus failing to meet the purpose of BRR.

Jurisdiction over cross-border copyright infringement can base on the 'causal event' limb. It is a good place to gather evidence, thus promoting the sound administration of justice and efficacious conduct of proceedings. Moreover, the localization of such a place is normally self-evident that parties involved may predict where they could sue or be sued, thus providing legal certainty.

For the criterion of 'the damage limb', it may ensure the legal certainty that granting jurisdiction to the place where the right is protected and alleged infringed. This jurisdiction will always exist without ascertaining the substance of the case. However, there are several practical problems especially in online case.

The defendant might be sued before the court, even though such a place is not its target. Moreover, the damage occurs everywhere, leading to a possibility of ubiquitous or multiple jurisdictions. Even worse, according to the territorial principle, each court will only have jurisdiction over local damage. Therefore, numerous separate actions shall be raised nation by nation if the plaintiff seeks for the protection of all damage.

Mere accessibility does not meet the requirements of PIL for jurisdictional rules, nor does it meet the characteristics of online copyright infringement cases. Even if the plaintiff obtains a favourable procedural advantage through the principle of 'accessibility', it helps to protect the rights of individuals as a vulnerable group. However, such a selective advantage places the defendant under uncertainty of the result and the possibility of being sued in an unforeseeable place. It is contrary to the basic norms of foreseeability and legal certainty of the international jurisdictional rules. Moreover, it is not the purpose of the legislation creating special jurisdiction if the justification for giving the plaintiff more options is based on the protection of the copyright holder's rights.

In a word, due to the ubiquitous technology, the jurisdictional rules established based on physical location become problematic in the digital world. Effective, balanced, coherent and predictable rules are needed. CLIP provides a series of detailed factors for national courts to consider in determining the competence to adjudicate cross-border copyright infringement.

CHAPTER 5 THE APPLICABLE LAW RULES CONCERNING CROSS-BORDER COPYRIGHT INFRINGEMENT IN THE UK AND CHINA

1. Introduction

The *lex loci protectionis* is assumed to be a universally acknowledged principle in IPR.¹ It is a specialised rule due to the territoriality of IPRs since general rules are not compatible. The doctrinal study over *lex loci protectionis* is thorough both in English and Chinese literature.² The protecting country under the PIL context mainly refers to the place where protection is sought, usually the place in which the work is being used, or the exploitation takes place.³ A narrow interpretation – where the author is involved in legal proceedings – cannot be accepted.⁴

Since CLFCR has prescribed *lex loci protectionis* in law for ten years, this chapter will mainly focus on the application of this concept in Chinese courts. Firstly, as the essential legislative background, this chapter will examine the legal source of *lex loci protectionis* and the problems of applying it in the copyright infringement case. Subsequently, it will explore whether Chinese courts have encountered these problems, if yes, how Chinese courts address that; if no, whether there any other problems in China.

2. Legal sources in the UK and China

2.1 Overview

Rome II Regulation has harmonised the choice-of-law rule within the EU. In Article 8(1), the law applicable to a non-contractual obligation arising from a copyright infringement shall be the law of the country for which protection is claimed.⁵ Freedom to choose the applicable law is not allowed pursuant to Article 8(3). It reveals a traditional territorial attitude over IPRs, and the party autonomy is not allowed in this mandatory choice of law rule.

Compared with the EU mandatory rule, the Chinese rule is relatively flexible which allows the parties to choose the forum law after infringement occurs. Article 50 provides: [1] the general rule: '*lex loci protectionis*' adopted in liabilities arising from

¹ Rome II Regulation, Recital 26.

² Introduction Chapter n 4 and n 5.

³ Fawcett & Torremans 2011, 676.

⁴ Ibid, 677. For example, during contractual negotiations, no legal proceedings exist but the parties involved may need to know the applicable law as well.

⁵ Fawcett & Torremans 2011, 801-821. Boschiero 2007, 87-113.

IPR infringement;⁶ [2] exception: ‘limited party autonomy’ – both parties might agree to submit the forum law (i.e., Chinese Copyright law) as the applicable law after the infringement occurs. Furthermore, JI Article 8 provides a detailed explanation: [1] ‘agreement’: (a) explicitly by agreement; or (b) implicitly agreed, when both parties invoke the same law, and no objection is raised; [2] when: (a) after the infringement occurs, and (b) before the end of the court debate in the first instance.⁷

2.1.1 The traditional *lex loci delicti*

Some common law states adopt *lex loci delicti* (the law where the infringement took place) to determine the law applicable to copyright infringement.⁸ Similarly, *lex loci delicti* was adopted before 2010 CLFCR’s entry into force in China.⁹ Furthermore, JI provides that *lex loci delicti* includes the law of the place of act and the law of the place of effect.¹⁰ If the two places do not coincide, the court might choose either of them to determine the applicable law. Although *lex loci delicti* and *lex loci protectionis* are different from a doctrinal perspective, but the result of those two approaches is sometimes similar.¹¹

After CLFCR enters into force, *lex loci delicti* is continuously adopted as the general rule in tort,¹² whilst a specific rule concerning liability arising out of IPRs infringement is established (*lex loci protectionis*). This new rule only applies to the

⁶ It should be noted that normally *lex loci protectionis* refers to the ‘country’ where protection is claimed. In China, ‘country’ is replaced by ‘place’, because it might involve the laws of Hong Kong, Macao and Taiwan, which are not ‘countries’ but have completely different legal systems compared with that of the Mainland China.

⁷ JI CLFCR [2012] No.24 was issued on 28 December 2012 and entered into force on 1 July 2013.

⁸ WIPO and HCCH: ‘A Guide for Judges: When PIL meets IP Law’ (2019) 52, <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1053.pdf>.

⁹ Before CLFCR, the choice-of-law rule is prescribed in GPCL Chapter 8 Articles 142-150, without specialised IPR-related provisions. Copyright infringement case, as a special type of tortious disputes, is subject to the general rule in respect of tort. Article 146: [1] general rule: *lex loci delicti* is applied to liabilities arising from tort. [2] exceptions: [a] if both parties have the same nationality or domicile in the same country, the law of that country shall be applied. [b] In addition, *lex loci delicti* will not be applied to the act committed outside the PRC territory if that act is not illegal under Chinese laws.

¹⁰ SPC [1988] No.6, Article 187.

¹¹ For example, *Guangyi v Blumberg* [2011] No.00319. The US company Blumberg first created the disputed fine art lamp in 2007 and registered the copyright both in US and China. Two Chinese companies were found to infringe the copyright of Blumberg’s lamp. Blumberg filed the suit in Chinese Chongqing Court where the defendants habitually resided. The court then decided to apply Chinese laws based on *lex loci delicti*, because the infringement occurred in China. If *lex loci protectionis* is adopted, Chinese Copyright Law would be applied as well, because China is also the place where the rightsholder claims for protection.

¹² The exception clause is revised. (n 9, GPCL Article 146) and Chap.5 Sec.3.1.2 chart (CLFCR Article 44).

facts that happened after the effective date of CLFCR.¹³ In other words, the court would adopt *lex loci delicti* in respect of infringement occurred before 1 April 2011 and adopt the new rule *lex loci protectionis* to deal with infringement occurred after 1 April 2011.

2.1.2 The party autonomy in infringement

Rome II Regulation allows party autonomy in some tort cases but excludes it in IPR infringement.¹⁴ In contrast, CLFCR allows parties to choose. However, it fails to be compatible with IPRs characteristics in two aspects.

Firstly, the substantive scope of applying party autonomy is not clear. The law does not express whether the party autonomy will be applied in determining the substance of the claim, or also remedies, or for third-party liability.¹⁵

Secondly, the requirement of the time of agreement is over-rigid. The law requires that the choice can only be made after the infringement occurs. However, most of IPR infringement arise from the breach of assignment or license contract. Therefore, such a requirement may result in an ignorance of the *ex-ante* choice-of-law agreements.¹⁶

In short, China adopts a relatively flexible approach in copyright infringement, but in lack of thorough understanding of IPRs characteristics when designing the provision.

2.2 The substantive scope of *lex loci protectionis*

EU copyright-related choice of law is partially harmonised and fragmented.¹⁷ The scope of *lex loci protectionis* in the EU does not extend to all issues concerning copyright but merely covers the non-contractual obligations arising from infringement.¹⁸ In other words, *lex loci protectionis* does not govern issues concerning initial ownership, existence, validity, content, duration or transferability and effects against third parties.¹⁹

Similarly, CLFCR does not adopt *lex loci protectionis* in IPR contractual relationship,²⁰ but expressly states that it shall be applied to the ownership and content

¹³ JI CLFCR Article 2, the CLFCR applies to civil events containing foreign elements that occur after its entry into force (1 April 2011).

¹⁴ It is accepted in CLIP Article 3:606, ALI §302, Transparency Proposal Article 305, Joint Proposal Article 302(1)(2).

¹⁵ Tang, Xiao & Huo 2016, para 12.62.

¹⁶ Ibid.

¹⁷ De Miguel Asensio 2020, para 4.100.

¹⁸ Rome II, Articles 1 and 8.

¹⁹ De Miguel Asensio 2020, para 4.102.

²⁰ CLFCR, Article 49. Party autonomy is the principal rule. In the absence of choice, the applicable law rule concerning contract is applied, that is, the characteristic performance principle or the most significant connection principle functions as the default choice-of-law rule for contracts. Tang, Xiao & Huo 2016, 333-339.

of copyright (Article 48) and liabilities of infringement (Article 50). It is not clear in law whether Article 48 can be interpreted broadly to include all property-related issues.²¹

2.2.1 Initial ownership

Among copyright substantive issues, the initial ownership is complex. As examined in the substantive chapter of this thesis, there are no unified provisions concerning the authorship of copyright internationally.²²

It was disputed whether Rome II Article 8(1) is applicable to initial ownership.²³ A common consensus has been reached that neither Rome I nor Rome II covers this property issue. MSs adopt different approaches concerning initial ownership: some adopt *lex loci protectionis*, and some adopt *lex origins* in contrast.²⁴

In China, neither laws nor JIs state whether the initial ownership shall fall outside the substantive scope ('ownership and content') of CLFCR Article 48 (*lex loci protectionis*). In practice, Beijing Internet Court confirmed that Chinese copyright law shall not govern the initial ownership of a foreign copyright work in *Peppa Pig* case.²⁵ The court found the initial ownership be determined by the law of origin.

The court first confirmed this case involving foreign elements, since both plaintiffs were foreign companies, and the disputed copyright work 'Peppa Pig' was created abroad. Subsequently, the court invoked CLFCR Article 2, rather than Article 48. Article 2 provides that the applicable law rule in a foreign-related relationship shall subject to CLFCR; if other laws prescribe special provisions, other laws prevail. Then the court pointed out that CL Article 2(2) National Treatment (i.e., the special provision)²⁶ shall be applied in this case.

The court analysed that the UK and China were members of BC; thus, the UK national's copyright shall be automatically protected in China under Chinese copyright law. Therefore, the attribution of rights (except for initial ownership), the content of rights and infringement liabilities shall be determined according to Chinese law.

The court stated that in order to ensure certainty, the law of the country where the work originated shall govern the attribution of the original rights in this work. The determination of initial ownership under *lex origins* is precise and stable, which will

²¹ Tang, Xiao & Huo 2016, 330.

²² Concept of initial ownership see Chap.1 Sec.4.1.1. It refers to the person or legal entities, who obtains the copyright when the work is created as designated by law. The actual author is not necessarily the initial owner. By comparing the ownership between China and the UK, conflicts exist in reality.

²³ See footnote 22 in CLIP 2013, 242.

²⁴ De Miguel Asensio 2020, paras 4.103-104. CLIP 2013, 243-244.

²⁵ *Entertainment One UK v Tuge* [2018] No.1045.

²⁶ CL, Article 2(2): 'Foreign work protected pursuant to agreement or international treaties': The copyright of the works of foreigners and stateless persons shall be protected by this Law in accordance with the agreements concluded between the country to which the author belongs or the country in which the author habitually resides and China or the international treaties in which that country is a MS.

not be affected by laws of other states. The certainty on initial ownership might encourage creators to create and enable users to seek a license and pay for the work, and therefore facilitate the dissemination of the work worldwide.

Peppa Pig illustrates the court's opinion that initial ownership shall be governed by the law of origin. However, this author is not convinced by the court's reasoning that CL Article 2 NT shall be applied as the applicable law rule, serving as the exception clause to the CLFCR *lex loci protectionis*. There is no literature or source illustrates that legislator regarded NT as the applicable law rule.²⁷

2.2.2 Problems of applying *lex loci protectionis* in the initial ownership

The problem of adopting *lex loci protectionis* in determining the initial ownership is widely agreed upon and examined thoroughly, that a country-by-country effect will arise.²⁸ When the copyright is created, such copyright might be owned by different parties located in different places. For example, a Chinese movie producer hires an English director to shoot a movie. The producer in China is considered as the initial owner, while the director only enjoys authorship rights. In the UK, the producer is the initial owner as well, but the director may act as a co-author at least.²⁹ If a Chinese movie producer claims copyright protection in China, it is the initial owner; however, in the UK, the director and producer shall enjoy co-authorship. Therefore, different substantive laws will result in different outcomes.

The situation would be more complex in respect of the employment relationship. For example, the first ownership of the copyright in such a work is generally enjoyed by the employee in China. In contrast, it belongs to the employer under CDPA.³⁰ In other words, if employee A of Company B has created a piece of work, the copyright is initially owned by A under Chinese copyright law but conferred to B under English copyright law.

If an English employee A signed an employment contract with an English company B and created a written copyrighted work without any agreement on the ownership. Later, someone located in China translated this work into Chinese and published it online without permission. Employer B, as the copyright owner under English law, therefore sued for infringement in China. In the trial, the ownership of copyright shall be determined at first. If *lex loci protectionis* is adopted, B would not

²⁷ Chap.3 Sec.1.2, National Treatment. From literal interpretation, it is merely a provision requiring National Treatment derived from BC.

²⁸ Matulionyte 2011, 203-229. CLIP 2013, 236. ALI §313 suggests a single location approach: the domicile of the creator or the place of first publication (the origin where copyright comes from).

²⁹ Chap.1 Sec.4.3.2.

³⁰ Chap.1 Sec.4.1. Chinese ownership is complicated, this example only illustrates the general favouring employee approach. As concluded by ownership section, Chinese employee approach is being adapted towards in favour of employer.

enjoy the copyright under Chinese copyright law. It means B's initial ownership and copyrights are deprived, while A might be conferred a new right in China.

2.2.3 Adjustment

CLIP Article 3:201 adapts the territorial approach *lex loci protectionis* concerning initial ownership. In order to mitigate the problem, it provides a special rule of 'contract interpretation' rather than a conflicts rule, for the work created under employment in Article 3:201(2). If the situation has a close connection with another State that has a work made for hire provision or deems a transfer or exclusive licence of all economic rights in the work to have taken place by virtue of the parties' contractual relationship, the effect may be given to such rules by constructing the parties' relationship under the law of the protecting country as involving a transfer or exclusive license of all economic rights in the work.³¹

Article 3:201(2) aims to guarantee the parties' expectations in a contractual relationship. This provision makes a suggestion to the judges that the contract shall be interpreted in the sense of a transfer or deemed transfer of the rights in favour of the person for whom the work was created.³² A flexible approach in line with the interests of parties is proposed.

2.3 Problems in the ubiquitous infringement

2.3.1 Multiple applicable laws

The most repeatedly discussed problem lies in the infringement involving multiple or ubiquitous states. The study of this problem has been thorough.³³ For example, Rome II *lex loci protectionis* might result in the mosaic of applicable national laws, under the current situation where the country-of-origin principle in E-Commerce Directive is not applied in IPRs. Therefore, an appropriate deviation from territorial *lex loci protections* under the Internet context is proposed. Otherwise, practical issues may arise, such as the burden of proof and increased duration and costs.³⁴

It is commonly accepted in a cross-border copyright relationship that different laws may be involved since the activities may locate in different places. For example, CJEU has stated that the act of distribution may occur in several states, particularly in the places where the distributed copyright goods are protected.³⁵ Moreover, CJEU held in *Football Dataco* that the act of sending data by A using the server located in X, to B's computer located in Y by B's request, for the purpose of the storage was an act that took place in Y. The act demonstrated a targeting intention to the public in Y. Y was

³¹ CLIP 2013, 236-240.

³² Ibid 238-239.

³³ Lutzi 2017, 698-699.

³⁴ Fawcett & Torremans 2011, 818.

³⁵ C-5/11 *Donner*, para 27.

the place where the act disclosed this intention.³⁶ Similarly, Chinese courts differentiate the act of reproduction located in the US and the act of communicating the work online located in *Google* case.³⁷

It might be acceptable if two or three laws applied, however, it will be troublesome under the ubiquitous Internet context, when the locations of the series of acts are located in different places. It may also concern the place where the act of uploading to the server is conducted, the place where the content is received, the place of the server or maybe the place where the decision of infringement is made.³⁸

The *lex loci protectionis* in the Internet case has long been debated. In reality, some self-restraint technologies, such as IP address filtering and geolocation technologies, can restrict the application of ‘ubiquitous’ laws within a certain scope. Accordingly, the infringement case might be raised in the place with a substantial connection.³⁹

However, from an international dimension, Internet-related activities still relate to multiple places. The case is heard by one court does not necessarily mean one substantive law shall be applied. For example, under the EU mosaic approach that the plaintiff may seek territorial damage, different laws shall be examined to determine each local damage.⁴⁰ As noted repeatedly by scholars, the adherence of *lex loci protectionis* is the direct consequence of IPR territoriality. The potential overlapping multiple laws may be addressed in the jurisdiction stage. Moreover, since EU copyright laws have been harmonised to a great extent, the negative consequence of using *lex loci protectionis* may decrease.⁴¹

The harmonisation of copyright law is the best approach to ensure a single law applied. However, it is not easy to achieve a full harmonisation in the near future, whether in a regional single market agreement or an international agreement, as examined in the substantive chapters of this thesis.

In order to provide an appropriate measure, some proposals allow an adjustment of *lex loci protectionis* concerning ubiquitous Internet-related activities.⁴² CLIP adopts a conservative approach that the single law can only be applied in ubiquitous infringement.⁴³ In other words, infringement takes place in a sizable number of states, rather than worldwide, remains subject to *lex loci protectionis*.⁴⁴ CLIP Article 3:603

³⁶ Chap.4 Sec.3.1.3. C-173/11 *Football Dataco*, paras 43 and 47.

³⁷ Chap.4 Sec. 4.3.3. *Wang v Google China and Google (US)* [2011] No.1321; [2013] No.1221.

³⁸ See generally Chap.2: the restricted acts by law, the acts which might be held secondary/indirect liability for infringement, and also acts which may be exempted from liability.

³⁹ De Miguel Asensio 2020, paras 4.109-4.115.

⁴⁰ Chap.4 Sec.3.1.2 and its application in *Hejduk* ‘mere accessibility and territorial scope of jurisdiction’.

⁴¹ Lutzi 2017, 717.

⁴² Matulionyte 2011, 166-202. CLIP Article 3:603. ALI §321.

⁴³ ‘Ubiquitous’ is defined cumulatively in Article 3:603(1): the infringement is conducted by ubiquitous media; the transmission by the ubiquitous media must lead to infringement in each state where the signals can be received.

⁴⁴ CLIP 2013, 315-316, para 3:603.C08.

adopts the law with closed connection (i.e., the single law) to adjudicate the cross-border infringement in its entirety and allows the global effect under this law.⁴⁵ The law provides multiple connecting factors to determine the law with a closed relationship.⁴⁶ The scope of this provision is restricted within the infringement arguably occurs in every state in which the signals can be received. The application scope of a single law is restrictive due to the CLIP's commitment to the territoriality principle.⁴⁷

As substantive laws are different, some activities may infringe copyright in X, while not in Y. CLIP Article 3:603(3) sets up a mechanism for the party to prove there is one or more countries apply a different law, unlike the substantive law in the state with the closest connection. The court shall consider both laws in determining the remedy. For the damages, it is not problematic that no damage will be imposed if the disputed acts are legal in the relevant state. However, the determination of the injunction may be not easy. The essential consideration shall focus on the legal acts conducted in one state, which do not automatically spread to other countries where the disputed acts are not legal.⁴⁸

2.3.2 The law applicable to determine ISP's secondary liability

In the field of PIL, secondary liability is rarely discussed. According to Rome II, the law applicable to principal infringement may also be applied to secondary liability of a third party.⁴⁹ In CLFCR, there is no equivalent provision.

As examined, intermediaries may be only found liable for infringement under specific circumstances.⁵⁰ Different requirements have been proposed worldwide, and the reform of intermediaries' obligation is being examined and researched.⁵¹ Therefore, a multinational ISP may have different obligations required by different laws.

A single law approach is proposed in CLIP Article 3:604(2), which allows the single law applied in determining secondary infringement conducted by certain types of intermediaries. However, the policies underlying this article and Article 3:603 is different. The purpose of the single law approach in Article 3:603 is to facilitate the enforcement of ubiquitous copyright, while this Article is to provide legal certainty for ISPs by providing one law in advance.⁵²

⁴⁵ Ibid 314-319.

⁴⁶ CLIP Article 3:603(2). For example, the infringer's habitual residence, the infringer's principal place of business, the place where substantial activities in furtherance of the infringement in its entirety have been carried out, and the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety.

⁴⁷ CLIP Preamble. CLIP 2013, 315.

⁴⁸ CLIP 2013, 319.

⁴⁹ Articles 8(1) and 15(g). The Regulation covers 'liability for the acts of another person'.

⁵⁰ Chap.2 Sec.3.2.

⁵¹ Chap.2 Sec.3.3.

⁵² CLIP 2013, 326, para 3:604.C02.

To sum up, a specialised territorial choice-of-law rule *lex loci protectionis* for copyright infringement is established in CLFCR, with a limited party autonomy as the supplementary approach. However, the law is simple without specific definition. It is difficult for Chinese court to make decision since Chinese legal system relies on written statutes. In lack of clear and definite statutory guidance, it might result in different understandings towards one rule, thus questionable judgments might be made. The following parts will examine whether Chinese courts apply *lex loci protectionis* and how the applicable law is applied in practice, in order to summarize or provide detailed factors which might be taken as reference in Chinese courts in the future.

3. Whether *lex loci protectionis* is applied in Chinese judicial practice?

Chinese courts used to apply a ‘wrong’ approach in determining the law applicable to copyright infringement, for instance, the law of the place of infringement or the law of the forum. This part will explore previous cases and their problems, and finally restate the importance of recognising the difference between *lex loci protectionis* and *lex loci delicti/lex fori*.

3.1 The first finding: *lex loci delicti*

Some Chinese judges make attempts to clarify what *lex loci protectionis* means. Some still hold the traditional opinion. For example, in the case *Spinmaster*, the court believes that ‘Spinmaster is a Canadian company and the disputed copyright infringement acts occur in China. According to CLFCR Articles 48 and 50, Chinese law will govern this case.’⁵³

SPC Judge Lang proposes in one journal article that *lex loci protectionis* in copyright infringement cases ‘shall’ be the law of the place of tort. She first makes a distinction between the automatically protected IPR (copyright) and registered IPR (trademark and patent).⁵⁴ If the protected rights require registration or approval, *lex loci protectionis* shall refer to the law of the place of registration and the place of infringement concurrently. The reason is that if the disputed IPR is not registered in one country, it shall be deemed that such rights are not protected within this territory; thus, the act of exploiting this unprotected IPR in this place would not be identified as an infringing behaviour.

If the disputed IPR is the right automatically protected, such as copyright rights and neighbouring rights, *lex loci protectionis* shall refer to the law of the place of infringement. The rationale is the law of protecting country will point to numerous (i.e.,

⁵³ *Spinmaster (Canada) v Guangyijingguang (China)* [2018] No.361.

⁵⁴ Lang 2019, 115. In addition, Judge Lang believes that *lex loci protectionis* will point to different substantive laws concerning different substantive issues. When determining the ownership and content of IPR it refers to the forum law, whilst the law of the place of infringement shall be applied in infringement.

179) laws according to the BC automatic protection.⁵⁵ In short, Judge Lang proposes the approach of selecting the single law among numerous national applicable laws – *lex loci protectionis* equals to *lex loci delicti* in copyright infringement.

3.1.1 SPC case analysis

The judicial precedence is not a legal source in China. However, the decision of the highest court might function as the guidance for the lower courts' judgment. In *Getty v Mianyang Newspaper*, SPC expresses the opinion on the relationship between the protecting place and the place of infringement in the choice-of-law stage.⁵⁶

The defendant Mianyang Newspaper, a local newspaper located in Szechuan Province of China, used an unauthorised photo, which owned by Getty US. The plaintiff Getty China, located and registered in Beijing, was authorised by Getty US as a Chinese agent to conduct the business of displaying, selling and licensing third parties to exploit the disputed photo within China. On 1 December 2010, the defendant Newspaper published news in print with the disputed photo, which was identical to No. 71085831 on the website of Getty.

In the first trial, there was no explanation on the determination of the law applicable to this issue. The judge directly applied Chinese laws and found that Mianyang Newspaper committed copyright infringement. The defendant appealed based on two substantive arguments: [1] Getty US was not the copyright owner of the disputed picture, and Getty China was not eligible to file a suit without a lawful copyright assignment or license. [2] The applied provision in Copyright Law, which governed the term of disputed copyright work, was wrong. The appellate court upheld the lower court's decision and rejected the appeal.

In 2014, Mianyang Newspaper applied to SPC for a retrial and raised a new argument concerning the choice-of-law rule: 'In this case, the main substantive issue is whether defendants own the copyright of the disputed picture. According to CLFCR, the court should first determine the place where protection is claimed and choose the law applicable to the dispute. However, the courts in the first instance and the second instance did not explain the choice-of-law rule and directly applied Chinese Copyright Law to address the issue. Moreover, both parties did not reach an agreement to choose Chinese law as the applicable law. Therefore, it is wrong to adopt Chinese Copyright Law to identify the infringement.'

SPC stated three issues in this case: one applicable law issue and two substantive issues. At the outset, SPC recognised this copyright infringement involving foreign elements. It then analysed why Chinese CL should be applied: 'The alleged infringement occurred within China; therefore, Chinese Copyright Law shall be applied. Furthermore, according to the international conventions that China has signed, Chinese laws shall protect the copyright of citizens of member states.'

⁵⁵ The possibility of applying 179 copyright laws occurs. WIPO, 'BC total contracting parties: 179' (29 January 2021) <https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15>.

⁵⁶ *Getty v Mianyang Newspaper* [2012] No.147; [2013] No.627; [2014] No.971.

The court continued to illustrate which choice-of-law rule shall be adopted in this case. ‘In respect of the applicable law issue that Mianyang has proposed, this court believes that the alleged infringement occurred before CLFCR entry into force; thus, CLFCR *lex loci protectionis* rule shall not govern this case.’⁵⁷ SPC further assumed that even if the infringing act took place after the effective date of CLFCR, ‘there would be no conflicts between the two national laws – CL and CLFCR – in the application of the law’. Therefore, SPC found no errors in the previous decisions that Chinese Copyright Law shall be applied.

From this author’s view, this decision does not define *lex loci protectionis*. Also, it is confusing that the court wrote there is no ‘conflict’ between CL and CLFCR in the application of the law. Due to the ambiguity of Chinese language, this simple Chinese sentence might be interpreted differently, mainly in three-fold.

One reasonable understanding is that the national treatment clause in CL provides that foreign copyright shall be protected within China under Chinese laws. If such a right is infringed in China, Chinese laws shall be applied. Similarly, the applicable law rule in CLFCR *lex loci protectionis* must point to Chinese Copyright Law in this case. Therefore, no conflict exists because the same result (Chinese Copyright Law is applied in this case) is achieved no matter which approach is chosen.

Another understanding might be inferred that the court believes that the two applicable law rules lead to the same result: if adopting *lex loci delicti* (the rule before CLFCR entry into force), Chinese law shall be applied; if adopting *lex loci protectionis* (the rule after CLFCR entry into force), Chinese law is the law of the protecting country which shall be applied as well. So, there is no conflict before or after the effective date of CLFCR in the law application.

A third understanding might be *lex loci protectionis* and *lex loci delicti* is assimilated. The court might confirm that the protecting place refers to the place of infringement. To sum up, no matter what this ‘no conflicts’ means, it could be ascertained that SPC fails to provide a clear and precise definition of *lex loci protectionis*. Furthermore, a distinction is not made between the traditional rule (*lex loci delicti*) and the newly established rule (*lex loci protectionis*), thus indicating a misconception that the place of infringement is the protecting place in copyright infringement without convincing legal reasonings.

3.1.2 The distinction shall be made

This author admits that the result of adopting *lex loci delicti* and *lex loci protectionis* is identical in most cases. For example, in *Getty* case, the infringement occurs only within China since the disputed local newspaper is distributed within a city in fact. It is the same place where the disputed work is exploited and sought protection. However, it does not mean that these two rules are the same. In practice, some Chinese courts do not distinguish *lex loci protectionis* and *lex loci delicti*, even apply the latter

⁵⁷ Chap.5 Sec.2.1.1.

rule directly in copyright infringement case after CLFCR entry into force.⁵⁸ The distinction shall be pointed out from a theoretical view.

Firstly, *lex loci protectionis* shall override *lex loci delicti* in copyright infringement. In China, IPR is recognised in Civil Code Article 123⁵⁹ as a civil right, followed by a non-exhaustive list of protected IPR objects, including ‘work’. Although IPR laws are not codified into Civil Code, a notion that IPR laws are special laws to the Civil Code (Law) has been upheld all the time.⁶⁰ The doctrine states that the law governing a specific subject (IPR) matter shall override the law governing the general matters (civil relationship).⁶¹ Thus, in the law (CLFCR) that governs the foreign-related civil relationship, the general tortious rule (*lex loci delicti*) shall yield to the specific IPR infringement rule (*lex loci protectionis*) in a copyright infringement case.

Also, the escape clause of those two rules is different. In other words, the exception provided in the general rule shall not be applied in the copyright infringement (see the chart). Specifically, even if one party’s habitual residence is the same as that of the other, the law of that habitual residence shall not be applied accordingly in the copyright infringement case. For example, in *Chunguang v Nanguo*⁶², both parties habitually reside within China. It is correct that the court did not use the Article 44 exception to conclude Chinese law (the place of two parties’ habitual residence) shall be applied, but relied on Article 50 exception.

	Article 44 (tort)	Article 50 (IPR infringement)
General rule	Lex loci delicti	Lex loci protectionis
Exceptions	If both parties habitually resided in one place, the law of this place shall be applied.	/
	If both parties choose <u>the applicable law by agreement</u> after tort occurs, the agreement shall prevail.	Both parties may choose <u>the law of forum</u> after infringement occurs.

5.1 The choice-of-law rules in CLFCR: tort and infringement

⁵⁸ *Lex loci delicti* was still wrongfully adopted to determine the applicable law in copyright infringement case after CLFCR entry into force, for example, in *Longchamp v Yihe* [2016] No.10468; cases filed by *Ye Jiaxiu* [2017] No.10178 & No. 10179, and [2017] No.13367; cases filed by *Alt-N technologies* [2015] No.4 & No.70; cases filed by *Rhino* [2015] No.17, No.18, No.37, No.38 & No.39; *Jiuzhang v Xu* [2018] No.757 & No.758.

⁵⁹ Civil Code (GPCL 2017) Article 123.

⁶⁰ Li Mingde 2017. Feng 2017, 12. Liu Renshan 2019, 10.

⁶¹ This doctrine is provided in Civil Code (GPCL 2017) Article 11: ‘Where there are any special provisions on civil relations in any other laws, such special provisions shall apply.’

⁶² *Chunguang v Nanguo* [2017] No.416; [2018] No.552. Both parties are Chinese candy companies. The plaintiff filed the suit against the defendant for its unauthorised use of the disputed artistic work ‘candy wrapper’. The candies produced by both parties were exported to the United Arab Emirates and the United States, and not on sale within China. Both parties did agree to choose CL in the trial.

However, the exception clause is not adopted correctly in *Jiuzhang v Xu*.⁶³ Jiuzhang is a Chinese biotechnology company which has signed a series of contracts with Xu, a Chinese professor at Szechuan University in China, concerning a study on chlorogenic acid, with the clause that Jiuzhang Company owns all IPRs created under this research project. In 2013, Xu submitted a journal article in ‘Journal of Analytical Methods in Chemistry’ published by Hindawi, located in London. Jiuzhang sued for copyright infringement that Xu published this article without authorisation.

The first trial confirmed this copyright infringement involving foreign elements, but oddly adopted Article 44 in determining the applicable law. It concluded that since the habitual residence of both parties locate within China, the law of the habitual residence (CL) shall be applied according to Article 44 exception rule. The second court did not express opinions on the choice-of-law issues. This author believes that it adopts a wrong approach. It is a copyright infringement case; thus, the special rule in Article 50 shall be applied. In other words, *lex loci protectionis* shall be adopted rather than the general rule in tort (*lex loci delicti*) and its exception (the law of habitual residence).

Secondly, the formulation of both rules is different. *Lex loci delicti* is the law of the place of ‘tort’ that is only applied in contentious circumstances. It is not a suitable approach to cover all aspects of copyright, for example, in a non-litigation or non-contentious context.⁶⁴ In CLFCR, *lex loci protectionis* is the approach concerning copyright proprietary issue (Article 48) and infringement-related issue (Article 50). There is a strong link between the content of copyright rights and infringement from a substantive view.⁶⁵ If *lex loci protectionis* was interpreted as the law of the place of infringement, it would not be appropriate to cover the content and ownership issue of copyright when no infringement has been committed.

The **third** difference lies in the dogmatic level. When a court adjudicates a foreign-related case, the first step is to choose the applicable law according to the choice-of-law rule, and then to apply the selected national law to address the substantive issue. If *lex loci delicti* is adopted, in order to locate the place of infringement, the court shall first assess the substantive issue to inquire whether there is a copyright infringement to a certain degree. It means the substantive question shall be initially answered at the choice-of-law stage.

On the contrary, there is no need to examine the substantive issue at first if *lex loci protectionis* is applied. At the applicable law level, the only question that should be answered is which country grants the disputed right protection. It is of no significance to find ‘whether and where the infringement takes place’. Such questions shall be

⁶³ *Jiuzhang v Xu* [2018] No.757 & No.758.

⁶⁴ Fawcett & Torremans 2011, 677-678.

⁶⁵ Chap.1 and Chap.2. In copyright law, the validity, ownership, content of rights and infringement are closely related. Once the content of copyright is determined, then the acts of infringement and its liabilities and remedies will follow logically. It is not proper to distinguish between property-related issues and infringement issues concerning copyright.

addressed in the second stage (the substantive law level) after the first step (the choice-of-law level) is finished.⁶⁶

Fourthly, the territorial consideration might be conducted in different stages. Both *lex loci delicti* and *lex loci protectionis* embody the territorial principle of IPR, but on different levels. For instance, in the same factual situation as that in *Auction* case.⁶⁷ From the applicable law level, it seems that *lex loci delicti* might cross borders and govern cross-border issues. However, it should be noted that the territorial principle will be applied on a substantive law level that HK law would only confine the relief to its territory. If *lex loci protectionis* is applied, the law of Hong Kong, the protecting place shall govern the issue that a major part of the infringement takes place within Hong Kong. The territorial principle is embodied in the choice-of-law level. Unfortunately, it seems that Chinese courts put little emphasis on the territorial consideration.

Finally, from an international cooperation perspective, *lex loci protectionis* is advantageous in harmonising the IPR-related choice-of-law rule. Compared with the determination of the place of infringement, it is easier to identify the place for which protection is claimed. Because different countries hold different opinions on what acts constitute copyright infringement.⁶⁸

In short, *lex loci delicti* is different from *lex loci protectionis*. It shall be avoided using the traditional approach in a copyright infringement case, even though the place of infringement coincides with the protecting place in most cases.

3.2 The second finding: *lex fori*

Some courts do not differentiate the rule of *lex fori* and the rule of *lex loci protectionis*. The decisions show that some courts treat the place of litigation as the protecting place.

⁶⁶ Matulionyte 2011, 60-61.

⁶⁷ *Wu (MC) v Duoyunxuan (MC) & Yongcheng (HK)* [1995] No.48. The plaintiff Wu is a famous painter domiciled in Mainland China (MC), and defendants are auction houses located in MC and HK respectively. The disputed painting attached with false authorship to Wu which was auctioned by the defendants in HK. Wu filed the suit in MC court claiming that the disputed work was not created by him and the authorship on the painting was false. He sued for the violation of his authorship right according to MC Copyright Law. The Shanghai court decided that MC Copyright Law shall be applied, based on the fact that defendants had prepared for auction, such as collecting paintings and conducted an infringing act of sending 50 books containing all the paintings for auction in Shanghai. The court therefore found the place of tort located in MC and the law of that place, MC Copyright Law, shall be applied. The court adopted *lex loci delicti* and concluded MC law should govern the cross-border infringement, even though the substantial infringement occurred in HK, while the preparatory act occurred in MC.

⁶⁸ Chap. 2. Fawcett & Torremans 2011, 807.

3.2.1 Cases

In *Google* case, the judge held that Chinese law should be applied because ‘Chinese court hear this case’.⁶⁹ In *Tezuka v Atongmu*, the court stated that ‘Tezuka is a Japanese company who files this suit in the Chinese court, and this case will apply Chinese law to ascertain the content and ownership of the copyright in relation to the disputed work, according to CLFCR Article 48.’⁷⁰ The reasoning of these cases is routinely written in the way that ‘the case is heard by the Chinese court; thus, Chinese law shall be applied’.

Such a decision is acceptable in most cases when the place of the court is also the place where exploitation of the work occurs. For example, if Chinese infringers conduct infringement within China and the copyright owner claims protection in China, the law of the protecting country is Chinese law without doubt.

However, the essential difference between the two should not be forgotten simply because most cases do not require a distinction between them. For example, in *Chunguang v Nanguo*, the disputed work ‘candy wrapper’ is used in foreign countries whilst both parties are Chinese companies.⁷¹ Assuming both parties do not agree with the applicable law, the protecting place in this case shall be the foreign country where the candy in dispute is exported. Even though the Chinese court hears the case based on the general jurisdiction that the defendant domiciled in China, it does not mean that the forum law (Chinese law) shall be applied to adjudicate an infringement that occurs in foreign countries. Therefore, *lex loci protectionis* shall not be confused with *lex fori*.

3.2.2 *Lex loci protectionis* shall not be interpreted as *lex fori*

First of all, from the wording of CLFCR Article 50⁷², *lex loci protectionis* shall not be treated as the law of court. According to the Chinese statutory interpretation rule, one legal term in one law shall be interpreted and understood identically, and different legal terms within one law shall embody different meanings.⁷³ Since the two rules juxtapose in one provision, they shall be interpreted differently from a literal perspective.

Secondly, the logic of this article suggests that there should be a possibility of applying foreign law besides the forum law, otherwise there would be no need to give the parties the right to agree on an option to apply the law of the forum after the infringement occurred.

⁶⁹ *Wang v Google China and Google (US)* [2011] No.1321; [2013] No.1221. Chap.4 Sec.4.3.3. The judge finally held that Google US’s behaviour did not constitute fair use and infringed the author’s copyright according to Chinese Copyright Law.

⁷⁰ *Tezuka (Japan) v Atongmu (China)* [2014] No.413. The court held that the Chinese translation of a foreign animation character’s name ‘阿童木’ shall be protected under Chinese copyright law.

⁷¹ *Chunguang v Nanguo* [2017] No.416; [2018] No.552. (for the fact, n 62).

⁷² Chap.5 Sec.2.1: the general rule – *lex loci protectionis*; the exception – *lex fori*.

⁷³ Wu & Zhu 2012, 56.

Moreover, the courtroom is not the only place for copyright holders to claim protection. There are various non-litigation means to seek copyright protection after infringement occurs, such as through governmental bodies⁷⁴ and arbitration⁷⁵.

Therefore, ‘the law where the protection is claimed’ does not necessarily refer to ‘the law of the court’, from a view of legal interpretation, legislation logic and practical consideration.

4. How *lex loci protectionis* is applied in Chinese courts?

For the purpose of analysing how the court applies *lex loci protectionis* in a copyright infringement case, this group of cases are searched under the keywords ‘copyright infringement’ and ‘*lex loci protectionis*’⁷⁶ after CLFCR entry into force. This part will examine [1] whether courts analyse the applicable law issue; [2] whether the substantive scope of *lex loci protectionis* is clarified in judgment; [3] whether the limited party autonomy is recognised; [4] how courts deal with Internet-related copyright infringement.

4.1 The neglect in analysing the applicable law issue

4.1.1 Finding: one sentence without analysis

According to the result of this research, there are 37 cases of the total 1044 (3%) that the court writes one sentence, listing the CLFCR relevant provisions and directly stating CL shall be applied, without analysing the applicable law issue. No error in the application of law is found in those 37 cases.

4.1.2 Suggestion

Although no error is found, this author still concerns the neglect of choice-of-law analysis in Chinese courts. Those 37 cases all involve foreign plaintiffs and Chinese defendants who exploited the plaintiff’s copyright without authorisation in China. There is no doubt that Chinese copyright law shall be applied to determine substantive issues. But this author concerns, as the increase of cases, such as *Chinese v Chinese*

⁷⁴ Chap.1 Sec.2.4.1. NCAC has established an online sector at its official website for copyright holders to report infringing behaviour. Anyone could fill in the form and upload evidence of infringing acts. NCAC will examine the evidence and deal with the copyright infringement by administrative methods, such as blocking the website of infringement works.

⁷⁵ The definition of *lex loci protectionis* may be required under contractual negotiation.

⁷⁶ China Judgments Online: <https://wenshu.court.gov.cn/>. Search keywords: copyright infringement (著作权侵权), foreign-related (涉外), *lex loci protectionis* (被请求保护地), civil cases first instance (民事一审). 1044 cases in total (9 February 2021).

(concerning the exploitation of copyright abroad) or *Chinese v Foreign*,⁷⁷ the inertia that comes from long periods of neglect will lead to problematic results.

There are several historical reasons for this concern. Generally, China has a long history of excluding the application of foreign laws.⁷⁸ It is a common problem in all foreign-related civil and commercial cases, not exclusive to IPR, that the analysis on choice-of-law rule is not sufficient.⁷⁹

In particular, in the area of IPR, the deep-rooted territoriality is embedded in Chinese law.⁸⁰ Dr Wang concluded in one journal article that it could be commonly seen that the IPR foreign-related decisions failed to analyse the applicable law issue. Even in the annual ‘Guidelines on Adjudicating IPR Cases’ published by SPC, all the ‘selected’ foreign IPR cases did not involve the choice of law analysis since 2008 (until the year 2011 when this journal article was submitted).⁸¹

There is a common belief in Chinese judges that no choice-of-law rule exists in IPR for a long time. In 2005, Judge Chen of Beijing HPC clearly proposed in two journal articles published by SPC that legal conflicts and choice-of-law issues did not exist in foreign-related IPR civil relationships due to the territorial nature of IPR. The rationale of this statement bases on the National Treatment that China protects foreign parties as Chinese nationals under Chinese copyright law.⁸² Judge Jiang, who was then the chief justice of the SPC Third Civil (IPR) Tribunal, also proposed that Chinese laws ‘must’ be applied in IPR cases containing foreign elements in light of territorial principle. Therefore, there is no need to state the choice of law rule and analyse the applicable law issue routinely in the decision.⁸³

Those statements were acceptable ten or twenty years ago, since the factual situation of almost all infringement cases that time was similar – the foreign copyright holder claimed for protection against Chinese infringer in China. Over the years, it has become a deep-rooted theoretical thought for Chinese judges that Chinese laws must be applied in solving foreign-related IPR cases. Even if CLFCR has been effective for almost ten years, some judges merely repeat the provision and conclude to adopt Chinese laws without any evidence-based interpretation under the influence of the traditional thought of excluding foreign laws.

⁷⁷ Chap.1 Sec.2.4.2 n 67.

⁷⁸ Chap.3 Sec.3.3.

⁷⁹ Song & Zhao 2011 (Characterization is ignored in the decision.) Xu 2018 (A case study is conducted in all civil and commercial relationship that CLFCR governs. Xu concludes that although legislative progress has been made, the problems in the judicial practice remain. The number of judgments without analysis on applicable law issue decreases, however judgments with insufficient reasoning still exist.) Wan 2005, 121, 124 & 129 (Early in 2005, the fourth division of SPC has carried out a guidance on the format of writing foreign-related cases.)

⁸⁰ Chap. Introduction Sec.1 and Chap.3 Sec.1.1.

⁸¹ Wang Chengzhi 2012, 133-34.

⁸² Chen Jinchuan (2005:1), 36; (2005:2), 35-6.

⁸³ Jiang Zhipei 2006, 9-10.

Another reason for neglecting the applicable law rule in copyright cases might lie in the case trials classification system in China. Certain types of dispute are allocated to different divisions of the court. Foreign-related civil cases are usually assigned to the 4th Division, while foreign IPR cases are adjudicated in the 3rd Division (IPR Division).⁸⁴ It is inevitable that judges in the IPR division attach more importance to the substantive issues, rather than the choice-of-law analysis in writing judicial opinions, which are mostly short and concise.

In order to eliminate this problem and promote judicial credibility in dealing with foreign-related cases, SPC has issued a notice to suggest a written format and urged courts to analyse the applicable law issue in making a decision.⁸⁵ It will be beneficial for foreign parties to understand the application of rule clearly if the Chinese judgment analyses it in more details, and furthermore, for attracting foreign parties to initiate or participate in the lawsuit in China.

This author admits that this SPC Notice is useful for raising judges' awareness of choice-of-law analysis, but it might be of limited effect if Chinese judges keep insisting that the territoriality principle is equivalent to the application of Copyright Law. Since the copyright industry in China has been more matured than decades ago, and has started to export Chinese copyright abroad, Chinese courts shall think outside the 'CL-must-be-applied' box and be more careful about the choice-of-law issues depending on the fact.

4.2 The diverse scope of substantive issues that *lex loci protectionis* applies

4.2.1 Finding: the substantive scope varies among courts

In CLFCR, there is a rigid requirement of substantive scope of adopting *lex loci protectionis*: content and ownership (Article 48); liabilities arising from infringement (Article 50). However, the application scope is flexible in practice, some of the researched cases may apply *lex loci protectionis* outside the substantive scope required by law.

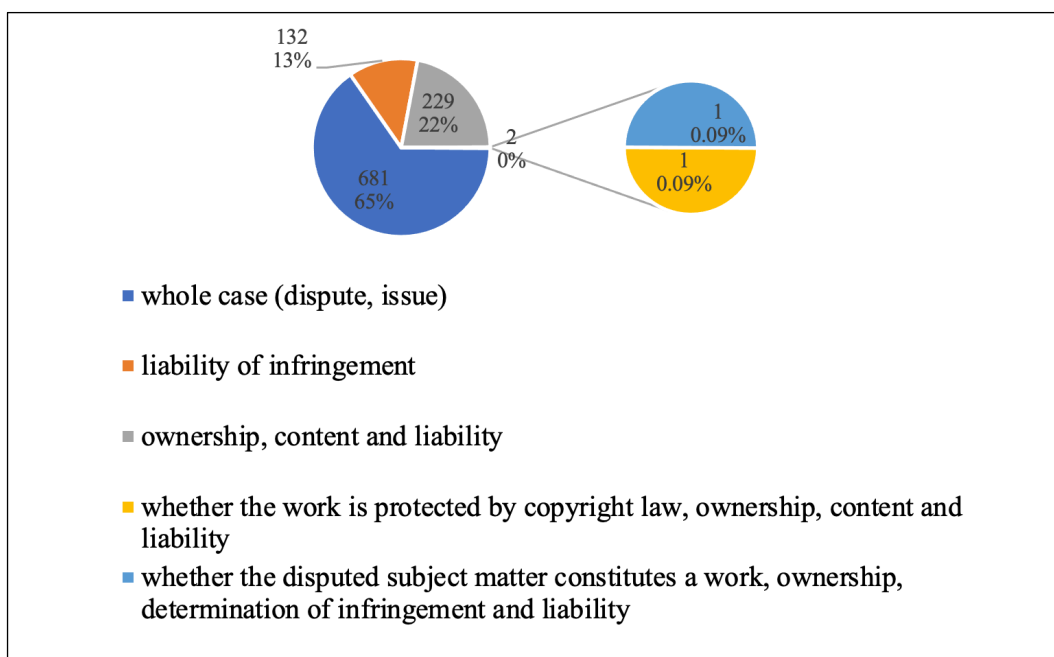
Firstly, it is commonly found in the decision that 'Chinese laws shall be applied "in this case", "to solve the dispute", and "to solve all substantive issues"'. Only 35% of the total clearly states the substantive scope that *lex loci protectionis* applies. Furthermore, among those 35% cases, two cases expand the legislatively substantive scope to validity issue,⁸⁶ and one case expands to cover the determination of infringement.⁸⁷

⁸⁴ Wang Chengzhi 2012, 136.

⁸⁵ In 2015, SPC published a notice ([2015] No.67) concerning the requirements on writing the foreign-related judgment. Article 14 (3) proposes that the court shall provide the analysis on the law applicable to the dispute.

⁸⁶ *KOEN Media (Korea) v JSTV* [2016] No.38614. *Asmodus (US) v Asmodus (Beijing)* [2017] No.47023.

⁸⁷ *Asmodus (US) v Asmodus (Beijing)* [2017] No.47023.



5.2 The substantive scope of adopting *lex loci protections*

4.2.2 Suggestion

The result reveals that most Chinese courts put less emphasis on the substantive scope. For those judges who have noted the rigid scope in law, they tend to adjust it or adopt a flexible approach in applying *lex loci protectionis*.

In *Chunguang v Nanguo*,⁸⁸ the court stated that the scope of using *lex loci protectionis* should be determined case by case. Hainan HPC analysed that according to the wording of Article 50, liabilities arising out of infringement referred to the remedies of the infringing act. However, in practice, this scope might extend to include the identification of infringement on a case-by-case basis. The court finally concluded that ‘liabilities arising out of infringement’ might include the identification of infringement and its remedies in this case.

This author would like to point out the importance of the substantive scope in applying *lex loci protectionis*. It is not appropriate to write in the judgment that ‘*lex loci protectionis* shall be applied in addressing the whole dispute/issues’, because copyright dispute may contain many issues.⁸⁹ Even though there is no finding that Chinese courts have used CL to deal with the initial ownership of foreign copyright,⁹⁰ courts have

⁸⁸ *Chunguang v Nanguo* [2017] No.416; [2018] No.552. (for the fact, n 62) This case is outside the scope of 1044 cases studied above. The database only contains the second trial of this case, thus under the method conducted by this researcher (filtering with keyword ‘civil case first trial’), this case falls outside the research scope of Figure 5.2.

⁸⁹ Generally, three-fold: property-related (Chap.1 Sec.3 and Sec.4), contractual (Chap.1 Sec.4.4) and infringement (Chap.2).

⁹⁰ Chap.5 Sec.2.2.

extended the scope to cover ‘validity’ and ‘determination of infringement’ indeed. The court shall be careful about the required ‘narrower’ scope in law.

4.3 The uncertain scope of substantive issues that the exception clause applies

One escape clause in CLFCR grants limited freedom, allowing parties to choose CL (the forum law) to address liabilities arising from copyright infringement, after the infringement occurred and before the end of the first-instance courtroom debate. 42 of 1044 (4%) judgments recognise the choice of parties.

There are two types: *foreign rightsholder v Chinese infringer* and *Chinese v Chinese*. For the first type, the protecting country is also China, this author does not see any difference if party autonomy is allowed or not. Those foreign plaintiffs won the cases because Chinese copyright law had been developed and was compliance with international treaties mostly.⁹¹ Therefore, those foreign plaintiffs would agree to apply the forum law (CL).

The problem mainly lies in *Chinese v Chinese*. For example, in *Chunguang v Nanguo*, the court resorted to the escape clause of Article 50. The court stated that parties should be allowed to choose the forum law after the infringement, especially in those IPRs cases which did not involve the public interest or registration/approval for protection by the state of origin. The court believed that it was an effective and efficient approach for the court to clarify the disputed legal relationship and solve substantive copyright issues, if the forum law could be applied.⁹² The rationale of this statement is apparent that the law which the court is most familiar with must be the law of that forum place.

However, what if the disputed copyrighted work was not exploited within China. The problem thus is, shall Chinese law (the forum law) govern the infringement occurred abroad, as long as parties agreed? A similar problem exists in *Xiang v Peng*.⁹³ The plaintiff Xiang is a Chinese painter whose painting named ‘Zuihe’ was first published in a book in 2007. In 2014, the defendant Peng (Chinese) exhibited his painting ‘Hezhongxian’ in Russia and Germany, which was found similar to the plaintiff’s painting ‘Zuihe’. The plaintiff brought a copyright infringement case to a Chinese court. The defendant claimed that his painting was an imitation of the original painting. Moreover, the defendant believed his work embodied originality to a certain extent, thus falling outside the scope of the restricted act of ‘copying’ under Copyright Law.⁹⁴

⁹¹ As examined in the substantive chapters, it is rarely seen that CL fails to meet the international requirement nowadays, except for the term of protection concerning photographic works. But no related cases have been encountered in those 42 searched cases.

⁹² *Chunguang v Nanguo* [2017] No.416; [2018] No.552 (for the fact, n 62).

⁹³ *Xiang Weiren v Peng Lichong* [2015] No.9141; [2015] No.1814; [2017] No.30.

⁹⁴ Both paintings depict a woman lying in the middle of lotus flowers. Multiple lines of Chinese calligraphy are added to the defendant’s painting, which are not presented in the plaintiff’s work.

The court stated that the applicable law issue was whether this case involved foreign elements and which law should be applied. The court firstly analysed that both parties were Chinese painters, but the illegal fact of exhibiting took place in Russia and Germany. Therefore, the judge ascertained it was a foreign-related copyright infringement case, and CLFCR would be adopted to determine the applicable law.

Subsequently, the court stated, according to CLFCR and JI, *lex loci protectionis* shall be applied in IPR infringement, with an exception that both parties might agree to choose the forum law.⁹⁵ The court then analysed that the plaintiff did not submit the choice-of-law issue, and all the substantive arguments were raised on the basis of Chinese Copyright Law. Moreover, the defendant applied CL to defend in the courtroom debate as well. Therefore, this court found that two parties had agreed to choose Chinese laws to govern this case.

This author could not agree with the court's decision in the determining the applicable law rule. According to CLFCR, *lex loci protectionis* shall govern both 'content and ownership' and 'liabilities', but those two substantive issues are prescribed separately. Article 48 (content and ownership) does not allow party autonomy. In other words, there is no room for parties to choose the forum law in the content and ownership of copyright,⁹⁶ and limited freedom only exists in liabilities arising from infringement.

However, if one takes a look at the substantive issue in this case, it seems that the court allows party autonomy in determining 'content and ownership' issue. In the latter stage of substantive analysis, the court stated that the act of imitating was complex. The determination of whether an imitating act constituted reproduction right infringement should base on the facts. The court believed it should assess whether the *defendant's* work was original or nor. If not original, the defendant's act therefore would be found infringement.

In this author's view, the determination of reproduction infringement thus includes an assessment of the validity issue, that is, whether the defendant's work is original and protected by copyright. However, according to CLFCR, parties are not allowed to choose the applicable law concerning the validity issue. The court should not adopt the limited party autonomy approach to address infringement issue and validity issue simultaneously.

The author of this research admits that it is a beneficial attempt to eliminate potential complexity that many laws could be applied, by introducing party autonomy into the infringement issues. Since copyright is automatically protected worldwide, this rule proposes a single-law approach, in order to ensure certainty, judicial efficiency and convenience, also facilitate the settlement of disputes and promote copyright protection

According to Copyright Law, the restricted reproduction acts in law does not include the act of imitating (Chap.2 Sec.2.2.2).

⁹⁵ Chap.5 Sec.2.1.

⁹⁶ JI CLFCR Article 6 provides that the choice by parties is held to be null and void if PRC laws do not make explicit provisions accordingly.

and enforcement.⁹⁷ It is beneficial for parties involved and also convenient for the court to hear the case using its forum law.

However, those advantages and conveniences are not justified, under the current circumstance when CLFCR adopts a strictly ‘narrow’ scope. Assuming the principle of party autonomy is adopted in all substantive aspects in practice, this choice shall be deemed null and void according to law, for the reason that there are no definite provisions allowing party autonomy to be adopted in addressing such a broad substantive scope.⁹⁸

Furthermore, it shall be noted that the party autonomy merely points to the forum law, that is Chinese Copyright Law because the precondition of invoking CLFCR is Chinese courts hear the case. China is the forum place. In most cases, China is also the protecting place. Therefore, even though the substantive scope of party autonomy in law is rigid, there is no difference in the result of applying CL, either adopting party autonomy (the law of forum place – CL) or *lex loci protectionis* (the law of protecting place – CL). This might be the reason why Chinese courts fail to note the substantive scope in the written judgment.

From an international perspective, if the party autonomy of applying the forum law in governing validity and infringement is allowed, it may result in a problem. Assuming X court hears the case based on the general jurisdiction that defendant B domiciled at X. If the copyright law of X does not protect the plaintiff’s copyright, or finds the defendant’s act legal, the party autonomy of using forum law (X copyright law) will result in the plaintiff being unable to win this case.

Most of plaintiffs would certainly choose the law most favorable to them to win the case. This party autonomy in Chinese law depends on the high level of protecting copyright under Copyright Law. However, it may not be suggested internationally to apply party autonomy in a broad substantive scope, because national copyright laws are still diversified worldwide and the protection level in each state varies. CLIP Article 3:606 provided that party autonomy might be applied in determining *remedies* under two circumstances: [1] the pure copyright infringement (Article 3:606(1)); [2] the contractual relationship (Article 3:606(2))⁹⁹. It is justified because it may increase legal certainty especially when infringement occurred in multiple states.¹⁰⁰

4.4 The Internet context: not the ubiquitous context in China

According to this author’s research, Internet-related copyright infringement cases involving foreign elements might be generally divided into two types: the series of

⁹⁷ Wu & Zhu 2012, 62.

⁹⁸ JI CLFCR, Article 6. (n 96)

⁹⁹ The law applied in the contract shall also be applied in determining remedies.

¹⁰⁰ CLIP 2013, 347.

litigations against Taobao¹⁰¹ and Apple App Store¹⁰². The facts within each type are similar.

For cases against Taobao, the foreign copyright owner brings the lawsuit against the Chinese defendants who illegally sell the product containing copyright work via Taobao.com. The cases involving Taobao are not problematic, since the website has a geographical restriction. The goods containing illegal copyrighted work can only be sold and distributed within China.¹⁰³ The protecting place is Mainland China without a doubt. It is not a pure ubiquitous or Internet case, where the alleged infringer mainly commits the act of violating reproduction right.¹⁰⁴

For cases against Apple, the plaintiffs are Chinese companies that are authorised to exploit the disputed books via the Internet and enjoy the globally exclusive copyright right to disseminate works online through license agreements with the actual authors. Several applications, categorised as ‘Books’ in the apps list, containing infringing literary works are found in the Apple App Store. The plaintiff companies file the copyright infringement case against Apple in the Chinese court. These cases fall within the scope of CIN right infringement and involve liabilities of intermediaries.

The judgments clearly stated that the first step was to determine the applicable law. ‘The defendant, Apple, locates in the US; thus, the case is foreign-related. According to CLFCR Article 50, the plaintiff claims that the infringing act in dispute is the act of providing the service for downloading the apps containing illegal contents by operating the Apple applications store within Mainland China. The place where the plaintiff seeks protection is Mainland China. Therefore, the liability arising for copyright infringement shall be governed by Chinese Copyright Law.’

According to the fact, both two types of cases are not ubiquitous actually. Both Taobao and App Store use geo-blocking measures to restrict the infringing work or the infringing digital content within one region or state.¹⁰⁵ Despite that, the court attempts to narrow the scope confined to Chinese territory by using the act-based analysis, that Apple provides service within China.¹⁰⁶ But in any case, no truly ubiquitous

¹⁰¹ Those decisions are made mostly by the Court of Hangzhou, where the defendant Taobao (the online shopping website) locates.

¹⁰² *COL v Apple* [2018] No.3243, 5320, 5322, 5323, 5325, 5326, 5328 and 5329. It is important to note that, Chinese courts start to realize CLFCR shall be analysed in the foreign-related copyright cases recently. Judges used to apply Chinese Copyright Law directly without determining the applicable law according to CLFCR in copyright infringement cases involving Apple’s liability. For example, in *Cao Haihui v Apple* [2015] No.00253, *Wang Xiaodi v Apple* [2015] No.00255.

¹⁰³ If the delivery address is shown as being outside of the Mainland, a reminder that ‘the order cannot be delivered’ will pop up and such an order cannot be placed.

¹⁰⁴ Chap.2 Sec.2.2 and Sec.2.3.

¹⁰⁵ If users plan to download applications to their Apple products (iPhone, iMac, etc.), they must register Apple ID and log in the App Store. Each account is associated with one Country/Region, which can be changed in the Settings on Apple products. Some apps are region exclusive.

¹⁰⁶ Chap.3 Sec.3.2.2. Chinese copyright law differentiates two types of activities in respect of ISPs: providing content and providing service.

infringement case has emerged in China after *lex loci protectionis* was officially recognised as the choice-of-law rule concerning copyright infringement in law (i.e., after the effective date of CLFCR).¹⁰⁷ Accordingly, there is no rule or detailed interpretation concerning the applicable law rule in ubiquitous infringement case.

5. Interim conclusion

Lex loci protectionis is widely accepted due to the territoriality principle of IPRs. When it encounters ubiquitous technology, problems arise, such as the possible application of ubiquitous laws. In order to find a suitable approach, different proposals have been carried out, but the basic *lex loci protectionis* based on territoriality has not been abandoned. It is expected that the territorial approach will remain the major rule while the universal approach act as an exception strictly limited in a certain scope. Since the harmonisation of copyright laws develop, the problems will decrease accordingly.

This author supports the legislative progression in Chinese laws to stipulate *lex loci protectionis* as an approach to determine law applicable to copyright infringement. In reality, no foreign copyright laws have been applied in foreign-related copyright infringement cases by far in China, according to the research of this author.

After examining the cases, this research finds at the early age when CLFCR was enacted, problems emerged in the judicial application of *lex loci protectionis* including: the adherence to the old rule *lex loci delicti*, the deliberately avoidance of applicable law issues, and the direct application of Chinese substantive laws without explanation.

Nowadays, Chinese courts have realised the importance of choice-of-law issue in foreign-related copyright cases. Although the above mistakes may occasionally occur, most of them are made by courts located in the less developed areas of China, while rarely found in judgments delivered by Beijing, Shanghai, Hangzhou and Guangdong Courts.

Even though Chinese courts have started to use *lex loci protectionis* in practice, problems still exist due to the oversimplified and rigid provision in the law. The understanding and application scope of *lex loci protectionis* and limited party autonomy varies from court to court. According to the researched cases, it has no effect on the outcome of applying CL, no matter whether the scope is clarified or not. Because almost all cases concern *foreign v Chinese*, that is, ‘foreign’ parties claim for copyright protection against ‘Chinese’ parties for the infringement occurred within China.

However, it is still worth noting the difference concerning the legal basis for applying CL, either from *lex loci protectionis* or party autonomy. Otherwise, problems would arise, if courts allow parties to choose the forum law governing ‘content and ownership’. Under the current situation, no problems arise. But as Chinese copyright

¹⁰⁷ The ubiquitous cases *Google* (Chap.4 Sec.4.3.3) and *Yahoo* (Chap.4 Sec.4.3.2) both occurred before CLFCR. The Google case adopted the traditional *lex loci delicti*, that either the law of the place of infringing act or the place of the effect shall govern the infringement (GPCL Article 146). China is the place of effect arising from Google US’s unauthorised digitalization; and also, the place of infringing act (violating CIN right) conducted by Google China. Therefore, Chinese copyright law is applied.

goes abroad, it would be inappropriate and incompatible with the territorial characteristics of copyright, in particular, when Chinese courts apply CL chosen by parties in governing ‘content and ownership’ in cases where the copyright is exploited and infringed abroad. Therefore, this author suggests a clarification or attention on the legislatively substantive scope which *lex loci protectionis* and party autonomy shall be applied.

Finally, since Chinese courts rarely encounter ubiquitous copyright infringement case, there has been no practical problems arising from the application of *lex loci protectionis* under ubiquitous context by far, which have been discussed thoroughly from the EU or UK perspective. The harmonisation of copyright law would reduce the potential problem of overlapping national copyright laws. Besides, the suggestion of abandoning mosaic principle in jurisdiction would eliminate the possibility of applying numerous substantive laws as well.

CONCLUSION

Contribution and limitation

This thesis generally compares copyright law and private international law in the UK and China concerning cross-border copyright issues. The contribution of this thesis is the detailed examination of how courts apply copyright law and private international law in respect of copyright protection in foreign-related situation. Compared with the examination concerning judicial practice, this thesis put less emphasis on the doctrinal issues which have been thoroughly analysed. Moreover, it mainly examines the current law and practice in China, that is, how copyright law protects foreign works and how the court deals with foreign-related copyright issues by adopting jurisdictional rules and choice-of-law rules.

The comparison is limited between Chinese law and the traditional English law (and its Europeanised law). It is of more value to discuss the UK law under the EU context in this thesis, because China has considered shifting from strict sovereignty protection to international, regional or bilateral cooperation over the foreign-related relationship, for example, the ‘One Belt and One Road’ initiative, the regional cooperation with Association of Southeast Asian Nation and the 2020 Asia-Pacific RCEP trade agreement. The merit of the EU single market experience will be beneficial for Chinese law and practice.

Brexit has brought significant effects in the UK, but this thesis could not follow up the UK law and practice after Brexit Day, which has been delayed several times. The limitation also exists in the examination of Chinese judicial cases. Thanks to the open and free database published by SPC, this research could base on the case study of Chinese practice. However, due to the large number of cases in China, the focus of judicial practice may centre around the judgments delivered by Beijing courts, where judges may be more professional and flexible with a comparative perspective of Chinese law and foreign law.

Copyright Law

It is natural to transplant rules from international treaties and other countries in a developing country like China without profound copyright theories and industrial practice. It indeed has a positive effect in establishing a copyright system in a short period of time and promote copyright protection. However, as the copyright industry grows, problems arise, mainly due to the gap between law and practice.

Chinese legislators prefer to transform ‘western’ rules in line with Chinese social, economic and cultural context. However, sometimes it may create several unique (or odd) provisions. It is appreciated that legislators attempt to establish Chinese characteristic copyright law in accordance with the social and economic context, in order to ensure rules are applicable in real life. However, such ‘creative’ legislation shall not be against international consensus; otherwise, it can be counterproductive as it treats foreign parties preferentially in the cross-border environment, for example, the

copyright protection of acrobatics and the original copy owner approach of protecting unknown authorship work.

As shown from the evolution or the transplantation process of Chinese Copyright Law before 2020, it is not coherent systematically. Moreover, some concepts and provisions are ambiguous and outdated. Furthermore, the Chinese court is just the judicial institution of applying the law, rather than the place of making law. Under the conservative legislative context where Chinese courts have no discretion, it is difficult for the court to apply ambiguous and abstract detailed provisions without an inherent logic systematic understanding. Inconsistent decisions are the inevitable result of these problems. Even worse, irreconcilable judgments cannot ensure legal certainty and predictability of parties involved and cannot inform citizens and corporations of their rights and obligations upfront.

Since 2012, China has genuinely begun to clarify its copyright law in the light of Chinese context and problems. On 11 November 2020, the new amendment was officially published and would be effective on 1 June 2021. The 2020 amendment has conducted a comprehensive revision concerning the subject matter, the content of rights, ownership, limitations, administrative bodies and damages. It is the first time China revised its copyright law under domestic social, cultural, economic and judicial needs.

One of the significant advances in the 2020 amendment is the adjustment of Internet-related rights to include acts which previously could not be covered by copyright rights. It solves the long-standing problem of the courts being unable to apply reasonable provisions to cases involving acts such as webcasting. A relatively complete system of Internet-related rights is now in place, and this author looks forward to its implementation in the future.

2020 Copyright Law fills some gaps between the law and practice. However, there is room for improvement. **From a detailed perspective, the basic concepts and provisions shall be refined.**

Fundamentally, the nationwide harmonized interpretation of originality is of significance. As 2020 CL has officially liberalized the list to protect new types of ‘works’ and adopted a broad concept of audiovisual works, originality is the starting point in answering whether a work will be protected in China.

Secondly, the term of photographic works shall be refined in the subsequent Regulation. It shall be noted that the new provision may have a negative impact on fulfilling WCT obligation.

Thirdly, the new provision concerning initial ownership shall be clarified further and more practical in real life. It requires the Regulation and Judicial Interpretation to provide detailed guidance, especially concerning the boundary between TV series & movies and other audiovisual works.

From a perspective of protecting foreign copyright, the problems which might arise in the future shall be noted. The protection of copyright in China shall be equal. In other words, no distinction shall be made between Chinese and foreign copyright work. During the past thirty years’ effort, the protection over foreign copyright increases in China. However, differential (some preferential and some

insufficient) protection over foreign copyright has occurred. Therefore, several certain aspects shall be refined.

Firstly, a prudent approach in judicial practice shall be adopted as new copyright law starts to embrace new types of works. Before determining whether a new work will be protected or not, a thorough examination of foreign laws must be made in advance. A situation should be avoided where, for example, acrobatic works, a work that is protected in China but cannot be protected by foreign copyright laws abroad.

Secondly, a more detailed calculation concerning the term of photographic works shall be provided in the subsequent Regulation, in order to make sure the term of protection vested to foreign photographic works is not decreased.

Thirdly, the ownership issues are complicated in the new law. There is a need for the subsequent Regulation to provide precise classification. Otherwise, it is difficult for foreign parties to fully understand why it is prescribed and to whom the copyright is attributed in the foreign-related relationship.

In short, the third revision of the copyright law has a domestic-driven character, and several provisions embody Chinese characteristics which are rarely seen worldwide. The author agrees that legislation should base on domestic issues, but it is important not to solely focus on domestic issues in legislation and judicial interpretation. Since China has attempted to impose more economic assumptions on copyright, it will be beneficial to take a transnational perspective and approach to refine and apply the law to step into the world market.

The cautious attitude in practice. Compared with the long history of copyright law and its application in the UK, this author concerns that the discretion of courts might be overly used in China after the open-minded 2020 CL's enactment. Chinese courts are given more discretion to determine the scope of protected work. The determination of originality shall be taken as the safeguard for avoiding radical protection over new types under 'copyright' protection.

This author suggests the court shall adopt a cautious attitude and restricted interpretation pursuant to the purpose of copyright law. This author agrees with the flexible approach of interpreting copyright law, but such flexibility shall not base on derogating from legal certainty. Otherwise, the completely divergent judgments, in relation to certain (new) works, among domestic courts today will continue to worsen. This would not help the future legislation based on judicial practice, and also would not assist in attracting foreign parties to choose Chinese courts and Chinese laws for trial because of legal uncertainty in Copyright Law.

The nationwide consensus in practice. The ambiguity in provisions and lack of systematic inherence in Chinese copyright law amounts to legal uncertainty for parties involved, especially in a cross-border situation. The vague transplanted concept need clarification in domestic laws, and the inherent logic shall be enhanced. It will be beneficial for foreign parties involved if the detailed and uniform application of copyright law is published by SPC nationwide. It might also achieve a far-reaching implication for foreign courts to apply Chinese laws to solve cross-border copyright disputes.

Some measures have been adopted to deal with different understandings of the same concept among judges. For example, Beijing HPC has tried to unify the application of the law by way of publishing ‘Guidance’. However, such a measure, which provides substantive legal certainty, is only effective among courts within a province. On the one hand, it cannot eliminate inconsistent rulings nationwide. On the other hand, it will bring a high burden to Beijing courts. When parties have options, they would prefer to choose the court where the rules are clear and definitive. Since China is not a case law country, SPC’s Judicial Interpretation and cases guidance might serve as an essential method for harmonizing nationwide decisions. SPC shall consider publishing unified guidance for the national courts.

The consideration of balance in practice. The past thirty years have shown the success of copyright law in protecting rights holders in China. However, the balance shall not be tilted to one side. It is challenging for Chinese judges to answer in the future: how to properly use the judicial power to solve problems brought by backward legislation? How to strike a balance between the protection of holders’ rights and the public interest?

From a general perspective, copyright protection shall be limited within a reasonable scope under its social, cultural and economic situation. The judicial interpretation shall be conducted in line with the purpose of copyright law, thus achieving a balance between creators, distributors, exploiters and public interest. Copyright is a ‘strong’ right with a long period of protection accompanying many exclusive rights. The overly broad protection might damage the public interest and become obstacles in accessing knowledge and disseminating culture.

Copyright Law in the UK and China

Despite there is a tendency of international and regional convergence, huge diversity still exists in the copyright field. Between the UK and China, copyright laws have fundamental differences and also share several similarities in many aspects.

The UK copyright law before Brexit, influenced by harmonisation of EU, follows civil law tradition in many aspects. It is not certain whether such a trend will continue in the post-Brexit age. Brexit might be a chance for UK law to move away from Europeanised aspects and revert to the traditional English approach. Chinese copyright law, based on the civil law system, has transplanted a large portion of the common law approach in the 1990s legislation, thus revealing a mix and complex characteristic. As the UK has left the EU, and China has adopted an open-minded attitude on the legislation of 2020 CL pursuant to domestic need, each legal order will continue to emphasise its different legal cultures and policies, and reflect domestic social, cultural, economic and technological needs.

The **creation and validity** of copyright play an important role in defining the scope of copyright protection. Generally, it is more dependent on the court’s interpretation to determine whether a work is protected by copyright law. Both courts have been seeking the balance between flexibility and certainty in addressing copyright validity, in line with the fast-pacing industrial and technological development. Although there is a process of convergence, diversity still exists due to different

domestic needs. It is not certain whether the UK originality will revert to the traditional approach due to Brexit, and the lack of inherent systematic originality amounts to unpredictable result in China. Such different understanding plus flexibility might bring different results in different national courts.

Since international conventions are silent on the authorship of copyright, different countries apply different approaches of granting **ownership**. In the UK, the work has always been considered as a commodity with economic value. The ownership therefore prefers the investor, that whoever undertakes the risk of exploitation shall have the right to receive economic benefits. In China, driven by industrial and commercial needs, there is a tendency to favouring legal entities, especially in works created by many contributors. Both countries tend to value the investor or entity, but the situation still exist when the rights of a same work are owned by one in the UK but might be granted to the other one under Chinese copyright law.

The differences concerning moral rights are big. Although the types vary, it is widely accepted that the purpose of protecting moral rights is to protect reputation rather than economic interests. If someone would like to exploit a work, it might reduce problems for acquiring the waiver of moral rights in advance. However, such a waiver might not be effective in China.

Copyright infringement is no longer as territorial as it once was (i.e., both the act and the result occur in one place). Copyright infringement is now transnational in nature, in particular under the context of the Internet. Therefore, the resolution of foreign-related infringements requires PIL rules to select the appropriate forum and law.

Both copyright laws do not provide sufficient assistance in localising the ‘places’ which are relevant in determining jurisdiction and choice of law. Both fail to provide the detailed definition of the restricted acts by law and the indication of where these activities occur. The development of technology further adds the difficulty in identifying and localising the ‘places’.

Furthermore, the involvement of intermediaries makes cross-border disputes more complicated. ISPs might be exempted from liability if their acts fulfil a requirement. Therefore, intermediaries might be found not liable in the end, but the possibility of being sued cannot be reduced. In fact, the intermediary is easy to be attacked in the litigation by copyright owners. It might be a good strategy for the plaintiff to sue an intermediary, especially the multinational ISP, under cross-border infringement. It is cost saving for plaintiffs in the procedure, but also effective since some measures of the remedy can reach a worldwide result.

Private International Law

If copyright law is in its youth, private international law and in particular copyright-related rules in cross-border copyright protection, may be in its infancy in China. As a country with a history of territorial closure and a long-time insistence on sovereignty and fear of foreign matters, China started to open its markets and acted as an international market participant not until 1980. The establishment of international jurisdictional rules in Civil Procedure Law and the legislation of CLFCR in 2010

reveals a paradigm shift and a positive attitude in attracting foreign investment and integrating into the international market.

However, those rules are rigid and also incomplete. Accordingly, there are not enough foreign-related cases to test and refine the rules in China. The PIL-related law and practice in China do not present the consideration of the balance between certainty and flexibility, but also reveal a lack of PIL methodology in designing jurisdiction and a deviation of applying the choice-of-law rule in practice. With the increasing number of foreign defendants in Chinese copyright cases, there is an urgent need in China for specific legislation on international jurisdictional rules to ensure legal certainty and predictability of foreign defendants in foreign relations. Copyright protection over works shall adopt a conflict-of-laws view.

In respect of **jurisdiction**, some rules are outdated, and some rules originated from the abundant domestic judicial experience are not appropriate in the foreign-related situation in China.

The **general structure** of international jurisdictional rule and the legislative attitude were established forty years ago. The legislative purpose that time focused on protecting national sovereignty and economy, some of which are old-fashioned and incompatible with the current social and economic situation nowadays.

Furthermore, due to the **conflation of domestic and international jurisdictions** in Civil Procedure Law and Copyright Law, the law established on the basis of domestic judicial practice cannot be well applied to foreign-related cases. The legislation of domestic rules does not take PIL methodology into account. The current successful jurisdictional rules regarding Internet activities originate from domestic practice and merely focus on allocating national courts. They do not necessarily work well and fair in foreign-related cases.

Factors related to **the single defendant** in general jurisdiction are not too problematic. It might be purely evidential and practical, which does not amount to special problems in online copyright. General jurisdiction may function well in cases when the defendant's act and result locate in multiple states. The plaintiff may sue in the place of defendant for the overall damage. Although the defendant is often unidentifiable in the Internet context, it is just the problem of evidence, not the problem of the rule itself. Regarding copyright cases involving **multiple defendants**, the rule needs perfection in line with legal certainty purpose. A balanced 'essential similar law and fact' approach is proposed.

Both countries encounter problems in interpreting **the special jurisdictional grounds**. The current approaches cannot guarantee the legal certainty and foreseeability for defendants. Effective, balanced, coherent and predictable rules are needed. In relation to special jurisdiction, Brussels Regulation distinguishes different rules based on the subject matter of the dispute. This classification might be learnt by Chinese legislation, to provide a systematic structure on designing international jurisdictional rules. But the wrong direction of adopting 'mere accessibility' in the EU is inconsistent with copyright characteristics and fails to meet the purpose of establishing special jurisdiction, thus shall be avoided in the Chinese practice.

The EU ‘causal event’ limb is not problematic since it adopts factual analysis and normally self-evident, so that parties may reasonably predict and ensure legal certainty. In contrast, theoretical and practical problems exist in the interpretation of ‘damage’ limb. This thesis proposes the place of infringement as the sufficient connecting factor with a *de minimis* limitation, and the territorial jurisdiction shall be granted a worldwide reach under limited ubiquitous circumstances.

Even though the interpretation of the special jurisdictional ground has evolved and furthered in law and judicial interpretation in China, these refinements were made merely based on the extensive examination on domestic cases. What an issue is in foreign cases is not an issue in terms of domestic allocation of jurisdiction. If those domestic rules are directly applied in foreign-related cases, problems like exorbitant jurisdiction might occur. Moreover, compared with the EU mosaic principle, there is no practice indicating in Chinese courts consider the territorial scope of jurisdiction.

Although there is a specialised **choice-of-law** rule concerning copyright issues in CLFCR, the applicable rule remains neglected or applied by mistake. The notion that Chinese law should be applied when a case is heard in Chinese courts is deeply rooted, and this inertia of thinking is particularly acute in territorial copyright cases. It is the result of long-standing notions of territorial protection and sovereignty protection over copyright in China. Although the law of the place where protection is sought in most of cases is Chinese law, it does not mean that Chinese law must be applied when the case is heard in China.

This thesis does not require the courts to apply foreign laws. The percentage of foreign laws applied is not a testament whether the choice-of-law rule is successfully and appropriately applied in China, nor a method to evaluate the decision of judges. What this thesis proposes is Chinese judges should not directly apply Chinese laws without taking the choice-of-law issues into consideration when dealing with cross-border copyright dispute.

Litigation with a **ubiquitous dimension** is most frequently faced by copyright. It is expected that the territorial approach will remain the major rule while the universal approach act as an exception strictly limited in a certain scope. Although the provisions concerning Internet-related acts have been improved in substantive law, it still fails to recognise the transnational copyright issues posed by the Internet. Since Chinese practice rarely encounters the truly ubiquitous context, there is not a big problem in practice. Accordingly, there is no further interpretation to address ubiquitous copyright issues from the PIL view in Chinese law and practice.

Since the copyright industry in China has been more matured than decades ago, and has started to export Chinese copyright abroad, Chinese courts shall think outside the ‘CL-must-be-applied’ box and be more careful about the choice-of-law issues depending on the fact. In addition, the possibility of applying numerous overlapping national laws shall be noted.

Concluding remarks

It would not be wrong to say that copyright development in China will step into its adolescence as the 2020 Copyright Law enters into force. At this stage, Chinese

copyright law is full of uncertainty and sometimes unpredictable. The judicial practice is dynamically adjusting the understanding and application of copyright law. The opinions of courts sometimes are outdated and conservative, sometimes are creative and aggressive, and sometimes are self-denying. Nevertheless, it is also through various attempts in judicial practice that the picture of copyright protection in China will become clearer.

At such a stage of dramatic change, despite a set of rules are established to protect copyright, the examination in this thesis reveals that the same provision can be interpreted differently by different judges. It might be even more severe, especially after the 2020 Copyright Law enters into force, due to its open and flexible legislative attitudes which grant courts more discretion. It may amount to substantive uncertainty for all parties involved in addressing foreign-related cases, especially when foreign parties plan to seek protection in Chinese courts.

The current situation in China perfectly reflects the long distance between Copyright Law and Private International Law. Copyright legislators, judges and lawyers might be confused with the PIL methodology, while PIL scholars are not familiar with characteristics concerning the national and international copyright relationship.

The reason may attribute to the rare judicial experience in China, due to the deep-rooted concept of the territoriality of copyright and the inability of some multinational ISPs to provide services to Chinese users. However, the lack of prominence of the problem in practice cannot be an excuse for the errors or misunderstanding in designing and applying PIL rules.

Legal certainty disappears under the Internet context. It is neither easy to localise one court to hear the world-wide reach dispute, nor proper to be adjudicated by multiple laws or the law from an unknown place. Some may suggest the Internet as a new jurisdiction. This author believes the Internet do not change the laws entirely. It just brings in some new situations in reality, for example, more foreign-related cases have emerged and the potential of involving many states is increasing due to the Internet.

China has established several special Internet Courts, such as Beijing Internet Court, Hangzhou Internet Court and Guangzhou Internet Court since 2017. All the litigation procedures are conducted online. SPC has stated on 3 February 2021 that the online submitting system is open for foreign (as well as HK, Macao and Taiwan) nationals, Chinese (Mainland) nationals who habitually resided in foreign countries (HK, Macao and Taiwan), and the enterprises or organisations registered in foreign countries (HK, Macao and Taiwan). It is regarded as an efficient and cost-saving method for foreign parties to initiate the litigation in China, especially under the COVID-19 context.

However, this is only a change of venue, from physical to virtual. It brings advantages to the participants, mostly the plaintiff. But the rules of PIL and the substantive laws which govern cross-border disputes are not changed. This author does not say that the Internet Court is not feasible but proposes that such convenient access to the Internet Court for foreign parties should impose higher requirements on the jurisdictional and choice-of-law rules concerning foreign-related cases in China.

The reason concerning deviation in understanding the basic PIL-related concepts essentially lies in the lack of specialised PIL legislation in China. For example, the same concept may have different meanings between jurisdiction (CPL) and the applicable law rule (CLFCR). Ideally, there would be a codification of PIL specifically governing jurisdiction, choice of law, recognition and enforcement of foreign judgments. The enactment of the PIL Code will create an inherently logic and consistent series of rules specialised in foreign-related relationships. In this regard, the study on codification has been proposed by the Chinese PIL Society. The group held the first meeting in December 2019. The PIL Code is to be expected.

In the short term, when PIL codification could not be achieved soon, the SPC's judicial interpretation and case guidance may eliminate the irreconcilable judgment among national courts and promote the predictability of judgment. In the long run, such a consensus shall be made on the maturing of legal doctrines, thus creating a coherent understanding of Copyright Law, Civil Code and the laws governing foreign-related relationships. Consistent academic, legislative and judicial understanding of key concepts can further advance the settlement of foreign-related copyright cases.

China's involvement in world trade grows fast, so does its judicial experience. Traditionally, the choice of the arbitration or the HK court was preferred in a cross-border transaction. Foreign companies are not willing to use China as a forum to settle the dispute. Since China has been seeking to act as the potential court for international dispute resolution, it is time to move from piecemeal PIL rules to an integrated PIL Code. It will be helpful for Chinese courts to be more attractive.

Cross-border copyright protection shall be effective and meaningful. In addressing transnational copyright cases, particularly those involving the Internet, it is more important to provide approaches for solutions than specific rules. The problems arising from the Internet or technology can be very specific based on the nature and fact of the dispute. Some problems can even be solved by technical or market-based means. It is impossible and unnecessary for the written rules to deal with all challenges and make precise predictions about changes in social relationships, particularly where technology is involved.

Therefore, this thesis does not suggest a one-size-fits-all rule but rather a number of factors that the court might consider in the decision. It is more practical than devising the specific rule. Moreover, this research is based on the opinion that Internet-related rules shall be adapted; however, not be reconstructed. It does not recommend an overall change but suggests a fine-tune of the application and operation of current provisions in order to strike a balance among participants, and also a balance between certainty and flexibility.

The flexibility in copyright protection is valued, but legal certainty must be guaranteed domestically or internationally. Exploiters and the third party like ISP, who act in good faith, shall be afforded a foreseeable result in cross-border copyright exploitation. Therefore, a balanced and tailor-made PIL approach shall be considered. On the one hand, the traditional principle and rule shall not be abandoned, thus ensuring legal certainty and predictability. On the other hand, flexibility shall be taken into account on a case-by-case analysis. This approach will further coordination between

the two states, even linking to the broader worldwide scale, from competing to cooperating.

From an international dimension, the sound, reasonable and balanced PIL rules can avoid positive or negative conflicts of jurisdiction. Since the worldwide consensus on copyright is hard to reach, there is a need for private parties not only making sure the precise scope of copyright protection before exploiting its work in a foreign country, and also a legal certainty to foresee the result of a dispute adjudicated by different courts and governed by different laws. The move from competition to cooperation should be proposed and promoted.

The year 2021 marks the 30th year of copyright legislation, the 30th year of incorporating international jurisdictional rule into legislation, the 10th year of enacting the first PIL-related legislation concerning applicable law in China. It is still far away from a complete and coherent set of foreign-related copyright rules, in particular, related to the Internet. This researcher admits that the refinement proposed by this thesis may not change the outcome of some or most of foreign-related copyright infringement cases in China that ‘Chinese court shall hear the case and apply Chinese law’. But this thesis suggests a PIL perspective to refine cross-border copyright-related law and judicial interpretation, and a theoretical foundation for addressing copyright infringement with foreign elements, which fits the digital age and also cross-border context. As the openness and professionalism of Chinese judicial practice increase, this author believes it is just around the corner.

BIBLIOGRAPHY

- Arnold, Richard, 'Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of Protection' (2011) 1(3) QMJIP 272.
- Arnold, Richard, 'The Need for a New Copyright Act: A Case Study in Law Reform' (2015) 5(2) QMJIP 110.
- Beijing HPC, '2018 Ten IP Cases' (24 April 2019) <www.chinacourt.org/article/detail/2019/04/id/3851555.shtml>.
- Beijing Internet Court (official account), 'Report on Protection of Photographs' (7 July 2020) <https://mp.weixin.qq.com/s/dyXQMW_z_09TPNTkRVUpFA>.
- Bently, Lionel and others, *Intellectual Property Law* (5th edn, OUP 2018).
- Bently, Lionel, Suthersanen, Uma & Torremans, Paul (eds), 'Part I The Statute of Anne and Its Role in the World of Copyright' in *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (EE 2010).
- Bigos, Oren, 'Jurisdiction over Cross-Border Wrongs on the Internet' (2005) 54 ICLQ 585.
- Bird, Robert C. & Ponte, Lucille, 'Protecting Moral Rights in the United States and United Kingdom: Challenges and Opportunities under the UK's New Performances Regulations' (2006) 24 Boston U.Int'l L.J. 213.
- Bogdan, Michael, 'Website Accessibility as Basis for Jurisdiction under the Brussels I Regulation' (2011) 5 Masaryk University Journal of Law and Technology 159.
- Boschiero, Nerina, 'Infringement of Intellectual Property Rights: A Commentary on Article 8 of the Rome II Regulation' in *Yearbook of PIL Volume IX 2007*, 87-113.
- Briggs, Adrian, *Private International Law in English Courts* (OUP 2014).
- Briggs, Adrian, *The Conflict of Laws* (4th edn, OUP 2019).
- Chen, Jinchuan, 'Adjustment in the Foreign-related IPR Civil Relationship' (2005) 3 PJ 34. (Chen Jinchuan 2005:1)
- Chen, Jinchuan, 'Can the Right of Revision in the Current Copyright Law be Understood as the Right of the Author to Revise a Work after it Has Been Published?' (2019) 3 China Copyright 16. (Chen Jinchuan 2019:1)
- Chen, Jinchuan, 'Judicial Practice and Its Development in Internet copyright case' (2006) 3 NetInfo Security 59.
- Chen, Jinchuan, 'Speech on China Forum on International Legal Cooperation' (10 November 2019) <<https://new.qq.com/omn/20191111/20191111A0A2EV00.html>>. (Chen Jinchuan 2019:2)
- Chen, Jinchuan, 'The Law Applicable in the Foreign-related IPR Civil Relationship' (2005) 5 PJ 33. (Chen Jinchuan 2005:2)
- Chen, Jinchuan, 'Whether Courts Can Create New Types of Works?' (2018) 3 China Copyright 25.
- Chen, Jinchuan, *Copyright Trials: Principles and Practical Guidance* (LP 2014).

-
- Chen, Lei, 'Debating Personality Rights Protection in China: A Comparative Outlook' (2018) 26 *European Review of Private Law* 31.
- Chen, Qian, *Policy, Legal Doctrine and Practice of E-commerce* (Baijia Press 2001).
- Chen, Shaoling, 'The Communication to the Public Right in Copyright Law' (2015) 2 *ECUPL Journal* 41.
- Chen, Weizuo, *Comparative Private International Law* (LP 2012).
- Clermont, Kevin & Palmer, John, 'Exorbitant Jurisdiction' (2006) 58 *Maine Law Review* 474.
- CLIP, *Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary* (OUP 2013).
- Collins, Lawrence, and others, *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012).
- Cong, Lixian & Zhang, Xiaoxiao, 'On Territorial Jurisdiction of Infringement Cases about Internet Intellectual Property Rights' (2011) 13 *Journal of Northeastern University (Social Science)* 432.
- Cong, Lixian, 'Determination of Liabilities Arising from Online Copyright Infringement' (2015) 12 *China Publishing* 11.
- Cong, Lixian, 'On Law Application to Foreign Infringement Cases of Internet Copyright' (2010) 12 *Journal of Northeastern University (Social Science)* 156.
- Cong, Lixian, 'The Construction of BRICS Intellectual Property Disputes Settlement Mechanism and Its Implementation Path' (2018) 20 *International Forum* 52.
- Cong, Lixian, 'The General Trend and Optimization of China's Copyright Law' (2020) 21 *China Publishing* 12.
- Cong, Lixian, *Study on Internet Copyright* (WUP 2007).
- CPPRI, *The Economic Contribution of Copyright-Based Industries in China* (from 2007 to 2020).
- Cui, Guobin, 'The "Complacent" Server Test' (2016) 8 *IPR* 3.
- Davies, Gillian & Garnett, Kevin, *Moral Rights* (2nd edn, Sweet & Maxwell 2016).
- De Miguel Asensio, Pedro A., *Conflict of Laws and the Internet* (EE 2020).
- Derclaye, Estelle, 'Assessing the Impact and Reception of the Court of Justice of the European Union Case Law on UK Copyright Law: What Does the Future Hold?' (2014) 240 *Revue Internationale du Droit d'auteur* 5.
- Dickinson, Andrew & Lein, Eva, *The Brussels I Regulation Recast* (OUP 2015).
- Dickinson, Andrew, *The Rome II Regulation* (OUP 2010).
- Dinwoodie, Graeme B. & Dreyfuss, Rochelle C., 'Brexit and IP: The Great Unravelling?' (2017) *Oxford Legal Studies Research Paper No.46/2017* <<https://ssrn.com/abstract=2996918>>.
- Dinwoodie, Graeme B., 'A Comparative Analysis of the Secondary Liability of Online Service Providers' in Dinwoodie (ed), *Secondary Liability of Internet Service Providers* (Springer 2017).
- Dinwoodie, Graeme B., 'International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?' (2001) 49 *Am.J.Comp.L.* 429.
- Dong, Kaixing, *Study on the International Jurisdictional Rule in Copyright Infringement Cases* (PhD thesis, ECUPL 2014).

-
- Drexl, Josef & Kur, Annette, *Intellectual Property and Private International Law* (Hart 2005).
- Du, Tao, *IP and Conflicts of Laws* (PKUP 2020).
- Du, Tao, *Principles of Private International Law* (2nd edn, FUP 2018).
- Dworkin, Gerald, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' (1994) 19 Colum.-VLA J.L.&Arts 229.
- Elizabeth, Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006).
- European Commission, 'Copyright reform: The Commission welcomes European Parliament's vote in favour of modernized rules fit for digital age' (26 March 2019) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_183>.
- Ewald, William B., 'Comparative Jurisprudence (I): What Was It like to Try a Rat?' (1995) 143 University of Pennsylvania Law Review 1889.
- Fan, Yu, 'On the Transplant of "Work Made for Hire" Doctrine by Copyright Law of China' (2018) 2 Digital IPR 14.
- Fawcett, James J. & Torremans, Paul, *Intellectual Property and Private International Law* (2nd edn OUP 2011).
- Feaver, Reiko R, 'China's Copyright Law and the TRIPS Agreement' (1996) 5 (2) Journal of Transnational Law & Policy 431.
- Feng, Gang (Judge from Beijing IP Court), 'The New Copyright Law' (19 Nov 2020) <<https://mp.weixin.qq.com/s/1ACdiVXuAZkfCuc1lQOSLQ>>.
- Feng, Peter, *Intellectual Property in China* (Sweet & Maxwell 2003).
- Feng, Xiaoqing & Huang, Frank Xianfeng, 'International Standards and Local Elements: New Developments of Copyright Law in China' (2002) 49(4) Journal of the Copyright Society of the USA 917.
- Feng, Xiaoqing, 'Comments and Expectations on IPR Articles in GPCL 2017' (2017) 4 Law Review 12.
- Ficsor, Mihály, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (OUP 2002).
- Fisher, William, 'Recalibrating Originality' (2016) 54 Hous.L.R. 437.
- Fitzgerald, Brian & Shi, Xiaoxiang 'Civil Jurisdiction, Intellectual Property and the Internet' in Fitzgerald and others (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (Sydney UP 2008).
- Flanagan, Andrew, 'China Takes Down Millions of Songs in Push Towards Digital Music Legitimacy' (*Billboard*, 7 August 2015) <www.billboard.com/articles/business/6656695/china-takes-down-millions-of-songs-in-push-towards-digital-music>.
- Foong, Cheryl, *The Making Available Right: Realising the Potential of Copyright's Dissemination Function in the Digital Age* (EE 2019).
- Gan, Yong, 'The Development and Implication of Foreign-Related Jurisdiction Legislation in Japan - Comments on China CPL 2012' (2017) 4 Present-day Law Science 93, 103.
- Gao, Zhi & Zhang, Nan, 'Average Annual Increase of 30% in IPR Cases in Beijing in the Past Five Years' (*Beijing Daily*, 26 September 2020).

-
- Garcimartín Alférez, Francisco J. & Saumier, Geneviève, 'Treatment of Intellectual Property-Related Judgments under the November 2017 Draft Convention' (2018) <<https://assets.hcch.net/docs/0c2a7a4d-17ed-43b1-9b98-6bdb452f28a7.pdf>>.
- Geller, Paul Edward, 'Conflicts of Laws in Copyright Cases: Infringement and Ownership Issues' (2004) 51 *Journal of the Copyright Society of the USA* 315.
- Ghosh, Shubha, 'Managing the IP Sprawl' (2012) 49(4) *San Diego L.Rev.* 979.
- Goldstein, Paul & Hugenholtz, P. Bernt, *International Copyright: Principles, Law, and Practice* (4th edn, OUP 2019).
- Griffiths, Jonathan, 'Dematerialisation, Pragmatism and the European Copyright Revolution', (2013) Queen Mary School of Law Legal Studies Research Paper No.156/2013, 24.
- Gu, Angran, 'Legislation Report' (24 April 2001) <www.npc.gov.cn/wxzl/gongbao/2001-12/06/content_5280828.htm>.
- Guo, Yimeei, *Modern China's Copyright Law and Practice* (Springer 2017).
- Han, Depei, *Private International Law* (HEP 2000).
- Han, Depei, *Private International Law* (HEP and PKUP 2007).
- Hansmann, Henry & Santilli, Marina, 'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis' (1997) 26 *Journal of Legal Studies* 95.
- He, Kan, 'The Concept of Originality in Copyright Law in China and Europe' in Nari Lee, Niklas Bruun and Mingde Li (eds), *Governance of Intellectual Property Rights in China and Europe* (EE 2016).
- He, Lianhong, 'Moral Rights in the Context of Internet' (2006) 3 *China Legal Science* 69.
- He, Qisheng, 'The Idea of the Judicial System in a Large Country and the Development of International Civil Procedure in China' (2017) 5 *Social Sciences in China* 123.
- He, Qisheng, *International Civil Litigation in a Comparative Perspective* (HEP 2015).
- He, Qisheng, *Private International Law in China: A Pluralistic Perspective* (HEP 2019).
- Hennessey, William O., 'Protection of Intellectual Property in China (30 Years and More): A Personal Reflection' (2009) 46 *Hous.L.R.* 1257.
- Ho, Norman P, 'The Legal Thought of Emperor Taizong of the Tang Dynasty (618–907)' (2017) 12 (4) *Frontiers of Law in China* 584.
- Hu, Kangsheng, *Explanatory Notes of Copyright Law* (LP 2002).
- Hu, Mimiao and others, 'China' in Neville Cordell (ed), *Intellectual Property and the Internet* (Global Law and Business 2014).
- Hua, Jie Jerry, 'Rethinking Copyright Reform: Should China Imitate or Innovate?' (2014) 9(2) *JICLT* 94.
- Huang, Jeanne, 'Chinese Private International Law and Online Data Protection' (2019) 15 *Journal of Private International Law* 186.
- Huang, Jin & He, Qisheng, 'E-Commerce and Conflicts of Law' (2003) 1 *China Legal Science* 145.
- Husovec, Martin, 'European Union: Comment on Pinckney' (2014) *IIC* 370.

-
- Hutchinson, Terry C. & Duncan, Nigel, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin LR 83.
- Hutchinson, Terry C., 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018).
- IFPI Report 2012, 'Digital Music Report 2012' <www.ifpi.org/content/library/DMR2012.pdf> accessed 29 October 2018.
- IFPI Report 2016, 'Piracy Report' <www.ifpi.org/content/library/piracy-report2006.pdf> accessed 29 October 2018.
- IFPI Report 2018, 'Music Consumer Insight Report 2018' (9 October 2018) <www.ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf> accessed 29 October 2018.
- Jenard Report, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968) by Mr P. Jenard, OJ C 59/79.
- Jiang, Ge, 'Elements of the Work Made for Hire and Legal Entity Work' (2014) 5 Science of Law 102.
- Jiang, Ying, 'Comparative Study on Originality' (2004) 3 IPR 8.
- Jiang, Zhipei & Zhang, Hui, 'Promotion on Judicial Protection of Copyright Online' (2001) 2 PJ 9.
- Jiang, Zhipei, 'Judicial Protection on Copyright online' (2004) 1 IP Law Research 3.
- Jiang, Zhipei, 'Three Issues in IPR Adjudication' (2006) 1 PJ 9.
- Jiao, Heping, 'Reconstruction on Broadcasting Right and CIN Right' (2013) 1 Science of Law 150.
- Jiao, Yan & Dong, Xiaolong (Judges from Beijing HPC), 'Territorial Jurisdiction on Internet-Related Tort' (2006) 1 Technology and Law 89.
- Judge, Elizabeth F, & Gervais, Daniel J, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law' (2009) 27 Cardozo Arts & Entertainment Law Journal 375.
- Kong, Xiangjun, 'Study on the Act of Information Network Dissemination' (2012) 7 PJ 59.
- Kono, Toshiyuki, *Intellectual Property and Private International Law: Comparative Perspectives* (Hart 2012).
- Koo, Justin, *The Right of Communication to the Public in EU Copyright Law* (Hart 2019).
- Kretschmer, Martin, Bently. Lionel & Deazley, Ronan, 'The History of Copyright History: Notes from an Emerging Discipline' in Deazley, Kretschmer and Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book 2010).
- Kur, Annette & Dreier, Thomas, *European Intellectual Property Law: Text, Cases and Materials* (EE 2013).
- Kur, Annette, 'Enforcement of Unitary Intellectual Property Rights: International Jurisdiction and Applicable Law' (2015) 10 Journal of Intellectual Property Law and Practice 468.

-
- Lang, Guimei, 'Challenges to the Judicial Judgment in the Context of International IPR Protection and Its Solutions' (2019) 7 *Journal of Law Application* 106.
- Larsen, Torsten Bjørn, 'Multiple Defendants in IP Litigation' (2017) 12 *JIPLP* 747.
- Lee, Nari, Bruun, Niklas & Li, Mingde (eds), *Governance of Intellectual Property Rights in China and Europe* (EE 2016).
- Leiner, Barry and others, 'A Brief History of the Internet' (2009) 39(5) *Computer Communications Review* 22.
- Li, Chen, 'Interaction Between Legal Text and Judicial Interpretation' (2020) 8 *IPR* 8.
- Li, Chen, 'Misinterpretation on the Revision Right' (2004) 3 *China Patent and Trademark* 69.
- Li, Chen, 'The Legal Implication of the Categorisation of Works' (2018) 8 *IPR* 3.
- Li, Mingde & Xu, Chao, *Copyright Law* (LP 2003).
- Li, Mingde, 'Comments on the Article of Intellectual Property Right in GPCL 2017' (2017) 4 *China IPR* 60.
- Li, Mingde, *IPR Law* (LP 2008).
- Li, Shuangyuan, *General Theories on Private International Law in China* (LP 2006).
- Li, Wang & Chen, Yijin, 'Exorbitant Jurisdiction in International Civil Procedure and Its Regulation' in Li (ed), *Study on Foreign-related Civil and Commercial Jurisdiction* (IP Press 2004).
- Li, Wang, 'Determining the Nationality and Domicile in Chinese Private International Law' (2010) *Law Science Magazine* 62.
- Li, Yufeng & Ng, Catherine W., 'Understanding the Great Qing Copyright Law of 1910' (2009) 56 (4) *Journal of the Copyright Society of the USA* 767.
- Li, Yufeng, 'Copyright Protection in China' in Rohan Kariyawasam (ed), *Chinese Intellectual Property and Technology Laws* (EE 2011).
- Li, Zizhu, 'Explanation Note III' (2 August 2018) <<http://news.zhichanli.cn/article/6695.html>>.
- Li, Zizhu, 'The Determination of Cable Operators' Liability' (2012) 1 *China Copyright* 31.
- Lin, Ping, 'The Interview with One of Legislators: Professor Liming Wang' (*Pengpai News*, 19 May 2020) <www.thepaper.cn/newsDetail_forward_7448320>.
- Liu, Chuntian & Liu, Bolin, 'How to Define WFH and Its Ownership' (1990) 6 *Journal of Renmin University of China* 61.
- Liu, Chuntian, *Intellectual Property Law* (HEP & PUP 2000).
- Liu, Chuntian, *Intellectual Property Rights: Law and Cases* (CRUP 2006).
- Liu, Jingdong, 'Reconstruction of International Civil Procedure in China' (2016) 7 *Law Science* 3.
- Liu, Renshan, 'Responses and Enlightenment to CLFCR from GPCL' (2019) 1 *Tribune of Political Science and Law* 3.
- Liu, Wenqi, 'Expanding the Copyrightable Objects' (2017) 8 *Digital IPR* 30.
- Liu, Xin, 'Reform and Improvement on Ownership concerning Media Work for Hire' (2020) 10 *Technology and Publishing* 96.
- Liu, Yinliang, 'Catch-all Provisions of Copyright Law: Right or Wrong and Choice' (2019) 11 *Law Science* 118.

-
- Liu, Yinliang, ‘The Scope of CIN Right and Broadcasting Right’ (2017) 6 *Legal Research* 97.
- Liu, Youdong, ‘Study on the Revision Right’ (2010) 3 *Modern Law Science* 176.
- Lu, Haijun, ‘Critique of Categorization’ (2020) 9 *Social Sciences* 95.
- Lucas-Schloetter, Agnès, ‘Is There a Concept of European Copyright Law? History, Evolution, Policies and Politics and the *Acquis Communautaire*’ in Stamatoudi and Torremans (eds), *EU Copyright Law: A Commentary* (EE 2014).
- Lundstedt, Lydia, ‘Putting Right Holders in the Centre: Bolagsupplysningen and Ilsjan (C-194/16): What Does It Mean for International Jurisdiction over Transborder Intellectual Property Infringement Disputes?’ (2018) 49 *IIC* 1022.
- Lundstedt, Lydia, *Territoriality in Intellectual Property Law* (PhD thesis, Stockholm University 2016).
- Luo, Dian, ‘Judicial Determination on the Infringement of the Revision Right and Integrity Right’ (2011) 12 *Journal of Law Application* 103.
- Luo, Shenghua, ‘Research on Temporary Reproduction’ (2004) 4 *IPR* 19.
- Lutzi, Tobias, ‘Internet Cases in EU Private International Law Developing a Coherent Approach’ (2017) 66 *ICLQ* 687.
- Matulionyte, Rita, *Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules* (2015) 6 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 132.
- Matulionyte, Rita, *Law Applicable to Copyright: A Comparison of the ALI and CLIP Proposals* (EE 2011).
- McConville, Mike & Chui, Wing Hong, *Research Methods for Law* (Edinburgh UP 2007).
- McMillan, John & Naughton, Barry, ‘How to Reform a Planned Economy: Lessons from China’ (1992) 8 *Oxford Review of Economic Policy* 130.
- Merges, Robert P. & Song, Seagull Haiyan, *Transnational Intellectual Property Law* (EE 2018).
- Mysoor, Poorna, ‘Does UK Really Have a “Closed” List of Works Protected by Copyright?’ (2019) 41(8) *EIPR* 474.
- National Bureau of Statistics, <<http://data.stats.gov.cn/english/easyquery.htm?cn=C01>>.
- NCAC Report 2018, (26 April 2018) <<http://www.ncac.gov.cn/chinacopyright/contents/483/372806.html>>.
- Nelken, David, ‘Comparative Law and Comparative Legal Studies’ in Örucü and Nelken (eds), *Comparative Law – A Handbook* (Hart 2007).
- Nordemann, Jan, ‘Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?’ (2017) In-depth Analysis for the IMCO Committee, <[www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA\(2017\)614207_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA(2017)614207_EN.pdf)>.
- Official Statistics from Beijing Internet Court (22 April 2020) <www.chinacourt.org/chat/chat/2020/04/id/52410.shtml>.

-
- Ohly, Ansgar, 'Choice of Law in the Digital Environment – Problems and Possible Solutions' in Josef Drexl & Annette Kur (eds), *Intellectual Property and Private International Law – Heading for the Future* (Hart 2005) 241-256.
- Orlowski, Andrew, 'UK.gov rushes out broken "Orphan Works" system as EU Directive comes in' (*The Register*, 29 October 2014) <www.theregister.co.uk/2014/10/29/govts_orphan_scheme_plops_out_broken_on_arrival/>.
- Örücü, Esin, 'Developing Comparative Law' in Örücü and Nelken (eds), *Comparative Law – A Handbook* (Hart 2007).
- Pan, Wei, 'Explanatory Note on Beijing Guidance' (2018) 3 China Copyright 16. (2018:1)
- Pan, Wei, 'Explanatory Notes concerning Beijing Guidance 2018' (31 July 2018) <<https://mp.weixin.qq.com/s/vskd8VOj3A8xgxWymfoiag>>. (2018:2)
- Philips, Jeremy & Firth, Alison, *Introduction to Intellectual Property Law* (4th edn, Butterworths 2001).
- Pila, Justine, 'Copyright and Its Categories of Original Works' (2010) 30 OJLS 229.
- Pocar Report, Explanatory report on Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, by Professor Fausto Pocar, 2009/C 319/01.
- PRC, 'Opinion of Legislators' (29 May 2006) <www.gov.cn/zwhd/2006-05/29/content_294127.htm>.
- Priest, Eric, 'Meet the New Media, Same as the Old Media: Real Lessons from China's Digital Copyright Industries' (2016) 23(4) *George Mason Law Review* 1079.
- Qiao, Lichun, 'Independent Creation: A Connotation of Originality?' (2011) 7 IPR 35.
- Qu, Sanqiang, 'A Dilemma for Feudal China: To Launch a Copyright Scheme in the Late 19th Century' (2001) 5(3) *Frontiers of Law in China* 319.
- Qu, Sanqiang, *Intellectual Property Law in China* (Kluwer 2012).
- Quintais, João, 'The New Copyright in the Digital Single Market Directive: A Critical Look' (2020) 1 EIPR 28.
- Rahmatian, Andreas, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' (2013) 44 IIC 4.
- Reimann, Mathias, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 *Am.J.Comp.L.* 671.
- Ren, Chongzheng, 'Copyright Law of China: Can It Effectively Protect U.S. Works?' (1995) 16(1) *Loyola of Los Angeles Entertainment Law Journal* 67.
- Ricketson, Sam & Ginsburg, Jane C., *International Copyright and Neighbouring Rights* (2nd edn, OUP 2006).
- Rigamonti, Cyrill P., 'Deconstructing Moral Rights' (2006) 47 *Harvard International Law Journal* 353.
- Rosati, Eleonora, 'Closed Subject-Matter Systems are No Longer Compatible with EU Copyright' (2014) 12 *GRUR International* 1112. (2014:1)
- Rosati, Eleonora, 'Luxembourg, We Have a Problem: Where Have the Advocates General Gone?' (2014) 9 *JIPLP* 619. (2014:2)

-
- Rosati, Eleonora, *Copyright and the Court of Justice of the European Union* (OUP 2019).
- Rosati, Eleonora, *Originality in EU Copyright: Full Harmonisation through Case Law* (EE 2013).
- Savin, Andrej, *EU Internet Law* (2nd edn, EE 2017).
- Shen, Rengan, 'Copyright Law in China' (1996) 1 *International Intellectual Property Law & Policy* 73.
- Song, Lianbin & Zhao, Zhenghua, 'Problems in Writing Foreign-related Civil and Commercial Judgments' (2011) 1 *Law Review* 116.
- SPC, 'The Summary of the Symposium on the IPR Judicial Practice' (20 July 1998) <http://zscq.court.gov.cn/dcyj/201205/t20120509_176747.html>.
- SPC, *Intellectual Property Protection by Chinese Courts* (People's Court Press, from 2007 to 2020).
- Šrámek, Martin, 'Brussels I: Recent Developments in the Interpretation of Special Jurisdiction Provisions for Internet Torts' (2015) 9 *Masaryk University Journal of Law and Technology* 165.
- Stamatoudi, Irini, 'Originality under EU Copyright Law' in Torremans (ed), *Research Handbook on Copyright Law* (2nd edn, EE 2017).
- Stoianoff, Natalie, 'The Influence of the WTO over China's Intellectual Property Regime' (2012) 34(1) *Syd LR* 65.
- Stone, Peter, *EU Private International Law* (3rd edn, EE 2014).
- Su, Zhipu, 'Explanatory Note IV' (4 August 2018) <<https://mp.weixin.qq.com/s/20525YQhYnjB3ZzseN1QJg>>.
- Su, Zhipu, 'How to Govern Webcasting Act from the Perspective of Applying Copyright Law?' (2016) 8 *IPR* 29.
- Sun, Shanghong, 'The Jurisdiction of Foreign-Related Internet Tort in China' (2015) 33(2) *Science of Law* 174.
- Sun, Xinqiang, 'Authorship in China: Authorship and Related Issues under the Chinese Copyright Law of 1990' (2016) 54 (2) *Hous.L.R.* 469.
- Svantesson, Dan Jerker B., 'Between a Rock and a Hard Place – An International Law Perspective of the Difficult Position of Globally Active Internet Intermediaries' (2014) 30 *Computer Law & Security Review* 348.
- Svantesson, Dan Jerker B., *Private International Law and the Internet* (3rd edn, Wolters Kluwer 2016).
- Tang, Guan H., 'Treatment of Moral Rights in China' in Davies and Garnett (eds), *Moral Rights* (2nd edn, Sweet & Maxwell 2016).
- Tang, Zheng Sophia, 'Multiple Defendants in the European Jurisdiction Regulation' (2009) 34 *EL Rev* 80.
- Tang, Zheng Sophia, Xiao, Yongping & Huo, Zhengxin, *Conflict of Laws in the People's Republic of China* (EE 2016).
- Tappin, Michael, and others, *Laddie, Prescott and Vitoria: The Modern Law of Copyright* (5th edn, LexisNexis 2018).
- Tong, Rou, 'The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role' (1989) 52 *LCP* 151 (translated by Jonathan K. Ocko).

-
- Torremans, Paul, 'Copyright Jurisdiction under EU Private International Law' in Torremans (ed), *Research Handbook on Copyright Law* (2nd edn, EE 2017).
- Torremans, Paul, 'Intellectual Property Puts Article 6(1) Brussels I Regulation to the Test' (2014) IPQ 1. (Torremans 2014:1)
- Torremans, Paul, 'Jurisdiction for Cross-Border Intellectual Property Infringement Cases in Europe' (2016) 53 CML Rev 1625. (Torremans: 2016:1)
- Torremans, Paul, 'Jurisdiction in Intellectual Property Cases' in Torremans (ed), *Research Handbook on Cross-border Enforcement of Intellectual Property* (EE 2014). (Torremans 2014:2)
- Torremans, Paul, 'Private International Law Issues on the Internet' in Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International 2016). (Torremans 2016:2)
- Torremans, Paul, *Holyoak & Torremans Intellectual Property Law* (9th edn, OUP 2019).
- UK Government, 'Changes to Copyright Law from 1 January 2021' (published 30 January 2020, last updated 4 January 2021) <www.gov.uk/guidance/changes-to-copyright-law-after-the-transition-period>.
- UK Government, 'Enforcement and Dispute Resolution - A Future Partnership Paper' (23 August 2017) 2 <www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>.
- UK Parliament, (21 Jan 2020) <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-16/4371>>.
- US Copyright Office, 'Section 512 of Title 17: A Report of the Register of Copyrights' (21 May 2020) <www.copyright.gov/policy/section512/section-512-full-report.pdf>.
- van Caenegem, William, 'Copyright, Communication and New Technologies' (1995) 23 FL Rev 322.
- van Calster, Geert, *European Private International Law* (2nd edn, Hart 2016).
- van Echoud, Mireille and others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law 2009).
- van Echoud, Mireille, 'Along the Road to Uniformity-Diverse Readings of the Court of Justice Judgments on Copyright Work' (2012) 3 Journal of Intellectual Property, Information Technology and E-Commerce Law 60.
- van Echoud, Mireille, *Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis* (Kluwer Law 2003).
- van Gompel, Stef & Lavik, Erlend, 'Quality, Merit, Aesthetics and Purpose: An Inquiry into EU Copyright Law's Eschewal of Other Criteria than Originality' (2013) available at SSRN: <https://ssrn.com/abstract=2326425>.
- Vennam, Sai, "'Cloud Computing" IBM Cloud Learn Hub' (18 August 2020) <www.ibm.com/cloud/learn/cloud-computing>.
- von Mehren, Arthur T., *Adjudicatory Authority in Private International Law: A Comparative Study* (Martinus Nijhoff 2007).

-
- Wadlow, Christopher, *Enforcement of Intellectual Property in European and International Law: The New Private International Law of Intellectual Property in the United Kingdom and the European Community* (Sweet & Maxwell 1998).
- Wan, Exiang, *Guidelines on Foreign-Related Commercial and Maritime Case* (PCP 2005).
- Wang, Chengzhi, 'The Applicable Law Issue in Adjudicating the Foreign-related IPR Cases' (2012) 1 *Law Review* 133.
- Wang, Fangfei, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (CUP 2010).
- Wang, Qian, 'Copyright Law, International Treaties and Foreign Legislation: Problems and Solutions' 3 (2012) *China Legal Science* 28. (Wang Qian 2012:1)
- Wang, Qian, 'Copyright Protection on Football Matches Live Streaming' (2020) 11 *IPR* 30.
- Wang, Qian, 'Reconstruction of WFH' (2007) 11 *Law Forum* 30.
- Wang, Qian, 'Retransmission in China Copyright Law' (2014) 5 *The Jurist* 125.
- Wang, Qian, 'Statutory Rules on Categorisation of Works: Commentary on Fountain Case' (2019) 3 *Law Review* 10.
- Wang, Qian, 'The Application of Reproduction Right on the Internet' in Yuzhong Luo (ed), *Economy and Law Concerning Knowledge* (PUP 2001).
- Wang, Qian, 'The Concept of CIN Right' (2008) 12 *Legal Application* 65.
- Wang, Qian, 'The Determination of Internet Dissemination Act and Infringement' (2006) 5 *Legal Science* 61.
- Wang, Qian, *Copyright Law* (CRUP 2015).
- Wang, Qian, *Copyright Protection in the Network Environment* (LP 2011).
- Wang, Qian, *Intellectual Property Law* (3rd edn, CRUP 2012). (Wang Qian 2012:2)
- Wang, Xiaoyan, *Study on Domicile of Natural Person in Private International Law* (PhD thesis, SWUPL 2009).
- Wang, Yanfang, 'Identifying the Act of CIN Right' (2017) 2 *PKU Law Journal* 456. (Wang Yanfang 2017:1)
- Wang, Yanfang, 'The Determination of Jurisdiction of Internet-related IP cases' (2017) *IPR* 51. (Wang Yanfang 2017:2)
- Wang, Yanfang, 'The Understanding and Application of JI CL [2012] No.20' (2013) 9 *PJ* 14.
- Westkamp, Guido, 'Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law' (2004) 36(5) *George Washington International Law Review* 1057.
- WIPO and HCCH: 'A Guide for Judges: When PIL Meets IP Law' (2019) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1053.pdf>.
- WIPO, '1978 Guide to the Berne Convention for the Protection of Literary and Artistic Works' <www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf>.
- WIPO, 'Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions' (30 August 1996) <www.wipo.int/edocs/mdocs/diplconf/en/cnrn_dc/cnrn_dc_4.pdf>.

-
- WIPO, 'Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' (2004) <www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf>.
- WIPO, 'The WCT and WPPT' <www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct_wppt.pdf>.
- WIPO, 'WCT with the Agreed Statements of the Diplomatic Conference that Adopted the Treaty and the Provisions of the BC (1971) Referred to in the Treaty' (20 December 1996) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_226.pdf>.
- WTO, 'Report of the Working Party' (1 October 2001) <www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm>.
- Wu, Handong, 'The Technological Evolution, Industrial Reform and Regulation Innovation of Copyright on the Internet' (2016) 6 *China Copyright* 5.
- Wu, Handong, *Intellectual Property Law* (4th edn, CRUP 2020).
- Wu, Handong, *Intellectual Property Law* (PUP 2019).
- Wu, Handong, *Study on Fundamental Problems of Intellectual Property Right* (CRUP 2009).
- Wu, Wenling & Zhu, Li, 'Law Applicable to Foreign-related Intellectual Property Rights: From the Perspective of the CLFCR Chapter Seven' (2012) 9 *PJ* 55.
- Wu, Youming & Song, Xiaohong, 'Relationship on China and International Copyright Conventions' (1995) 1 *Nanjing University Law Review* 147.
- Xu, Nina, *Study on Copyright and PIL* (CSSP 2015).
- Xu, Qingkun, 'A Review of the Judicial Practice of CLFCR in China' (2018) 2 *Chinese Review of International Law* 102.
- Yan, Xiaohong, '30 Years of Copyright Law: History, Experiences and Reflections' (2020) 21 *China Publishing* 5.
- Yang, Changhai, *Conflict of Laws in IPR* (Xiamen UP 2011).
- Yang, Dejjia, 'Legal Analysis on the Right to Amend' (2017) 6 *China Copyright* 12.
- Yang, Linping, Yao, Hui & Jiang, Qiang, 'Interpretation and Application of JI [2014] No.11' (2014) 12 *Journal of Law Application* 22.
- Yang, Yanchao, *Moral Rights in Works* (LP 2007).
- Yu, Nengbin, *Study on Civil Code* (WUP 2004).
- Yuan, Bo, 'Is Magic Copyrightable?' (*China IPR*, 6 March 2013) <www.iprchn.com/Index_NewsContent.aspx?newsId=57440>.
- Yuan, Feng, 'Copyright Protection on Musical Fountain Show: Commentary on Fountain Case' (2019) 7 *Digital IPR* 11.
- Zhang, Jianhua, *Explanation on CIN Right Regulation* (China Legal Publishing 2006).
- Zhang, Jing, 'Retaining or Abolishing Exorbitant Jurisdiction and the Choice for China' (2019) 5 *Wuhan University International Law Review* 41.
- Zheng, Chengsi, 'Several Theoretical Problems concerning Moral Rights' (1990) 3 *China Legal Science* 71.
- Zheng, Chengsi, *Intellectual Property Law* (3rd edn, SSAP 2007).
- Zhu, Hongjun & Peng, Guibing, 'Ownership of News: History, Dispute and Suggestion' 2020 (10) *Editorial Friend* 81.
- Zittrain, Jonathan L., 'The Generative Internet' (2006) 119 *Harvard Law Review* 1974.

Zweigert, Konrad & Kötz, Hein, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).

This thesis was submitted on 30 March 2021 and the websites cited were current as of that date unless otherwise noted.