

Copyright's Communication Policy over Cable Retransmission

---A comparative study of US, EU and China

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Abstract

This thesis is aiming to provide an analysis of the problems contained in China's current legal framework that governing the broadcasting market and further provide a concrete proposal for legislative reform. In particular, this thesis will examine two possible approaches, firstly, whether the US or EU regulatory approach can be transplanted into China in the cable retransmission market, and secondly, whether such regulatory models can be adjusted and applied in the internet streaming market of China.

This thesis argues that given the state-owned nature of broadcasters and cable operators, it is inapplicable and practically unrealistic for China to adopt statutory licensing system to regulate the radio and television market as in the US and EU. And the dual-function of content regulator further extents the administrative monopoly into the internet streaming market and causing the same dilemma. This thesis also argues that the statutory licensing scheme is inefficient as a regulatory tool under the current Chinese copyright law. And the administrative monopoly created by the semi-governmental, semi-corporate nature of copyright collective organizations has led to chaos in their internal management, and further weakens the legality and reduce the efficiency of statutory licensing regime.

Provisions concerning online transmission in Chinese copyright law also contains loopholes. The standard adopted by the court in identifying infringement cannot provide adequate protection to the copyright owners.

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Table of Legislations

US:

Cable Television Consumer Protection And Competition Act of 1992

Copyright Act of 1909

Copyright Act of 1976

Satellite Home Viewer Act of 1988

The United States Constitution

UK:

Licensing Act 1662

The Statute of Anne 1709

EU:

Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001
On The Harmonization Of Certain Aspects Of Copyright And Related Rights In The
Information Society

Council DIRECTIVE 93/83/EEC of the European Parliament and of the Council of 27
September 1993 On The Coordination Of Certain Rules Concerning Copyright And Rights
Related To Copyright Applicable To Satellite Broadcasting And Cable Retransmission

China:

Notice on The Prohibition of Providing Audio-Visual Program Service on The Internet to The TV Terminal Devices Through OTT Box 2011

Regulation On The Applicability Of Law Regarding The Infringement Of Communication Through Information Networks 2001

Regulation On The Applicability Of Law Regarding The Infringement Of Communication Through Information Networks. 2001

Regulation on the applicability of law regarding the infringement of communication through information networks. 2001

Regulation on the Implementing Procedures of Copyright Law of P.R.C 1991

Regulation on The Management Of Cable Television 1995

Regulation on the Protection of Computer Software 1991

SAPPRFT Decree No 6, Regulation on Linear Transmission of Audiovisual Service, 2016

SAPPRFT Documentation 181, Notice On The Licensing Requirements Of Internet Television Broadcasting Services. 2014

Second Amending Proposal for the Third Amendment of Copyright Law China July 2012

Temporary Regulation of Cable Television Management Decree 2 1995

The State Administration of Copyright 2005 Decree 49

Third Amending Proposal for the Third Amendment of Copyright Law China Oct 2012

International:

Berne Convention for the Protection of Literary and Artistic Works 1979

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Abbreviations

CAB - Central Administration of Broadcasting

CATV - community antenna television

CCTV - China Central Television

DCI - Digital Copyright Identifier

FCC - Federal Communications Commission

LAN - local area network

MBFT - Ministry of Broadcasting, Film, and Television

MIIT - State Ministry of Industry and Information and Technology

P.R.C. - People's Republic of China

SAPPRFT - The State Administration of Press, Publication, Radio, Film and Television of P.R.C.

SARFT - the 'State Administration of Radio, Film and Television'

UHF - Ultrahigh Frequency

WIPO - World Intellectual Property Organization

WTO - World Trade Organization

Introduction

Cable technology firstly emerged in the U.S. in 1950s, since then, the debate surrounding the regulatory treatment of cable retransmission lasted until the present.² At the beginning, cable systems were the 'supplement' to traditional wireless broadcasting stations by delivering the free-to-air broadcasting signals further to rural areas that would otherwise be blocked by geographical conditions.³ In that period, there was no disputes arisen between broadcasting stations and cable systems with respect to the right of retransmission.

However, the status of cable systems changed since they started to import distant signals into the local market and became competitors to the local broadcasters. Consequently, broadcasting contents became the key to the competition between the broadcasters and cable operators in the TV market. Regulations were then put in place by the Federal Communications Commission (hereinafter FCC) in the form of sector-specific regulations to govern the business practice of cable operators with respect to their modes of signal transmission. After years of disputes in courts regarding the property interests of the broadcasting contents, the legislators ascertained that the issues involved in the disputes were in fact the copyrights of the broadcasting programs rather than the signals themselves. Therefore, the U.S Congress amended the copyright law in 1976 by expanding the scope of the copyright owner's right of public performance so as to encompass cable retransmission activities. But meanwhile, the expanded copyright were deem as the bottleneck in the cable distribution market and generated concerns of market failure caused by overly high transaction costs.⁴ Therefore, Congress incorporated a statutory licensing scheme in the copyright law which allows the use of the copyrighted work without the author's consent, but upon a payment of fee set either by law or through mandate negotiation.⁵

On the other hand, the EU member states enacted regulations domestically that limited the use of cable to retransmitting free-to-air signals from 1960s.⁶ On the EU level, the *Cable and Satellite Directive 93/83/EEC*⁷ was enacted in 1993 which harmonised the domestic

² Wu, Tim, Copyright's Communications Policy. (2004), Michigan Law Review, Vol. 103, p. 310

³ Ibid Tim Wu, p312

⁴ Robert Merges, Compulsory License Vs. The Three 'Golden Oldies', (2004), Policy Analysis, No.508

⁵ Sam Ricketson & Jane Ginsburg, International Copyright and Neighbouring Rights, The Berne Convention and Beyond, (2005, 2nd edition, Oxford University Press, US, p756-758)

⁶ EU Monitoring and Advocacy program, Television across Europe, regulation, policy and independence,(2005) volume 2,

⁷ COUNCIL 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.

copyright law regarding cable retransmission and laid down the requirement of a mandatory collective licensing management system under Art3(2). The mandatory collective licensing scheme requires the copyright owners to exercise their cable retransmission right only through collecting societies. Both the regulatory approaches adopted by the US and EU have the primary purpose of regulating competition between broadcasters and cable operators in the communication market, however, such regulations evolved and transformed from sector-specific regulations to a comprehensive limitation scheme in the copyright law that restricts the copyright owners from freely exploiting their copyrighted works. Tim Wu refers such function as the 'copyright's communications policy' based on the fact that its main goal is to set out the conditions for competition between rival disseminators, rather than producing incentives necessary for creation which is the prevailing rationale for the copyright law as a whole.⁸ Therefore, such policy based provisions in the copyright law incur criticisms from both scholars and industry representatives who strongly advocate for the author-incentive theme of copyright from a theoretical standing point, as well as those who believe in the free-market notion of the broadcasting content market.

Meanwhile, it is interesting to notice that unlike in the US and EU where cable retransmission led to intense debates over its regulatory and copyright treatments, no similar arguments have been raised in China since cable TV entered Chinese TV market in the 1980s.⁹ Despite the fact the cable TV has become the major TV transmitting method in China nowadays, the issue of cable retransmission never incurred much attention of the academics nor regulators in the process of legislation.¹⁰ This phenomenon is caused by the fact that both traditional wireless broadcasting stations and cable systems are state-owned and controlled by the State Administration of Radio, Film and Television (hereinafter SARFT) in China. Therefore, the competition issue between broadcasters and cable operators is eliminated whereby exchanges of broadcasting contents are internalized by their corporate management rather than by way of market transactions. However, such an internal system

⁸ Ibid Tim Wu, p279

⁹ Y Zhao & H Ai, Textbook on the History of China's Radio and TV. (2009, China Broadcasting and Film Publication, Beijing, p119)

¹⁰ According to the Public Report of the Development of Cable Industry in China issued by the State Administration of Press, Publication, Radio, Film and Television of the P.R.C.(SAPPRFT), cable subscribers occupy 55.70% of the total TV audiences in China. Public Report of the Development of Cable Industry , (2017), Season 2.

may seem to effectively tackle the issue of cable retransmission from a competition standing point, there are nevertheless inherent problems that are calling for immediate solutions. Firstly, the interests of individual copyright owners cannot be guaranteed under the current system due to the lack of rule of law. That means the legal system itself contains bias against individual property interests vis-à-vis the interests of state owned broadcasters due to the political function that the broadcasters are required to fulfil; and secondly, since such system fails to scrutinize the copyright issue when broadcasting contents are disseminated cross networks upon the development of cable and satellite TV, therefore, when the internet joined the competition, the current system cannot sustain and set up a competition landscape between traditional state owned broadcasters and private internet content providers in the copyright market.

Therefore, this thesis is aiming to provide an analysis of the problems contained in China's current legal framework that governing the broadcasting market and further provide a concrete proposal for legislative reform. In particular, this thesis will examine two possible approaches, firstly, whether the US or EU regulatory approach can be transplanted into China in the cable retransmission market, and secondly, whether such regulatory models can be adjusted and applied in the internet streaming market of China. Based on the distinction between 'Method' and 'Methodology' where the former refers to the techniques used to collect evidence, and the latter refers to the overall research strategy,¹¹ the key methodology adopted by this thesis is doctrinal or a 'black letter law' research that mainly concerns with the legal rules, principles and doctrines with respect to the issue of cable retransmission. The research will focus on the texts and wordings of such legal instruments, aiming to systematise, rectify and clarify the law on cable retransmission by the application of reasoning.¹² Meanwhile, this research is explanatory, hermeneutic and evaluative in nature, that means the underpinning theoretical and conceptual framework will also be revealed by a logical and coherent explanation and interpretation of the above legal instruments.¹³ The evaluative element will be shown by testing whether the law governing cable retransmission works in practice, and whether it is in accordance with its desirable goals, for example whether they can actually reduce transaction costs as intended by the

¹¹ Matt Henn, Mark Weinstein and Nick Foard, 'A Critical Introduction to Social Research' (2nd edition, 2006 Sage, UK, 10)

¹² Mike McConville and Wing Hong Chui, *Research Methods for Law*, (2017, Edinburgh University press, UK, p4)

¹³ Mark Van Hoecke, *Methodologies of Legal Research*, (2011, Hart Publishing, Oxford, UK, vi)

legislators when incorporated the statutory licensing scheme. Also, the research will explore the current issue of cable retransmission in the internet environment by identifying the flaws contained therein which fail to tackle the problems within the streaming market, and propose a reform to sustain the law contemporarily.¹⁴

On the other hand, the method of research can be classified as desk research, i.e. library-based research. Both primary sources including legislations, regulations and supplementary documents such as Congress Reports, as well as secondary resources including books, journal articles, law comments and press releases are accessed in libraries or by electronic means through online databases. In addition, a certain amount of field research is conducted whereby the Chinese government officials and industry representatives were interviewed. The outcomes of the interviews mainly contribute to the discussions of the underlying market structure of China from a political perspective.

Another important method invoked by this paper is the comparative approach based on a systematic study of the similarities and differences over the legal treatments of cable retransmission among the US, EU and China.¹⁵ The goal of this thesis is to examine the hypothesis that whether the US and EU regulatory approach can be transplanted into China, and if not, whether this approach can be adjusted and effectively applied over the internet to regulate the competition between traditional broadcasters and private TV streaming companies. However, in order to provide a deeper insight of the Chinese domestic law regarding cable retransmission, it is necessary to explore the issue within a broader cultural, economic and political background of which the law sits on, i.e. the socialist market economic structure. This discussion is necessary not only in showing the reasons behind the similarities and differences of the existing laws in China, EU and the US, but will also set up a framework for the analysis of future problems that China may face in regulating the competition in the streaming market between traditional state-owned broadcasters and the private internet content providers.

The primary sources of this thesis include three major categories of legal instruments, first, the regulations in the communications markets which set out the competition landscape between broadcasters and cable systems, second, relevant provisions contained in

¹⁴ Supra Mike McConville and Wing Hong Chui, p20

¹⁵ Edward Eberle, *The Method and Role of Comparative Law*, (2009), 8 Wash. U. Global Stud. L. Rev 451

copyright law concerning the property rights of the broadcasting contents, third, case law that evolves that supplements the legislative development.

In the US, regulations in this regard will include a series of FCC regulations that govern cable retransmission activities since 1960s, primarily the non-duplication rule, syndicated exclusivity rule and distant signal rule. These rules set out the regulatory framework in the cable industry until the statutory licensing regime was introduced in the 1976 copyright revision. Discussion of the regulations will demonstrate the underlying regulatory philosophy and rationales that underpinning the FCC measures that substituted the copyright infringement liability, so as to build the link between the regulation and the subsequent copyright law reform. The study of case law, notably the case of *Teleprompter* and *Fortnightly* will further identify the ambiguities and loopholes contained in the copyright law which rendered the interest of the broadcasters and copyright owners unprotected in the retransmission market.¹⁶ Discussion of the copyright law on the other hand will mainly focus on the interpretation of the sections dealing with the right of public performance of the authors, specifically, how the texts of the provision evolved to include cable retransmission activities in its scope. Moreover, the statutory license scheme under S111 of the US copyright law will be analysed to examine the underlying principles and justifications as set out by Congress in a series of legislative reports and Hearings.

In China, regulations that governing the broadcasting market are promulgated by the State Administration of Radio, Film and Television (SARFT). However, due to the state-owned nature of the broadcasting stations across the country, such regulations were put in place as a form of internal management measure among the stations rest on different levels, i.e. national, provincial, municipal and county.¹⁷ Nonetheless, such regulations need to be analysed for two main purposes, firstly, to identify the dual regulatory approach of the SARFT and the Publicity Department of the Communist Party of China (hereinafter PDCPC) and their respective functions based on the socialism political structure; secondly, to set up the four-layered operational model that is currently embedded in the broadcasting industry. Both discussions are important in explaining the current TV market structure as between

¹⁶ United Artists Television, Inc., vs. Fortnightly Corporation, 255 F.Supp. 177 (1966) *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 US 394,(1974)

¹⁷ Decree no 11, Full text (in Chinese) are available at <http://www.scyanbian.gov.cn/xxgk/fggw/bmwj/52786.shtml> accessed in March 2018.

traditional wireless broadcasters and the cable operators, as well as the problems that will arise when expanding the current regulatory framework to the internet, particularly when taking into account the private internet content distributors into the competition.

Moreover, regulations enacted by SARFT which directly established the market entry requirement of the on-demand and IPTV market, for example the Decree no.6,¹⁸ Decree no.56¹⁹, Decree no. 97²⁰ and Decree no.181²¹ and Decree no. 229²², need to be analysed in accordance with the rationales and justifications underpinning the current regulatory framework, so as to examine the legalities of such regulation in the online market.

With respect to the copyright law, the historical development of the overall copyright law regime in China will be analysed so as to establish the conceptual and ideological foundation of the copyright law as it evolved in China since its enactment. For example, what is the origin of copyright law in China as distinct from the US and EU from a theoretical standing point, and why China enacted the modern copyright law in as late as 1990s, what are the impacts of the late enactment of the copyright law to the content industry etc.. On this ground, the emphasis will be placed on the provisions that granted the privileges to the broadcasters' and cable operators' against individual copyright owners, for instance the provisions that allowed the broadcasting stations to use copyrighted works without authorization nor pay remunerations to the copyright owners in Copyright Law 1990,²³ as well as the deficiencies contained in the administrative procedures that fail to guarantee the payment to the copyright owners under the statutory licensing scheme under Copyright Law 2000 and 2010, such as the lack of ground for action and remedy to copyright owners, as well as the administrative monopoly nature of the collecting societies.²⁴ Such discussion will identify the underlying differences between the Chinese legal system vis-à-vis the US and EU from the social, cultural and economic perspectives, and further highlight the problems

¹⁸ Full text (in Chinese) are available at: http://www.gov.cn/gongbao/content/2016/content_5097742.htm accessed in February 2019.

¹⁹ Full text (in Chinese) are available at: http://www.gov.cn/flfg/2007-12/29/content_847230.htm accessed in February 2019.

²⁰ Full text (in Chinese) are available at :http://www.sarft.gov.cn/art/2016/3/24/art_106_30291.html accessed in February 2019.

²¹ Full text (in Chinese) are available at: <https://wenku.baidu.com/view/1a7773f09e31433239689308.html> accessed in February 2019.

²² Full text (in Chinese) are available at: http://www.ttacc.net/a/news/2015/1028/38242_3.html accessed in February 2019.

²³ Article 40 of the Copyright Act 1990.

²⁴ Article 43 of the Copyright Act 2000; The State Administration of Copyright, Explanatory Note of the Copyright Law of P.R.C.(Amending Proposals) March 2012,Section 12.

caused by the lack of rule of law in the current system that eventually jeopardizes the interests of individual copyright owners. Regarding internet transmission, there are two main rights in the Chinese copyright law that governing the internet transmission activities, i.e. the 'right of broadcasting' and the 'right to communicate to the public through the information network' under Art 10 of the Copyright Law 2010. The wording of these two rights will be scrutinized in order to examine whether they can sufficiently cover all types of transmissions of audio-visual content on the internet. Together with a cautious reading on the case law of these two rights in comparison to the right of public performance under the US copyright law as well as the right of communication to the public under the EU law, the loopholes contained in the interpretation of the rights will be identified and a recommendation to reform will be proposed.

History of Copyright Law of China

The development of Copyright Law in China

The current copyright legislation that is in force in China is Copyright Law of the People's Republic of China (P.R.C.) 2010.²⁵ Although the history of China's copyright law can be traced back to the Qing Dynasty, however, the first modern copyright legislation of China was promulgated in 1990, almost fifty years after the establishment of the P.R.C in 1949. In the year of 2001, The National Peoples' Congress overhauled the Copyright Law 2000 for the purpose of facilitating the transition from the socialist planned economy to the socialist market economy.²⁶ Later in 2010, Copyright Law 2001 was amended slightly in order to fulfil China's obligation under the WTO pursuant to the dispute settlement decision over the conflict between China and the US.²⁷ At the time of writing, The National Congress is conducting the third major amendment to the Copyright Law 2010, and the new law is expected to come into force in 2019.

Legislative History of Copyright Law in China

Similar to the primitive mode of copyright that was promulgated as 'royal prerogative' and 'a tool of censorship' in the UK in the early 1400s, the history of copyright in China can be traced back to Song Dynasty (A.D.960- A.D.1279).²⁸ The Crown issued 'injunction' against individuals to prevent 'block printing'.²⁹ However, it has been argued that the 'injunction' was issued primarily for the purpose of 'controlling the ideology' by the Crown rather than securing the property interests of the owners of the publication, thus shall not be seen as an early evidence of 'copyright' in China's history.³⁰

²⁵ Copyright Law of the People's Republic of China 2010(Adopted at the 15th Meeting of the Standing Committee of the Seventh National People's Congress on September 7, 1990; amended for the first time according to the Decision on Amending the Copyright Law of the People's Republic of China at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on October 27, 2001; and amended for the second time according to the Decision on Amending the Copyright Law of the People's Republic of China at the 13th Meeting of the Standing Committee of the Eleventh National People's Congress on February 26, 2010)

The copyright law 1990 was the first copyright law promulgated since the establishment of Peoples' Republic of China in 1949. The English version of the Copyright Law 2010 can be found at:

http://www.wipo.int/wipolex/en/text.jsp?file_id=186569 accessed in February 2019.

²⁶ Shen Rengan, *Discussion over the China's Copyright Law Amendment*, (2001), *Journal of Intellectual Property*, Vol 6, p3

²⁷ WTO Dispute DS362: China — Measures Affecting the Production and Enforcement of Intellectual Property Rights. See detail on note 44

²⁸ Chengsi Zheng, *Copyright Law*, (Renmin University Press, 1997), p4

²⁹ Ibid, Zheng.

³⁰ William Alford, *To Steal A book is An Elegant Offense: Intellectual Property Law In Chinese Civilization*, (Stanford University Press, US.) 1995, Yufeng Li, *Law Under The Gun – Research on the History of Chinese Copyright*, (Intellectual Property Press, China, 2006,) p57

Modern conception of the economic value of intellectual property, primarily ‘trademarks’ in China was formulated in the period of late 19th century through widespread commerce with western countries.³¹ At the same time, foreign traders intensely pushed the government to take measures to protect their intellectual property attached to the trade commodities.³² British traders sought to formalize the ‘trade relation’ by way of agreements and subject the trade norms to the rule of law, so as to guarantee the minimum protection over their brand names and labels.³³ Later, when the Anglo-Chinese War out in China 1840, China signed into a series of ‘unfair’ Conventions with western countries and further opened up Chinese market for foreign countries.³⁴ Besides the pressure imposed by foreign traders over the government to regulate the intellectual property market, the contemporary ideology of copyright protection was brought into Chinese culture by missionaries through foreign publication.³⁵ In 1902, a series of negotiations carried out between China and the US over the ‘China - US Maritime Commerce Convention’ finalized certain protective measures concerning trademarks, patents and copyrights in accordance with the Paris Convention and the Berne Convention.³⁶ Up until then, China has for the first time undertaken to protect copyright by law.³⁷

Although the primitive mode of copyright appeared in Song Dynasty, the first copyright law that was codified into statute in Qing Dynasty. In order to fulfil the obligations under the China- US convention, China enacted the first Copyright Law of Qing Dynasty in 1910. It contains fifty-five Articles under five main chapters regarding the provisions of definitions, scope of protection, authors’ rights, duration of the rights, procedures of cancellation,

³¹ In the late 19th century, the trade between China and western countries expanded dramatically, especially in the areas along the coast in South China. Since products imported from foreign countries were immunized from the ‘inland tax’, Chinese traders imitated the names and labels of the products of foreign traders so as to avoid the tax. In 1897, British opium retailers accused Chinese manufactures from using their product names without authorization, this event has been seen as the first dispute in China concerning unfair competition based on intellectual property. Ibid, Li, p83

³² It is commonly recognized by Chinese scholars that the establishment of the overall intellectual property law regime in China, including copyright law, was largely due to the pressure came from western countries. Cui Guobin, *Copyright Law-Cases and Materials*, (Peking University Press, China, 2004)14, Zhang Yumin & Li Yufeng, *History of the Copyright Law of China*, (2004), Technology and Law, Issue 1, p42-47.

³³ Ibid Li, p81

³⁴ Also known as the Opium War. The unfair Conventions including ‘Tianjin Convention’ and ‘Beijing Convention’ signed in October 1860. See Li(2006), p57

³⁵ Since China further opened up trade deals with foreign countries, missionaries came into China and established several publication organizations. The most famous one at that time was called ‘Tong Wen Book Club’ created by American missionaries in Shanghai in 1887. The Tong Wen Book Club supplied a variety of foreign books imported from the US, and among those, the ‘Global Magazine’ published by the American missionary Linle Zhi while in China has the most influential effect of educating the public with the conception of a property right based copyright. See ibid, Li, p86

³⁶ Ibid.

³⁷ Guobin Cui, *Copyright Law-Cases and Materials*, (Peking University Press, China, 2004), p16.

limitations and penalties.³⁸ The Copyright Law 1910 formed the basis of the successive copyright laws that were enacted in 1915 and 1928 by the North Warlord Government and the Nationalist Government.³⁹

The modern Copyright Law 1990 was the first copyright legislation promulgated by the Central Government after the establishment of the People's Republic of China in 1949. During the period of 1949 to 1990, copyright was protected primarily by other of legislations and regulations issued by the central government such as constitutional law and the civil code.⁴⁰ Immediately after the enactment of the Copyright Law 1990, the National Congress issued a series of supplementary regulations and decisions such as the 'Regulation on the Implementing Procedures of Copyright Law of P.R.C 1991', 'Regulation on the Protection of Computer Software 1991' and 'Decisions on the Criminal Sanctions of Copyright Infringement'.⁴¹ Together with the relevant provisions laid down in the civil code and the criminal law, a comprehensive and systematic legal framework for copyright protection has been created in China.⁴²

In 1998, the National Congress conducted the first major amendment to the 1990 Copyright Law in order to facilitate China's transition from the planned economy to a socialist market economy, as well as reconcile China's domestic legislation in line with the international treaties, primarily the Berne Convention and the TRIPS agreement, for the upcoming accession to the WTO in 2000.⁴³ In 2010, China amended the Copyright Law 2000 with a

³⁸ Jin Mei and Zhang Zhongqiu, *Legislative History of the Copyright Law of China*, (1994), Commentary on Legal Studies, Issue 2, p80.

³⁹ However, upon the establishment of the P.R.C. in 1949, The Copyright Law 1928 enacted by the nationalist government was abolished by the central government of P.R.C. Although the new government sought to inherent and maintain the ideology of copyright protection, the socialism-based reform of the country largely compressed the perception of copyright as private property right enjoyed by individuals. Copyright owners were merely entitled for the right of remuneration under the influence of the Remuneration Scheme introduced by the Soviet Union. During the period of Cultural Revolution(1966-1967), the remuneration scheme was abolished and copyright was left with no formal protection until 1990. Ibid,81. Zhou Lin, *Trails for the Study of the Legislative History of Copyright of China*. Edited chapter in Essays on the Study of Legislative History of China, (Fangzheng Press, China, 1999) pIV; Zhi Wei, *Principles of Copyright*, (Peking University Press, China 1998)p8

⁴⁰ Article 47 of the Constitution promulgated by the State in December 1982 stipulates that "citizens of the People's Republic of China have the freedom to conduct scientific research, literary and artistic creation and other cultural activities, and that the State shall encourage and help citizens engaged in educational, scientific, literary, artistic and other cultural undertakings who are beneficial to the creative work of the people". The protection of copyright provides a legal basis.the Civil Code, the Inheritance Law and Tax Law. For example, Article 94 of the Civil Code 1986 provided that: 'Citizens and legal entities shall enjoy the copyright and the right of attribution, right of publication and the right of remuneration etc.'

⁴¹ Ibid, Shen,

⁴² Ibid, Cui, Shen.

⁴³ Thus, certain 'vestiges' inherent from the planned economy that granted special treatments to the state owned enterprises were removed, so as to lay down the foundation for competition between state owned enterprises and the private enterprises. The special treatment granted to state owned enterprises including, for example, Article 43 of the Copyright Law 1990 allowed non-commercial uses by the radio and television stations of sound recordings that were

minor change to Article 4 to comply with the ruling issued by the Dispute Settlement Body (DSB) of the WTO in the case of Dispute DS362: China — Measures Affecting the Production and Enforcement of Intellectual Property Rights.⁴⁴ Other provisions contained in the Copyright Law 2000 remained unchanged under the Copyright Law 2010.

At the time of writing, the National Congress is conducting the third major amendment to the Copyright Law 2010. The amending process was initiated in 2011, meanwhile, three proposals have been released by the State Administration of Copyright.⁴⁵ However, due to the intense debates among government officials, scholars as well as industry representatives surrounding several key provisions contained in the proposals, the

published by the copyright holders without authorization and remuneration; Article 33 granted publishers the exclusive right of publication during the contract period. And the Regulation on the Implementing Measure of the Copyright Law 1991 further expand the exclusive right of publication enjoyed by the publishers to the 'original, editorial and compression version' of the publication. Such privileges were gradually removed in later amendments.

Meanwhile, the scope of protective subject matters under Article 10 was expanded to include acrobatic works, works of architecture and works created through compilation, including database etc. The single provision that granted an overall 'property right' i.e. 'the right to use and right to remuneration of the copyrighted work' to the copyright holders was broken down into thirteen distinct rights through Article 10(5) to Article 10(17), including: the right of reproduction, the right to distribution, the right to rental, the right of exhibition, the right of performance, the right of representation, the right of broadcasting, the right of communication through information network, the right of cinematography, the right of adaption, the right of translation, the right of compilation, and other rights to be enjoyed by copyright owners. Definitions of the rights was included in the provision respectively.

Moreover, producers, scriptwriters, directors, cameramen, lyricists, composers and other authors were granted with a right of remuneration to the cinematographic work under Article 15. At the same time, neighboring rights was granted to publishers over the adaption, translation, annotation, arrangement or compilation of the work for ten years under Article 35. Performers were granted with a right of remuneration over the live performance, electronic transmission, reproduction and publication of the performance or the sound recording and cinematographic work for fifty years under Article 37 and Article 38. Radio and TV broadcasters were granted with the right to prohibit retransmission and recording of the broadcast for fifty years under Article 44. Producers of sound recordings were granted with the right to authorize the rental and dissemination over the information network of the sound recordings for fifty years under Article 41. Regarding the fair use defence, the new law narrowed down the scope to 'incidental use' of the work in new reporting under Article 22(3). Also, a statutory licensing was inserted under Article 43 which guaranteed payment to the copyright holder with respect to the use of sound recordings by radio and TV stations. Another statutory license was deployed in Article 23 which permitted the use in textbooks for the purpose of compiling and publishing the textbook for the nine-year compulsory education and national education planning without authorization of the owners of copyright upon a payment of fee. With respect to the collecting right management, Article 8 clarified the legal status of the collective right organizations in the process of negating the license, litigation and arbitration as the representatives of the members of the organization. Regarding the Damages, Article 49 provided the statutory damage of 50,000 RMB in cases where the actual damages is unlikely to be measured. Ibid, Shen.

⁴⁴ WTO Dispute DS362: China — Measures Affecting the Production and Enforcement of Intellectual Property Rights. In 2007, The U.S. filed a claim in the WTO claiming that the first sentence of Article 4 which provide that 'Works the publication and/or dissemination of which are prohibited by law shall not be protected by this law.' has the effect of denying copyright and related rights protection and enforcement to works that have not been authorized for publication or distribution within China, in other words, the works that failed or were never submitted for the content review in China. The US representatives argued that this provision was inconsistent with Article 9 of the TRIPS Agreement incorporating Article 5(1) and 5(2) of the Berne Convention, and Article 14, Article 61 and Article 41 of the TRIPS Agreement. The Dispute Settlement Body ruled in favor in partial favor of the US and found that the first sentence of Article 4 is inconsistent with China's obligations under Article 5(1) of the Berne Convention as incorporated by Article 9.1 of the TRIPS Agreement, as well as Article 41.1 of the TRIPS Agreement.' In order to comply with this rule, China removed Article 4 from the Copyright Law 2000.

⁴⁵ The first proposal was released by the State Administration of Copyright in March 2012; the second and third proposal were released in July and October the same year. See detail below.

enactment procedure has been postponed, and the new law is not expected to be enacted until the end of 2019.

Theories of Chinese Copyright Law

Since China's copyright law is completely transplanted from western countries, China does not have its own theory of copyright derived from its domestic social and economic conditions. In the initial stage of China's reform and opening up, private property over knowledge was almost a forbidden area for theoretical discussion.⁴⁶ However, without the support of social practice and guidance of mature and systematic copyright theory, it is difficult to develop the law consistently and effectively.

Having realized that lack of theoretical foundation is a major issue that hinders the development of copyright law in China, scholars and judges began to commence comprehensive research of western theories in this regard. A large number of western theories, including the natural right theory, personality theory and utilitarian theory, are constantly brought up in academic debates. Academics sought to build a logical and sustainable theoretical underpinning for the copyright system on the basis of such theories so as to maximize the utility of the law.⁴⁷ Therefore, the study of the theory of Chinese copyright law in China is in fact the study of basic theories.

Natural Theory

Natural right theory is regarded as one of the main theories that underpins copyright law in China.⁴⁸ Natural right theory is originated from the legal philosophy that deals with tangible property right under the Lockean Theory of Property Right.⁴⁹ In Chapter V of the 'Two Treatises of the Government', John Locke formulated the basic philosophy of asserting property right from the common by arguing that 'each person shall be entitled to the fruits of his labor.'⁵⁰ He argued that once a person put in labour to add something more than the

⁴⁶ Wang Ziqiang, Establishment and Development of Copyright Legal System in China, (2018), Journal of China New and Press, Vol 5, p4

⁴⁷ Zhou Pingan, Research On The Theory And Practice Of Copyright In China,(People Press, 2014), p3

⁴⁸Li Chen, On the Legislative Techniques of "Rational Use" in the Revision of Copyright Law in China, (2013), Journal of Intellectual Property, Vol 1

⁴⁹ J Locke, Two Treatises of the Government, In the Former, The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government,

⁵⁰ J Locke, Two Treatises of the Government, In the Former, The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government, p116, para24

'nature' has given, he has 'mixed his labour with it, therefore makes it his property.'⁵¹ Based on the Lockean property right theory, dedication of 'labour' would be capable of triggering an recognition of a property right. This argument gave rise to the subordinate 'labour theory' and led to intense debate over the nature and adequacy of 'labours' in the context of legal and economic philosophy of property right.⁵²

Personality Theory

Besides the Lockean 'private property right' theory, 'personality' theory stands as another major justification for intellectual property. Personality theory claims that persons should be entitled with control over resources in the external environment for the purpose of 'self-actualization.' According to Hegel: "[a] person must translate his freedom into an external sphere in order to exist as an idea' and that "personality is the first, still wholly abstract, determination of the absolute and infinite will."⁵³ This is a justification build upon the human's will, freedom and personality, vis-a-vis the 'labor' originated property philosophy proposed by Lockean theory. Human's personality gives rise to an 'abstract right', and such right contains a positive assertion in its external form.⁵⁴ This 'abstract right' is incorporated into copyright law as author's 'moral rights'.

Incentive Theories

Protection of intellectual property is seen by the utilitarianisms as a means of ensuring optimal production of intellectual creations for the benefit of the society as a whole. Since intellectual creation is crucial for human flourishing and cultural development, lack of protection may lead to underproduction and result in market failure eventually.⁵⁵ Thus certain protective measures should be put in place in order to provide incentives for intelligence to contribute to the production and dissemination of culture products.

⁵¹ Ibid para 26

⁵² The 'labor theory' in this chapter will be limited to Lockean argument which serves as the fundamental justification of initial acquisition of private property right. Further implications of this theory developed by economists with respect to the 'labor theory of value' concerning with the price measurement of the property will not be included. Counter argument for the lockean 'labor theory of value', See M Rose, *The Author as Proprietor and the Genealogy of Modern Authorship*, (1988), *Representations*, No. 23. (Summer, 1988) PP. 311-326

⁵³ G Hegel, *Philosophy of Right*, First Section Property, para 41 translated by S Dyde, *Philosophy of Right*, Batoche Books, Kitchener, 2001.

⁵³ Supra Hughes, see also G Hegel, *Philosophy of Right*, First Section Property, para 33.

⁵⁴ M Quante, 'The Personality Of The Will', *As The Principle Of Abstract Of Right*, Analysis Of S33-40 Of Hegel's *Philosophy Of Right In Terms Of The Logical Structure Of The Concept*, edited chapter in R Pippon and Others, *Hegel on Ethics and Politics*, (2004, Cambridge University Press, UK ,94)

⁵⁵ L Bently and B Sherman, *Intellectual Property Law*, (2009, 3rd edition, Oxford University Press, UK,37)

The origin of utilitarianism is found in Jeremy Bentham's literature 'An introduction to the Principles of Moral and Legislation'. In which he claimed that 'the principle of utility can be used to approve or disapprove of every action', based on the criteria that whether 'it tends to produce benefit, advantage, pleasure, good or happiness, or to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered.'⁵⁶ The premise of this justification is that all mankind is under the governance of two sovereign masters, pain and pleasure, and they are the standard in determining what we ought to do and what we shall do.⁵⁷ Thus if a piece of law has the tendency to augment the happiness of the community, it is conformable to the principle of utility and can be called a 'law of utility',⁵⁸i.e. a piece of law that adds the sum total of pleasure or diminish the sum total of pain of individual, since the interest of the society is the sum of interest of individuals who compose it.⁵⁹ These standards can be materialized by 'welfare-maximization' criteria and 'Kaldor-Hicks" criterion:

'Welfare – maximization' counsels lawmakers to select the system of rules that maximizes aggregate welfare measured by consumers' ability and willingness to pay for goods, services, and conditions; the Kaldor- Hicks standards on the other hand made a one state of affairs is preferred to a second state of affairs if, by moving from the second to the first, the "gainer" from the move can, by a lump-sum transfer, compensate the "loser" for his loss of utility and still be better off.⁶⁰

In order to apply the utilitarian justification to copyright law, it must be shown that the conferment of copyrights and the protective measures can effectively produce incentive.⁶¹ Most evidences were presented by economists rather than lawyers based on economic analysis. However it must be noted that the economic approach sometimes end up with odd conclusions that against the traditional perception of copyright law, it nevertheless provides convincing arguments regarding the issue of incentive in this context⁶². Economist such as Richard Posner and Wendy Gordon focus on 'trade-offs' between production and

⁵⁶ J Bentham, an introduction to moral and legislation, 1875, Chapter 1, section V

⁵⁷ Ibid, Section I.

⁵⁸ section VII , viii

⁵⁹ Ibid, section III

⁶⁰ Ibid note **Error! Bookmark not defined.**

⁶¹ It must be more than the mere motive of the law that is to produce the happiness for the public, it must be prove that it is the effect of the enactment of the law.Ibid, section XIX

⁶² One of the examples is that 'piracy' was proven to be 'socially beneficial' from an economic point of view. R Watt, Copyright and Economic Theory, Friends or Foes? (2000, Edward Elgar Publishing, USA, 35)

distribution of intellectual property, they use the efficiency 'gains' and 'losses' to strike the balance between 'access' and 'incentive'.

Richard Posner pointed out, firstly, there is in need of 'incentive' because of market failure caused by the 'public good' feature of intellectual property.⁶³ 'Public goods' is defined as goods of non-excludable and non-rivalrous consumption in nature: Non – rivalrous means that one's use of the resource does not compete with the others, non-excludability on the other hand refers to the impossibility from excluding others from enjoying the benefit of the goods.⁶⁴ The public good nature of intellectual property causes market failure based on its high production cost vis-à-vis low reproduction costs between its inventor's vis-à-vis imitators. As illustrated by Jeremy Bentham:

'...that which one man has invented, all the world can imitate. Without the assistance of the laws, the inventor would almost always be driven out of the market by his rival, who finding himself, without any expense, in possession of a discovery which has cost the inventor much time and expense, would be able to deprive him of all his deserved advantages, by selling at a lower price.'⁶⁵

How does copyright system can actually produce incentive? The short answer is it guarantees financial rewards for the creators to recover their costs for their inventive endeavors.⁶⁶ People are motivated by the promise of this monetary reward and make further creative works. The reward is taking the initial form of a temporary monopoly over the work, and realized by the discretionary price setting that recovers the costs.⁶⁷ The 'costs' in this context include both production costs and risk cost incurred through the inventing stage to the distribution process.⁶⁸ That means the legitimate monopolistic power conferred by copyright allows the authors to set a price which is capable of recovering the costs incurred in their investment, as well as the potential loss that can be anticipated when

⁶³ W Landes and R Posner, *An Economic Analysis of Copyright Law*, (1989) 18 J. Leg. Stud. 325, 325-33, 344-53

⁶⁴ T Cowen, *Public Goods and Market Failures: A Critical Examination*, (1992, Transaction Publishers, US, 3). Shiffrin argued that intellectual product is not only non-rivalrous, rather it is anti-rivalrous because simultaneous use of intellectual product enhance the use of the others. See S Shiffrin, *Intellectual property*, chapter 36 in *A companion to contemporary political philosophy*, edited by R Goodin and others, (2012, John Wollin & Sons, UK, 659)

⁶⁵ Jeremy Bentham, *The Works of Jeremy Bentham*, vol. 3 (Usury, Political Economy, Equity, Parliamentary Reform) [1843]

⁶⁶ S Calandrillo, 'An Economic Analysis Of Intellectual Property Rights: Justifications And Problems Of Exclusive Rights, Incentives To Generate Information, And The Alternative Of A Government-Run Reward System' (1998) 9 *Fordham Intell. Prop. Media & Ent. L.J.* 301,

⁶⁷ *Ibid* note 66

⁶⁸ W Landes and R Posner, *An Economic Analysis Of Copyright*, (1999), 18 J. Legal Stud. 325, 328

the work comes into the market. For example, the 'uncertainty of demand' is regarded as a significant disincentive for intellectual creations, thus the price is ought to adequately compensate this risk of loss if the market turns out to be unsuccessful.⁶⁹ Moreover, the economic rationales of the idea/expression dichotomy is based on the net effect of protecting ideas by imposing license fees and other transaction costs on all subsequent uses would reduce the total number of works created.⁷⁰

Also, it has been argued that forming a systematic copyright protection regime can effectively overcome the free-rider problem caused by the non-rivalrous and non-excludable nature of intellectual property.⁷¹ The non-rivalrous and non-excludable nature of intellectual property makes easily for others to re-use them and share the benefits without contributing to the production cost.⁷² With unsecured recovery of cost, the free-rider problem will reduce the author's incentive to create and cause under-production.⁷³ Copyright in this sense serves as a 'tax' on readers similar to the governmental intervention on correcting market failures caused by free-riders in other economic sectors.⁷⁴

Despite the discrepancies on the theoretical basis that justify the existence of intellectual property, the reality is that they universally recognized as private property, therefore the above mentioned theories and arguments shall not be construed in a way that challenges the legitimacy of intellectual property itself, rather, they are the theoretical basis used to measure the scope of the right accord to the creators. The nature of the right decides the scope of exclusivity it shall be accorded to, thus directly limit or expand governmental intervention upon the entitlement of the author.

The EU treats intellectual property right as a 'convention right', thus control over intellectual property is guaranteed by basic human rights: Article 1 of The First Protocol of

⁶⁹ Ibid.

⁷⁰ Ibid Posner, p348

⁷¹ Ibid

⁷² A Barron, Copyright Infringement And Free-Riding And The Lifeworld. (2009), In Copyright And Piracy: An Interdisciplinary Critique, Lionel Bently, Jennifer Davis And Jane Ginsburg, Eds., Cambridge: Cambridge University Press, 2010 .

⁷³ Ibid.

⁷⁴ Government intervention for correcting market-failure caused by free-rider problems is carried out through the imposition of taxes, thus copyright license fee was regarded as a form of 'tax on reader' by Lord Macaulay's. See R Baldwin and Others, Understanding Regulation, theory, strategy, and practice, (2012, 2nd edition, Oxford University Press, UK, 20), See also Thomas Babington Macaulay, Speech Delivered to British House of Commons Regarding 1841 Copyright Bill (Feb. 5, 1841), in Macaulay's Speeches On Copyright And Lincoln's Address At Cooper Union 25 (Charles Robert Gaston ed., 1914).

the European Convention on Human Rights provides that: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' Also the EU Charter of Fundamental Rights explicitly includes intellectual property right and provides that intellectual property shall be protected thereunder.⁷⁵

In China, Article 1 of the Copyright Law provides that that law was enacted 'for the purpose of protecting the copyright of authors ... encouraging the creation and dissemination of works'. Although it clearly included 'copyright of authors' in the text, But in fact, many scholars are now tend to interpret the copyright law under the US context.⁷⁶ In the U.S. , the primary source that identifies the nature of intellectual property right is the U.S. constitution, section 8 provides that: 'Congress shall have the power to ... promote the progress of science and useful arts, by securing for limited times to authors and inventors their exclusive right to their respective writings and discoveries.' Therefore the fundamental purpose of recognising intellectual property rights is to 'promote the progress of science and useful arts' for the benefit of the public – a strong utilitarian based justification associated with the incentive theory.

Since moral rights are rationalised by the 'personhood' argument within the broad interpretation of natural right jurisdiction, different treatment of moral rights between the EU and US copyright system may also manifest their philosophical orientation.

US has been long showing a sceptical attitudes towards the adoption of moral rights provisions in their domestic legislation.⁷⁷ One reason is that the economic analysis shows that moral rights reduces economic incentives to create due to the additional cost incurred in transactions.⁷⁸ Therefore, unlike the continental European jurisdictions (typically France and Germany) which incorporated moral rights by the first instance legislation,⁷⁹ the U.S. recognized moral rights in later copyright law revisions in order to fulfil its obligation under

⁷⁵ Article 17(2): 'Intellectual property shall be protected.'

⁷⁶ Yang Ming. Qualitative Research on Polymeric Linking Behavior (2017) [J]. Intellectual Property Rights, (4).

⁷⁷ Ibid note **Error! Bookmark not defined.**

⁷⁸ Ibid note 59.

⁷⁹ France by the first time recognized moral rights of the authors against unauthorized amendments of texts by publishers in the 1814. See J.A.L Sterling on World Copyright Law,(Sweet & Maxwell,2015)338

Berne Convention. Article 6bis Of the Berne Convention⁸⁰ laid down the requirements for member states to recognize moral rights which include: 'the right to claim authorship of the work to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.' Moral rights were later incorporated in to the US copyright law in 1988 by the Berne convention implementation act of 1988, Section 3 (b): (1) the provision of the Berne Convention, and adhered to the united states thereto, and satisfaction of the united states thereunder, do not expand or reduce any right of the author of a work, whether claimed under federal, state or common law: (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation. Secondly, although the US incorporated moral rights into its copyright protection system, both the types of rights and categories of works are limited;⁸¹ and some scholars argued that the US has in fact decrease the protection of authors moral rights,⁸² thus this change does not change the utilitarian basis of US copyright law.⁸³

From a judicial point of view, the utilitarian based justification has been repeatedly confirmed by the US supreme court in case law: 'The primary objective of copyright is not to reward the labour of authors, but "[t]o promote the Progress of Science and useful Arts."⁸⁴ ; 'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration...It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius⁸⁵. Fisher summarised the primary purpose proposed by the utilitarian theory is to produce 'greatest happiness to the greatest

⁸⁰ Berne Convention on the protection of literature of artistic works

⁸¹ Under the Visual Artists Rights Act 1990, only 'right of attribution' and 'right of integrity' of 'visual arts', such as paintings, drawings, prints, photographs produced for exhibition purposes, or sculptures are protected at the federal level, such protection is limited to original embodiment and do not extend to reproduction of copies etc. For details see C Rigamonti, Deconstruction of Moral Rights, (2006) 47 Harv. Int'l L.J. 353, 407, Ibid note 79 Stingler, 351.

⁸² Because authors can only exercise moral rights over original embodiments of their work, author who is also the creator of the work is incapable of enforcing moral rights against market intermediaries and users.; On the other hand the UK CDPA also attracted the same accusation as being 'a poor example of common law countries' because of the waiver system incorporated therein. It has been argued the UK waiver system renders the moral rights under the contractual default rules subject to bargaining power elements, thus this common law ground in tort gives much weaker protection than on a solid statutory ground. See Ibid, Rigamonti, 407, see also J Ginsbery, Moral Rights in Common Law Countries, (1990), Ent. L. r. 121 9.

⁸³ Ibid, Rigamonti, p68, See also C Rigamonti, A conceptual transformation of moral rights. (2007), the American journal of comparative law, vol 55, p68

⁸⁴ Feist Publications Inc v Rural Telephone service Co Inc 499 U.S. 340 (1991) 349-350.

⁸⁵ United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)

number'.⁸⁶ In the context of copyright, the 'greatest happiness to the greatest number' is not the absolute control granted to individual authors, rather, it is the incentive that the reward mechanism creates which can effectively increase the amount of public good.⁸⁷ Reward in the form of property right is merely an 'immediate effect' to achieve the ultimate aim of incentive production that benefits the public.⁸⁸

The U.S. Congress also explicitly provided the prevailing justification of public welfare over a natural rights basis: 'The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings . . .'.⁸⁹ The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."

⁸⁶ Ibid note **Error! Bookmark not defined.**

⁸⁷ B. Lehman and R. Brown, Intellectual Property And The National Information Infrastructure, The Report Of The Working Group On Intellectual Property Rights. Information Infrastructure Task Force, September 1995, 22.

⁸⁸ Justice Potter Stewart made the following observation regarding the function of copyright law in the case of *Twentieth Century Music Corp. v. Aiken*: 'The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.' 422 U.S. 151, 156, 186 U.S.P.Q. (BNA) 65, 67 (1975).

⁸⁹ H.R. REP. NO. 2222, 60th Cong., 2d Sess., 7 (1909) (report accompanying the Copyright Act of 1909, the first comprehensive revision of the copyright laws).

Chinese Communications Market and Policy

In the previous section, it has been pointed out that because the copyright law of China is transplanted from western countries, therefore China adopts the same theories of copyright law that is found on the natural right, personality and utilitarian basis. However, whether the application of the law can actually produce the effect as intended should be assessed within the market. China's copyright content market, such as book publishing industry and traditional radio and television industry, are dominated by large state-owned enterprises or state television stations. These industries are often categorized as the 'mouthpiece' of the Communist Party and carries the political duty of propagandization. Therefore, laws and regulations are put in place to block the private companies from entry.

The traditional broadcasting market of China should be seen as a typical planned economy where by the broadcaster are state-owned, and the market entry is blocked for any private entities from carrying out broadcasting services. This state-owned nature broadcasters and the market entry regulation significantly restrict the application of relevant economic theory that is based on a free market notion. And consequently, such restriction has been reflected in the copyright law regarding statutory license scheme. This section will attempt to provide an overview of the overall communication market structure by analysing the state-owned nature of broadcasting stations that mouth-piece function served for the Party, so as to disclose the underlying reason for the privileges granted to the broadcasting stations in copyright law. Before continuing, a general theme of the economic structure needs to be set.

Planned Economy v. Market Economy

Communication infrastructures in China, i.e. telecommunication networks and broadcasting networks, remains state-owned and is subjected to heavy market entry control by two separated regulators of the state: The Ministry of Industry and Information Technology (MIIT) and the State Administration of Film, Radio and Television (SARFT). The MIIT has the overall regulatory power within telecommunications market, vis-a-vis the broadcasting market controlled by the SARFT. The administrative and regulatory function of the two departments originated from the underlining economic structure of China: the socialist market economy which justifies the state-ownership of major national infrastructure, and in

the meantime, creating a strong regulatory capture between the market and the regulator (vertically), and strong conflict of interests between the two regulators (horizontally).

State Ownership - Economic Justification

In order to analysis the role of China's state-owned enterprises (SOEs) and the rationale behind the state-leading system within the market, it is necessary to introduce the unique economic structure created by China which justifies the current market management measures adopted by the state and guarantees the operation of this system across varies industries.

China is the second largest economy in the world.⁹⁰ Its economy is in the process of transitioning from a planned economy to a market economy.⁹¹

A 'market economy' has been defined as an economy in which 'the largest part of economic activity is organized by private individuals, entrepreneurs, for personal profit'.⁹² In this economic system, private individuals make their own decisions regarding the range and degree of productivity, profitability, utility and investments of their own business.⁹³ The underlining market driven forces are competition and self-interests on the basis of private ownership.⁹⁴ Therefore instead of making monetary contribution to the economy itself, governments play a small role by merely structuring relevant laws and regulations, e.g. general competition law, to encourage private sector economic activity.⁹⁵

Although in early 20th century, state-owned enterprises were common in infrastructure-based sectors such as energy, transport and telecommunications all over the world, the degree of government's involvement (acting as the agency of the state) is gradually diminished by selling publicly owned assets and transferring ownership and liabilities of

⁹⁰ The World Bank: China Overview, available at <http://www.worldbank.org/en/country/china/overview> accessed in Dec 2018.

⁹¹ A 'market economy' has been defined as an economy in which 'overwhelmingly the largest part of economic activity is organized by private individuals, entrepreneurs, for personal profit'.

⁹² S Kate, Free Market Economics: An Introduction for the General Reader(2011, Edward Elgar Publishing, UK ,1) .

⁹³ Ibid

⁹⁴ The Role of Self-Interest and Competition in a Market Economy – The Economic Lowdown Podcast Series,http://www.stlouisfed.org/education_resources/economic-lowdown-podcast-series/the-role-of-self-interest-and-competition/

⁹⁵ ibid

major public enterprises upon privatization from 1980, for example, the privatization of British Telecom in 1984 and British Petroleum in 1987.⁹⁶

Consequently, privatized enterprises were segregated from direct political controls except 'arm-length' political contingency established by regulations,⁹⁷ and decision-making function was transferred from a central public authority to individuals within the enterprises so as to initiate decentralization internally.⁹⁸ To sum up, market economy implies an ongoing process where government gradually deregulate the economy and privatize public enterprises to create a decentralized system, so as to introduce competition and encourage autonomy of the market.

On the other hand, a 'planned economy', also known as the 'command economy', is an economic structure based on 'public ownership' notion vis-a-vis private ownership of production in market economy. Government, as the representative of the people, makes all the decisions concerning production and distribution, such as setting prices and allocating resources.⁹⁹ Such decisions derive from a collection of individual private decisions and are enforced by way of central plans issued by government planners that always carry weight of laws.¹⁰⁰ Within planned-economy, state-owned enterprises in both infrastructure-based and manufacture-based industries are owned and operated by the state.

What the term 'transition' encompasses is that China's current economy is mixed by certain characteristics of planned economy, for example, the recognition of public ownership of resources and production on one hand and introducing market competition as the main market mechanism as the other.¹⁰¹ The combination of planned and market elements within

⁹⁶ Article 10 of The British Telecommunications Act 1981 Transfers the liabilities of telecommunications services from the Post Office upon the two newly created corporations. See 'The Privatisation of British Telecom (1984)' available at : http://www.instituteforgovernment.org.uk/sites/default/files/british_telecom_privatisation.pdf, R Millward, The nature of state enterprises in Britain, chapter 2 of F Amorati & Others, Re-appraising State-owned enterprises, a comparison of UK and Italy,(2011, Routledge, NY) 11.

⁹⁷ H C Katz, Telecommunications: restructuring work and employment relations worldwide, (1997, Cornell University Press, US, 90.)

⁹⁸ Decentralization: A Sampling Of Definitions, Working Paper Prepared In Connection With The Joint UNDP-Government Of Germany Evaluation Of The UNDP Role In Decentralization And Local Governance, (1999)

⁹⁹ W A. McEacher Economics: A Contemporary Introduction, (2010,Cengage Learning, US, 43)

¹⁰⁰ Ibid

¹⁰¹ China's economic transition began at the end of 1978 derived from the 'market-oriented reform' carried out by Deng Xiaoping's government. And during the whole transition period, China created its unique economic structure known as the 'Chinese - Characterized Socialist Market Economy'. In the early 1950s, the central government issued the 1st Five-Year-Economic-Plan started to manifest the traditional Soviet-style planned economic structure adopted by China when the People's Republic of China was officially established in 1949. The formal transition commenced in 1978 when the 'Third Plenary Session of the 11th Central Committee of the Chinese Communist Party' was held in which the central government, announced the official launching of the 'opening-up reform' aiming at promoting China's economic development but

a single economy has in fact created a special 'Chinese-Characterized Socialist Market Economy' and been proven a great success over its dramatic growth in the past decades.¹⁰² Therefore, the central government expressed their faith on the continuous deployment of the existing approach by requiring the regulators to further 'shaping' and 'perfecting' the 'Chinese-Characterized Socialist Market Economy' within the 12th Five-Year - National Development Plan (hereinafter '125 Plan')¹⁰³.¹⁰⁴ This plan is confirmed in the 135 Plan under Chapter 2 which provides that: '...adhering to the important principles of socialist political economy with Chinese characteristics, liberating and developing social productive forces and adhering to the reform direction of socialist market economy.'

What are the Chinese Characteristics?

Under Article 7 of China's Constitution, Chinese 'National Economy' is defined as 'Socialist Public-Owned Economy'. The first sentence of Section 11 of the 125 Plan summarizes China's current economy as 'an economic system that maintains 'public ownership based economy' as the main body of the system and simultaneously develops both public owned and private owned economies therein'. The rest of the sentences sets out the framework of the development: 'to establish a systematical environment that enables both types of

maintaining China's Socialist nature at the same time. At the beginning of the transition period, western economists predicted that this peculiar Chinese economic structure would soon collapsed due to lack of any theoretical basis caused by the contradiction inherited in the socialism, i.e. public-owned resource and production goods system, and the market-oriented economy structure, i.e. typical capitalist competitive market structure based on private ownership of production goods. However, China's dramatic economic growth led by the socialist ideology-based reform has been argued as 'one of the great economic success stories in the post-war era.' The underlining principle of such reform may be explained by reference to Deng Xiaoping's famous 'cat theory': "Whether a cat is black (a metaphor for socialism) or white (a metaphor for capitalism) makes no difference. As long as it catches mice, it is a good cat." See OECD Synthesis Report : China in the World Economy: The domestic policy challenges. (2002), p1 available at :

<http://www.oecd.org/daf/fin/insurance/2075272.pdf>; Li Wu, Working Paper on the Development of Chinese Communist Party and Chinese Economy (1949-2006) - An assessment on the development of Chinese Communist Party and contemporary Chinese Economy, The institute of contemporary China Studies. available at (Chinese version only) : <http://www.iccs.cn/contents/301/8225.html>; A Cottrell and W. Cockshott, Socialist planning after the collapse of the Soviet Union, (1992) *Revue europe'ene des sciences sociales*, tome XXXI, no. 96, 1993, 167-185. J Lin, F Cai and Z Li, The Lessons of China's Transition to a Market Economy, (1996), *Cato Journal*, Vol. 16 No. 2. CNN: Inside China, Reformer with an iron fist: Deng Xiaoping, available at: <http://edition.cnn.com/SPECIALS/1999/china.50/inside.china/profiles/deng.xiaoping/>; accessed in Dec 2018 in May 2013.

¹⁰² China was ranked as the 7th economy in the year of 1978. The economy transition brought a steady economic growth since then until a peak was reached in 1992 where GDP growth remained in an 10% increasing annually. China overcome Italy as the 6th economy in 2005; in 2006 China overcome the UK and took the 4th place behind the US, Japan and Germany; In 2007 it became the 3rd economy, and after three years it was ranked after the US and become the 2nd largest economy. See OECD Country statistical Profiles: China (People's Republic of), available at : http://www.oecd-ilibrary.org/economics/country-statistical-profile-china_csp-chn-table-en, See also China Economic Newsrelease : China GDP ranking in recent 10 years, available at : http://www.ce.cn/macro/more/201103/01/t20110301_22257993.shtml, accessed in December 2018.

¹⁰³ Full text of the 125 (Chinese version only) is available at :

<http://www.sdpc.gov.cn/fzgh/ghwb/gjih/P020110919592208575015.pdf> accessed in Dec 2012, no long available.

¹⁰⁴ S11.

economies; to receive legal and equal allocation of resources and to engage in fair market competition that grants equivalent regulatory protection’.

Planned-Economy Elements: Five-Year-Plan

The 125 Plan itself is the type of ‘plan’ that can be used to identify a planned-economy. The ‘National Five-Year-Plan’ of China serves as the premier economic development instruction issued by the Central Government of PRC under the approval of the National People’s Congress. It has a significant effect of shaping the framework of China’s future economy by setting out the directions and objectives for the long term national economic development, and providing guidance on the formulation of major national construction projects and the allocation of productivity and resource in the following five years.¹⁰⁵ The current plan that is in force is the 135th Five-Year- Plan published in October 2016.¹⁰⁶

However, the contents of the Plan are different from what people usually perceived from the concept of Planned Economy: instead of giving specific orders regarding means of production and distribution, the plan assigns tasks to the government to ‘advance market economy’ by requiring relevant government departments to carry out internal reforms, so as to separate their governmental supervisory functions from those closely connected with SOEs in a commercial sense, such as the capacity of SOEs’ administrators and market agency.¹⁰⁷ Technically speaking, by bringing market competition into most of the private sectors and diminishing the degree of government’s involvement in the market, China can no longer be defined as a complete planned economy. Nonetheless, it is now using the ‘planned economy’ approach to reshape the market structure towards a ‘market economy’.¹⁰⁸

¹⁰⁵ See full text of The 125 Plan at : <http://www.sdpc.gov.cn/fzgh/ghwb/gjjh/P020110919592208575015.pdf> No accessed in June 2013, no longer available.

¹⁰⁶ Full text of the 135 Plan(Chinese version only) is available at: http://www.xinhuanet.com/politics/2016h/2016-03/17/c_1118366322.htm accessed in Feb 2019.

¹⁰⁷ S11, Chapter 46,

¹⁰⁸ Although the title of ‘The 125 Plan’ was officially changed to ‘The 125 Program’, the nature of the plan remains the same, For example, it went through the same drafting and ratification procedures from the local government to the National Development and Reform Commission, then approved by Congress and executed by the State Council. Most of these procedures are required in legislative process, therefore it can be argued that the plan is a legally binding document which carries the weight of law.

Socialist element: Public Ownership

As mentioned above, Socialism shall not be simply assumed as a complete planned economy, rather, it is an indication of the public ownership rationale in the overall economy. Basically, public ownership represents the idea that property is commonly possessed by a group of people but with all members enjoying and exercising equal owners' rights over the property through collective activities.¹⁰⁹ This is the theoretical basis that established the Peoples' Republic of China in 1949 and a large scale of state enterprises at the initial stage: there were more than 100,000 state owned enterprises that occupied 78% of the overall market in Mao's era.¹¹⁰ Along with the market-oriented reform carried out in early 1980s, most of SOEs have been privatized and the number has been reduced to 169 in 2013.¹¹¹ The selective privatization approach was carried out based on the notion expressed by the former Chairman of P.R.C Hu Jintao : ' basic heavy industries related to national defence and those which require large amount of investment capital ought to be managed by the state, whereas public utilities relate to peoples' daily activities shall be jointly managed by state-owned and private enterprises.'¹¹² It might be rare that there are non infrastructure-based enterprises such as 'China Recording Corporation'¹¹³ and 'Dongfeng Motor Corporation'¹¹⁴ that remain in a state-owned status in China. However, the Chinese constitution that built up the socialism foundation of the country as a whole¹¹⁵ will provide a legal basis for the government planners to sustain the public ownership performance in the economic reform by way of granting proportionate market place to SOEs even in private sectors. In a recent speech delivered by the President Xi Jinping, The central government has reemphasized the status of state-owned enterprises as the 'core carrier' of the state-owned economy, with the aim of strengthening the position of state-owned enterprises in the economy as a whole.¹¹⁶

¹⁰⁹ S Hong and N Zhao, *China's State - Owned Enterprises: Nature, Performance and Reform*, (World Scientific Publishing, Singapore, 2007) 7 .

¹¹⁰ J Zhou, *Remaking China's Public Philosophy for the Twenty-First Century*, (Greenwood Publishing Group, U.S., 2003) 85

¹¹¹ See the list of SOEs in China (Chinese version only) at <http://wenku.baidu.com/view/af466f8ecc22bcd126ff0ca8.html> accessed in Feb 2019.

¹¹² M.L.Bian, *The Making of the State Enterprise System in Modern China: the dynamics of institutional change*(2009, Harvard University Press, USA)207

¹¹³ Official website available at: <http://www.china-crc.com.cn/> accessed in Feb 2019.

¹¹⁴ Official website available at :<http://www.dfmc.com.cn/> accessed in Feb 2019.

¹¹⁵ Preamble of the Constitutional Law of China. para 11,13.

¹¹⁶ Press Article: 'Taking Reform as the Motivation to Stronger and Better to Be Large State-owned Enterprises: Written on the 2nd Anniversary of Xi Jinping's Important Directive on the Reform of State-owned Enterprises', available at: <http://www.chinanews.com/gn/2018/07-04/8556069.shtml> accessed in Feb 2019

Analysing Regulatory Theories within the Chinese-Characterized Socialist Legal System

‘Chinese-Characterized Socialist Legal System’ (CCSL) is a new term introduced by the State Council White Paper published by the Information Office in 2011. It is defined as a system: ‘headed by the Constitution, with laws related to the Constitution, civil and commercial laws and several other branches as the mainstay, and consisting of laws, administrative regulations, local regulations and other tiers of legal provisions, ensures that there are laws to abide by in economic, political, cultural and social development, as well as in ecological civilization building.’¹¹⁷

This socialist legal system is built based upon China’s economic structure, i.e. the Chinese-Characterized Socialist Market Economy, and its ‘People’s Congress’ political system^{118, 119}. Since the Constitution of P.R.C. explicitly prescribed the socialism nature of its economy¹²⁰ as well as the country as a whole¹²¹, the ‘socialist factors’ still play an important role whereby setting the basis of the ‘public-ownership’ notion in property rights regime within public sectors and designating the legislative power to the National People’s Congress(NPC) and the NPC Standing Committee.¹²² Despite having the primary legislative powers of ‘Law making’ resting upon the NPC,¹²³ the State Council is empowered with drafting ‘administrative regulations’. Though the enforceability is ranked lower than the ‘Laws’, it

¹¹⁷ ‘the White Paper of Chinese-Characterized Socialist Legal System’, Information Office of the State Council, The People's Republic of China October 2011, Beijing. Available at (English version available): <http://www.scio.gov.cn/zfbps/ndhf/2011/201110/t1036756.htm>, No longer available. The establishment of the CCSL can be divided into 3 stages: the Questing Stage(1949-1978); the Foundation Stage (1978-1998) and the Founding Stage (1998-2008).

¹¹⁸ i.e. the People’s Congress at both national and provincial level, acting as the representatives of people, exercise state power under China’s Constitution. See Art 2 of China’s Constitution: ‘All power in the People’s Republic of China belongs to the people. The organs through which the people exercise state power are the National People’s Congress and the local people’s congresses at different levels. The people administer state affairs and manage economic, cultural and social affairs through various channels and in various ways in accordance with the law.’

¹¹⁹ Marxist socialism theory sees the basis of any legal systems is the corresponding economic and political structure of the country. H Yang, ‘On Basic Formation Of The Socialist Legal System With Chinese Characteristics- To Commemorate The 60th Anniversary Of The Establishment Of The People’s Republic Of China’, (2009), Hebei Law Science, Vol.27, No.6. 172

¹²⁰ Art 15 of the Constitution of the P.R.C. 2004.

¹²¹ Art 1 of the Constitution of the P.R.C. 2004.

¹²² Supra. the White Paper. Also a short summary of the National People’s Congress legislative process can be seen at ChinaDaily at: ‘The System of People’s Congress’ (English version available): http://www.chinadaily.com.cn/china/2010npc/2010-02/09/content_9449872.htm accessed in Feb 2019

¹²³ Chapter 2 Section 2 Article 7 of the Legislative Law of the P.R.C 2000

still has the overall jurisdiction at a national level, compared to local regulations.¹²⁴ Up till 2011, the total number of NPC enacted Laws is 240 whereas the State Council drafted 706 administrative regulations.¹²⁵ Moreover, most of the sector specific regulations are ‘administrative regulations’ which means they are in fact drafted by and is ought to be enforced by the same sector specific regulators, i.e. various ministries and administrations. The line between ‘legislator’ and ‘regulators’ is so blurred in this context, which could have been a result of a poorly drafted regulation in the first place. The deficiencies contained in the regulation itself are then used as a shield for omissions in enforcement, basing upon poor interpretations or discretion.¹²⁶

The ‘conflict of interests’ outcome may be evidenced by a ‘crack-down’ action carried out by the telecommunication regulator Ministry of Industry and Information Technology (MIIT) in 2010 against all VoIP (Voice over Internet Protocol) service providers in order to safeguard the profit of the SOEs from providing international calling service as the only legal licensees.¹²⁷ The justification referred by the MIIT is that according to China’s Telecommunications Service Classification List 2003, VoIP is classified as basic telecommunications service and the business must obtain Basic Telecommunications Service License to carry out such services.¹²⁸ Therefore all VoIP services were held illegal except provided by the basic telecommunications licensee, i.e, China Telecom and China Unicom. The fact that VoIP services maintains the ‘basic telecommunications service’ status in China’s 2013 updated Telecommunications Classification List (drafted by MIIT) guarantees a legitimate and long-lasting monopolistic position for China Telecom and China Unicom in

¹²⁴ Chapter 3 Section 1 Article 56 of the Legislative Law of the P.R.C. 2000. The ranking of legal enforceability of three different instruments are set out in Chapter 5 Article 79: i) Laws (leading by the Constitution), ii) Administrative Regulations and iii) Local Regulations, Autonomous Regulations and Rules.

¹²⁵ See note 117.

¹²⁶ R Baldwin & Others, *Understanding Regulation: Theory, Strategy, and Practice*, (Oxford University Press, U.K.2011)27

¹²⁷ See People’s newsreale(Chinese version only): MIIT Cracks Down Voip To Cease ‘Telephone Fraud’, available at : <http://it.people.com.cn/GB/42894/196085/13606247.html> accessed in Feb 2019. See also 163 Newsrelease (Chinese version only): MIIT ‘Rectifying’ Voip Market, Skype May Face A Strike.’

<http://money.163.com/10/1231/15/6P883CAM00253B0H.html> accessed in Feb 2019.

¹²⁸ Such requirement is set out in Article 7 and Article 9 of China’s Telecommunications Regulation 2000.

the future VoIP market, and meanwhile leaves all other VoIP service providers in potential risk to be excluded via the licensing regime^{129, 130}

On the other hand, due to the state-owned nature of China Telecom and China Unicom, they are bound to fulfill the obligations imposed by the MIIT, advancing the technology development which normally incur a cost of investment. For example, whereby the UK's governmental plan of laying fiber optic cables across the whole country ended up as a form of contract with BT upon subsidies,¹³¹ China's 'Fiber optic takes over copper'¹³² project is written in the MIIT issued Telecommunications Industry 125 Plans for the long term goal of fastening broadband speed and promoting network convergence.¹³³ Therefore regardless of the degree of commercial incentives that initiated this investment, China Telecom and China Unicom would nevertheless serve such major decisions made by the MIIT and carry out the project even without further subsidies granted.¹³⁴

Nevertheless, in terms of the legal regime, it seems that the regulatory development is heavily influenced by the particularistic concerns of MIIT in respect of its duty to promote

¹²⁹ License allocation has been regarded as another typical example of governmental rent-seeking behaviors. See A O. Krueger, 'The Political Economy of the Rent-Seeking Society', (1974), *The American Economic Review*, Vol. 64, No. 3 pp. 291-303

¹³⁰ Category A Basic Telecommunications Services: Sub-Category A15: VoIP Services (A15-1 Domestic VoIP Services; A15-2 International VoIP Services). However, the MIIT's strike-down action took place in 2010 did not exclude all other VoIP services providers from the market, for example Skype now still provides the VoIP services over a Chinese website Tom.com which acting as the 'agency' of Skype in China. There also exist other domestic VoIP service providers such as UUcall, 66Call etc. The reason might be that China Telecom and China Unicom themselves do not carry out VoIP services, and before establishing their own VoIP services as well as a concrete legal regime in the VoIP market, banning the VoIP business completely will subject the end-users to a much higher international telephone call charge currently set by China Telecom/Unicom/Mobile over their traditional telephony service which is ¥ 8 RMB/min (approximately £1 GBP/min).

¹³¹ See BBC newsrelease: 'Rural broadband verdict - too little, too late' by Rory Cellan-Jones, available at : <http://www.bbc.co.uk/news/technology-23194287> accessed in Dec 2018 in July 2013.

¹³² '光进铜退'

¹³³ Section 4: Main Tasks, Sub (1): '...fasten the substitution of copper by fibre to meet the requirements of broadband and network convergence development.' See Telecommunications Industry 125 Development Plan available at (Chinese version only): <http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/14578927.html> accessed in Dec 2018 in July 2018.

¹³⁴ Although it has been argued that along with the internal reform of SOEs starting from 1990s they have been given relative autonomy over pricing and investment decision making. The major national development plan tend to maintain a very strong influence over their business practice compare to other decision makings over regarding commercial and internal issues. See David A. Ralston et al., *Today's State-Owned Enterprises of China: Are They Dying Dinosaurs or Dynamic Dynamos?*, (2006), 27 *Strategic Mgmt.* J.825, 827. See also the Recommendation issued by MIIT to China Unicom: 'Recommendations on Fostering Fibre Network Construction' MIIT-Unicom [2010] Decree 105; See also 'Recommendations on Universal Broadband Service and Broadband Speed Increasing Construction' MIIT-Unicom [2012] Decree 140. Available at (Chinese Version Only) http://www.gov.cn/zwggk/2010-04/08/content_1576039.htm; <http://www.miit.gov.cn/n11293472/n11293877/n15090235/n15090304/n15090487/15095486.html>, accessed in Dec 2018 in July 2013. No longer available.

technology and to safeguard the profit of the three internal SOEs¹³⁵.¹³⁶ This phenomenon seems to have been literally caught on by the ‘interest group theory of regulation’ or ‘economic theory of regulation’:¹³⁷ the former sets out the broad premise that, contrary to the public interest rationale, regulation can be driven by the concerns of particular interest groups;¹³⁸ the latter offers an economic explanation regarding the orientation and ultimacy of such driven force which is to maximize their own material interest for their benefit.¹³⁹

The means to achieve ‘self interest maximization’ while reducing the net wealth of others is always referred to as ‘rent seeking’ activities.¹⁴⁰

It must be pointed out that the common conception of a prominent self-interest, always pursued by regulators, which is the electoral support from voter,¹⁴¹ seems unlikely to apply in MIIT’s case, as based on China’s ‘single communist party led’ centralized political system. Instead, ‘rent-seeking’ is institutionalized in China by virtue of other factors such as the segment of Chinese culture that emphasis the personal relationships and networks, or as emphasized above, the remnant of old command economy.¹⁴² With the induction of future votes under the economic theory of law, the regulator’s ‘self-interest’ identifies as straightforward. In light of China’s unique ‘socialist’ economic and legal system, it may be reasonable to argue whether advancing the technology development for the sake of promoting the country’s overall economic development as required by the ‘Plans’ should be regarded as a form of ‘self’ interest of the MIIT.

Chinese Communications Market Overview

Although the development of the radio and television broadcasting industry in China started as early as the 1920s, it was however largely delayed by the domestic chaos caused by wars

¹³⁵ ‘China Radio, TV & Internet Co. Ltd (CRTI)’ is a SOE under direct control of the State Administration of Radio, Film and Television. It is claiming to be entering the telecommunications market in the near future. It has been regarded as the ‘outsider’ by the existing telecommunications market players, i.e. China Telecom and China Unicom. How the internal or vertical conflict of interest may extent and convert to a interdepartmental or horizontal conflict of interest and bring further chaos in the converging regulatory regime will be discussed below.

¹³⁶ supra 111,

¹³⁷ also known as Chicago/Virginian Political Economy.

¹³⁸ JG Stigler, *The Theory of Economic Regulation*, (1971), *The Bell Journal of Economics and Management Science*, Vol. 2, No. 1, pp. 3-21

¹³⁹ Ibid

¹⁴⁰ ‘Rent seeking theory’ was firstly introduced by Gordon Tullock in 1967 when describing the government political behavior of self-interest agencies. See M Boucher, *Rent-Seeking and the Behavior of Regulators: An Empirical Analysis* (1991), *Public Choice*, Vol. 69, No. 1 pp. 51-67

¹⁴¹ Baldwin, *Understanding Regulation: Theory, Strategy, and Practice*, 44.

¹⁴² TW Ngo and Y Wu, *Rent Seeking in China*, (2008, Routledge Contemporary China Series, U.S. 3)

as well as political crisis within the government.¹⁴³ The history of the broadcasting industry can be classified into three phases in accordance with major political events: the first phase commenced upon the emergence of the first radio broadcasting station in China in 1923 until the establishment of the People's Republic of China (P.R.C.) in 1949; the second phase was marked by the establishment of the P.R.C. until the Cultural Revolution that lasted for ten years until 1976; and the third phase started from 1978 upon The Third Plenary Session of the 11th Central Committee that restored the governing power of the contemporary Communist Party until present, i.e. the post 'reform and opening-up' period.

In China, both wireless broadcasting system and cable systems are provided by the state owned company: – the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT). The State Administration of Press, Publication, Radio, Film and Television of P.R.C. (SAPPRFT) is the successor of The State Administration of Radio, Film and Television (SARFT).¹⁴⁴ It plays two major roles in the broadcasting market as both the market player as well as the regulator: it is the owner of all the TV broadcasting infrastructures (excluding telecommunication and mobile networks) in each cities, i.e. traditional broadcasting stations, cable systems, and the broadcasting satellites¹⁴⁵. It is also the only service supplier authorized by the government to provide traditional TV services over broadcasting, cable and satellite networks.¹⁴⁶ In addition, it is the regulator of the 'news, publication, radio broadcasting, film and television broadcasting' industry. It carries out the regulatory

¹⁴³ Although The first radio broadcasting station emerged in China in 1923, the political changes brought by the wars from the 1927 to 1945 significantly slowed down the development of the industry. Two major wars broke out during that period: 1) the Second World War against Japan's aggression from 1931 to 1945, and the Civil War between the Communist Party and the Nationalist Party of China from 1927 to 1949. Besides the war, the impact of the Cultural Revolution from 1966 to 1976 that created tremendous domestic disorder and fundamentally altered the nature of the broadcasting system from the mass media to a 'instrument that facilitated the declaration of extremist left-wing political views'. During the Cultural Revolution, education of the history of radio broadcasting in universities was postponed, and the construction of the infrastructures (including the development and manufacture of television sets) as well as cooperation with foreign broadcasters ceased. See Y Zhao, *History of China's Radio and TV*, (2006, China Communication University Press, 2nd edition, Beijing, P284-331); H Zhao, *History of the Development of China Central Television(1958-1997)*,(2008, China Broadcasting Press,p80); S Yan, *Contemporary Chinese Diplomats*, (2004, Fudan University Press, p216) Y Zhao & H Ai, *Textbook on the History of China's Radio and TV*. (2009, China Broadcasting and Film Publication, Beijing, p112-122)

¹⁴⁴ See the SAPPRFT official website (in Chinese): <http://www.sapprft.gov.cn/sapprft/> accessed in Feb 2018. The state administration of radio, film and television become SAPPRFT in the year of 2013. The change is manifested by the merger of SAPPRFT and the General Administration of News Publication. By doing so, the jurisdiction of SAPPRFT is extended to press and publication. However, in the history of the broadcasting industry, the regulator has experience several changes in terms of regulatory function. The name and ranking were altered consequently. See detail on next page.

¹⁴⁵ Excluding the telecommunication and mobile networks, which are owned by state-owned enterprises such as China Telecom, China Unicom and China Netcom under the direct control of the MIIT.

¹⁴⁶ IPTV services carried out by the telecommunications operators are now available long after the plan of network convergence been issued back in 2012.

function by way of issuing licenses to control market access, as well as scrutinizing the content on both traditional and online platforms.¹⁴⁷

The first regulator of the broadcasting industry was created in the year of 1949. In 1949, the central government of China established the 'Central Administration of Broadcasting' (CAB), which is the predecessor of the SAPPRFT, as an organ of the 'General Administration of News' within the Government Administration Council.¹⁴⁸ In the next year, the General Administration of News issued the 'Decision on the Construction of Radio Broadcasting Network'.¹⁴⁹ It is the first regulation of the broadcasting industry issued by the central government since its creation. The construction of the radio networks were carried out in two main forms, to integrate privately owned radio stations that were put in use prior to 1949, and to develop the existing 'China Central Radio Station' as the national radio broadcasting medium, with the aim to 'publish news, deliver governmental orders, as well as to educate and entertain the public'.¹⁵⁰ Meanwhile, the 'Regulatory Decision On The Radio Stations Of Liberalized Cities' issued by the central government required that 'broadcasting stations shall be operated by the State' and forbade any form of foreign investments.¹⁵¹ As a result, stations that were established by the Nationalist party before 1949 were 'taken-over' by the central government, and thirty-three privately owned radio stations were purchased by local governments, primarily in Shanghai and Beijing.¹⁵² Until then, the underlying 'state-owned state-run' structure has been established in the broadcasting market.

The television industry in China started to develop upon the establishment of the first Television broadcasting station by the CAB in 1958 – the Beijing Television, which is now the China Central Television (CCTV).¹⁵³ In the year of 1964, the CAB passed the bill on the construction of communal antenna system.¹⁵⁴ The first cable system was installed in Beijing

¹⁴⁷ Notice Of The State Council Regarding The Function Of SAPPRFT, Internal Organizations And Establishment Of Officials. State Council Publication, [2013], No. 76. Not only SAPPRFT monitors audiovisual contents, its jurisdiction extends to all the press and publication, newspapers, magazines and journals. It carries out the scrutinizing function by way of issuing licenses to publishers and audiovisual service providers. Publishers include both traditional and online publishers.

¹⁴⁸ Y Zhao, *History of China's Radio and TV*, (China Communication University Press, 2nd edition, Beijing, 2006) P195

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid* p198,

¹⁵¹ *Ibid*, 207

¹⁵² Y Zhao & H Ai, *Textbook on the History of China's Radio and TV*. (2009, China Broadcasting and Film Publication, Beijing, p81)

¹⁵³ Y Zhao , *History of China's Radio and TV* ,*Ibid*, 248.

¹⁵⁴ Y Zhao & H Ai, *Textbook on the History of China's Radio and TV*. (2009, China Broadcasting and Film Publication, Beijing, p119)

Hotel in the year of 1974, however, it was a local area network (LAN) and it provided services only to the Beijing Hotel.¹⁵⁵ In 1974, the first cable television centre was built by Beijing East Red Oil Company,¹⁵⁶ and large scales of network construction were carried out in the 1980s.¹⁵⁷ However, instead of building up the stations and networks across the nation by the central government, local governments took the leading role of the infrastructure construction for their region. Local governments either relied on their own tax revenues or forming 'joint ventures' with local state-owned enterprises in other sectors to generate capital inputs.¹⁵⁸ In 1990, the Ministry of Broadcasting, Film and Television (MBFT), which was the successor of CAB, promulgated the 'Temporary Regulation of Cable Television Management' (Decree 2) in which local cable networks were brought into the central regulatory framework of the MBFT.¹⁵⁹ However, due to the fact that the original construction of cable networks were conducted by local governments and local broadcasting stations in each city, the fragmented layout rendered it difficult for the MBFT to integrate local networks into a large nation-wide network.¹⁶⁰ Thus, in 1994 and 1997, MBFT issued the 'Regulation On The Management Of Cable Television' and 'The Ordinance On The Management Of Television Broadcasting' which laid down the geographical, i.e. city-based regulatory and development approach.

The Four-Layered Operational Model: As mentioned before, the construction of cable networks were mainly conducted by local governments and rests on four levels 'from the bottom to the top', i.e. county, city, province and the state.¹⁶¹ Thus the operational mode was set up based on the four-layered construction mode accordingly. The Four-Layered mode remains as the operational structure of the broadcasting market till date.

¹⁵⁵ Y Zhao & H Ai, Textbook on the History of China's Radio and TV. (2009, China Broadcasting and Film Publication, Beijing, p119)

¹⁵⁶ Y Zhao & H Ai, Textbook on the History of China's Radio and TV. (2009, China Broadcasting and Film Publication, Beijing, p119)

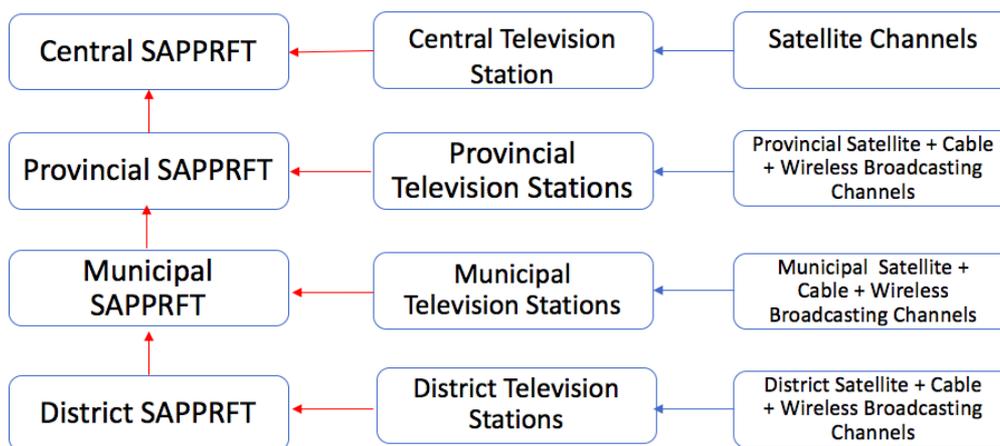
¹⁵⁷ Y Zhao, History of China's Radio and TV, Ibid, 248.

¹⁵⁸ For example the Sinopec constructed cable networks that served 10,000 household in Beijing from 1983 to 1990.

¹⁵⁹ In the year of 1982, the level of CAB was raised from the Administration to the Ministry within the government, moreover, the penetration of television set has replaced the radio and became the major communication platform across the nation. Thus, CAB changed its name to the Ministry of Broadcasting, Film and Television. Ibid.

¹⁶⁰ The network construction mode is referred as the 'Four Layered Model', i.e. County, City, Province and State. Y Zhao & H Ai, Textbook on the History of China's Radio and TV. (2009, China Broadcasting and Film Publication, Beijing, p145)

¹⁶¹ Y Zhao & H Ai, Textbook on the History of China's Radio and TV. (2009, China Broadcasting and Film Publication, Beijing, p145)



In the 11th National Broadcasting Television Conference held in 1983, the MBFT implemented such a ‘Four –Layered Broadcasting’, ‘Four-Layered Television’, ‘Four Layered Coverage’ policy to encourage the investment of local governments on the construction of the infrastructure.¹⁶² As an incentive, the local governments were granted with autonomy over the business operation of the stations, and were permitted to originate their own programs.¹⁶³ By doing so, broadcasting stations could perform the duty as a ‘medium of propaganda’ for local governments.¹⁶⁴ As a result, local governments started to invest in the construction of the infrastructures and the number of broadcasting and cable stations increased dramatically during the period of 1983 to 1988 at approximately 30% increasing rate each year.¹⁶⁵ While the Four-Layered operational mode was established, the ‘dual-function’ of the broadcasting stations was confirmed in the 11th conference as both the ‘News delivery and propaganda platform’ and ‘administration of broadcasting business’.¹⁶⁶ However, the ‘propaganda work’ shall be treated as the central task of the broadcasting stations.¹⁶⁷ And the mass media, including newspapers, radio and broadcasting stations,

¹⁶² As a result of the During 1983 to 1988, the number of broadcasting and cable stations increased 30% each year. Y Zhao & H Ai, Textbook on the History of China’s Radio and TV. (2009, China Broadcasting and Film Publication, Beijing, p145)

¹⁶³ Y Zhao & H Ai, Textbook on the History of China’s Radio and TV. (2009, China Broadcasting and Film Publication, Beijing, p145)

¹⁶⁴ Y Zhao & H Ai, Textbook on the History of China’s Radio and TV. (2009, China Broadcasting and Film Publication, Beijing, p145)

¹⁶⁵ Y Zhao & H Ai, Textbook on the History of China’s Radio and TV. (2009, China Broadcasting and Film Publication, Beijing, p145)

¹⁶⁶ Y Zhao, History of China’s Radio and TV, (China Communication University Press, 2nd edition, Beijing,2006) P387

¹⁶⁷ Ibid.

shall serve as the ‘mouth-piece’ of the Party, the government and the people.¹⁶⁸ The mouth-piece theory remains as the core guideline in the journalism ideology of Communist’s Party in China until the present day,¹⁶⁹ and has laid down the basis for the SARFT’s jurisdiction over the broadcasting industry as well as the regulations that aiming at controlling the public opinions.

The Dual – Regulatory Approach: On the other hand, a ‘dual-regulatory framework’ was set up within the broadcasting market during the 11th National Broadcasting Television Conference. ‘Dual-regulators’ refers to both the Communist Party and the Government,¹⁷⁰ i.e. local governments and the local MBFT in each area following the bureaucratically ranking of ‘Ministry, Department, Administration’.¹⁷¹ The regulatory function of the MBFT includes: the implementation of regulations, issuance of the development plans, coordinate and communicate between central and local MBFT, manage the establishment of broadcasting stations, assignment of the frequencies, guiding the technology and infrastructure research and development etc.¹⁷²

Although MBFT was created by the central government in June 1949, the reason why local governments and the MBFT carry out regulatory function independently is that it was nevertheless under the direct control of the Publicity Department of the Communist Party of China (hereinafter PDCPC). PDCPC has the main function as ‘guiding and directing public opinions’, ‘controlling public ideology’ ‘directing the creation and production of ‘ideological and cultural products’’, and planning the political and ideology advancement tasks’ etc.¹⁷³

Although the MBFT was incorporated into the central government under the ‘General Administration of News’ in November 1949, the PDCPC remained as the superior of MBFT and was significantly involved in the enactment of regulation in the TV market until the

¹⁶⁸ The mouth-piece theory was created by Karl Marx in the Marxist principle of political economy. Marx argued that mass media shall be confined and serve to the economic foundation of the society. The mouth-piece function of the media in China was firstly mentioned by Liu Shao Qi, the former Vice-Chairman of China, in a speech delivered to the working group of newspaper and media industry 1948. Z Tian, Historical Analysis of the ‘Mouth-Piece Theory’, (2005), Collection of Papers on Journalism And Communication, China Academic Journal Electronic Publishing House. P86; See also the X Hu, ‘Evolvement of contemporary liberalism and mouth-piece theory of journalism in China’, 2004, available at : <http://www.people.com.cn/GB/14677/22100/40528/40529/2986095.html> accessed in February 2019.

¹⁶⁹ L Li, Ensuring The Mouth-Piece Function And Sustained Development Of The Broadcasting Industry, July 2003, Audio-Visual World, China Academic Journal Electronic Publishing House.p4; X Xu, Study of the ‘Mouth-Piece Theory’ of Journalism; Hu Nan University Academic Journal, the Column of ‘Social Science’, p3.

¹⁷⁰ X Wang, Analysis of the Development of China’s Online Video industry Under the SARFT Regulation, 2015, Tianjin Normal University, Master Dissertation, p6

¹⁷¹ There are five levels within China’s administrative ranking system: State, Ministry; Department; Municipal, and County.

¹⁷² Y Zhao, History of China’s Radio and TV, (2006, China Communication University Press, 2nd edition, Beijing, P387)

¹⁷³ See the introduction of PDCPC at: <http://cpc.people.com.cn/GB/64114/75332/5230610.html>

present day, and in some extreme cases, supersedes the MBFT and becomes the owner of the entire broadcasting networks in a particular area.¹⁷⁴

The regulatory function of SARFT

In 1997, the MBFT was renamed as the 'State Administration of Radio, Film and Television' (SARFT). In the same year, the Regulation on Broadcasting and Television Administration 1997 was enacted. The 1997 Regulation, which was amended in 2013 and 2017, sets out a comprehensive regulatory framework of the SARFT and provided an overreaching jurisdiction of the SARFT that covers all wireless radio and broadcasting as well as cable and satellite broadcasting service across the nation.¹⁷⁵ Also, the 1997 Regulation assigned the SARFT as the sole 'agency' that is in charge of 'the formulation of the plan for the establishment of broadcasting stations and television stations nationwide and the determination of the aggregate, distribution and structure of broadcasting stations and television stations.'¹⁷⁶ More importantly, Article 10 requires that all television stations must be established by SARFT and no private firms or individuals are allowed to establish television stations.¹⁷⁷ In establishing the broadcasting stations, the SARFT must file applications following the four-layered model and seek for approval at each level.¹⁷⁸ Regarding the broadcasting content, stations shall censor all the programs in accordance with the requirements set out in Article 32,¹⁷⁹ and any programs that are imported from other countries shall seek to obtain separate approval from the department designated in

¹⁷⁴ At the time of writing, the PDCPC issued an order and claimed to be the only owner of all the broadcasting networks that used to belong to the SARFT in Shan Xi province.

¹⁷⁵ Article 5 provides that: The department of broadcasting and television administration under the State Council shall be responsible for broadcasting and television administration across the country.

The departments or agencies in charge of broadcasting and television administration (hereinafter referred to as departments of broadcasting and television administration) of local people's governments at or above the county level shall be responsible for broadcasting and television administration within their respective administrative areas.

¹⁷⁶ Article 8.

¹⁷⁷ Article 10 Broadcasting stations and television stations shall be established by departments of broadcasting and television administration of people's governments of counties and municipalities without subordinate districts and above, among which educational television stations may be established by departments of education administration of people's governments of municipalities with subordinate districts and autonomous prefectures and above. No other units or individuals shall establish broadcasting stations and television stations.

The State prohibits the establishment of foreign capital operated, Sino-foreign joint venture and Sino-foreign cooperative venture broadcasting stations and television stations.

¹⁷⁸ Article 11.

¹⁷⁹ Article 32: Broadcasting stations and television stations should improve the quality of broadcasting and television programmes, increase the number of excellent Chinese programmes and ban the production and broadcast of programmes containing any of the following content (1) that which endangers the unity, sovereignty and territorial integrity of the country;(2) that which endangers state security, honour and interests; (3) that which instigates nationality separation or disrupts nationality solidarity;(that which divulges state secrets;(5) that which slanders or insults others,(6) that which propagates obscenity, superstition or plays up violence; and(7) other contents prohibited under provisions of law and regulations.

governing foreign contents within the SARFT.¹⁸⁰ While the internal management that focused on the goal of ‘centralization’ would reduce incentive in program creation and business operation, it has been pointed out that the SAPPRT’s ‘State-owned, state-run’ nature suffers from heavy political interference and it remains as the underlying economic structure in the broadcasting market until present.¹⁸¹

Overview of the Internet TV Market in China

‘Notice on The Proposal of Promoting Three-Networks Convergence’

In 2015, the State Council issued the ‘Notice on The Proposal of Promoting Three-Networks Convergence’ (hereinafter ‘the Convergence Plan’) to coordinate the network convergence project between the SARFT and telecommunication operators across the country.¹⁸² In the Convergence Plan, the State Council laid down the main task of ‘promoting the two-way access between SARFT and telecommunication services’. The wording of the Convergence Plan provides that the broadcasting enterprises, by complying with the provisions of relevant telecommunication regulations, may carry out telecommunications services such as the basic and value added telecommunications services, internet access based on cable networks, internet data transmission value added services etc. On the other hand, the telecommunications enterprises may provide broadcasting services such as program production, internet audiovisual program signal transmission, IPTV or mobile TV distribution services etc.¹⁸³ Also, the Plan further harmonised the local cable networks towards a single national cable network, but more importantly, the Convergence Plan made it specifically that ‘All contents of IPTV shall be integrated by the integrating platform of *TV broadcasting organizations*, and further provides to the IPTV transmitting system of telecommunication enterprises through one single interface.’¹⁸⁴ This provision has the effect of creating a monopoly to the SARFT system by granting control over the most crucial segment for the internet TV supply chain, the integration service to the SARFT authorised organizations.¹⁸⁵

¹⁸⁰ Article 39

¹⁸¹ B Yu, Study Of The Legal Framework Governing Broadcasting Industry, (2006), Ph.D Thesis, University of International Economics And Commerce, International Economic Law, P30

¹⁸² Full text(in Chinese) available at: http://www.gov.cn/zhengce/content/2015-09/04/content_10135.htm, accessed in April 2018.

¹⁸³ Section 1, Article (2) Para (2)(3)

¹⁸⁴ Section 1, Article (2) Para (2)(3)

¹⁸⁵ See the regulatory package of the Convergence Plan, Decree 181 that restrict the market entry for the internet TV market to the SARFT system by way of the licensing regime below in Section___.

The 135 Development Plan on News, Publications, Broadcasting and Films 2017

Besides the 135 National Development Plan, the State Council issued the 135 development Plan on News, Publications, Broadcasting and Films in 2017(hereinafter the NPBF 135 Plan). The NPBF 135 Plan sets out the specific plan for development from 2015 to 2020 for the cultural and broadcasting industry.

Firstly, it sets out the guiding principle for development in line with the National Development Plan, i.e. pertaining the underlying socialism evaluate.¹⁸⁶ Moreover, it reemphasises on the political function of the broadcasting industry on guiding the public opinion and prioritizing the ‘political direction’ set out by the Communist Party.¹⁸⁷ In particular, the status of the broadcasting industry as the ‘promulgator for the Party and Government’ is reiterated, and the ‘Party-led, Party-governed’ nature of the media is reaffirmed.¹⁸⁸

Secondly, regarding the development of the broadcasting market, the NPBF 135 Plan sets out the goal of ‘deeply converging and unifying the traditional and new media market’.¹⁸⁹ In this vein, the Plan laid down the requirement for speeding up the project on upgrading to the Next Generation Broadcasting networks and integrate the local broadcasting networks into one single national network, so as to utilize the existing networks with the advanced service internet to provide

Thirdly, in the context of copyright administration, the Plan requires the copyright administrative department to strengthen the management and development of the copyright industry.¹⁹⁰ In particular, to enhance the licensing and remuneration mechanism and establishing the national online copyright transaction platform, i.e. the Digital Copyright Identifier system.¹⁹¹ Regarding the collective management system, the Plan makes it clear that the authorisation process and the internal management of collecting societies shall be made transparent and accessible to the members and the copyright users, while the dispute

¹⁸⁶ Section 2, Guiding ideology and principles. P16

¹⁸⁷ Section 2, Guiding ideology and principles. P17

¹⁸⁸ Ibid.

¹⁸⁹ Section 3, Development Objectives and Main Tasks. P29

¹⁹⁰ Ibid, P66

¹⁹¹ Ibid, P67

settlement procedure and the royalty distribution mechanism shall be improved to cope with the newly developed market on the internet.¹⁹²

Besides the 135 Plan, the government conducted a major departmental reform in early 2018.¹⁹³ As a result of the reform, the Propaganda Department of the CPC Central Committee takes over several major regulatory functions from the SARFT, including the regulatory power over the news and publication industry as well as the film industry.¹⁹⁴ Also the copyright administrative function of SARFT, i.e. the function performed by the original National Copyright Bureau within SARFT, is transferred to the Propaganda Department of the CPC Central Committee. Meanwhile, SARFT maintains the regulatory power over the broadcasting industry and will continue to lead the public ideology formation and further enhance the 'mouth-piece' function of the broadcasting media.¹⁹⁵

The theme set by the 135 plan can be further interpreted to predict the structure of the future broadcasting market from three aspects. Firstly, since the broadcasting media remains as the promulgator and mouth-piece of the Communists Party, and will continue to belong to and be governed by the Communist Party, therefore, the entire broadcasting market will remain as state-owned whereas no private entities will participate. Meanwhile, SARFT and the Propaganda Department of the CPC Central Committee will continue to impose strict censorship over the broadcasting content in line with the underlying ideology of socialism valuation. Secondly, the broadcasting infrastructures, primarily the cable networks, remains fragmented geographically among the four levels of administration, i.e. national, provincial, municipal, county. The convergence task will remain challenging not only within the broadcasting industry, but will also impact the convergence plan concerning to the telecommunications networks within the overall communications market. On this basis, to carry out of IPTV services will be burdensome for the telecommunication operators since they must negotiate with individual broadcasters in each geographic area.

¹⁹² Ibid.P67

¹⁹³ 'Proposal on Deepening Reform of the Party and State Organizations.' Chinese Communist Party Central Committee, March 19, 2018.

¹⁹⁴ Section 1, Para 11, 12.

¹⁹⁵ Section 1, Para 35.

In 2015, the State Council issued the 'Notice on The Proposal of Promoting Three-Networks Convergence' to coordinate the network convergence project across the country.¹⁹⁶ Despite the difficulties encountered by the State Council in implementing the proposal on the national level, the internet TV market seem to grow quickly since 2015. According to the Developing Perspective of the Broadcasting and Internet Audio-visual Industry of China 2018¹⁹⁷, the total number of IPTV subscribers reached 122 million in December 2017, with an increase of 43.98% than December 2013. The total sale of smart TV in 2016 reaches 41 million in 2016, the penetration rate was increased from 38.5% to 85%.¹⁹⁸

In China, there are two main types of services that deliver television contents on the internet, i.e. IPTV (Internet Protocol Television) and OTT (Over-The-Top) services. According to the data released by MIIT in March 2018, the total number of IPTV and OTT users reached 130 million and 320 million respectively in China.¹⁹⁹ The main difference between the two types of services rests upon the technological level concerning the underlying delivery networks, where the former is delivered over a private, dedicated Internet Protocol network, and the latter is transmitted over the public internet.²⁰⁰ Some have argued that 'IPTV is basically a set of technologies and market strategies that allow telephone companies to compete with cable companies for current mass-audience TV viewers.'²⁰¹ Since IPTV requires 'designated networks' to transmit the broadcasting content, whereby in China only state owned telecommunication operators and broadcasting enterprises are authorised to construct information infrastructure networks.²⁰² Therefore, IPTV brought the state-owned telecommunication operators into the TV market to compete with traditional wireless and cable broadcasters under the SARFT system. On the other hand, given that OTT services can be carried out on the public internet, private internet companies that have access to the online content could provide the OTT services through set-top boxes or

¹⁹⁶ Full text(in Chinese) available at: http://www.gov.cn/zhengce/content/2015-09/04/content_10135.htm, accessed in April 2018.

¹⁹⁷ Texts are Available at: <http://www.chyxx.com/industry/201804/631118.html> accessed in April 2018.

¹⁹⁸ Ibid

¹⁹⁹ http://www.sohu.com/a/229455384_488163, <http://www.madisonboom.com/2017/08/23/avc-publishes-2017h1-ott-report/>

²⁰⁰ Michael Strangelove, *Post-TV: Piracy, Cord-Cutting, and the Future of Television*, (2015,University of Toronto Press, Toronto, P9)

²⁰¹ Darcy Gerbarg, *Television Goes Digital*, (2008, Spinger, US, 136)

²⁰² Article 45 of the Telecommunications Act 2000: The construction of public telecommunications networks, designated telecommunications network and television broadcasting transmitting networks are subject to the plan and management of the relevant departments of the State Council.

applications installed on terminal devices. Consequently, private internet companies became another group of competitors to the traditional broadcasters in the internet environment.

In fact, China experienced the same technological evolvement in the TV market since 2006.²⁰³ Major television manufacturers started to produce smart TVs that enable end-users to access to online contents.²⁰⁴ Meanwhile, OTT boxes were manufactured and marketed by private companies without many regulatory constrains. As a result, internet TV market grew rapidly during that period and the number of cable TV started to decrease.²⁰⁵ Traditional wireless and cable broadcasters on one side and IPTV and OTT service providers on the other side started to ‘fight for the TV screen in the living room’.²⁰⁶ Facing the potential loss of audiences, SARFT as the only broadcaster as well as the regulator in traditional broadcasting market initiated several regulations and policies since 2010 seeking to sustain the dominant market power for traditional cable operators against the state-owned telecommunications operators and private internet companies in the TV market.²⁰⁷ Regarding IPTV, the Three-network Convergence Plan set out the requirement that all IPTV systems must be connected to the content aggregation platform operated by SARFT before further transmitting the contents to the end users. Regarding OTT services, SARFT enacted Decree 181 in 2011 which set out the same requirement for OTT service providers to connect to the aggregation platform, with an additional prohibition to provide live broadcasting services. The aggregation platform service market is rigidly controlled by the SARFT by way of licensing, so far there are merely seven licensors under the SARFT system are authorised to carry out aggregation platform services.²⁰⁸

Besides the compulsory connection requirement regarding the aggregation platforms, the Three-Networks Convergence Plan and Decree 181 further provided that all the seven aggregation controlling platforms must be connected to the ‘content service platforms’ to obtain broadcasting contents, in other words, the aggregation controlling platform shall not

²⁰³ Shao Shen, Development of Internet TV and Its Impact on Traditional TV Industry, (2011), News World, Vol 2. P60

²⁰⁴ Ibid.

²⁰⁵

²⁰⁶ <http://it.people.com.cn/n/2015/0702/c1009-27243234.html>

²⁰⁷ Normally rules initiated by SARFT are negotiated internally among affected departments before submitting to the state’s legislative department. And internal management within the SARFT system, i.e. the SARFT and its local bureaus will be carried out by way of normative documents. See Ying Zhu, Two Billion Eyes: The Story of China Central Television.(2012, The New Press, New York, fn27)

²⁰⁸ <http://www.sapprft.gov.cn/sapprft/govpublic/6955/290988.shtml>

acquire contents from the internet content providers directly, for example from the online video websites. Same as the aggregation platform market, the content service platform market is controlled by the SARFT by way of licensing. So far there are sixteen licensors authorised by SARFT, which are all state-owned broadcasters.²⁰⁹

Therefore, in order to provide OTT and IPTV services, service providers must cooperate with one of the seven aggregation controlling platform licensors. Since the aggregation platform must acquire contents from the content service platforms which are also state-owned broadcasters, therefore, SARFT can not only exercise censorship over all the contents provided through OTT and IPTV services, but also effectively creates an administrative monopoly in the aggregation platform and enables the seven state-owned aggregation platforms to charge a large amount of service fee to OTT and IPTV service providers.

Thus, it can be seen that although technology development has provided the Internet TV with sufficient competitiveness against traditional broadcasting industry in China, such competitiveness was largely suppressed by the regulators by way of a total block of the content service platform and aggregation platform. It is not difficult to understand why SARFT choose to impose such high market entry controls against both the telecommunication operators as well the private internet companies. Regarding IPTV, it requires a large amount of investment to upgrade the existing point-to-multipoint networks to the next generation broadcasting networks that are capable of providing interactive, i.e. non-linear transmission to the end-users. Whereas traditional telecommunication networks show clear advantages in this regard since telecommunication networks are point-to-point interactive networks in nature, therefore upgrade of which requires significantly less works and investments.²¹⁰ Secondly, broadcasting networks are fragmented across different administrative regions, and the issue of interconnection remains unsolved due to the localism of provincial governments and SARFT. Hence, there is in lack of a nation-wide backbone network for the broadcasters to carry out internet TV or telecommunication service, for example broadband services relying on their traditional fragmented broadcasting networks.²¹¹ However, the telecommunication networks were constructed

²⁰⁹ <http://www.sapprft.gov.cn/sapprft/govpublic/6955/290988.shtml>

²¹⁰ accounting system,

²¹¹ In fact, not only the issue of interconnection of the physical networks among local broadcasting networks remains unsolved, it has been pointed out that the local medias can normally asserted great influence over the implementation of

initially by the MIIT across the nation under a single and uniform scheme, therefore the interconnection of telecommunication networks across the country can be easily realized. Hence, despite the fact that broadcasters may have the potential to compete with telecommunication operators in the IPTV market in theory, telecommunication operators possess much stronger technical advantages. Thus, the only approach that SARFT could adopt to safeguard the market place for traditional broadcasters is to reinforce the political importance of ideology control and its traditional role of censorship so as to create a barrier to entry against telecommunication operators. Therefore, the compulsory connection requirement to aggregating platforms are included in the Notice on The Proposal of Promoting the Three-Network Convergence.²¹²

Regulation Timeline:

June 2004: Decree No.39, Regulatory Measures on The Distribution of Audiovisual Program on The Internet and Other Information Networks.²¹³

Decree No.39 is the earliest regulation that governing online audio-visual services. Although there was no internet TV or IPTV services when Decree No.39 was enacted, it still serves as the main regulatory tool that governing both linear and non-linear internet TV nowadays. Primarily, the Decree sets out the licensing requirement from entering the online audio-visual service market, i.e. ‘License for the distribution of audiovisual program on the information network’.

December 2007: Decree No. 56 ‘Administrative Provisions for the Internet Audio-Visual Program Service’²¹⁴.

In December 2007, the State Administration of Radio, Film and Television (SARFT) together with the Ministry of Industry, Information and Technology (MIIT) issued the Administrative Provisions for the Internet Audio-Video Program Service, also known as Decree No.56. Decree No.56 for the first time brought the online audio-visual content service into the jurisdiction of the SARFT and MIIT.

policies and the central authority control over provinces in policy enforcement are weak. See Yik Chan Chin, Policy process, policy learning, and the role of the provincial media in China. (2011), Media, Culture & Society. Vol 33, P198
²¹²

²¹³ ²¹³ Full text(in Chinese) available at: http://whsczfj.jining.gov.cn/art/2014/5/22/art_5934_145004.html

²¹⁴ Full text (available in English) can be viewed at: <https://wenku.baidu.com/view/ab721b5b312b3169a451a4ad.html> accessed in April 2018.

August 2009. ‘SARFT Notice on Strengthening the Management of Online Audio-Visual Program Services On TV Terminal Devices’²¹⁵

The Notice reemphasised the jurisdiction of SARFT and MIIT over the online Audio-visual Program Services, and clarified that all the OTT box service providers and Online program aggregation and operation service providers must obtain authorisations from, and comply with a series of regulations issued by SARFT and MIIT.

April 2010: ‘Administrative Norm on the Internet TV Content Service’²¹⁶; ‘Administrative Norm on Aggregation Service’²¹⁷

The two decrees set out the licensing requirement for market entry of the aggregation service and content service market, which rendered the then existing aggregating platform contained in the smart TV and over-the-top boxes manufactured by private enterprises illegal. Such provisions were reinforced in later in 2011 in Decree 181.

July 2011, ‘Notice on The Prohibition of Providing Audio-Visual Program Service on The Internet to The TV Terminal Devices Through OTT Box.’

The 2011 Notice was issued by SARFT to prohibit the provision of any audio-visual service on the internet to televisions through OTT boxes. In particular, the SARFT clarified that any IPTV services are prohibited prior to the SARFT launching its own OTT services.

October 2011, Decree No.181 ‘Notice of the Operation and Management of Internet TV License Organizations’²¹⁸

Decree No.181 sets the requirement that the internet TV providers can only connect to the content aggregation platforms that are authorised by SARFT. This provision was put in place to reinforce the licensing regime set out in the ‘Administrative Norm on the Internet TV content Service’ and the ‘Administrative Norm on Aggregation Service’ issued in 2011. Moreover, the content aggregation platforms only support the on-demand service and

²¹⁵ https://wenku.baidu.com/view/76013449e45c3b3567ec8b77.html?rec_flag=default

²¹⁶ Full text(in Chinese) available at: https://wenku.baidu.com/view/06ce484bfe4733687e21aad3.html?rec_flag=default accessed in April 2018.

²¹⁷ Full text(in Chinese) available at <https://wenku.baidu.com/view/b72e25427e21af45b307a896.html?from=search>, accessed in April 2018.

²¹⁸ Full text(in Chinese) available at: <http://otv.lmtw.com/zc/j/201407/106069.html> accessed in April 2018.

text/graphic information service, and shall not open the interface for linear streaming service.

September 2015, Decree No.229 ‘Notice on The Cracking Down on Infringing Activities of Illegal TV Network Reception Devices’.²¹⁹

Decree No.229 was jointly issued by the People’s Supreme Court of China, the Supreme People’s Procuratorate of China, The Ministry of Public Security of China, and the State Administration of News, Publications, Radio, Film and Television. (The current SARFT). It provides that manufacturers and retailers of illegal TV reception devices, including software, and anyone who provide download services to illegal TV reception software not only violate relevant regulations issued by the SARFT, they also constitute criminal offences under criminal law. Decree No.229 was deemed as the strictest punishing measures issued in the TV regulatory history.

May 2016, Decree No.6 ‘Regulation on The Management of Designated Networks and Point to Point Distribution of Audio-visual Services’²²⁰

Decree No.6 set out the framework for the advancement of the network convergence program initiated by the State Council, primarily the telecommunications network and traditional broadcasting networks. The Decree opens the access to the linear broadcasting programs to the telecommunication operators, and limited the access only to the state-owned telecommunications operators.²²¹

Analysation of the Regulations

In 2015, the State Council issued the ‘Notice on The Proposal of Promoting Three-Networks Convergence’ (hereinafter ‘the Convergence Plan’) to coordinate the network convergence project between the SARFT and telecommunication operators across the country.²²² In the Convergence Plan, the State Council laid down the main task of ‘promoting the two-way access between SARFT and telecommunication services’. The wording of the Convergence Plan provides that the broadcasting enterprises, by complying with the provisions of relevant telecommunication regulations, may carry out telecommunications services such as

²¹⁹ Full text(in Chinese) available at: http://www.sarft.gov.cn/art/2016/3/24/art_106_30293.html accessed in April 2018.

²²⁰ Full text (in Chinese) available at: http://www.sarft.gov.cn/art/2016/5/29/art_1583_30902.html, accessed in April 2018.

²²¹ Article 6(1)

²²² Full text(in Chinese) available at: http://www.gov.cn/zhengce/content/2015-09/04/content_10135.htm, accessed in April 2018.

the basic and value added telecommunications services, internet access based on cable networks, internet data transmission value added services etc. On the other hand, the telecommunications enterprises may provide broadcasting services such as program production, internet audiovisual program signal transmission, IPTV or mobile TV distribution services etc.²²³ Also, the Plan further harmonised the local cable networks towards a single national cable network, but more importantly, the Convergence Plan made it specifically that ‘ All contents of IPTV shall be aggregated by the aggregation platform of *TV broadcasting organizations*, and further provides to the IPTV transmitting system of telecommunication enterprises through one single interface.’²²⁴ This provision has the effect of creating a monopoly to the SARFT system by granting control over the most crucial segment for the internet TV supply chain, the aggregation service to the SARFT authorised organizations.²²⁵

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²²³ Section 1, Article (2) Para (2)(3)

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²²⁶ Section 2, Guiding ideology and principles. P16

²²⁷ Section 2, Guiding ideology and principles. P17

²²⁸ Ibid.

²²⁹ Section 3, Development Objectives and Main Tasks. P29

the Next Generation Broadcasting networks and aggregation the local broadcasting networks into one single national network, so as to utilize the existing networks with the advanced service internet to provide

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²³⁰ Ibid, P66

²³¹ Ibid, P67

²³² Ibid.P67

²³³ 'Proposal on Deepening Reform of the Party and State Organizations.' Chinese Communist Party Central Committee, March 19, 2018.

²³⁴ Section 1, Para 11, 12.

²³⁵ Section 1, Para 35.

SARFT and the Propaganda Department of the CPC Central Committee will continue to impose strict censorship over the broadcasting content in line with the underlying ideology of socialism valuation. Secondly, the broadcasting infrastructures, primarily the cable networks, remains fragmented geographically among the four levels of administration, i.e. national, provincial, municipal, county. The convergence task will remain challenging not only within the broadcasting industry, but will also impact the convergence plan concerning to the telecommunications networks within the overall communications market. On this basis, to carry out of IPTV services will be burdensome for the telecommunication operators since they must negotiate with individual broadcasters in each geographic area.

In 2015, the State Council issued the 'Notice on The Proposal of Promoting Three-Networks Convergence' to coordinate the network convergence project across the country.²³⁶ Despite the difficulties encountered by the State Council in implementing the proposal on the national level, the internet TV market seem to grow quickly since 2015. According to the Developing Perspective of the Broadcasting and Internet Audio-visual Industry of China 2018²³⁷, the total number of IPTV subscribers reached 122 million in December 2017, with an increase of 43.98% than December 2013. The total sale of smart TV in 2016 reaches 41 million in 2016, the penetration rate was increased from 38.5% to 85%.²³⁸

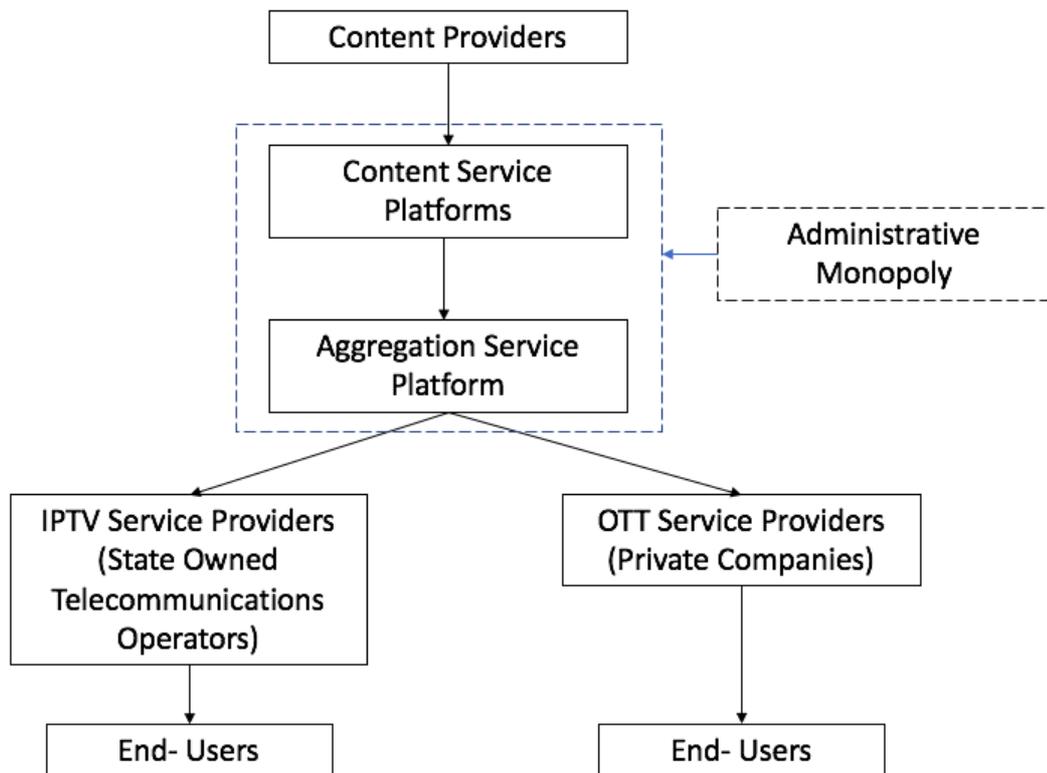
From the above regulations, it can be seen that SARFT set out the regulatory landscape by way of imposing a strict licensing regime on each segment of the Internet TV supply chain. By maintaining the regulatory power over the most important segment in the supply chain – the aggregation platform and content service platform, SARFT effectively created an administrative monopoly for the broadcasters under its own system against

²³⁶ Full text(in Chinese) available at: http://www.gov.cn/zhengce/content/2015-09/04/content_10135.htm, accessed in April 2018.

²³⁷ Texts are Available at: <http://www.chyxx.com/industry/201804/631118.html> accessed in April 2018.

²³⁸ Ibid

telecommunication operators and private OTT service providers.



In fact, the control over the aggregation platform service has always been a key stake in the gaming between SARFT and the MIIT. It has been argued that in 2010 when the State Council firstly issued the ‘*Experimental Proposal for Convergence of The Three Networks*’²³⁹, SARFT and the MIIT had intense debate over the control of the aggregation platform service during the drafting process. In the fourth draft, SARFT retrieved the regulatory power over the aggregation service that was previously granted to MIIT in the third draft, together with control over the EPG (Electronic Program Guidance).²⁴⁰

However, in 2015, the State Council issued the final ‘*Notice On The Proposal Of Promoting The Three-Networks Convergence*’ to coordinate the network convergence projects across the country.²⁴¹ Under Section 2 Article (1) Paragraph 3, the proposal provides that the content aggregation service shall be provided by SARFT and then deliver to the IPTV services transmission system through one single interface. Together with the ‘*Administrative Norm*

²³⁹ Full text (in Chinese) available at: <https://wenku.baidu.com/view/14fb1f2c4b73f242336c5f8f.html>. accessed in April 2018.

²⁴⁰ Yu Zhao, Regulation Of The Internet TV and Its Policy Impact, (2016), Journalism Bimonthly, Vol 3, P7

²⁴¹ Full text(in Chinese) available at: http://www.gov.cn/zhengce/content/2015-09/04/content_10135.htm, accessed in April 2018.

on the Internet TV Content Service’; ‘Administrative Norm on Aggregation Service’ and The Decree 181 , they form a regulatory package that directly shape the internet TV market by limiting the operation and interconnection of the two key services on the internet TV supply chain, i.e. the aggregation service platform and the content service platform, to those authorised by SARFT by licensing, primarily the state-owned media operate under the control of SARFT. Regarding the aggregation service platform, Article 1(2) of The Decree 181 provides that ‘The Internet aggregation platform may only interconnect with the legal content service platform established by internet TV content service organizations authorised by SARFT. Meanwhile, Article 1(4) explicitly prohibits the internet TV aggregation platform from interconnecting with websites on the public networks and provide contents on the public networks directly to end users. On the other hand, Article 2(1) provides that: ‘the internet TV content service platform may only interconnect with the internet TV aggregation service platform authorised by SARFT, and shall not interconnect with illegal aggregation service platform, and shall not interconnect with websites established on public networks.’

Besides the limitation on the provision of the aggregation service platform, SARFT put further requirement over the design of the terminal devices so as to guarantee the market place for the SARFT authorised content and aggregation platforms from a practical perspective. Article 4(1) provides that ‘Terminal devices as chosen by internet TV aggregation organizations in co-operation may only interconnect with internet TV aggregation platform, and shall not provide any other access to the internet.’ Moreover, Article 4(2) provides that each of the terminal devices may contain the address of only one aggregation service platform, and the aggregation platform shall be the only administer that exercises full control and management over the terminal devices.

Although SARFT has been enacting governmental decrees to regulate internet TV since as early as 2009, the regulations were loosely enforced in practice in the initial period. As a result, a large number of OTT boxes and smart TVs manufactured by internet content providers appeared in the market.²⁴² Until 2013, a series of intensive regulatory implementing measures were launched jointly by The State Copyright Administration of China, The Internet Information Office of China, MIIT and the Ministry of Public Security of

²⁴² Such as LeTV and Xiaomi.

China since 2013 until 2015 to combat the ‘illegal OTT boxes’ and other terminal devices that provide online broadcasting and on-demand services without authorisation, such as software and applications embedded in mobile phones or computers.²⁴³ As a result of the implementing measures, 81 illegal internet TV applications and terminal devices were closed.²⁴⁴ Such actions were carried out on the dual-basis of ‘combating copyright infringing activities’ and illegal OTT boxes.

Currently, there are 7 aggregation service platform licensees that are authorised by SARFT, including: CNTV (CCTV News Networks), China International Broadcasting Station (CIBN), China National Radio, South Media, Huashu Media, Hunan Broadcasting Station (Mango TV) and Bestv.²⁴⁵ SARFT made subsequent announcement in 2014 that no more license will be issued in the future to any other internet aggregation platform service providers.²⁴⁶ Notably, all the seven aggregation platform licensees are state owned under SARFT, three of them rest on the national level, and three of them rest on the provincial level.²⁴⁷ Therefore, the high market entry threshold in the aggregation platform service market enables the SARFT to control the entire internet TV market supply chain and effectively exclude the competitors, including both private internet and content companies or state-owned enterprises from other sectors, for example the telecommunication operators, from the internet TV market. Such market status quo has a strong feature of ‘Chinese Characteristics’ whereas the TV regulator, by setting the restrains through regulation, creates administrative monopoly so as to retain the market place for traditional state-owned broadcasting enterprises only.

²⁴³ The implementing measures were titled as the ‘Sword-Network Action’. Such action was initiated in 2005 and renewed annually with different tasks to combat online infringing activities of copyright. However, the year of 2014 and 2015 has been regarded as the most strict years whereby the major online service See the National Copyright Administration of China portfolio on the Sword-Network Action of 2014 and 2015 at :

<http://www.ncac.gov.cn/chinacopyright/channels/596.html>; See also the latest Sword-Network Action 2017 at the official National Copyright Administration of China: <http://www.ncac.gov.cn/chinacopyright/channels/10870.html>. accessed in April 2018.

²⁴⁴ See the People’s press release: Prohibition on 81 Third Party Applications in TV Boxes at : <http://media.people.com.cn/n/2015/1117/c40606-27822372.html> accessed in April 2018.

²⁴⁵ Yifan Liu, The Status Quo, Problems and Countermeasures, (2014), The Journal of Media, Volume 1. P41; CNTV News release: SARFT enlisted 7 licensees to implement Internet Regulation, available at (in Chinese): http://finance.cnr.cn/jysk/201407/t20140717_515879070.shtml, accessed in April 2018.

²⁴⁶ Yuan Li, ‘SARFT: No Further License Of Aggregation Service Will Be Issued’, (2014), Journal of The Front of Media, China Broadcast, Vol 9.

²⁴⁷ Yu Zhao, Regulation on The Internet TV and its Policy Impact. (2016), Journalism Bimonthly, Volume 3, p5

Problems with the convergence plan and provision of internet TV

In China, the internet TV can be classified into two broad categories concerning different groups of service providers based on the underlying 'designated networks' and 'public networks' of respectively. The first one is the IPTV services provided by traditional telecommunications operators, and the second one is the internet audio-visual services provided through over-the-top boxes by private internet companies. On the technological level, the main difference between the two types of services is that the former is provided by telecommunications operators on 'designated networks' that were constructed for the only purpose of carrying out the IPTV services. The latter is delivered based on public networks that are independent from the designated networks which carry out all types of telecommunications services.²⁴⁸

The arising of the smart TV and OTT setup boxes could effectively circumvent the content aggregation service traditionally controlled by SARFT on a technological level, and attracts a larger group of audience based on the abundant contents generated from the internet, therefore it harms the interests of the traditional broadcasters and poses threats to the 'ideology control' and safety of the system under the regulatory obligation of SARFT.²⁴⁹ Thus, there is in lack of an internal incentive to push the national network convergence plan.

As mentioned above, despite that the State Council of the Central Government has been strongly advancing the network convergence project in the 125 and 135 National Development Plan since 2010, and further issued particular proposal for the Advancement of Network Convergence in 2015, however, the implementation of the plan by the central government incurred strong resistance on the local level. One reason might be attributed to state-owned nature of the broadcasters and telecommunication operators. It has been argued that the state ownership of such entities can be seen as the underlying reason that causes market fragmentation in China.²⁵⁰ In China, local governments act as the 'regulatory entrepreneurs' and directly involve in the innovative activities, thus the interests of the local government is closely connected with the economic development of that area.²⁵¹ The

²⁴⁸ Zhu Xufeng, Expectation and outcome of regulations: Analysis of the Process of Telecommunications Market Reform of China. (2003), China Industrial Development Forum, p78

²⁴⁹ Yu Zhao, Regulation Of The Internet TV and Its Policy Impact, (2016), Journalism Bimonthly, Vol 3, P3

²⁵⁰ Liu Ruiming, State-Owned Enterprises, Invisible Subsidy and Market Fragmentation: Theory And Experimental Evidence. (2012), Management World, Vol 4, P21-32

²⁵¹ Zhou Yean, Interpretation on the Evolution of Chinese Regulation. (2000), Study on Economics, Vol 5. P3

economic development is reflected by the social welfare in that particular area, and the state-owned enterprises is imposed with the burden to increase social welfare from a policy perspective, therefore, local governments will take protective measures to create administrative monopolies for local SOEs, such as overly high taxes and barriers to entry against competitors from other regions so as to protect the local SOEs from competition and enable them to generate as much income as possible to increase the social welfare.²⁵² As a result, the protective measures adopted by local governments against enterprises from other regions will cause market fragmentation, and such market fragmentation is a form of invisible subsidy that the local government granted to the local SOEs.²⁵³ But meanwhile, it inevitably renders the national convergence plan difficult to implement across provinces.²⁵⁴ Since local broadcasting regulators have strong incentives to implement protective measures in favour of the local broadcasters to increase the social welfare in that particular administrative region, as a result, such protective measures form high market entry barriers against other broadcasters and further led to market fragmentation on a national level. In essence, such market fragmentation has its origin from the fragmented ownership of the broadcasting infrastructures controlled by the local governments on the four levels as well as the local SARFT.²⁵⁵

The other reason arises from the political conflicts embedded in the communications market among the regulators as to the prevailing rationale for the regulations on the broadcasting content.²⁵⁶ Professor Zhao disclosed the underlying reason as to the chaos and difficulties in developing the internet TV market in China by stating:

²⁵² Liu Ruiming, State-Owned Enterprises, Invisible Subsidy and Market Fragmentation: Theory And Experimental Evidence. (2012), Management World, Vol 4, P22

²⁵³ Ibid, P23

²⁵⁴ Ibid, P27

²⁵⁵ Hu Zhengrong and Li Jidong, Regulatory Predicaments Of Media Regulation and Its Ideological Origin,(2005),Journalism University,

²⁵⁶ Professor Zhou argued that the role of the Central Government of China is similar to a 'judge' in common law countries. Since the conception of individual regulatory and economic environment of each region of China by the central government is inadequate, it would choose to delicate the power to local governments to carry out regulatory innovation in each circumstance, and the central government would then compare and make the judgement of such innovative regulation based on their final outcomes from the market. On the other hand, local governments possess precise knowledges about the social members and resources in individual area, therefore they are trusted with the discretion to choose from those external rules that is believed to have the effect of improving the welfare of that region. By doing so, the central government retains the superiority and keeps the centralized political structure of the government. Zhou Yean, Interpretation on the evolution of Chinese regulation. (2000), Study on Economics, Vol 5. p9, Zhang Shuguang, Case Study on the Regulatory Evolvment of China, (1999), Vol 2.

“The application and popularization of internet TV in China has always been embedded in several dimensions concerning the convergence of the three networks, cultural system reform and ideological management on the national strategic level. The degree of separation of the policy space is far more than the general view of the competition between radio and telecommunications sectors. In this process, the State-Owned Assets Supervision and Administration Commission of the State Council, the National Development and Reform Commission, and the Central Propaganda Department has inserted influences on the direction of the issue in different ways. The national macro policy has a phased emphasis on several policy objectives in promoting economic development, increasing social welfare and ensuring cultural security, the chaos existed on the regulatory level is caused by the design of the upper level.”²⁵⁷

It is true that every time when the central government sought to implement the network convergence plan it always faces difficulties in co-ordinating the arguments raised by broadcasters and telecommunication operators respectively. For example, broadcasters within the SARFT system always advocate for the strong control over the ideology and valuation delivered by the broadcasting programs, thus they argued for a tense censorship regime over all the broadcasting content.²⁵⁸ In this vein, they raised further argument that broadcasters themselves have been the sole manager of the broadcasting content under the control of the SARFT since the emergence of the industry in the 1940s, and is much more competent than the telecommunication operators in continuing regulating the content in the internet TV market.²⁵⁹ Thus, the aggregation service platform shall be regulated by the broadcasters to further implement the underlying ideology by way of content control. On the other hand, telecommunication operators always seek to invoke the economic argument of the technical advantage of the traditional telecommunications networks by arguing that compared to the traditional broadcasting networks, the telecommunication networks can be easily upgraded to carry out both traditional telecommunication service as well as the internet TV services whereas the reconstruction of

²⁵⁷ Yu Zhao, Regulation on The Internet TV and its Policy Impact. (2016), Journalism Bimonthly, Volume 3, p7

²⁵⁸ Ibid.

²⁵⁹ Ibid.

the broadcasting network is not only costly but is also a waste of governmental resource.²⁶⁰ Therefore, the development of the internet TV market is eased by both the internal problems within the SARFT system caused by localism as well as the political tensions between the broadcasters and telecommunications operators.

²⁶⁰ Ibid.

U.S. and EU Approach towards Cable Retransmission.

As mentioned in the previous chapter, there is a fundamental difference between the traditional broadcasting market and internet market in the US and EU on the one hand, and China on the other. In China, cable retransmission market is closed up against private entities and preserved only to state-owned cable operators under the State Administration of Radio, Film and Television(SARFT). Not only that the cable retransmission market is dominated by state-owned cable operators, all traditional wireless broadcasters are state-owned which are either operated by SARFT or under the control of SARFT.

As a result, when a broadcaster seeks to acquire the right from individual copyright owners, the broadcaster would normally acquire authorisations that covers both the original broadcasting as well as cable retransmission within one package for the convenience of further delivery of the signals among the state-owned TV and cable operators.²⁶¹ Cable retransmission of broadcasting signals that contain the copyrighted works then becomes a matter of internal management measure within the SARFT, rather than a copyright transaction between copyright owners and the cable operators.

In this circumstance, China has not experienced the impact of cable technology brought to copyright law, as in the United States. Although the current regulation of cable television in the United States was mainly implemented through copyright law, in the early days, such rules were laid down in a series FCC regulations. Therefore, the study of the transformation of the regulatory approach towards legislative approach of cable television in the United States is of great significance for two reasons, firstly, to examine how new technologies changed the competition landscape in the broadcasting industries. The discussion in this regard will help to understand the market structure of the newly emerged internet streaming market. Secondly, the rationales behind the transition from regulation towards copyright law will further provide an analysis of the nature of copyright and the regulatory tool incorporated therein, i.e. the statutory licensing regime. These findings will contribute to the understanding of the problems related to radio and television in China's copyright law.

²⁶¹ It is disclosed in the interview with the copyright department of the China Central Television(CCTV) that the standard license provided by the broadcasters would classify two broad categories of uses and pay the royalty fee for each of them:1) wireless, cable and satellite broadcasting; cable retransmission, 2) IPTV and OTT services.

FCC Regulation

FCC started to assert jurisdiction over cable's market operation since 1965.²⁶² Prior to 1965, FCC merely regulated cable as they were 'radiation of energy', i.e. those systems that were served by the microwave facilities.²⁶³ At that time, FCC declined to regulate cable since it believed that cable systems neither operated as broadcasters nor qualified as common carrier under the 1934 communications law.²⁶⁴ Three major factors that cause the FCC's reluctance to regulate cable: first, knowledge as to the CATV's economic impact was limited given that the industry was an infant; second, political difficulties in regulating competing interests, and third, the regulatory philosophy that against FCC's regulatory activism.²⁶⁵ Therefore, broadcasters sought to solve the problem by bringing several claims against cable systems in court on unfair competition basis.²⁶⁶ However, the court rejected the unfair competition claims made by broadcasters by concluding that there was no 'property interest' in need for protection, and cable system has the constitutional right to access to information that were in public domain.²⁶⁷ At the same time, cable industry started to grow since early 1960s. As a result, FCC asserted jurisdiction into cable industry in 1965 for the

²⁶² A Report Of The Register Of Copyrights, The Cable And Satellite Carrier Compulsory Licenses: An Overview And Analyses. March 1992, P9.

²⁶³ A Report Of The Register Of Copyrights, The Cable And Satellite Carrier Compulsory Licenses: An Overview And Analyses. March 1992, P9.

²⁶⁴ Report and Order in Docket No. 12443, Inquiry Into the Impact of Community A-51 Antenna Systeyns, TV Translations, TV " Satellite" Stations and TV "* Repeaters" On the Orderly Development of Broadcasting, 18 Pike & Fischer, Radio Regulation, 1573, 1600-01, pars. 62-65 (1959); Notes: Regulating Community Antenna Television, Columbia Law Review, Vol. 70, No. 5 (May, 1970), pp. 837-875 P850 ,Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).

²⁶⁵The FCC expressed this concern of competing interest in the First Report and Order: "...[t]here is presented a problem of conflicting interests and objectives. On the one hand are the interest of the general public of the areas involved in the preservation of a local television outlet, with the attendant advantages which a community gains from having a local means of self-expression, and (in some cases but not in all) the preservation of the only television service to some of the public, such as rural residents who cannot be served by CATV. On the other hand is the interest of another group, such as city residents who want and can afford to pay for CATV service, in obtaining multiple television service, . . ." M Zarkin, The FCC and the Politics of Cable TV Regulation, 1952-1980, Organizational Learning and Policy Development, (2010, Cambridge Press, US,84)

²⁶⁶ Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc 196 F. Supp. 31; Cable Vision, Inc. v. KUTV, Inc. 211 F. Supp. 47 (D. Idaho 1962), vacated and remanded, 335 F.2d 348 (9th Cir. 1964)

²⁶⁷ Ibid, Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc 196 F. Supp. 31; Cable Vision, Inc. v. KUTV, Inc. 211 F. Supp. 47 (D. Idaho 1962), vacated and remanded, 335 F.2d 348 (9th Cir. 1964)

purpose of protecting local broadcasters as well as the development of a national-wide Ultrahigh Frequency Television Station which was promoted by the FCC.²⁶⁸

When cable emerged as the 'community antenna television' (CATV) in 1950s, it was not seen as a competitor to the traditional broadcasters, rather, it served as an 'supplement' to broadcasters by assisting the delivery of broadcasting signals further to rural areas that would otherwise be blocked by geographical conditions.²⁶⁹ Broadcasters saw cable systems as a complement service with flavour because the additional audience brought by cable system contributed to the total number of the broadcasters' audience, thus increased the advertising revenue that was calculated on that basis.²⁷⁰

However, the status of cable systems changed since they started to import distant signals into the local market.²⁷¹ By doing so, cable systems brought the distant broadcasting stations into the local market to compete with local broadcasters.²⁷² With the increase over the cable and distant broadcaster audience, the number of local broadcasters' audience decreased, which directly affected the revenue that local broadcasters received from the advertisers.²⁷³ And the loss of revenue was then reflected to the fees paid to the copyright owners of the programs carried by the local broadcasters.²⁷⁴ At the same time, advertisers in the distant market recognised that although that it appeared that the number of the total audience increased as a result of the cable retransmission of the signal, the newly created market was not their primary targeting.²⁷⁵ Other factors such as the better quality of the program, the advanced live retransmitting, technological obstacle to switch cable TV set to receive over-the-air signals, made broadcasting a less attractive advertising medium.²⁷⁶

Moreover, the development the 'Community Antenna Television' (CATV) television

²⁶⁸ H Barnett and E Greenburg, *Regulating CATV Systems: An Analysis Of FCC Policy And An Alternative*(Law and Contemporary Problems,568), Hearings Before the Senate Comm. on Interstate and Foreign Commerce, United States Senate, 85th Cong., 2d Sess. (1959) (statement of William C. Grove).

²⁶⁹ T Wu, *Copyright's Communications Policy*,(2004)312

²⁷⁰ F Cate, *Cable Television and the Compulsory Copyright License*, (1990) 42 *Federal Communications Law Journal*, 193

²⁷¹ F Cate, *Cable Television and the Compulsory Copyright License*, (1990) 42 *Federal Communications Law Journal*, 193

²⁷² Detailed analysis between the Audien-Avenue-relation, see Fisher and Others, *Community Antenna Television systems and local television station audience*, *Quarterly Journal of Economics*,227. See also F Cate, *Cable Television and the Compulsory Copyright License*, (1990) 42 *Federal Communications Law Journal*, 193-195

²⁷³ F Cate, *Cable Television and the Compulsory Copyright License*, (1990) 42 *Federal Communications Law Journal*, 193-195

²⁷⁴ F Cate, *Cable Television and the Compulsory Copyright License*, (1990) 42 *Federal Communications Law Journal*, 193-195

²⁷⁵ F Cate, *Cable Television and the Compulsory Copyright License*, (1990) 42 *Federal Communications Law Journal*, 193-195

²⁷⁶ *Notes Community Antenna Television: The New Federal Exercise Of Jurisdiction* (1966)51 *Iowa L. Rev.* 366 367

broadcast stations and the 'Ultrahigh Frequency' (UHF) broadcast stations, a national development plan forwarded by the FCC, was slowed down by the competing growing cable broadcasting systems.²⁷⁷ Therefore, all four groups of interested parties, i.e. broadcasters, copyright owners and advertisers began to accuse the cable practice as unfair competition by retransmitting broadcasters' content without compensation.²⁷⁸

Broadcasters found their claim based on the argument of destruction of incentive to create new programs.²⁷⁹ Due to the fact that cables' unpaid retransmission had the effect of fragmenting the local audience, thus reduced the advertising revenue broadcaster's tent to invest to create new programs, which would eventually harm the public interest.²⁸⁰ Moreover, since the problem within copyright law was yet decided, broadcasters argued cable operators harmed their 'property right' by taking their program without their permission and sold for profits.²⁸¹

Upon the above mentioned concerns, as well as the omission of Congress from legislating on this matter, the FCC changed its attitude and started to regulate cable industry since 1965 to protect the interest of broadcasters and copyright owners.²⁸² The FCC asserted its jurisdiction over the cable industry, which was confirmed by the court,²⁸³ and enacted several rules in 1966, 1968 and 1972 to regulate competition between broadcasters and cable: the must-carry rule, the non-duplication and exclusive syndicated rule, distant signal rule and the retransmission consent mechanism.²⁸⁴ The FCC restated the basis of the rules:

"Our determination to adopt the carriage and nonduplication requirements rested on two basic grounds: (1) that failure to carry local stations and duplication of their

²⁷⁷ A policy that was established in the Sixth Report and Order on Television Allocation. It has been pointed out that the FCC was 'arbitrarily reserved a large, specific volume of the VHF and UHF spectrum space for future television use even though there were other contemporary and prospective users for the frequencies' See H Barnett and E Greenburg, *Regulating CATV Systems: An Analysis Of FCC Policy And An Alternative*(Law and Contemporary Problems,564), R Betting, *Copyrighting Culture, The Political Economy Of Intellectual Property*, (1996, Westview P ess,US,) 123, Sixth Report and Order on Television Allocation, 1 RAD. REG. (P&F) 91:599, pt. 3 (1952).

²⁷⁸ T Wu, *Copyright's Communications Policy*,(2004)312

²⁷⁹ T Wu, *Copyright's Communications Policy*,(2004)312

²⁸⁰ T Wu, *Copyright's Communications Policy*,(2004)313

²⁸¹ *Ibid* Wu, *Hearings Before the Senate Comm. on Interstate and Foreign Commerce, United States Senate, 85th Cong., 2d Sess. (1959)*

²⁸² The FCC twice made the request to Congress to legislate over cable retransmission and 'clarify the situation with respect to property right' in 1959 and 1965 1st and 2nd Report and Order. See Report and Order in Docket 12443, 26 FCC 403, 429 (1959); Second Report and Order in Docket No. 1597, 2 FCC 2d 725 (1966).

²⁸³ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968),

²⁸⁴ Second Report and Order, Amendment of Subpart L, Part 91, 2 F.C.C.2d 725 (1966)

programs are unfair competitive practices, which are inconsistent with the supplementary role of CATV . . . , and (2) that these requirements were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential. ..”²⁸⁵

Moreover, the FCC filed a bill to Congress advocated for the of prohibition of CATVs from originating their own programs.²⁸⁶ These rules set out the regulatory framework in the cable industry for the next decades until the compulsory licensing regime was introduced in the 1976 copyright law revision.²⁸⁷

Must-Carry rule: The must carry rule required CATVs to carry all local broadcasters programs.²⁸⁸ This provision was put in place for the purpose of securing local broadcasters’ market and avoiding audience fragmentation which would otherwise occur due to the technical cumbersome faced by CATV audience to receive both local and distant signals at the same time.²⁸⁹ However, this rule was found unconstitutional from violating the First Amendment of Free Speech by the court in the case of Quincy Cable TV. Inc. v. FCC²⁹⁰ and Century Communications vs FCC²⁹¹ and were abolished eventually.

Non-Duplication and Syndicated-Exclusivity Rule: Provided that ‘cable system not carry the programs of a distant station when they duplicated the programs of local stations during a period of fifteen days before or after the local broadcast,’ and prohibited cable systems to retransmit the programs of which the broadcasters had acquired exclusive rights from the program owner, and required cable system to ‘black out’ those program when retransmitted.²⁹² This rule intended to preserve the broadcasters with competitive

²⁸⁵ Second Report and Order, Amendment of Subpart L, Part 91, 2 F.C.C.2d 725 (1966) 736.

²⁸⁶ H Barnett and E Greenburg, Regulating CATV Systems: An Analysis Of FCC Policy And An Alternative(Law and Contemporary Problems,564)

²⁸⁷ After the court found that the must-carry rule failed to establish a substantial governmental interest and indiscriminately protected all local broadcasters even if their market was not threatened by cable. K Cooper, The Cable Industry: Regulation Revisited in the Cable television consumer protection and competition act of 1992, (1993) 1 common law conspectus 109,113

²⁸⁸ Rules re Microwave, First Report and Order, 38 F.C.C. 683, 4 R.R.2d 1725 (1965)

²⁸⁹ Since if cable system do not carry local signals, the only way that cable subscribers could receive local signals was to disconnect cable and switch to the antenna, which was cumbersome and seen as an obstacle to access to local programs. S Bensen & R Crandall, The Deregulation of Cable Television, Law and Temporary Problems, (1981) Vol 44 no.1 p87.

²⁹⁰ 768 F.2d 1434.(1986)

²⁹¹ 835 F.2d 292(1988)

²⁹² Upon receiving notification ... a cable community unit located in whole or in part within the geographic zone for a network program, the network non-duplication rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal... And... a cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which

exclusivity as against other broadcasters as well as cable operators.²⁹³ Since cable was free from copyright liability at that time when this rule was put in place, this rule could be deemed as an FCC created substitute for copyright infringement liability to guarantee broadcaster's exclusive showing, as well as to prevent cable's unauthorized further sale of the program of which the broadcasters bare all the cost from initial negotiation and the royalty fees.²⁹⁴

Distant Signal Rules: This rule imposed a full hearing for cable systems that wished to import distant signals into top hundred markets, i.e. subject the importation of distant signals to the FCC's permission, as well as the number of signals that each cable systems was allowed to import. Permission would be granted only if cable systems can demonstrate that such importation would fulfil the goal of public interest and not threaten the UHF stations in that particular markets.²⁹⁵

Retransmission Consent: This rule requires cable to obtain consents from the broadcasters for the retransmission of their programs.²⁹⁶ It was established in the 1968 as an experiment undertaken by the FCC to brought the 'property right' issue within the regulatory framework.²⁹⁷ The enactment of this rule was seen as an appeal to the 'property right' that broadcasters had long been arguing for in their signals.²⁹⁸ Prior to the establishment of the retransmission consent, the FCC has twice required Congress to extend the range of the original retransmission consent provision contain in S325 of the Communication Act from broadcasters to cable systems.²⁹⁹ Since Congress did not respond to the FCC's requests, the FCC took its own action by promulgating this rule into its Notice of Rulemaking in 1968.³⁰⁰ However, the effect of the retransmission consent was a total freeze of the grow of cable

are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal..."CFR Title 47, Subpart F - Network Non-duplication Protection, Syndicated Exclusivity and Sports Blackout Ss76.92, Ss76.101

²⁹³ S Bensen & R Crandall, The Deregulation of Cable Television, Law and Temporary Problems, (1981) Vol 44 no.1 p87.

²⁹⁴ D Bowman, "The FCC's Deregulation of Cable Television: The Problem of Unfair Competition and the 1976 Copyright Act," (1982), Hofstra Law Review: Vol. 10: Iss. 2, Article 11.p595

²⁹⁵ S Bensen & R Crandall, The Deregulation of Cable Television, Law and Temporary Problems, (1981) Vol 44 no.1 p87.

²⁹⁶ Notice of proposed Rulemakings in Docket 18397, 15 FCC 2d 417 (1968)

²⁹⁷ Notice of proposed Rulemakings in Docket 18397, 15 FCC 2d 417 (1968)

²⁹⁸ C Lubinsky, Reconsidering Retransmission Consent: An Examination Of The Retransmission Consent Provision(47U.S.C. ss325(b))of the 1992 Cable Act,(1996) Federal Communications Law Journal: Vol. 49: Iss. 1, Article 5133

²⁹⁹ The Cable and satellite carrier compulsory licenses: an overview and analysis, A report of the copyrights of the United States of America, Library of Congress, (1992),137,

³⁰⁰ Community Antenna Televisions Sys., Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417 (1968)

industry in the next two years since broadcasters refused to issue the consent.³⁰¹ Therefore this rule was eliminated in 1971.³⁰² However, it was adopted again in the 1992 in the Cable Television Consumer Protection And Competition Act despite the fact the copyright office made strong argument that the operation of retransmission consent and the compulsory license in the Copyright Act 1976 were in conflict, and the court has recognised this issue in case law to dismiss FCC's petition for the re-adoption of the retransmission consent prior to the 1992 Act, this mechanism remain valid in the current Communications Act which prohibits all cable and satellite systems from retransmitting the signals of broadcasting stations without the broadcasters' consent.³⁰³

Judicial Development

Unfair Competition claims

As mentioned above, prior to the FCC assertion of jurisdiction into cable industry in 1965, broadcasters had twice sought to solve the problem in court in 1961 and 1965 by claiming that cable retransmission constitute unfair competitive practices in the cause of *Intermountain Broadcasting and Television Corp. v. Idaho Microwave, and Cable Vision, Inc. v. KUTV*. The district court ruled in favour of the plaintiff, but the decisions were reversed by the Court of Appeals.

In the case of *Intermountain*, the defendants were cable systems operated in Twin Falls, Idaho. The plaintiffs were broadcasters operated in Salt Lake City, Utah. The defendant, without consent of the plaintiff, picked up and conveyed the broadcasting signals through their systems and further distributed to their subscribers in Twin Falls, Idaho. The plaintiff claimed that the defendants' conducts amounts to 'a misappropriation of the fruits of

³⁰¹ Evidence showed that during the first trail of the retransmission consent from 1968 to 1971, there was only one cable system obtained the consent to retransmit from the broadcaster. M Botein, *Access to cable television*, (1972) 57 Cornell L. Rev. 419, 420

³⁰² *Commission Proposals for Cable Television Regulation*, 31 F.C.C.2d 115, 117, 22 R.R.2d 1755, 1762 (1971)

³⁰³ In the case of *Marite TV of New York v. FCC* 652 F.2d 1140 (1981), cert . denied, 454 U.S. 1143 (1982) , the court observed that : "Retransmission consents would undermine compulsory licensing because they would function no differently from full copyright liability, which congress expressly rejected. Under the NTIA proposal cable oerators would be forced to negotiate individually with numerous broadcaster and would not be guaranteed retransmission rights, a scenario congress consider unworkable when opting for the compulsory licensing arrangement. A rule imposing a retransmission consent requirement would also directly alter the stator royalty formula by precipitating an increase in the level of payment of cable operators to obtain consent for program use. Such a rule would be inconsistent with the legislative scheme for both the specific compensatory formula and the appropriate forum for its adjustment." See *The Cable and satellite carrier compulsory licenses: an overview and analysis*, A report of the register of copyrights of the United States of America, Library of Congress, (1992),140.
.https://www.fcc.gov/news-events/blog/2015/09/22/time-has-come-end-outdated-broadcasting-exclusivity-rules

plaintiff's money, skill and labor', and constituted 'unfair competition' and 'unjust enrichment'.³⁰⁴

However, the court found two grounds for dissenting, firstly, the court found itself shall 'refrain' from recognizing 'property right' that afford protection in the present case, neither common law nor statutory copyright, especially when public interest was involved.³⁰⁵

Secondly, the unfair competition claim was not valid since the defendant did not intent to 'palm off' the goods of the plaintiff, in other words, the competition in the present case did not involve fraudulent conduct or breach of contract, thus shall be distinguished from precedent cases laws where the defendant was found liable of unfair competition primarily because of their misrepresentation.³⁰⁶

Follow the line of this case, the district court in *Cable Vision, Inc. v. KUTV* concerning with similar issue as to unfair competition claim of cable retransmission emphasised on the 'exclusive contract' factor and ruled in favour of the plaintiff based on the exclusive contract entered between the plaintiff and the defendant. In this case the broadcaster claimed that by retransmitting distant signals of which the broadcasters negotiated with the distant broadcasters and paid royalties, the plaintiff was 'prevented by tortious interference and unfair competition of the community antenna from enjoying the fruits of its own contractual arrangements of the first showing...'³⁰⁷ And the plaintiff was entitled for protection under the doctrine of unfair competition and torturous interference with regard to the contractual agreement entered for the first showing of the program in the specified area.³⁰⁸

However, the decision was overturned by the Court of Appeal based on the fact that the plaintiff failed to demonstrate their 'protectable interests' under the copyright law, thus the broadcasting signal was deemed within public domain.³⁰⁹ The Court of Appeal relied on two decisions made by the Supreme Court during the time of the appeal, both of which

³⁰⁴ P321 *International News Service v. Associated Press*, 1918, 248 U.S. 215, 39 S. Ct. 68, 63 L. Ed. 211

³⁰⁵ P322

³⁰⁶ 'fraud or force or other unlawful acts or purposes, such as misrepresentation in the 'palming off' of defendants' goods as those of plaintiff, or some breach of contract or trust or inducement thereof...' See *International News Service v. Associated Press*, 1918, 248 U.S. 215, 39 S. Ct. 68, 63 L. Ed. 211, in which the P322

³⁰⁷ pA7

³⁰⁸ The Court is of the opinion that such exclusive rights for the first showing of syndicated or feature films are entitled to protection under the circumstances here presented —under the doctrines of unfair competition and tortious interference with contractual relationships—for the same reasons that rights to broadcast network programs are entitled to protection.

³⁰⁹ Ibid

emphasised the constitutional right of 'free access to copy whatever the federal patent and copyright laws leave in the public domain'.³¹⁰ Therefore, the Court of Appeal concluded that since the plaintiff failed to establish a copyright claim to qualify them as an exception to this public policy that promote the free access, the court was not in the position to grant any relief beyond what the copyright laws conferred.³¹¹

Copyright Claims

Despite that the court in the above cases sought to direct the cable retransmission issue toward a 'property based' solution rather than unfair-competition, and the FCC had been long petitioning Congress to clarify the broadcaster's situation with respect to their property right,³¹² however, the court made it clear in the case of *Fortnightly Corp. v United Artists Television Inc.*, 392 U.S. 390 and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394.³¹³ that the issue of cable retransmission did not fall into the scope of Copyright Act 1909. In both cases where broadcasters claimed that cable systems infringed their right of public performance over the programs they carried by retransmitting them without compensation, the court found that cable retransmission did not publicly perform the work as defined in the S101 of 1909 Act. As a result, Congress extended the definition of public performance under S101 in 1976 by inserting a transmit clause so as to encompass cable retransmission within the scope of copyright law.

Fortnightly: The case was brought in front of the district court in 1966. The plaintiff and defendant were broadcasters and cable systems that operated in Virginia. The broadcaster claimed that the cable systems 'receive and reproduce television signals emanating from television broadcasting stations...signals so received and reproduced and then distributed by cable ... against payment by said subscribers of an initial hook-u fee and a monthly service fee to defendant.', and by retransmitting the program, the defendant 'exhibit, perform, represent, produce, reproduce, copy, publish and vend,' of the copyrighted works contained

³¹⁰ *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 US 234 (1964),P238; *Sears, Roebuck & Co. v. Stiffel Co.*, 376 US 225 1964 Both cases concerning with subject matter that were not copyrightable nor patentable, thus was deemed within public domain and free from copies.

³¹¹ Para24

³¹² "It is desirable to clarify the situation with respect to their [broadcasters] property right... Report and Order Docket 12443, 26 FCC 403, 429 (1959)

³¹³ The Court Laid Down A Rule In The Two Cases That CATV Providers Did Not 'Perform' The Copyright Work Because They Were 'More Like A Viewer Than A Broadcaster,' And 'Broadcasters Perform, Viewers Do Not Perform'

in the program.³¹⁴ However, the court found that this case was merely concerning with the right of public performance, and the other issues were ‘far-reaching and the court will not pass on them where the determination is not necessary to the disposition of the case in front’.³¹⁵ The court observed that its main task was to interpret the word ‘performance’ and decide whether the defendants’ activity fell inside the copyright statute’s purview.³¹⁶ The court examined the ‘linguistic realities, technological realities and economic realities of term.’³¹⁷

The court pointed out that the term ‘to perform’ could encompass the acts of: “(1) receiving electromagnetic waves embodying a broadcast performance, which were propagated into the air by a television broadcaster; (2) amplifying and reproducing them; and (3) transmitting the resultant reproductions of those electromagnetic waves by means of coaxial cables so that subscribers can utilize their TV sets to see and hear the reproductions of the broadcast performance.”³¹⁸

In assessing the technological realities, the court found that cable systems were not merely ‘passive antenna services’ because they not only receive the signals but also ‘electronically process them’.³¹⁹ Therefore, broadcasters and cable function as ‘technological equivalents’ which present in the same manner and method of performing.³²⁰ This conclusion was made based on the similar transmission function of broadcasters and cables, i.e. that the programs were not visible or audible during the process of transmission until it reached the subscriber’s television.³²¹

The court briefly mentioned the economic realities by recognizing that cable was selling the television programs contained in the signal and thus were in direct competition with broadcasters for audience.³²²

In summing up, the district court found that the cable systems function similarly to broadcasters in performing the programs, and based on previous cases where broadcasters were found liable for the infringement of performing in the same manner, cable should be

³¹⁴ United Artists Television, Inc., v. Fortnightly Corporation, 255 F.Supp. 177 (1966) P181

³¹⁵ P199.

³¹⁶ P202

³¹⁷ Ibid

³¹⁸ p202-203

³¹⁹ The court observed that the signals passes by the cable systems to its subscribers are not the same signals that were received but electronic reproduction of them which contained same programs. P204

³²⁰ P205.

³²¹ Ibid.

³²² P206

liable for infringing the public performance right of the broadcasters or the copyright owners of the works that were contained in the program.³²³

Cable system appealed the case in 1967. Despite the fact that the Court of Appeals rejected the technology reliance approach adopted by the district court, it reached the same conclusion that cable system infringed the right of public performance enjoyed by the broadcasters and copyright owner.³²⁴ The Court of Appeals observed that technical characteristics of the cable system was not a decisive factor in identifying the act of performance, rather, it is the result that cable's retransmission brought about, i.e. the simultaneous viewing of broadcasters copyrighted work on by thousands of subscribers on their television set at home, rendered the activity to be characterized as a public performance.³²⁵ The rationale of this conclusion can be found in the fundamental purpose of the exclusive rights which is to protect copyright proprietors against dilution of the market of their works.³²⁶

However, this decision was overturned by the Supreme Court in 1968. The Supreme Court held that:

“Judicial construction of the Copyright Act, in the light of drastic technological changes, has treated broadcasters as exhibitors, who "perform," and viewers as members of the audience, who do not "perform," and, since petitioner's CATV systems basically do no more than enhance the viewers' capacity to receive the broadcast signals, the CATV systems fall within the category of viewers, and petitioner does not "perform" the programs that its systems receive and carry.”³²⁷

The court reversed back to the technology reliance approach by focusing on the function of broadcasters and cable systems rather than the actual effect of the transmission emphasized by the Court of Appeal. The Supreme Court found that contrary to the analysis

³²³ *Message v. British Broadcasting Co.*, [1927] 2 K.B. 543, *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F.2d 411 (6th Cir.), cert. denied, 269 U.S. 556, 46 S. Ct. 19, 70 L. Ed. 409 (1925). *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (D.N.J. 1923). *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund*, 46 F. Supp. 829, 831 (S.D.N.Y. 1942), aff'd, 141 F.2d 852 (2d Cir.), cert. denied, 323 U.S. 766, 65 S. Ct. 120, 89 L. Ed. 613 (1944).

³²⁴ *United Artists Television, Inc., Plaintiff-appellee, v. Fortnightly Corroration, Defendant-appellant*, 377 F.2d 872 (2d Cir. 1967)

³²⁵ *United Artists Television, Inc., Plaintiff-appellee, v. Fortnightly Corroration, Defendant-appellant*, 377 F.2d 872 (2d Cir. 1967)

³²⁶ *United Artists Television, Inc., Plaintiff-appellee, v. Fortnightly Corroration, Defendant-appellant*, 377 F.2d 872 (2d Cir. 1967)

³²⁷ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968),p392

given by the district court, the function of cable and broadcasters has 'little in common'.³²⁸ The main difference rests upon broadcasters' editorial function over the programs: 'Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers'.³²⁹

Teleprompter: Teleprompter concerning with the same legal issue as to whether cable retransmission of programs contained in broadcasters' signal constitute public performance. And once again the Appellate court reversed the decision of the Court of Appeal, and held that cable system did not perform regardless of whether the signals they carried were local or distant.

In the case of Teleprompter, the plaintiff were creators and producers of television programs, and the defendants were five cable systems operating in different cities.³³⁰ The plaintiff claimed that the cable systems infringed their right of public performance by intercepting broadcast transmissions of copyrighted material and rechanneling them on the cable system.³³¹ The complaint of the plaintiff was dismissed by the district court on the ground that such activity was barred from the decision of Fortnightly which held that cable systems did not perform.³³² On appeal, the plaintiff drew the attention of the court over the issue that the cable systems in Fortnightly were different from the cable systems in the present case in two main ways. Firstly, the broadcaster and cable systems in the Fortnightly case operated in the same geographic area, thus the signals in question were merely local signals that already been served in the community. However the cable system involved in the Teleprompter case imported signals from distant market which were not available through the local broadcasting service.³³³ Secondly, cable systems had developed since Fortnightly in terms of both technical advancement and the way they do business, thus the current mode of operation had effectively converted their function to broadcasters from viewers. Three main developments were emphasized by the broadcasters: first, cable

³²⁸ Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968),p392

³²⁹ Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968),p392

³³⁰ Elmiram New York,Famington, New Mexico, Rawlins, Wyoming| Great Fallls, Montanal and New York City.

³³¹ Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 US 394,(1974) 398.

³³² Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 US 394,(1974) 398.

³³³ Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 US 394,(1974) 398.

systems had started to originate their own programming which were independent from the broadcasters' signals they carry; second, cable started to sell commercial times to advertiser, and third, cable systems has engaged in interconnection with each other by selling the right of distribution of the original programs they produced.³³⁴

Both the Court of Appeal and the Supreme Court followed the rule of 'broadcasters perform, viewers do not perform' that was laid down by the Supreme Court in the case of *Fortnighly*, and adopted the broadcaster/viewer distinction as the criteria to determine cable systems' status as viewers.

In dealing with the argument raised by broadcasters, the Court of Appeal divided cable systems into two categories: first, those merely carry the signals of local broadcasters, and thus the audience could receive the signal either by using roof-top-antenna or cable systems, and second, those carry both local signals and signals from distance market of which the audience was unable to properly receive by using roof-top-antenna.³³⁵ On this basis, the court held that cable systems fell within the first category did not perform, but those who carrying distant signals within the second category were no longer within the ambit of the *Fortnighly* doctrine and functioned as broadcasters, thus perform the works in the context of copyright law.³³⁶

Regarding cable's three new functions acknowledged by the Court, the Court of Appeal found the fact that cable systems originated their own programs apart from those relays broadcast programming did not alter the result of *Fortnighly*, even though they 'perform' their self-originated programming by transmitting them to subscribers. Therefore, cable systems were not performers for the copyright purpose.³³⁷ Moreover, the court rejected the broadcasters' argument of 'spill-over effect' over the commercial selling practice. And due to the small scale of interconnection among cable systems at the time of the litigations, the court upheld the district court decision that "whatever this brief interconnection may portend for the future, it did not transform Teleprompter's present CATV system into a broadcasting network as appellants suggest."

³³⁴ P415

³³⁵ p415

³³⁶ *Columbia Broadcasting System, Inc., et al., Plaintiffs-appellants, v. Teleprompter Corporation and Conley Electronics Corporation, defendants-appellees*, 476 F.2d 338 (2d Cir. 1973)

³³⁷ *Columbia Broadcasting System, Inc., et al., Plaintiffs-appellants, v. Teleprompter Corporation and Conley Electronics Corporation, defendants-appellees*, 476 F.2d 338 (2d Cir. 1973)

In summing up, the Court of Appeal found that only in the circumstance where cable systems imported distant signals that were not available through the local broadcasting service, cable systems functioned as broadcasters and perform, otherwise, their status remained the same as within the ambit of Fortnightly doctrine. Even though cable performs when they transmit the self-originated programs, it did not infringe the copyright of broadcasters over the programs contained in the signals.

However, the Supreme Court overturned the decision that cable system which imported distant signals performs and exclude all copyright liability for cable retransmission under the 1909 Act. The Supreme Court held that:

“The development and implementation, since the Fortnightly decision, of new functions of CATV systems -- program origination, sale of commercials, and interconnection with other CATV systems -- even though they may allow the systems to compete more effectively with the broadcasters for the television market, do not convert the entire CATV operation, regardless of distance from the broadcasting station, into a "broadcast function," thus subjecting the CATV operators to copyright infringement liability, but are extraneous to a determination of such liability, since in none of these functions is there any nexus with the CATV operators' reception and rechanneling of the broadcasters' copyrighted materials. ”

The Supreme Court emphasized that the reception and rechanneling of signals for simultaneous viewing remained as a viewing function regardless of whether they were local or distant signals that imported from other geographic market.³³⁸ And choosing which broadcasting signals to carry did not amount to ‘selecting’ or ‘editing’ of the programs since its creative function is extinguished upon the point when it chooses the signal.³³⁹ Moreover, cable systems did not procure or propagate distant signals to the public since the signals have already been “released to the public”.³⁴⁰ And the Supreme Court upheld the rulings that the program origination, sale of commercials and interconnection is nexus with cable system reception and rechanneling function therefore of little copyright significance.³⁴¹

³³⁸ Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 US 394,(1974) 398

³³⁹ Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 US 394,(1974) 398p411

³⁴⁰ Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 US 394,(1974) 396

³⁴¹ Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 US 394,(1974) 396

Legislative respond

After nearly two decades of debates over cable's copyright liability, Congress overturned the Supreme Court's rulings in *Fortnightly* and *Teleprompter* by amending the Copyright Act of 1909 and eventually bringing cable activities into the scope of the Act. And in order to mediate the anti-trust concern derived from the high transaction cost problem cable would face from broadcasters over authorization, Congress introduced compulsory license under S111 as a form of limitation on exclusive right, which has the effect of guaranteeing cable's access to the broadcasting content upon a statutorily fixed payment of fee. S111(a) read as:

“(c)Secondary retransmission made by cable:

(1) ...secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work shall be subject to compulsory licensing...”

The expanded definition of 'right of public performance' under s101 now read as:

“To perform or display a work “publicly” means—

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”

The second part of the definition is also known as the transmit clause. The transmit clause was incorporated for the primary purpose of catching the activity of cable retransmission within the scope of public performance. Congress clarified in the House Report that '...the concept of public performance...includes not only performances that occur initially in a public place', i.e. live performance, 'but also acts that transmit a performance of the work to

the public by means of any device or process.³⁴² Congress went further to define the term ‘transmit’:

‘The definition of “transmit”- to communicate a performance or display “by any device or process whereby images or sound are received beyond the place from which they are sent” – is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a “transmission”, and if the transmission reaches the public... the case comes within the scope of s106.’

The definition of ‘transmission’ now clearly included the cable retransmission made by wire, vis-à-vis the initial transmission of broadcasters of performance made by wireless radio waves. By doing so, the standard of broadcaster/viewer distinction that had been constantly adopted in judicial interpretation was eventually abolished in the context of cable. Thus both broadcasters and cable systems ‘perform’ within the existing broaden definition. The only difference remained was the technical level between the initial transmission and second transmission, which shall not be deem as decisive in the context of copyright law for the sake of technology neutrality. Until then, the concept of public performance contained two categories of performance, i.e. live performance and performance transmitted by electronic device. Such transmission further encompasses three types of activities of (1)initial transmission made by broadcasters using wireless radio signals, (2)secondary transmission of cable systems using wired cable, and (3)viewers who perform the program on their receiving devices:

“...the concepts of public performance cover not only the initial rendition or showing, but also any further act by which the rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; broadcasting network is performing when it transmits his or her performance(whether simultaneously or from records); a local broadcasters is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the

³⁴² House Report 94-1476, P64

broadcast to its subscribers; and any individual is performing when he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.”³⁴³

Satellite Compulsory License

Similar to the mechanical reproduction license, Congress established another compulsory license in the Satellite Home Viewer Act 1988 to regulate the retransmission of broadcasting signals by satellite. The establishment of satellite compulsory license largely followed the pattern of the cable compulsory license established in 1976. Prior to 1988, when satellite resale carriers emerged as a form of technological advancement of traditional radio broadcaster and cable retransmission system, they were free from any copyright liabilities from retransmitting superstation and network television signals that contained copyrighted programs to cable systems, based on the judicial interpretation that satellite retransmission qualified as a ‘passive carrier’ under the then existing S111 (a)(3) of 1976 Act. This exemption allowed satellite to grow rapidly until Congress enacted the 1988 Act. However, when satellite home dishes were largely adopted by private homes, the signals which was retransmitted merely between satellite and cable systems could easily be intercepted by private homes. As a result, satellite systems started to scramble the signals and sale decoders to their subscribers. This self-protective technical measure adopted by satellite rendered satellite resale systems lose their ‘passive carrier’ status under the copyright law. At the same time, a compulsory license was imposed on satellite carriers to retransmit upon statutory fixed royalties. Nevertheless, the Satellite Home Viewer Act 1988 set out a sunset period of six years and expiration date of 1994, however, the expiration date was extended by Congress through 1999. In the 1999 Act, Congress reduced the rate set by the Librarian of Congree and the Copyright Office. The 1999 Act was further extended to 2004 and renamed as Satellite Home Viewer Extension and Reauthorization Act. In the 2004 Act which granted the parties with a ‘voluntary negotiation’ period.³⁴⁴

³⁴³ House Report 94-1476, P64

³⁴⁴ 17 U.S.C. 119(C)(1)(d)(ii)(I)

Satellite became the domestic communications carriers in 1974. The first home satellite system was launched in 1980.³⁴⁵ Prior to the establishment of the compulsory license in 1988, satellite was not heavily regulated as of cable by the FCC, instead, the FCC tended to pre-empt local regulations that has the effect of favouring broadcasters in competition with satellites.³⁴⁶ The reason was that FCC sought to encourage participation of the satellite in the broadcasting market which at that time was dominated by cable systems, thus the FCC adopted a 'flexible regulatory approach' to promote satellite service in joining the competition with cable as well as against other satellite service providers.³⁴⁷ Therefore, FCC only inserted jurisdiction over satellite resale services unless it is necessary to serve the public interest.³⁴⁸

Not only satellite was lightly regulated during the period of 1974 to 1988, they were free from any copyright liability under the 'passive carrier exemption' provided in s111(a)(3) of the 1976 Act. As a result, satellite services grew rapidly in that period, until mid 1986s, there were 16 million American household had satellite dishes.³⁴⁹ And the large scale of satellite broadcasting significantly expanded the geographical coverage of the signal outside the broadcasting area. The expansion was more widely than the cable, 'footprint' can cover 1/3 of the earth surface in the lack of restraint from physical cable wires.³⁵⁰

Judicial interpretation of Satellite Retransmission prior to 1988

Copyright was not a major issue when satellite was firstly employed by the three networks to connect with their affiliate cable systems. It leased space on a satellite from an underlying carriers and then retransmitted the superstation broadcaster signals to cable systems thereupon.³⁵¹ Until home dishes stations were largely used in private homes, it

³⁴⁵ Three major networks started to deploy satellite to transmit their broadcasting signals to their affiliates. See Karen J. Shapiro, *Federal Oversight of State and Local Regulation of Satellite Earth Stations: Uniformity Through Preemption?*, (1990) 37 Wash. U.J. Urb. & Contemp. L. 325, P328

³⁴⁶ K J. Shapiro, *Federal Oversight of State and Local Regulation of Satellite Earth Stations: Uniformity Through Preemption?*, (1990) 37 Wash. U.J. Urb. & Contemp. L. 325, P328

³⁴⁷ D Ross, *Telecommunications Satellite Regulation*, (1985) Ann. Surv. Am. L. 439, 442

³⁴⁸ For example, when the FCC started to regulate satellite since 1983, the underlying rationale was a public policy one which requires Satellite broadcasters to provide viewers in remote areas with improved reception and additional programming, which has less concern with the competition. See D Ross, *Telecommunications Satellite Regulation*, (1985) Ann. Surv. Am. L. 439, 440

³⁴⁹ *Satellite Homer Viewer Copyright Act of 1988*, House Report No 100-887, Part 1, 100th Cong., 2d session (August 18 1988) P11,

³⁵⁰ S Singer, *Satellite/Dish Antenna Technology: A Copyright Owner's Dilemma* (1984) 59 Ind. L.J. 417, 419

³⁵¹ N Schaumann, *Copyright Protection In The Cable Television Industry: Satellite Retransmission And The Passive Carrier Exemption*, (1983), 51 Fordham L. Rev. 637 643

interfered in the transmission between network and cable affiliates by capturing the broadcasting signals and relayed the signal to home dishes for free.³⁵² Copyright owners, primarily broadcasters who acquire the copyright from the original owners of the works contained in the program, decided to brought a claim against satellites' unauthorised reception by challenging their passive carrier status granted by S111 exemption.

S111(a)(3) provides that:

'The secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if—the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others...'

The primary purpose for the creation of the passive carrier exemption was to ensure traditional telecommunications company, such as AT&T, free from copyright liability during the retransmission.³⁵³ Thus, it laid down four basic requirements to be fulfilled distinct from original broadcasters and cable retransmit system in order to qualify as passive carrier as, they require the carrier(1)not to exercise control over the content;(2)not to control the particular recipients of the retransmission, i.e. service must be available to all;(3)not to originate its own programming, and (4)not to select the primary transmission.³⁵⁴

Several cases regarding the issue of whether satellite retransmission constitutes public performance and qualified for the S111(a)(3) exemptions were brought to court since early 1980s.

WGN Continental Broadcasting v. United Video, Inc In WGN Continental Broadcasting v. United Video, Inc.,³⁵⁵ the plaintiff was a broadcasting company which owns copyright of the

³⁵² Satellite Homer Viewer Copyright Act of 1988, House Report No 100-887, Part 1, 100th Cong., 2d session (August 18 1988)P11,

³⁵³ Since 1966, The final establishment of the passive carrier exemption was the result of successful lobbying of the representative of the at&t started lobbying for their exemption during the house hearing session. See See The Cable and satellite carrier compulsory licenses: an overview and analysis, A report of the register of copyrights of the United States of America, Library of Congress, (1992),140.

³⁵⁴ N Schaumann, Copyright Protection In The Cable Television Industry: Satellite Retransmission And The Passive Carrier Exemption,(1983), 51Fordham L. Rev. 637 653

³⁵⁵ 523 F. Supp. 403 (N.D. Ill. 1981)

television programming in the broadcast, brought an action against the defendant, a satellite retransmission system, claiming that defendant 'stripped' and retransmitted the plaintiff's broadcast signal by satellite system to 1400 cable earth stations across the United States.³⁵⁶The district court found that not only was the defendant entitled to the passive carrier exemption under S111(a)(3), also it did not perform the plaintiff's work publicly, thus was free from liability of infringing the plaintiff's right of public performance under on either ground.³⁵⁷

The district court took the approach of examining the passive carrier exemption prior to identify whether the defendant's retransmission constituted public performance within the context of S101 of the 1976 Act. The court held that since the teletext program, which was deleted and substituted by the defendant from the original signal to Dow Jones news when retransmitted, constituted separated copyright work from the 9:00 News program, therefore, the deletion of the teletext together with the defendants' insertion of the Dow Jones new service did not amount to the 'control over or selection of' the plaintiff's 9:00 News program. Therefore the defendant was entitled to S111(a)(3) exemption.³⁵⁸Regarding the issue of whether the defendant's retransmission constituted public performance, the district court held that the retransmission made by the defendant was clearly 'performance' for copyright purpose; the underlying question was whether the transmission or the performance was made to the public.³⁵⁹However, the court found that since the defendant merely retransmitted the signals to cable systems, and regardless of the large number of the cable systems involved in the distribution chain, cable systems did not constitute 'the public' by reason that the program was not viewed by the cable system during the transmission. It was the subscribers were 'the public' within the meaning of S101, and it was the cable systems, rather than the defendant, which distributed the signal and perform the work to the subscribers' television set.³⁶⁰ Thus the defendant did not perform 'to the public'.³⁶¹

³⁵⁶ p405

³⁵⁷ p413

³⁵⁸ p413

³⁵⁹ P413

³⁶⁰ P413

³⁶¹ p415

The decision was overturned by the Court of Appeals in the following year.³⁶² The Court of Appeals held that the district court misinterpreted the term 'public' within the 1976 Act as to cover solely the subscribers, rather, it also encompasses 'indirect transmission' to the ultimate public based on the Transmit Clause incorporated in 1976.³⁶³ The Court of Appeal also made it clear that the term 'public' shall not be construed in a way that immunize satellite retransmission from overall copyright infringement in the first place, otherwise it would render the passive carrier exemption superfluous.³⁶⁴ Thus, the defendant has in fact performed the works publicly under the S101 definition and the retransmission constitute an infringement and to the plaintiff's right of public performance under S106.³⁶⁵ Moreover, the Court found that the defendant was not a passive carrier due to the fact that it did not retransmit 'intact'.³⁶⁶ This decision was made based on the different identification over the copyright status of teletext, the Court of Appeals found that the teletext and the 9:00 News service shall not enjoy separate copyright status, rather, teletext was covered by the copyright of the 9:00 News service as part of audiovisual work defined in S101, regardless of the technical process that required to switch from one to another.³⁶⁷ Therefore, the deletion of the teletext from the retransmission and publish the 'truncated version' constituted alteration of the copyrighted work, i.e. the 9:00 News as a whole, and shall not be exempted from the passive carrier exemption.³⁶⁸

Eastern Microwave v Doubleday: In the case of Eastern Microwave Inc. v Doubleday Sports,³⁶⁹ the plaintiff EMI was licensed by the FCC to act as 'communications common

³⁶² WGN Continental Broadcasting Company and Albuquerque Cabletelevision, Inc., Plaintiffs-appellants, v. United Video, Inc., Defendant-appellee, 693 F.2d 622 (7th Cir. 1982)

³⁶³ "To perform or display a work 'publicly' means ... to transmit or otherwise communicate a performance or display of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

³⁶⁴ Ibid

³⁶⁵ Ibid

³⁶⁶ Ibid

³⁶⁷ Audiovisual work was defined as a work that consists "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 [work is] embodied." The Court of Appeals found that the teletext and the 9:00 News were in the same channel. Although the subscribers who wished to switch from the teletext to the 9:00 News or (vice versa) need to press a decoder button on the controller which was a similar method to switch channels,

³⁶⁸ The court found that : 'A copyright licensee who "makes an unauthorised use of the underlying work by publishing it in a truncated version" is an infringer--any "unauthorised editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright." Gilliam v. American Broadcasting Cos., 538 F.2d 14, 20 (2d Cir. 1976).'

³⁶⁹ Eastern Microwave, Inc. v. Doubleday Sports, Inc., 534 F. Supp. 533 (N.D.N.Y 1982)Eastern Microwave, Inc., Plaintiff-appellant, v. Doubleday Sports, Inc., Defendant-appellee, 691 F.2d 125 (2d Cir. 1982)

carrier³⁷⁰ which retransmitted broadcasting signals to cable systems via microwave and satellite³⁷¹. The defendant was the owner of a national league baseball team- the New York Mets which contracted with a broadcaster WOR-TV to broadcast Mets games.³⁷² Neither the broadcaster nor the defendant authorised the defendant to retransmit the Met's games further to approximately 600 cable system across the country.³⁷³ The defendant sent a number of notices informing the plaintiff that such retransmission was unauthorised and infringed the defendant's copyright interest in the broadcast. After receiving the notice, the plaintiff continued to retransmit the signals, and filed suit in the New York District Court seeking a judicial declaration that the retransmission did not infringe Doubleday's copyright interest in the broadcast.³⁷⁴

Without disputing on the issue that whether Doubleday owned the copyright interest in the broadcast of the game, the court went straight to answer the question of whether EMI's retransmission constitute public performance under S101, and if the question was yes, whether EMI was exempted from copyright liability under S111(a)(3).

At the time of litigation, the definition of public performance has had been amended to include cable retransmission into the scope of the 1976 Act by inserting the transmit clause into S101(2). The court relied on the transmit clause and found that although the EMI's 'headends' are not places open to the public, i.e. it merely transmits to the central cable system, it may not perform publicly under S101(1). However, the term 'public' shall be construed broadly and not limited to members of the 'viewing public', thus EMI shall be deemed as performing to the public under S101(2) that since it "transmits or otherwise communicates a performance to the public".³⁷⁵

After establishing that EMI's transmission constituted public performance under S101, the Court went on to examine whether EMI qualify as a 'passive carrier' and thus exempted from liability under S111(a)(3). The court went through the four requirements and found that EMI did not qualify for the exception since even though it did not exercise control over the content of the broadcast, it does exercise control over the selection of the primary

³⁷⁰ Under Title 47 U.S.C. s214.

³⁷¹ Eastern Microwave, Inc. v. Doubleday Sports, Inc., 534 F. Supp. 533 (N.D.N.Y 1982) 534

³⁷² 535

³⁷³ 535

³⁷⁴ 535

³⁷⁵ 534

transmission as well as the recipients of the secondary transmission.³⁷⁶ And assuming that EMI did not exercise control over the selection of the primary transmission and the recipients, it was not a passive carrier which merely providing wires and cables for the use of others since 'they are used to make available the product it is marketing'.³⁷⁷

This decision was reversed by the Court of Appeal for the Second Circuit.³⁷⁸ Curiously, the Court of Appeal did not contemplated the legal issue of whether EMI performed publicly, rather, the Court went into detailed analysis of the 'nature' and technical function of EMI, and reached the conclusion that '... the retransmission services provided by EMI are thus an intermediate link in an overall chain of distribution of television broadcast signals...',³⁷⁹ and tended to argued that the responsibility for payment of the compensation to copyright owners was already placed cable system which 'performed [the signal] entirely'.

Assuming from the vague judgement given by the Court that EMI perform publicly, The Court then found that EMI qualified for the passive carrier exemption under S111(a)(3) and was not liable for the infringement of the Doubledays' right of public performance.

Again the court went through the four requirements set out in S111(a)(3), and concluded that due to the 'technical restriction', i.e. only one extra-terrestrial signal was available to EMI, EMI was exercising an 'initial and one time' selection, or 'forced selection', which shall not be construed as the exercising of control over the content, nor the control of the selection of the primary transmission.³⁸⁰ Moreover, because EMI passively retransmitted exactly 'what and all of what it received' from that particular one signal, without injecting its own communications in the chain of distribution, so it shall not be deemed as originating its own program.³⁸¹ Finally, the court found that EMI did not exercise control over the receipts of the secondary transmission by reason that in the case of satellite retransmission, EMI was in fact serving the receiver rather than the sender of the communication, i.e. the cable system rather than the individual subscribers, and based on the fact that it never refused any request made by CATV in compliance with the FCC rules, it shall not be deemed as

³⁷⁶ 538

³⁷⁷ 538

³⁷⁸ Eastern Microwave, Inc., Plaintiff-appellant, v. Doubleday Sports, Inc., Defendant-appellee, 691 F.2d 125 (2d Cir. 1982)

³⁷⁹ Ibid, p127

³⁸⁰ Ibid

³⁸¹ Ibid

exercising control over its recipient CATV customers.³⁸² The court also rejected the argument that EMI was selling Mets' game as a product for its own, and found that it merely sold its retransmission services, without self-originated programming, thus qualify as the provider of wires, cables and other communication channels for the use of others under S111(a)(3).³⁸³

Hubbard Broadcasting Inc. v Southern Satellite Systems Inc Also in the case Hubbard Broadcasting Inc. v Southern Satellite Systems Inc³⁸⁴ concerning with the same issue as to copyright liability of satellite retransmission, both the district court and the Court of Appeal found that the defendant's retransmission made by microwave signals constituted 'secondary transmission of a primary transmission', but was nevertheless exempted from the passive carrier exemption in S111(a)(3). The plaintiff was a broadcaster operated in Atlanta. The defendant was satellite company hired by another broadcasting group to carry the signal further to cable systems across the country. Due to the fact that both the plaintiff and the defendant broadcasting company acquired the same copyrighted works in the programming, it resulted an overlapping programming in three broadcasting market in Atlanta which gave rise to the action.³⁸⁵ The district court referred to Congress's intent in drafting the Transmit Clause, as well as the judgement of the case of WGN discussed above, and held that the Transmit Clause shall be interpreted broadly to cover all transmissions, i.e. both direct transmissions made to subscribers, and indirect transmissions made between satellite and cable systems, regardless of the situation of the satellite system in the whole distribution chain.³⁸⁶

As to whether the defendant shall be exempted from liability under S111(a)(3), the court scrutinized the nature of the primary and secondary transmission made by the defendant, i.e. the transmission of the UHF(over the air ultra-high frequency) signal and the microwave

³⁸² Ibid

³⁸³ Ibid

³⁸⁴ Hubbard Broadcasting, Inc., Plaintiff, V. Southern Satellite Systems, Inc. and Turner Broadcasting System, Inc., Defendants. United States District Court, D. Minnesota, Third Division. August 23, 1984. ;Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc., 593 F.Supp. 808, 823 (D.Minn.1984).

³⁸⁵ Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc., 593 F.Supp. 808, 823 (D.Minn.1984). Para 24

³⁸⁶ The court specifically addressed the issue that if the transmit clause was interpreted in a narrow sense that include direct transmission but exclude indirect transmission, the passive common carrier exemption would be rendered superfluous. 'Congress intended to cover all transmission activity in its broad definition of transmit. The House Report explains that "any device or process" is "broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them."'P813

signals, and examined whether the defendant's activities constitute an 'secondary transmission of primary transmission to controlled group' under S111(b), thus was disqualified from the passive carrier exemption provided in S111(a)(1)and(3). S111(b) provides that regardless of the exemptions provided in S111(a), the secondary transmission constitutes an infringement 'if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public.' The court found that the defendant did not limit or control either the microwave signal nor the UHF signals to specific or identifiable recipients. The defendant broadcasting company transmitted the signals free of charge without receiving payment from cable systems or the satellite system. Thus, is should be distinguished from the controlled signals for pay TV or pay cable, which were the primary target of S111(b).³⁸⁷And finally, both courts held that the defendant qualified for the passive carrier exemption under S111 (a)(3) despite the fact the defendant satellite system substitute the local commercial to national commercials, the Court of Appeal found that the choose over the content of the commercial was exercised by the defendant broadcasting company, rather than the satellite system which retransmits the signal with no deletion or modification.³⁸⁸

Legislative respond

However, satellite system lost their 'passive carrier' status when they started to encrypt and scramble their signals. As can be seen in the above cases where the signals were merely distributed by satellite to cable systems, only subscribers of the cable system could access to the program by paying a fee to the cable systems. However, when satellite home dish earth stations became popular across the country,³⁸⁹ they enabled nonsubscribers who possessed the home dishes to intercept the signals that were intended to be interchanged between satellite and cable systems only, and relay the programs at their own homes without paying a fee to either the cable nor the satellite system.³⁹⁰ As a self-protective measure, satellite systems fostered a second level of technology by encoding and

³⁸⁷ Para32,33.

³⁸⁸ Para54

³⁸⁹ 4000-6000 dishes were used by private household by the end of 1984. M Meyerson, The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires(1985), 19 Ga. L. Rev. 543,P608

³⁹⁰ House Report On The Satellite Home Viewer Copyright Act Of 1988 ,100TH CONGRESS 2d Session House of Representatives 100-887 Part 1, P12

scrambling the signals and launched direct to home TV services, providing the decoding and unscrambling device to their subscribers only.³⁹¹

Congress legalised the scrambling measure by the Cable Communications Policy Act 1984 to protect the programmers' interests from their market plan, but created one exception for the reception of unscrambled signals by home dishes to ensure free flow of knowledge and ideas.³⁹² However, home dish owners raised the concern that the legalization of the scrambled services might create difficulties in getting access to the program for the home dish owners, and they also feared that they may need to purchase several different decoders unless FCC unify the encryption standard;³⁹³ Moreover, it has been argued by the Registry of Copyright that the combined activities of 'scrambling the signals, licensing the descrambling devices, and the subsequent sale of descrambled signals to earth station households', constituted an 'active' retransmission,³⁹⁴ and could no longer be construed as merely providing 'wires, cables, or other communications channels', thus shall exclude satellite retransmission system from the passive carrier exemption within the copyright law.³⁹⁵

Obviously, if the scrambling technology renders satellite to be excluded from the passive carrier exemption, the retransmission would be held liable for infringing the copyright owners' right of public performance and the access to content would be based on private negotiation which, during mid 1980s, would create extra burden to satellite industry as an infant industry. Thus, satellite industry took a step back from claiming total exemption of copyright liability to guaranteed access over a cable compulsory license. In the case of

³⁹¹ A Zizzi, The Scrambling of Satellite Signals And The Satellite Home Viewer Act Of 1988 (1989), 7 Comm. Law. 16 ,House Report On The Satellite Home Viewer Copyright Act Of 1988 ,100TH CONGRESS 2d Session House of Representatives 100-887 Part 1, P12

³⁹² Unscrambled signals remained free to be received by home dish owners under section 5, which provides that: 'The provisions of subsection (a)[unauthorised reception of satellite communications] shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if '(1) the programming involved is not encrypted...'; See Public Law 98-549, 98th Congress, Cable Communications Policy Act 1984,Section 5. A Gilroy, Cable Television : Formation of A National Regulatory Policy (Archived---02/21/85) Economics Division, Congressional Research Service, Order Code IB83195, p7; M Meyerson, The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires(1985), 19 Ga. L. Rev. 543,P608 House Report On The Satellite Home Viewer Copyright Act Of 1988 ,100th CONGRESS 2d Session House of Representatives 100-887 Part 1, P12

³⁹³ A Zizzi, The scrambling of satellite signals and the satellite home viewer act of 1988 (1989), 7 Comm. Law. 16 ,

³⁹⁴ House Report on The Satellite Home Viewer Copyright Act Of 1988 ,100TH CONGRESS 2d Session House of Representatives 100-887 Part 1, P12

³⁹⁵ Hearings on the Satellite Earth Station Copyright Act of 1987 Before the House Judiciary Comm Subcomm on Courts, Civil Liberties and the Administration of Justice, 100th Cong, 1st and 2d sess (1987-88) (statement of Ralph Oman) (Jan 27, 1988)P21

Pacific & Southern Co., Inc. v. Satellite Broadcast Networks,³⁹⁶ the defendant satellite system claimed that Congress's intent when creating the cable compulsory license was to interpret it 'flexibly' to encompass new distributing technologies such as satellite retransmission system.³⁹⁷ However, the court held that satellite system did not qualify for the cable compulsory license since it did not meet the definition requirements for the cable system contained in S111(c).³⁹⁸ S111(c) defined cable system as:

'a facility, located in any state, territory, trust territory, or possession, that in whole or in part receives signals transmitted or programs broadcast by one of more television broadcast stations licensed by the federal communications commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service.'³⁹⁹

The court found that, firstly, satellite system was not 'a facility' in the sense that it was comprised with various earth stations and the satellite; second, it is not located merely in any state of territory, but rather in space, and thirdly, the function of reception and retransmission was utilized by different facilities instead of one that was required in the text.⁴⁰⁰

Given the complains raise by both the home dish owners and the satellite systems, Congress introduced a series of hearings and bills regarding the duel concerns since 1985. During Congressional discussion, different opinions were brought up regarding the proposed total banning of scrambling until the FCC effectively regulate the price of decoding devices; some have argued that satellite shall be subject to the cable compulsory license; and some have argued that it shall remain free from copyright liability not based on the passive carrier exemption but a narrow reading of the right of public performance because it was for private viewing and not to the 'public', some also proposed the introduction of satellite

³⁹⁶ Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc., 694 F. Supp. 1565 (N.D. Ga.1988)

³⁹⁷ P1570

³⁹⁸ P1572

³⁹⁹ P1571

⁴⁰⁰ Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc., 694 F. Supp. 1565 (N.D. Ga.1988) A Zizzi, The scrambling of satellite signals and the satellite home viewer act of 1988 (1989),

compulsory license managed by the FCC.⁴⁰¹ However, Congress recognized that ‘scrambling protects the integrity of the signal,’ and excluding satellite retransmission from the scope of public performance would undermine the philosophy of S111 per se.⁴⁰² Moreover, based on the court decision that satellite system shall be distinguished from cable system in the context of copyright law, cable compulsory license is not application. And moreover, if compulsory license was to be adopted, it should be a newly designed satellite retransmission compulsory license ‘in the context of the copyright laws and not in an external regulation by the FCC’.⁴⁰³ Thus , this issue was eventually settled with a satellite retransmission compulsory licensing which Congress deemed it as meeting the public interest since it ‘respects the network/affiliate relationship and promotes localism’ as well as accorded equal copyright protection to both national and independent station programs’.⁴⁰⁴

The compulsory license was introduced by the S2 of the Satellite Home Viewer Act 1988, and incorporated to the 1976 Copyright Act as a new S119.⁴⁰⁵ However, the compulsory license applied to satellite carriers which provide services to unserved (by over-the air or cable) households only.

Unlike the cable retransmission compulsory license that has consistent application, Congress set out a six-year time scape for the application of the satellite retransmission compulsory license for private home viewing. In the first phase, i.e. the first four years from 1988 till 1992, a statutorily fixed flat fee applied which was 12 cents a month per subscriber

⁴⁰¹ In the Bill of H.R. 1769, H.R. 2989, and H.R.1840 introduced in 1985, A Report Of The Register Of Copyrights, The Cable And Satellite Carrier Compulsory Licenses: An Overview And Analyses. March 1992, P96-99. House Report On The Satellite Home Viewer Copyright Act Of 1988 ,100TH CONGRESS 2d Session House of Representatives 100-887 Part 1, P12

⁴⁰² ‘If Southern Satellite delivered WTBS to the backyard dish user there is no provision in the law for a copyright royalty payment to the copyright owner Although it could be argued that since Southern Satellite is a common carrier and since the TVRO dish owner uses the signal for purely private viewing, there is no copyright liability However, that position runs directly contrary to the philosophy of § 111 of the Copyright Act, and as a result we believe that it is a very tenuous position.’ See Hearing on Ensuring Access to Programming for the Backyard Satellite Dish Owner Before the Subcomm on Telecommunications, Consumer Protection and Finance of the House Comm on Energy and Commerce, 99th Cong , 2d sess 101 (1986)

⁴⁰³ A Report Of The Register Of Copyrights, The Cable And Satellite Carrier Compulsory Licenses: An Overview And Analyses. March 1992, P96-99. House Report On The Satellite Home Viewer Copyright Act Of 1988 ,100TH CONGRESS 2d Session House of Representatives 100-887 Part 1, P13-14

⁴⁰⁴ House Report On The Satellite Home Viewer Copyright Act Of 1988 ,100TH CONGRESS 2d Session House of Representatives 100-887 Part 1, P13-14

⁴⁰⁵ S2 of the Satellite Home Viewer Act 1988 :’ SECTION 2 AMENDMENTS TO TITLE 17, UNITED STATES CODE- Section 2 of the proposed legislation contains amendments to the Copyright Act of 1976 a new section 119 is added to the Act, creating an interim statutory license for the secondary transmission by satellite carriers of superstations and network stations for private home viewing, only necessary technical and cross-referencing amendments are made to section 111 of the Act, regarding the cable television compulsory license.’

for each superstation signal, and 3 cents a month per subscriber for each network station signal.⁴⁰⁶ In the second phase, i.e. the next two years from 1992 till 1994, fees were set by voluntary negotiations between the contracting parties, but subject to compulsory arbitration if any disputes arise.⁴⁰⁷ After the six year period, the 1988 Act was subject to a sunset provision and was scheduled to expire in 1994.⁴⁰⁸ In 1994, Congress amended the 1988 Act and renewed the compulsory licensing provisions under S119 for another five years until December 31, 1999.⁴⁰⁹ Moreover, the ‘passive carrier exemption’ that the satellite systems had long been relied on to escape from copyright liability was explicitly restricted by S119 (e) from applying to satellite retransmission when the compulsory license regime was in place.⁴¹⁰

⁴⁰⁶ S119(b)(1)(B), S119(c), see also House Report On The Satellite Home Viewer Copyright Act Of 1988 ,100TH CONGRESS 2d Session House of Representatives 100-887 Part 1, p15

⁴⁰⁷ S119(c)(2)(D),S119(c)(3).

⁴⁰⁸ S6 of the 1988 Act, ‘Termination’: The Act and the amendments made by the Act terminate – that is, are ‘sunset’ – on December 31, 1994.

⁴⁰⁹ Section 4 Termination.(a) Expiration of Amendments- S119 of title 17, United States Code, as amended by section 2 of this Act, ceases to be effective on December 31,1999. PUBLIC LAW 103-369—OCT. 18, 1994. The 1994 Amendment also made two significant changes, the first is the introduction of the signal intensity measurement regime which enabled network broadcasters to challenge the retransmission services provided by the satellite carrier to those that were claimed not to be the ‘unserved household’, i.e. those could receive the over-the-air signal directly without technical assistant of the satellite. Upon receiving the challenge, the satellite carrier could cut off the service directly, or if it wanted to continue the service, it must conduct a signal intensity test to ensure that the subscribers were in fact not be able to receive quality signals. However, this test was proved to be inefficient in the sense that the cost of the test exceeded the profit made for the service provided to the particular subscribers. Another change made by the 1994 Act was the introduction of the so called ‘fair market value’ criteria in formulating the royalty rate. A report of the register of copyrights, August 1, 1997, US Copyright Office, A review of the copyright licensing regimes covering retransmission of broadcast signals, P9

⁴¹⁰ S119(e) Exclusivity Of This Section With Respect To Secondary Transmissions Of Broadcast Stations By Satellite To Members Of The Public – No provision of section 111 of this title or any other law (other than this section) shall be construed to contain any authorization, exemption, or license through which secondary transmissions by satellite carrier for private home viewing of programming contained in a primary transmission made by a superstation or a network station may be made without obtaining the consent of the copyright owner.

Compulsory License Regime in Chinese Copyright Law

In order to examine the issue of cable retransmission within the context of China's copyright law, it is necessary to provide an overview of the whole statutory licensing scheme evolved from the Copyright Law 1990 to the current amending proposal released in 2012. The reason is that, and will be explained in details below, the provisions of the statutory licensing scheme in the copyright laws encountered constant and significant alterations throughout the legislative history, and the debate over these provisions continued until now as reflected in the proposals of the third major amendment. Chinese scholars pointed out that the frequency and latitude of modification made over the statutory license indicate that the legislatures are lack of a 'stable conception over the value of the whole statutory licensing institution', thus it is unlikely that the application of which will create a positive effect as expected.⁴¹¹ Moreover, the deficiencies inherited in the design of the statutory licensing system cause tremendous difficulties for the copyright holders to reclaim any royalty fees under the license. In that sense, there is reason to doubt that whether the whole system of statutory license which was constructed on a misconception and misinterpretation in China copyright law is the best solution in dealing with problem of cable retransmission or the contemporary issue of internet transmission. On the other hand, due to the state owned nature of the broadcasting vis-à-vis cable stations, the issue of cable retransmission in China's copyright law is closely linked with the initial transmission of broadcasting, which was regulated by a statutory license created in 1990.

Copyright Law 1990

The Copyright Law 1990⁴¹² made no specific reference to statutory license, however, relevant provisions contained in Article 32, Article 35, Article 37 and Article 40 established the de-facto statutory licensing regime which allowed unauthorized uses upon a payment of fee in the cases of: (1) newspapers and periodicals;⁴¹³ (2) public performance of published

⁴¹¹ Qi Xiong, Rethinking The Source Of Statutory License and Its Transplanting Effect. (2015), Journal of Legal Studies, Issue 5, p73.

⁴¹² All translated text below were adopted from the English version of the Copyright Law 1990 available at: www.pkulaw.cn.

⁴¹³ Article 26 provided that: '...Except where the copyright owner has declared that reprinting or excerpting is not permitted, other newspaper or periodical publishers may, after the publication of the work by a newspaper or periodical, reprint the work or print an abstract of it or print it as reference material, but such other publishers shall pay remuneration to the copyright owner as prescribed in regulations.'

work by performers;⁴¹⁴ (3) mechanical reproduction of sound recordings⁴¹⁵, and (4) broadcast of the works by radio and TV broadcasters.⁴¹⁶ On the international level, the imposition of these statutory licenses found their roots in Article 9(2)⁴¹⁷, Article 11bis(2)⁴¹⁸ and Article 13(1)⁴¹⁹ of the Berne Convention which grants discretions to the member countries to set conditions over the right of reproductions, right of communication to the public and right of recording of musical works enjoyed by the copyright and neighbouring right owners.

Copyright Law 2001&Copyright Law 2010

The Copyright Law 2001 abolished the performer's compulsory license under the old Article 36 and required performers to obtain prior authorizations from authors of all works, including both published and unpublished works, and pay remuneration accordingly.⁴²⁰ Regarding the mechanical reproduction license, the 2001 Law narrowed down the scope of its application from 'sound recording that...was published' to 'sound recording that... was made (legally recorded)' under Article 39, thus excluded the uses of the sound recording that were not commercially exploited but were otherwise published through other

⁴¹⁴ Article 35 provided that : '... a performer who for a commercial performance exploits a published work created by another does not need permission from, but shall, as prescribed by regulations, pay remuneration to the copyright owners';

⁴¹⁵ Article 37 provided that : '... a producer of a sound recording who, for the production of as sound recording, exploits a published work created by another, does no need permission from, but shall... pay remuneration to the copyright owner...'

⁴¹⁶ Paragraph 2 of Article 40 provided that: 'A radio station or television station that exploits, for the production of a radio or television program, a published work created by another does not need a permission from the copyright owner, but such a work shall not be exploited where the copyright owner has declared that such exploitation is not permitted. In addition, remuneration shall be paid as prescribed by regulations unless this Law provides that no remuneration need to be paid.'

⁴¹⁷ Article 9(2) of the Berne Convention provided that: '... It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'

⁴¹⁸ Article 11bis (2) of the Berne Convention provided that: '... It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

⁴¹⁹ Article 13(2) of the Berne Convention provided that: '... (1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorised by the latter, to authorise the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

⁴²⁰ Article 36 provided that: 'A performer (an individual performer or a performing group) who for a performance exploits a work created by another shall obtain permission from and pay remuneration to the copyright owner. A performance organizer who organizes a performance shall obtain permission from and pay remuneration to the copyright owner. A performer who for a performance exploits a work created by adaptation, translation, annotation or arrangement of a pre-existing work shall obtain permission from and pay remuneration to both the owner of the copyright in the work created by adaptation, translation, annotation or arrangement and the owner of the copyright in the original work.'

Translations were adopted from the English Version of the Copyright Law 2001, available at : [www. Pkulaw.cn](http://www.Pkulaw.cn)

means.⁴²¹ Article 43 of the 2010 Copyright Law⁴²² significantly lowered the threshold for the compulsory license granted to broadcasters under Article 40 of the 1990 Copyright Law. In the Copyright Law 1990, radio and television stations were allowed to use any published works ‘for the production of a radio or television program’ without authorization upon the payment of remuneration. The new law provides that ‘... a radio station or television that broadcasts a published work created by another person may do without permission, but shall pay remuneration to, the copyright owner.’ under Article 43. These changes were written into the current Copyright Law 2010 identically.

Amendment proposals of Copyright Law 2010

Currently, the mechanical reproduction licenses of sound recordings under Article 40 and the broadcasting statutory license for broadcasting stations under Article 44 are subjected to intense debate during the process of the third amendment.⁴²³ Three proposal released by the State Administration of Copyright contain opposite provisions over their applications.

The first proposal not only sought to maintain both the mechanical reproduction license and the broadcasting license for broadcasting stations, but to set a time period for the application of the mechanical reproduction license to ‘three months after the first publication of the sound recording’,⁴²⁴ and exclude ‘audio-visual work’ from the subject matters that covered by the broadcaster’s license.⁴²⁵

However, both licenses were removed from the second and third proposals due to strong veto advocated by industry representatives and copyright owners. Music industry representatives argued that the imposition of the mechanical reproduction license would promote online piracy and devastating the incentives for creation.⁴²⁶ On the other hand,

⁴²¹ Paragraph 3 of Article 39 provided that: ‘A producer of a sound recording who, for the production of a sound recording, exploits a musical work which has been lawfully recorded as a sound recording by another, does not need to obtain permission from, but shall, as provided in regulations, pay remuneration to the copyright owner; such work shall not be exploited where the copyright owner has declared that such exploitation is not permitted.’ Since publication may

⁴²² Paragraph 2 of Article 43 provided that: ‘A radio station or television station that broadcasts a published work created by another person may do without permission from, but shall pay remuneration to, the copyright owner.’

⁴²³ Some have argued that the language of ‘a musical work of sound recording has been made’ is ambiguous by neglecting the difference between a work which is ‘recorded’ and a work that is ‘published’. Case law suggested that such ambiguity would give rise to doubts where authors and the publishers where the authors of the lyrics authorised the ‘recording’ of the work but nonetheless reserved the right of publication, and vice versa. *Chen Tao v. Shabao Liang & Beijing modern strength Culture Co.* (2003), case 23818; *Tang Lei v. Nanjing Audio-visual Press* (2005), case no 08.

⁴²⁴ Article 46 of the 1st proposal.

⁴²⁵ Article 47 of the 1st proposal.

⁴²⁶ The Audio-Visual Production Association of China and the Association of Musicians of China published announcement claiming that the sound recording compulsory license would create ‘disastrous effect’ on the music industry by encouraging online piracy and allows the reproducers of the sound recording to compete unfairly with the original

copyright owners claimed that they had been suffering from loss of royalty fees because no royalty distribution mechanism has ever been established administratively, broadcasting stations are in fact using their works for free.⁴²⁷ Thus they advocated for the removal of the broadcasting license under Article 47.⁴²⁸ Whether the new law that is coming into force next year would follow this approach remains to be seen. As a result, both of the licenses were removed in the most recent proposals. However, the third proposal reverted to the original position in the first proposal, restored the statutory license under Article 48 and subjected its application to the procedure provisions under Article 49.

Broadcasting license for Radio and TV stations.

Among all four types of statutory licenses contained in the Copyright Law 2010, the broadcasting license is closely connected with the issue of cable retransmission since it can be interpreted as implying a statutory license for cable retransmission in China's context, hence requiring further exploration.

Copyright Law 1990 – The Establishment of the Broadcasting License

In the Copyright Law 1990, the broadcasting statutory license was incorporated in Article 40 which provided:

'A radio station or television station that exploits, for the production of a radio or television program, a published work created by another does not need a permission from the copyright owner, but such a work shall not be exploited where the copyright owner has declared that such exploitation is not permitted. In addition, remuneration shall be paid as prescribed by regulations unless this Law provides that no remuneration need to be paid.'

Article 43 further provided that:

'A radio station or television station that broadcasts, for non-commercial purposes, a published sound recording needs not obtain permission from, or pay remuneration to, the copyright owner, performer or producer of the sound recording.'

publishers. See Yuru Zuo, Copyright Law Amendment: The Dilemma Of Sound Recording Statutory License, (2012), *Electronic Journal of Intellectual Property*, Vol 3. P 30.

⁴²⁷ Ibid.Xiong.

⁴²⁸ Kaizhong Hu, Study of The Statutory License for Public Performance by Broadcasting Stations. (2013), *Journal of Intellectual Property*, Vol 3.

Thus, the Copyright Law 1990 set up a broadcasting statutory licensing scheme and made an exception to the non-commercial use of sound recordings from its application.⁴²⁹

Copyright Law 2001-Removal of the non-commercial use exception

The Copyright Law 2001 removed the non-commercial use of sound recordings in Article 42 and provided:

‘A radio station or television station that broadcasts a published work created by another does not need to obtain permission from, but shall pay remuneration to the copyright owner.’

Moreover, Article 43 re-emphasized the inclusion of sound recording under the scope of broadcasting statutory license by providing:

‘A radio station or television station that broadcasts a published sound recording does not need to obtain permission from, but shall pay remuneration to the copyright owner, unless the parties concerned have agreed otherwise.’

Copyright Law 2010

The Copyright Law 2010 inherits the provisions under Article 42 and Article 43 of the Copyright Law 2001, and incorporates them under Article 43 and Article 44. In fact, Article 43 and Article 44 contain an overlapping provision regarding sound recordings. The wording of Article 44 made no distinction between sound recordings and other types of works, since the original text reads as ‘A radio station or television station that broadcast a ‘published work’. Thus, Article 44 was removed later in the first amending proposal.

The First Amending Proposal Of Copyright Law 2010- The Establishment of the Administrative Procedure

The 1st amending proposal maintained the broadcasting statutory license under Article 47, but made two changes to the original provision, firstly, the proposal excluded ‘audiovisual works’ from the subject matters of the broadcasting statutory license, and more importantly, Article 48 laid down the administrative procedures to be followed under the general statutory licensing scheme.

⁴²⁹ However, although the Copyright Law 1990 contains the provision of statutory license for broadcasting stations, this provision was never implemented. See detail below.

Article 47 provided that:

‘Subject to the conditions laid down in Article 48, a radio or television station may broadcast a published work without the permission of the copyright owner.

Nonetheless, permissions shall be acquired for the broadcast of audiovisual works from the producers.’

Article 48 then set out three conditions to be satisfied for the application of the statutory license:

‘In accordance to the provisions of Article 44, Article 45, Article 46, and Article 47, users of published works without authorizations from the copyright owners shall meet the following conditions:

- (1) Apply and deposit records with state administrative department of copyright prior to use;
- (2) Specify the name of the author, name of the work and the source of the work;
- (3) Pay royalty fees to collecting societies in accordance to the standards set by the state administrative departments of copyright no later than a month after use, and deposit a statement of account covering the name of the work, the name of the authors, source of the works and other relevant information....

Collecting societies shall, in accordance with the provision of paragraph one, distribute royalty fees to relevant copyright owners in time, and establish information systems that enabled copyright owners to search on the use of the works and the royalty payment.’

This provision can be interpreted as imposing a new duty to report on the users of the works under the statutory licenses while clarifying the role of collecting societies as the intermediate between copyright owners and the users in carrying out the royalty collection and distribution obligation. Although Article 48 contains no specific provisions such as the fee schedule or the method of payment, it nonetheless shows the intention of the legislators to establish a build-in administrative support to implement the statutory licensing scheme from a practical point of view.

2nd Amending Proposal Of Copyright Law 2010 - Removal of the Broadcasting License

The second amending proposal preserved the general procedural rules that apply to the overall statutory licensing regime, but removed the broadcasting statutory license contained in Article 48 in the first proposal. Therefore, under the background of the second proposal, broadcasters shall acquire authorizations from all copyright owners of the works broadcasted, except in the circumstances where the general 'fair use' rule applies.⁴³⁰

3rd Amending Proposal Of Copyright Law 2010 - Restoring the Broadcasting License

Due to strong opposition initiated by the broadcasters over the removal of the broadcasting license in the second proposal, the legislators restored the broadcasting license in the third proposal, and subject it to the general procedural rules under Article 49.

Basically, the concept of statutory licensing in China came from to the relevant provisions of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as the Berne Convention), that is, each member country can set certain conditions for the exercise of rights by copyright owners under certain special circumstances.⁴³¹ However, the statutory licensing regime under China's Copyright Law is completely transplanted from foreign experience rather than from the perspective of its own industrial development.⁴³²

The Establishment of Statutory License in China

The main reason lies in the lack of basic theoretical understanding of copyright law as whole by Chinese legislators.⁴³³ At the beginning of China's economic reform and opening up, the nation had to deal with external pressures to establish a legal system of intellectual property rights, and there was in lack of a general awareness of intellectual property protection in China. Especially in the field of copyright, it was relatively common that institutions, such as press and publication, would massively use the works of others without authorization. However, such institutions were mostly state-owned and not market players, but rather a government units that undertook the duty of cultural dissemination and national ideological control. Therefore, the institutional value from protecting individual private rights to stimulate creativity is less important than facilitating the undertakings of

⁴³⁰ The fair use provision was set out in Article 22 of the Copyright Law 2010.

⁴³¹ Article 9(2), Article 11bis, and Article 13

⁴³² Xiong Qi, *Research on Music Copyright Licensing Model in the Internet Era*, (2017, Peking University Press, Beijing, p97)

⁴³³ *Ibid.*

major state-owned broadcasting stations and the press to advance the social and political goals.

China's Copyright Law adopts the concept of statutory licensing in line with the international treaties, but removed the relevant administrative and remedial procedures that are incorporated as complementing measures that are usually incorporated in western copyright laws, together with a 'reservation clause' that allows the copyright owners to opt-out from the statutory license by making declaration, such legislative method reflects the consistently extensive nature and flexibility of Chinese legislation. Therefore, it can be said that China fulfilled the requirements set out in the international conventions, but meanwhile, it exempted users from the obligation to obtain prior authorisation from the copyright owner by mandatory legal norms based on China's national conditions at that time, so as to encourage and support the development of publishers, recorders and broadcasters' in the cultural industry. It can be seen that under the premise of fulfilling the obligations of acceding to international conventions, China's Copyright Law 1990 further restricts the protection of copyright through statutory licensing system in addition to the fair use regime. It is more a pragmatic policy to deal with domestic and international situations than a scientific legislative choice based on sufficient theoretical underpinnings. However, after the adoption of the Copyright Law 1990, with the gradual strengthening of copyright protection and the emergence of the Internet industry which was eager to avoid the risk of infringement, Chinese scholars began to pay attention to the theoretical discussion of statutory licensing. Among them, some scholars emphasize that the scope of copyright is now expanding along with the development of network technology, so the statutory licensing system needs to be relaxed in order to strike the balance of interests among the copyright owners, users and the public.⁴³⁴ Others are more influenced by the transaction cost theory in economics, they argued that by granting the copyright owner an exclusive right may seriously hinder the use of the work by the society given that the transaction cost might be overly high and block the transaction from happen, however, if the use is classified as a reasonable use, it will damage the remuneration that the copyright

⁴³⁴ Feng Xiaoqing, Copyright Protection, Restriction and Benefit Balance in the Network Environment,(2006),Journal of Social Sciences, No. 11, p

owners deserve.⁴³⁵ Thus, as far as the social welfare is concerned, statutory licensing regime shall be implemented to achieve the efficiency result rather than granting the copyright owners with an monopolistic right.⁴³⁶

However, it has been pointed out that the establishment of the statutory licensing system for involuntary licensing of copyright in China is mainly a pragmatic move, as a result, it is in lack of a sustaining theoretical underpinning and fail to take into considerations of market competition and maintain the competition order in the market. In fact, at the beginning of the establishment of the Chinese copyright system in early 1990s, the market players, including the copyright owners themselves, did not understand the exclusive nature of rights. And the legislators formulated the copyright statutory licensing system for the purpose of minimizing the 'adverse impact' of the establishment of copyright protection system on the original press and publishing media undertakings.⁴³⁷

In the first chapter regarding the discussion of fundamental theories of copyright, it can be seen that the emergence and development of copyright in western countries is based of the four clusters of theories, i.e. natural law theory, utilitarian theory personal theory and the culture flourishing theories. Not only these theories set up the legal foundation for the copyright law but also provides comprehensive explanations and considerations to the whole restriction regime as well, including the statutory licensing regime, and demonstrate the rationales behind such policy on maximizing social welfare by maintaining the balance of interests between the right holder and the user, as well as between the individual and the public interests. On this basis, the statutory licensing regime under the western copyright law, for example the US copyright law that incorporated the first statutory license in 1909, gone through hundreds of years of development and ultimately sustains as a stable and feasible policy with legal certainty.

On the contrary, although China has the history of copyright law that can be dated back to the Qing dynasty, copyright law of the People's Republic of China has developed relatively lately - the first copyright law was promulgated as late as 1990, and its promulgation was

⁴³⁵ Li Yongming & Cao Xinlong, A comparative study of the statutory licensing system of copyright between China and the United States (2005), *Journal of Zhejiang University, (Humanities and Social Science)*, 35 Vol 4, P31

⁴³⁶ *Ibid.*

⁴³⁷ Guan Yuying, Rethinking and Reconstructing the Statutory Licensing Regime in China. (2005), *Journal of East China University of Politics and Law*, Vol 2.

entirely due to the consideration of China's accession to the WTO. The lack of fundamental understanding of the theories of copyright by Chinese legislators made it inevitable to borrow the foreign copyright statutes without cautious consideration of the compatibility with the Chinese domestic legal, economic and social conditions. As a result, the 1990 Copyright Law went through an overhaul amendment in 2010 in which most provisions were revised significantly. Even so, the application and the effects of many provisions in the current law remains highly controversial. Among them, the statutory licensing regime is a typical example of which the development is unsustainable and lack of legal certainty. As a result, despite the Chinese Copyright Law incorporates several statutory licensing provisions similar to the copyright statutes of certain western countries, but the effects of implementation is unsatisfactory and it failed to set up the legal order in the concerning industry. Therefore, the statutory licensing regime in China has experienced a serious situation of 'acclimatization'. This chapter will provide a detailed analysis of the statutory licensing regime in China's copyright law and explain the reasons as to why such regime fail to effectuate its policy goals as intended. The initial finding of the analysis can be summarized as follows: First, The nature of the statutory licensing mechanism is unclear; second, the supporting administrative procedure is incomplete; and third, there are inherent deficiencies in the operational mechanisms of institutions due to its state-owned nature.

Deficiencies of the Statutory Licensing Scheme in China

Despite the uncertainties as to whether the new law will continue to deploy all the statutory licenses contained in the old law, some of the licenses had been incorporated into law since 1990 Copyright Law and become the main instruments that regulate transactions in the corresponding markets. Moreover, along with the enactment of the Copyright Law in 2010, the National Congress promulgated the 'Interim Measure For The Payment Of Remuneration For Audio Products Played By Radio And TV Stations' in 2011 to supplement the broadcasting statutory license of sound recording in Article 43.⁴³⁸ Surprisingly, the State Administration of Copyright in an explanatory note observed that none of the licensees, including the state owned broadcasters, have ever fulfilled their obligations and paid remunerations to the copyright owners in the past twenty, nor have they ever been

⁴³⁸ Amended in 2011.

punished from failing to do so.⁴³⁹ Thus, the State Administration of Copyright stated that the statutory license scheme within the current law is a 'sham' since:

“...in allowing others from using the copyrighted works without the need to obtain authorization from the owners, the statutory licensing scheme is essentially a limit imposed by law over the copyright owners' right of exploitation. However, if copyright owners are not guaranteed with a right of remuneration correspondingly, then this scheme is in fact depriving the relevant rights from the copyright owners.⁴⁴⁰

Based on this finding, it can be reasonably concluded that although China incorporated the statutory licensing scheme pursuant to the relevant provisions laid down in the Berne Convention, the underlying rationality of such mechanism is severely jeopardized by its implementation in China's market. Although the function of reducing transaction cost is deemed as the main justification for the establishment of the statutory licensing scheme from an institutional perspective, it comes with another counterbalancing aim, i.e. by having realized that the total exemption would seriously impair needed rewards for the author, statutory license trade the bargaining power conferred on the copyright owner for a monetary award in approximate to the market price.⁴⁴¹

The State Administration of Copyright in the explanatory note identified the two main factors that collapsed the whole statutory licensing system under China's copyright law on this basis: lack of royalty collecting mechanism and remedy.⁴⁴² In order to solve these problems, a prior-to-use applications system and the after-use registration system was put in place in the proposals for the third amendment. Article 49 of the first proposal provides that:

In accordance to the provisions of Article 44, Article 45, Article 46, and Article 47 uses of published works without authorizations from the copyright owners shall meet the following conditions:

⁴³⁹ The State Administration of Copyright, Explanatory Note of the Copyright Law of P.R.C.(Amending Proposals) March 2012,Section 12.

⁴⁴⁰ Translated by the authors,Ibid.

⁴⁴¹ Paul Goldstein, International Copyright: Principles, Law, and Practice, (Oxford University Press,2001, 309)

⁴⁴² The State Administration of Copyright, Explanatory Note of the Copyright Law of P.R.C.(Amending Proposals) March 2012,Section 12

- (1) Apply and deposit records with state administrative department of copyright prior to use;
- (2) Specifying the names of authors, names of the works and the source of the works while using the work;
- (3) Pay royalty fees to collecting societies in accordance with the standards set by the state administrative departments of copyright no later than a month after use, and deposit a statement of account covering the name of the works, the name of the authors, source of the works and other relevant information.

...

Collecting societies shall, in accordance with the provision of paragraph one, distribute royalty fees to relevant copyright owners in time, and establish information systems that enabled copyright owners to search on the use of the works and the royalty payment.

This provision has been incorporated in all three proposals released by the State Administration of Copyright. However, such establishment encountered heavy criticisms from the State Administration of Press, Publication, Radio, Film and Television, they argued that the administrative procedures imposed a burdensome obligation on the broadcasters and increased their cost of operation derived from record keeping.⁴⁴³

The reason as to why the old copyright laws have omitted from incorporating the procedural provisions into the broadcasting statutory licensing scheme is due to a lack of market motivation.⁴⁴⁴ Since all the broadcasting stations in China are established by the State and subjected to rigorous administrative approval, such market entry requirements create de facto monopoly within the TV program distribution market that prevent other market players, i.e. private broadcasting stations from entering into the market. Moreover, contrary to the US and EU where wireless broadcasting stations and cable operators are 'competitors' in the traditional broadcasting market, cable stations are successors of the wireless broadcasting stations in China under the management of the SAPPRFT. With the lack of competition, i.e. both external competition against privately owned stations and

⁴⁴³ Ibid, Xiong, p72

⁴⁴⁴ Ibid.

internal competition between the wireless broadcasting stations and cable broadcasting stations, this weakened the institutional role of property right in resource allocation. Hence, Professor Xiong argued that the ‘chaos’, as referred by the legislators, that existed in the current broadcasting market is in fact caused by the ‘indulgence’ granted by law, which allowed broadcasters to abuse the statutory licensing scheme to avoid payment and ignoring the property interests of individual copyright owners.⁴⁴⁵

The root of the ‘indulgence’ can be found in the discussion in previous chapter concerning the nature of broadcasting stations in China. Since all the broadcasting stations are owned and controlled by the state, i.e. either by the local government or local State Administration of Press, Publication, Radio, Film and Television (SAPPRFT). The broadcasting industry serves as the ‘mouth-piece’ of the Communist Party, carrying the obligation of ‘disseminating culture and controlling ideology’.⁴⁴⁶ Moreover, the conception of the overall intellectual property regime was relatively weak in 1990s when the first copyright law was enacted. Therefore, the loopholes were left in the law intentionally to subsidize and encourage development of the broadcasting industry, and enabled them to further pursue their political goals.⁴⁴⁷

A statement made by an official from the China Central Television during the interview can support such a conclusion.⁴⁴⁸ The official explained that broadcasting stations in China are in fact a ‘government division’ assigned with the duty of propaganda. Until 2001, broadcasting stations had been using copyrighted works from copyright owners without authorization or remunerations, claiming that the uses were for non-commercial purpose under Article 42 of the Copyright Law 1990.

The situation changed in 2001 upon the enactment of the amended Copyright Law.

Broadcasting stations had been invoking the statutory license for uses concerning three types of works: literary works⁴⁴⁹, musical works⁴⁵⁰ and photographic works⁴⁵¹. China Central

⁴⁴⁵ Ibid, p80.

⁴⁴⁶ Besides broadcasting stations, major publisher in China are owned by the SAPPRFT as well. Thus the statutory licensing and the fair use defense that allowed republication without permission could be seen as another subsidy granted to the printers. Yuying Guan, Rethinking and reconstructing the statutory licensing regime in China, (2015), Journal of East China University of Political Science and Law, vol 2, p20

⁴⁴⁷ Ibid.

⁴⁴⁸ The interview was conducted by phone in May 2017. The name of the official shall remain anonymous.

⁴⁴⁹ Article 1 of Copyright Law 2010

⁴⁵⁰ Article 3 of Copyright Law 2010

⁴⁵¹ Article 5 of Copyright Law 2010.

Television has entered several agreements with major collecting societies in China, primarily the Collecting Societies for Literary Works of China⁴⁵², Music Copyright Society of China⁴⁵³, as well as the image licensing company Visual China Group (Getty Images)⁴⁵⁴, and acquired the ‘blanket licenses’ that cover all the works used for program creation and broadcasting. Regarding cinematographic works and works created by a process of analogues to cinematography, government officials claimed the statutory licensing scheme had never extended to cover broadcast of such works in practice, and they have been carrying out individual negotiations with copyright owners to acquire authorizations.

Even though the broadcasting stations started to fulfil the payment obligation, under the statutory license provision since 2001, there is doubt whether the remuneration paid is proportionate to the amount and frequency of which the works were broadcasted. The Copyright Law 2010 sets no specific requirements over the remuneration mechanism, thus, it is assumed that remuneration over the uses specified by the four type of statutory licenses can be set either by law, or through voluntary negotiations between the contracting parties in compliance with Article 11bis(2) of the Berne Convention which provided that:

‘(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under the rights mentioned in the preceding paragraph...but these conditions shall not be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority’.

In cases where the contracting parties can reach an agreement, the issue of rate becomes less important although whether the rate negotiated by the collecting societies on behalf of the copyright owners is reasonable remains doubtful.⁴⁵⁵ The law made an exception to the sound recordings under the broadcasting license and set a specific rate in “Interim Measure for The Payment of Remuneration for Audio Products Played by Radio and TV Stations 2011”. Article 4 of the Interim Measure provides that

⁴⁵² Official website of the Copyright Collecting Society of Literary Works China: <http://www.prccopyright.org.cn/>. Accessed in Sep 2017.

⁴⁵³ Official website of the Music Copyright Society of China <http://www.mcsc.com.cn/>. Accessed in February 2019

⁴⁵⁴ Official website of Getty Image(China): <https://www.vcg.com/>. Accessed in February 2019.

⁴⁵⁵ The issue of Collecting Societies will be discussed below.

“To play audio products, a radio or TV station may stipulate with the collective management organization of copyright, which is responsible for the management of relevant rights, the payment of a fixed amount of remuneration to the copyright holders every year. The radio or TV station and the collective management organization, which is responsible for the management of relevant rights, may negotiate on paying remuneration to the copyright holders on the basis of either of the following ways if they have not stipulated or fail to stipulate a fixed amount:

1. Compute the amount of remuneration by multiplying the balance of the annual advertising income of the present station or each channel (frequency) of the present station minus 15% of the costs and expenses by the remuneration rate as prescribed in Article 5 or 6 of these Measures; or
2. Compute the amount of remuneration by multiplying the current annual total time for which the audio products are played by the present station by the unit remuneration rate as prescribed in Article 7 of these Measures.

Article 5 and Article 6 contains the schedule that lists eight different categories of calculative methods based on the total advertising revenue prescribed in Article 4(1). The eight categories were classified based on the proportion of the overall time of which the program that embodied the sound recordings are broadcasted in the channel, and accords different ratio of rates under the eight categories respectively.⁴⁵⁶ On the other hand, Article 7 contains the schedule based on the standard of ‘unit remuneration’ of the total

⁴⁵⁶ Article 5 provides that: Where a radio or TV station decides the amount of remuneration to be paid to copyright holders under Article 4 (1) of these Measures, it shall, within 5 years as of the date of implementation of these Measures, negotiate about the amount of remuneration according to the following rates for remuneration:

1. If the time for which audio products are played accounts for less than 1% of the total time for which the programs are played by the present station or channel (frequency) (hereinafter referred to the proportion of time played), the remuneration rate shall be 0.01%;
2. if the proportion fo time played is more than 1% and less than 3%, the remuneration rate shall be 0.02%
3. If the proportion of time played is more than 3% and less than 6%, the corresponding remuneration rate shall be between 0.09% and 0.15%. The remuneration rate shall increase by 0.03% for the increase of each 1% of the proportion of time played;
4. If the proportion of time played is more than 6% and less than 10%, the corresponding remuneration rate shall be between 0.24% and 0.4%. The remuneration rate shall increase by 0.04 % for the increase of each 1% of the proportion of time played;
5. If the proportion of time played is more than 10% and less than 30%, the remuneration rate shall be 0.5%;
6. If the proportion of time played is more than 30% and less than 50%, the remuneration rate shall be 0.6%;
7. If the proportion of time played is more than 50% and less than 80%, the remuneration rate shall be 0.7%; and
8. If the proportion of time played is more than 80%, the remuneration rate shall be 0.8%.

broadcasting time of the program prescribed in Article 4(2).⁴⁵⁷ However, since the royalty fees that are calculated based on the unit remuneration standard is normally much lower than the fees generated from the advertising revenues, broadcasters always seek to invoke Article 4(1) and pay remuneration in such manner.⁴⁵⁸ In cases where the broadcasters and copyright owners failed to reach an agreement over the manner of remuneration, Article 8 stipulates the mandatory application of the advertising revenue based standard under Article 4(1).⁴⁵⁹

Thus it can be seen that the Interim Measure seeks to set a fixed rate schedule while guaranteeing a higher remuneration for the copyright owners over disputes as to the payment manner. However, both manners set out in Article 4(1) and Article 4(2) requires the computation of the ratio of the programs are broadcasted within the overall broadcasting time.

From a practical standing point, such provision requires the broadcasting stations to deposit a statement of account containing relevant information and that an administrative institution should be empowered with handling such statements. This is the approach adopted by the US where Section 111(a) of Copyright Act 1976 makes specific provisions over the statement of account regarding cable retransmission statutory license under Section 111(1) and designated the Register of Copyright as the administrator to deal with the statement deposited. Section 111(d)(1) provides that:

‘... a cable system... shall, on a semi-annual basis, deposit with the Register of Copyrights...

⁴⁵⁷ Article 7 provides that: Where a radio or TV station decides the amount of remuneration to be paid to copyright holders under Article 4 (2) of these Measures, it shall negotiate about the amount of remuneration according to the following rates for remuneration:

1. The rate for the remuneration per unit time to be paid by a radio station shall be 0.30 yuan per minute; or
2. The rate for the remuneration per unit time to be paid by a TV station shall be 1.50 yuan per minute within 5 years as of the date of implementation of these Measures and shall be 2 yuan per minute as of the date on which these Measures have been implemented for 5 full years.

⁴⁵⁸ Hu Kaizhong, Study On The Remuneration Mechanism Of Sound Recordings Under Broadcasting Statutory License, 2012, Journal of Legal Science, Vol 2, p169.

⁴⁵⁹ Where a radio station or TV station fails to stipulate with the collective management organization, which is responsible for the management of relevant rights, about a fixed amount of remuneration for playing audio products in accordance with Article 4 of these Measures and fails to decide the payable remuneration upon negotiation, it shall decide the amount of remuneration to be paid to the collective management organization of copyright, which is responsible for the management of relevant rights, according to the manner as prescribed in Article 4 (1) and the rates as prescribed in Articles 5 and 6 of these Measures.

(1) A statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may from time to time prescribe by regulation.'

Leaving aside the technical issues that distinguish cable retransmission from initial broadcasting discussed in question, the framework set by this provision can be seen as a 'build-in administrative support'⁴⁶⁰ that ensures that the fees are calculated on figures that reflect authentic uses. In China, due to the absence of the fee schedule designated for other types of works, as well as a competent authority designated in handling the fees, broadcasting station has been neglected from keeping precise record for the frequency or the overall time of the performance broadcasted in the past years. This is evidenced by the strong opposition came from the SAPPRFT regarding the insertion the procedural rule in Article 48 in the first amending proposal released in 2012, they asserted that this provision imposed a 'burdensome' obligation on the broadcasting stations because they would have to input labours to calculate and keep record of the exact frequency and overtime of the works played. Until now, broadcasting stations maintains the view that the procedural rule would be a 'rigorous condition' imposed on the broadcasting stations for the invocation of the license under the new law. Without a statement of account to serve as the foundation for the calculative method provided under the law, it is highly questionable that whether the fees that are rationale and reflect the actual amount of use of the work.

Besides the issue of administrative support, another major deficiency that contained in the design of the statutory licensing scheme is the lack of ground of action and remedy. The Copyright Law 2010 provides no ground of action for copyright owners against the users who failed to pay remunerations or fulfil other obligations under the procedural provision. Consequently, no remedies are available that enables the copyright owners to neither recover the license fee nor claim further damages. On the contrary, the US Copyright Act

⁴⁶⁰ Ibid, Merges, 'R Merges, Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations,(1996), California Law Review, Volume 84, Issue 5, p1295.

1976 set the ground of action and eligibility for remedies in Section 111(c)(2)(b) explicitly. Section 111(c)(2)(b) provided that:

‘... secondary transmission to the public by a cable system of a primary transmission...embodying a performance or display of a work is actionable as an act of infringement under 501, and is subject to the remedies provided by section 502 through 506, in the following cases:

(b) where the cable system has not deposited the statement of account and royalty fee required by section (d)...’

Since cable retransmission is technically relying on the signals initiated by the broadcasting stations, S501 grants the standing to sue under S111 to the television broadcaster as the legal or beneficial owner of the works. S502 and S504 grants injunctions and damages to the broadcasting stations remedies.

The Nature Of The Statutory Licensing Mechanism Is Unclear

Scope of the Broadcasting License

The first problem of the statutory licensing regime in Chinese copyright law is that the nature of this mechanism is unclear. This problem are manifested from two perspectives, first, the scope of the license is unclear with regard to the subject matters and method of use that are subject to the statutory license, and second, the legal certainty remains ambiguous due to the ‘reservation clause’ contained in the statutory provisions.

As mentioned above, there are five types of statutory license contained in the current copyright law, (1)reproduction right for compilation of compulsory educational textbook under Article 23,⁴⁶¹ (2)reproduction right for newspaper republish and recapitulate under article 33,⁴⁶² (3)reproduction right of making sound recordings under Article 40⁴⁶³ and

⁴⁶¹ Article 23 Except where the author declares in advance that use of his work is not permitted, passages from a work, a short written work, musical work, a single work of the fine arts or photographic work which has been published may, without permission from the copyright owner, be compiled in textbooks for the purpose of compiling and publishing textbooks for the nine-year compulsory education and for national education planning, provided that remuneration is paid, the name of the author and the title of the work are mentioned, and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced.

⁴⁶² Article 33 Except where the copyright owner declares that no reprinting or excerpting of his work is permitted, a newspaper or periodical publisher may, after the work is published by another newspaper or periodical publisher, reprint the work or print an abstract of it or print it as reference material, provided that remuneration is paid to the copyright owner in accordance with relevant regulations.

⁴⁶³ Article 40 A producer of sound recordings or video recordings who exploits, for making a sound recording or video recording, a work created by another person shall obtain permission from, and pay remuneration to, the copyright owner.

(4) broadcasting of published works for broadcasters under Article 43⁴⁶⁴, and (5) broadcasting of published sound recordings Article 44.⁴⁶⁵ The problem that the scope of statutory license is not clear is that the wording of the subject matter and the means of use covered by the statutory license are too vague. For example, Article 43 provides that:

'A radio station or television station that broadcasts and published work created by another person may do without permission from, but shall pay remuneration to, the copyright owner',

and Article 44 provides that :

'A radio station or television station that broadcasts a published sound recording may do without permission from, but shall pay remuneration to, the copyright owner, unless the parties have agreed otherwise. Specific measures in this regard shall be formulated by the State Council.'

It can be seen that Article 43 and Article 44 made a different treatment to the types of works in question: Article 43 granted the radio station and television station the statutory license to broadcast *any* published works without permission upon a payment of remuneration, and Article 44 granted the broadcasting and radio stations with the statutory license to broadcast sound recordings without permission upon a payment of remuneration. However, the latter part of Article 44 also incorporated the wording that 'unless the parties have agreed otherwise' which leaves the legal certainty of the enforceability of the statutory license in doubt. Besides, Article 44 also stipulates the statutory fees for broadcasting stations with respect to the broadcast of the sound recordings in a separate Specific Measures formulated by the State Council. Yet regarding other types of works, no such provision or Specific Measures are promulgated to supplement the operation of the statutory license of broadcasting stations.

It might be argued that such different treatments were granted based on the underlying civil law system of China where copyright and neighboring rights are treated differently.

⁴⁶⁴ Article 43 A radio station or television station that broadcasts a published work created by another person may do without permission from, but shall pay remuneration to, the copyright owner.

⁴⁶⁵ Article 44 A radio station or television station that broadcasts a published sound recording may do without permission from, but shall pay remuneration to, the copyright owner, unless the parties have agreed otherwise. Specific measures in this regard shall be formulated by the State Council.

However, this distinction not only makes the copyright owner's right to remuneration unguaranteed, but also blurs the scope of statutory licensing in interpretation. For example, in the case of *Jiazhigang vs. Foshan Radio Broadcasting Station*⁴⁶⁶, Jiazhigang is the copyright owner of the book 'Jiazhigang's commentary on Chunqiu', and Foshan Radio Broadcasting broadcasted the program 'Listen to the World of Chunqiu' they created based on the content of the book of Jia for two years. Jia claimed that his book constituted literature work that is not covered by the statutory licensing provision stipulated under Article 43. And the defendant, the Foshan Radio Broadcasting claimed that the use of the work was covered by the statutory license, therefore it was not required to obtain prior authorization from the plaintiff. Although the court of the first instance and the appeal court ruled in favor of the plaintiff and held that the use of the work of Jia was not covered by the statutory license under Article 43, however, the decision was given based on the fact that Foshan Radio Broadcasting failed to acknowledge the name of the author in the program, and the program created constituted an adaptation of the original work.⁴⁶⁷ Therefore, the court issued an injunction against Foshan Radio Broadcasting to cease the infringing activities and pay damages accordingly. It needs to be mentioned that despite in the argument Foshan Radio Broadcasting claimed that the use of the work of Jia was covered by the statutory license and shall not constitute an infringement if remuneration is made, however, given that no specific measures were promulgated for the use of literary works under the broadcasting statutory license,⁴⁶⁸ Foshan Radio Broadcasting had been neglected to fulfill the payment requirement in the previous years until the litigation.⁴⁶⁹

Therefore, it can be seen that because Article 43 of the Copyright Law does not specify the subject matter and method of use that are subject to statutory licensing regimes, there remains uncertainty in the interpretation of the scope of this provision by both the copyright owners and the court. For example, in similar provisions concerning the statutory license for textbooks under Article 23, the subject matter was clearly set out as including 'short written work, musical work, a single work of the fine arts or photographic work which

⁴⁶⁶ *Jiazhigang vs. Foshan Radio Broadcasting Station* (2014) Dongminchu case no.1501

⁴⁶⁷ *Ibid.*

⁴⁶⁸ The State Council issued an 'Interim Measures for Payment of Remuneration for Broadcasting, Radio and Television Stations Broadcasting Records' in 2009. However, no statutory fees are set for the broadcast of other types of works under the broadcasting statutory license under Article 43.

⁴⁶⁹ *Ibid.*

has been published...’Some have argued that that because the works that are broadcasted cannot directly meet the needs for broadcasting and are usually required to be adapted in a special form for the purpose of dissemination by wireless means.⁴⁷⁰ Therefore, a certain degree of changes and adaptations to the original work should be permitted under the broadcasting statutory license for practical purposes. This view is now widely accepted and has become an industry practice. Nevertheless, such standards shall be formalized and incorporated into concrete provisions under the copyright law to provide further legal certainty.

Moreover, if refers to the wording of Article 43, it can be seen that the provision does not specify the author's right of authorship within the text per se: *‘A radio station or television station that broadcasts and published work created by another person may do without permission from, but shall pay remuneration to, the copyright owner’*. Therefore, whether the court can read the provision extensively and rule in favor of the plaintiff on the basis that the radio station failed to make an acknowledgement of the name of the plaintiff shall remain questionable. It is pointed out that, although Article 43 does not provide for the right of authorship in plain terms, in pursuant to the unity of the copyright law as whole, the statutory license for radio and television stations under Article 43 should be interpreted in line with the similar provisions that are stipulated in the textbooks statutory license under Article 23, which provides that the name of the author and the title of the work shall be mentioned apart from remuneration.⁴⁷¹ Thus, in accordance with the underlying rationale of the overall statutory license regime which is seeking to strike a balance between the interest of copyright owners as well as users, Article 43 shall be interpreted as implying the requirement for the broadcasters to specify the author's name and respect the author's spiritual rights.⁴⁷² This requirement is in fact a condition for the broadcasters to invoke the statutory licensing.⁴⁷³

⁴⁷⁰ Zhou Wenjun, *Application Of Broadcasting Statutory License And The Identification Of The Civil Infringement Liability – Commentary On The Case Of Jia Zhigang V.S Foshan Radio Broadcasting*, (2015), China Copyright, P28-P30.

⁴⁷¹ Article 23: Except where the author declares in advance that use of his work is not permitted, passages from a work, a short written work, musical work, a single work of the fine arts or photographic work which has been published may, without permission from the copyright owner, be compiled in textbooks for the purpose of compiling and publishing textbooks for the nine-year compulsory education and for national education planning, provided that remuneration is paid, the name of the author and the title of the work are mentioned, and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced.

⁴⁷² See Zhou, *Ibid* at note 470.

⁴⁷³ *Ibid*.

Legal uncertainty as to the Broadcasting Statutory License

Another major flow contains in the statutory licensing regime in Chinese copyright law is that there is in lack of legal certainty as to its enforceability due to the 'reservation clauses' that are incorporated into the statutory provisions.⁴⁷⁴

It is noteworthy that besides the broadcasting statutory license under Article 43, and Compulsory educational reproduction license under Article 23, the other types of statutory license set out under Article 33, Article 40 and Article 44 stipulate a proviso -'unless otherwise agreed by the parties'.⁴⁷⁵ This proviso has the effect of allowing the copyright owners to reserve his right that are subject to the statutory license, that is to say, when the copyright owners declares the right to retain, the statutory license will no longer have binding effect upon them.⁴⁷⁶ Some Chinese scholars refer it 'Quasi-Statutory License', or 'Voluntary statutory license', to distinguish it from the traditional statutory license with absolute enforceability.⁴⁷⁷

Some academics argued that the 'quasi-statutory licensing regime' or 'voluntary statutory license' regime underpinned by the reservation clause should neither be categorized as an advantage nor disadvantage of the Chinese copyright law, but a sui generis regime with 'Chinese character'.⁴⁷⁸ For example, Professor Zheng argued that in the case of newspaper publication statutory license⁴⁷⁹, most authors would be willing to disseminate his/her work as wide as possible, and no actual damages would be caused so long as the newspapers were not competing with each other for the same reader group. However, if the author altered his original argument made in his work and wishing to cease the dissemination of his article in public, it is only reasonable for him to do so by granting him the right to declare that 'no further use is permissible'.⁴⁸⁰ However, such interpretation demonstrates a lack of understanding of the fundamental rationales of the statutory licensing regime as whole. Since quasi-statutory license essentially changes the policy purpose of statutory licensing as

⁴⁷⁴ Liu Chunmao, 'Study on Chinese Civil Law – Intellectual Property Law', (1997), People's Public Security University of China Press, Beijing, P201

⁴⁷⁵ See footnote 461 to 465.

⁴⁷⁶ He Ming, Research on the Statutory Licensing Regime of Copyright, (2017), World Book Publishing House, China, P89

⁴⁷⁷ Shen Rengan & Zhong Yingke, Principles of Copyright Law, 2003, Business Publishing House, Beijing, P102.

⁴⁷⁸ Zhang Chengsi, Chinese Intellectual Property Law, features, advantages and disadvantages. (1994), Journal of Graduate School of Chinese Academy of Social Sciences, vol 1, p71.

⁴⁷⁹ Article 23 of Copyright Law 2010, ex Article 22 of Copyright Law 1990.

⁴⁸⁰ Ibid.

a restriction of copyright owners' right of exploitation so as to balance the interests of the copyright owners and the users by way of reducing transaction costs so as to increase the overall social welfare. Instead, it re-establishes the contractual relationship between the copyright owners and the user and replaces the statutory license with a voluntary negotiation in a free market.

Compulsory Licensing Scheme in U.S. Copyright Law

The above discussion shows that the lack of intellectual property theory in China leads to a lack of clarity on the rationales and modalities of the statutory licensing policy. In the United States, this policy has been studied since the United States incorporated statutory licences in its copyright law as early as 1909. Compared to the sham effect of statutory licensing in China, the US statutory licensing system operates as the most basic business model in the relevant market. A detailed analysis of the US statutory licensing scheme in the United States can further reveal the rationales, purpose, and applicability of this policy.

Copyright Limitation Regime

'Copyright is a right given against the copying of defined types of cultural, informational and entertainment productions.'⁴⁸¹ Such proposition is justified by two main streams of theories, i.e. the Continental tradition of natural right, and Anglo – American utilitarian based theories. Natural right based theories asserting that 'each person shall be entitled to the fruits of his labor',⁴⁸² and the utilitarian based theories content that copyright should be deemed as a tool that promotes the development of science and creation of useful arts.⁴⁸³ Regardless of the preferential philosophical justification of copyright chosen by different jurisdictions, it is universally recognized that certain restrictions shall be put in place in particular circumstances. The primary arguments that underpinning the limitation scheme are 'public policy' and 'public interest'.⁴⁸⁴ A typical example of public interest based

⁴⁸¹ Cornish & Others, *Intellectual Property; Patents, Copyright, Trademarks and Allied rights*.(2013, 8th edition, Sweet & Maxwell, London,8)

⁴⁸² J Locke, *Two Treatises of the Government*, In the Former, *The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government*, p116, para24

⁴⁸³ See for example Article 8 of the US Constitution which provides: 'Congress shall have the power to ... promote the progress of science and useful arts, by securing for limited times to authors and inventors their exclusive right to their respective writings and discoveries.'

⁴⁸⁴ S Ricketson & J Ginsburg, *International Copyright And Neighbouring Rights, The Berne Convention And Beyond*, (2006, 2nd ed, Oxford University Press, New York, 757)

restriction is copying for educational purpose.⁴⁸⁵ On the other hand, Copyright's communications policy, as its name suggests, implied the limitations generated by public policy concerns within the communications market.⁴⁸⁶

According to Ginsburg, limitations normally take three formalities: (1) subject matter limitations; (2) use limitations; (3) use limitations requiring compensations.⁴⁸⁷ 'Subject matter limitations' have the effect of excluding certain categories of works from overall protection, such as 'obscene, blasphemous, or immoral works',⁴⁸⁸ or works of legal nature,⁴⁸⁹ 'Use limitations' merely exclude certain 'uses' from infringement, but reserve protection over the work for other uses. For example, use for the purpose of news reporting and educational purposes are not deemed as infringement, but reproducing the same work for commercial purpose may nevertheless be stopped by the copyright owner. Finally, 'use limitations requiring compensation' allows the user to use the work without authorisation of the copyright owner upon a payment of fee, i.e. a compulsory or statutory license.

In fact, some doctrines of copyright can be seen as 'limitations of copyright', but in an implied or build-in way. For example, from the substantive work viewpoint, the idea/expression dichotomy made a clear distinction between ideas and expressions, thus excludes 'ideas' from the pool of copyright protection from the outset.⁴⁹⁰ Moreover, the criteria of originality which laid down the basic degree of labour, skill or judgement required to qualify as a copyright work, has the actual effect of excluding those works that do not meet the threshold of requisite intellectual qualities.⁴⁹¹ Finally, if looking at the nature of the right, the imposition of a fixed duration effectively switching copyright from a common law perpetual right to a statutory right⁴⁹², thus restrains the author from 'locking up' learning perpetually.⁴⁹³

⁴⁸⁵ under Article 10(2) of the Berne Convention.

⁴⁸⁶ Tim Wu, Copyright Communications Policy, (2004) Michigan Law Review, Vol.

⁴⁸⁷ S Ricketson & J Ginsburg, International Copyright And Neighbouring Rights, The Berne Convention And Beyond, (2006, 2nd ed, Oxford University Press, New York, 756-757)

⁴⁸⁸ Glyn v Weston Film Feature [1916] 1 Ch 261

⁴⁸⁹ Article 2(4) Berne Convention.

⁴⁹⁰ Unlike Copyright, the primary purpose of patent is to protect ideas rather than its expression.

⁴⁹¹ L Bently & B Sherman, Intellectual Property Law, (2009, Third edition, Oxford University Press, US, 93)

⁴⁹² P29-32

⁴⁹³ G Davies, Copyright and the Public Interest, (2002, Sweet & Maxwell, London, 32)

Limitation regime is set out in the US Copyright Act 1976 through S107 to S122.⁴⁹⁴ It includes the general fair use defence as well as the compulsory license scheme for covers various type of uses.⁴⁹⁵ The extent to which the copyright statute can impose limitations in specific circumstances differ from jurisdictions. For example, cable retransmission compulsory license was inserted in the U.S. copyright law since 1976, and carries on to be in force until present, but such instrument has never been employed by the EU. The reason may arise from philosophical, economic, social or political background. Therefore, this chapter will attempt to provide an overview of the justifications for the compulsory license from the above mentioned perspectives, and examine the validity of the justifications nowadays. Before discussing compulsory license as a type of specific limitation, it is necessary to have some general understanding as to how copyright evolved in its nature. As will show in the later section, copyright serves as the royal propogative since 1662. However, upon the enactment of the first copyright statute, copyright was recognized as the author's common law property right since then. The common law property right nature largely limited the government involvement from imposing any limitations upon the copyright owners from exercising the right. On the other hand, in the case of *Millar v Taylor*⁴⁹⁶ and *Donaldson v Beckett*⁴⁹⁷, the conception of copyright evolved from a common law property right to a statutory right upon fixed durations. This conceptional change has an important effect by laying down the foundation for the imposition of a limitation regime, and scope of limitation that shall accorded to.

Nature of the Statutory License

Proponents of natural rights justification tend to argue for exclusive control over the works' use, distribution and price, because the natural rights philosophy sets the basis for limiting the power of government upon the individual's right from exercising their private property rights.⁴⁹⁸ On the other hand, proponents of utilitarian justification always advocates for alternative mechanism solely for the purpose of achieving 'optimal compensation', such as the deployment of compulsory licensing system.⁴⁹⁹ Compulsory license is ' involuntary

⁴⁹⁴ US Copyright Code Title 17.

⁴⁹⁵ See detail below.

⁴⁹⁶ *Millar v Taylor* (1769) 4 Burrow 2303 98 E.R. 201 18

⁴⁹⁷ *Donaldson v Becket* (1774) 2 Brown's Parl. Cases (2d ed.) 129, 1 Eng. Rep. 837

⁴⁹⁸ *Ibid*, Lock, *Two Treaties of the Government*. See also J Gaba, John Lock and the meaning of taking clause, *Missouri Law Review*, Vol 7, 550

⁴⁹⁹ *Ibid* note **Error! Bookmark not defined.** Shiffrin,

licensing' imposed by law or legal authority to allow others to use an intellectual property with the owner's consent.⁵⁰⁰ It stands in the middle way between granting full control to the author and denying copyright protection altogether.⁵⁰¹ And its main function, as with all other limitations and exceptions imposed on the right holders, is to serve public interest by way of facilitating public access.⁵⁰² Compulsory license takes two forms: it may be stipulated in law addressing a specific type of activity, for example the cable retransmission compulsory license or the compulsory license imposed in Patent Law regarding certain pharmaceutical products;⁵⁰³ Or, it can serve as an injunctive remedy issued by courts on a case-by-case basis upon the conviction of abusing monopoly power.⁵⁰⁴ Within the first category, i.e. compulsory license that is written in law which has a general application, therein lies another difference: if the license fee stipulated binds the contracting parties, it shall be deemed as a 'Statutory License'⁵⁰⁵; if the law merely provides that the right holder shall be forced to license the rights but leaves the parties with the opportunity to freely negotiate the license fees, it is a 'Compulsory License'. The immediate effects of statutory license is to put three limitations on the contractual freedom of the copyright owner to choose from: (1) the person he may want to contract to, (2) the time he wants to contract, and (3) the price he wants to contract.⁵⁰⁶

Based on the discussion above, it seems logical to conclude that the 'public-benefit' goal underpinning the U.S. copyright law would suggest frequent adoptions of compulsory licenses, but the fact is that U.S. rarely issues compulsory licenses in their litigations compare to the EU. Two broad economic arguments can be made: first, the fair size and the wealth of U.S. market is usually capable of attracting incentives to exploit intellectual property through voluntary transactions.⁵⁰⁷ Second, the U.S. has a strong faith in 'free-

⁵⁰⁰ J Dratler, Licensing Intellectual Property, (2014, Law Journal Press, U.S. 3-22)

⁵⁰¹ R Mergers, Compulsory Licensing v. the Three "Golden Oldies" Property Rights, Contracts, and Markets, (2004), Cato Policy Analysis No. 508

⁵⁰² T Dreier, Regulating Competition By Way Of Copyright Limitations And Exceptions, (2007), edited chapter in P Torremans, Copyright Law, A Handbook Of Contemporary Research, (2007, Edward Elgar Publishing, UK, 235)

⁵⁰³ The Patent (Compulsory License and supplementary certificates) Regulation 2007

⁵⁰⁴ J Tudor, Compulsory Licensing in the European Union. (2008), Geo. Mason J. Int'l Com. Law [Vol. 4:2, 222

⁵⁰⁵ In the text of the Copyright Act 1976, the provision title made clear reference to 'cable statutory license' rather than compulsory license. See S111.

⁵⁰⁶ Study 5-6. The Economic Aspects of the Compulsory License. Copyright Law Revision Studies Prepared For The Subcommittee On Patents, Trademarks, And copyrights Of The Committee On The Judiciary United States Senate Eighty-Sixth Congress, First Session Pursuant To S. Res. 53, p91

⁵⁰⁷ Ibid note 500

market' principle and issues compulsory license only when the necessary competition conditions cannot be satisfied.⁵⁰⁸

Given the fact that copyright law operates as an 'exclusionary right': that is to say it prevents all parties from exploiting the work but does not confer any positive rights to the proprietor to make and sell copies, exploitation of the work will be subjected to other regulatory regimes in question.⁵⁰⁹ A distinction between 'existence' and 'exercise' of intellectual property rights is observed at this point: once intellectual properties enter into the market, transactions of intellectual property rights will immediately come into the jurisdiction of competition or anti-trust rules.⁵¹⁰ Thus it becomes a matter of legal cultures over which different jurisdictions to choose between protecting either the competition interest or the interests of intellectual property right holders.⁵¹¹ The EU experience showed an early sign of perceiving intellectual property rights as barriers to entries in 1989, since then, the ECJ and EC Commission started to value competition interests over the need to avoid free-ridings and induced incentives, notably the application of essential facility doctrine in intellectual property litigations.⁵¹² On the other hand, the U.S. takes a 'dim view' of compulsory licensing based on their 'free market' economic notion.⁵¹³ Therefore the imposition of compulsory license as a form of governmental intervention was heavily disfavoured and 'eschew' by both Congress and the courts.⁵¹⁴

From the competition law perspective, the US anti-trust law sets high threshold for 'market power' than the 'dominant position' in the EU, thus rendering it difficult to establish 'abusive conduct' of right holders.⁵¹⁵ In the EU, several categories of activities can easily attract competition interventions, such as refusal to license, excessive pricing, tying and setting anti-competitive contractual terms.⁵¹⁶ Also the strong lobbying from the

⁵⁰⁸ For example when there is insufficient exploitation of intellectual property rights to meet the market demand of overly high transaction costs. See *ibid* note 500.

⁵⁰⁹ L Bently and B Sherman, *Intellectual Property Law*, (2009, 3rd edition, Oxford University Press, UK, 276)

⁵¹⁰ F Fine, *European Community Compulsory Licensing Policy: Heresy versus Common Sense Symposium on European Competition Law*, (2005), *Northwestern Journal of International Law & Business*, Vol.24, Issue 3, 622

⁵¹¹ V Korah, *The Interface Between Intellectual Property Law And Anti-Trust- The EU Experience* (2001), 69 *Antitrust L.J.* 801, 803

⁵¹² In fact the ECJ touched slightly upon the competition-intellectual property interface in 1970s by creating a juridical doctrine of exhaustion. Nonetheless the underline rationale behind this doctrine is the integration of internal market concerning cross-border transactions only, rather than to solve the conflicts over core principles contained in the two disciplines. See *ibid* 225.

⁵¹³ *Ibid* note 500

⁵¹⁴ *Ibid* note 500

⁵¹⁵ J Tudor, *Compulsory Licensing in the European Union*. (2008), *Geo. Mason J. Int'l Com. Law VOL. 4:2*, 222

⁵¹⁶ *Ibid* note 509, 286-294

pharmaceutical industry has the effect of influencing the patent law making and judicial opinion which favours their exclusive control over the commercial exploitation of the work in the market.⁵¹⁷

Statutory License under US Copyright Law:

The US Copyright Act sets out a series of compulsory licenses that serve the entertainment market.⁵¹⁸ Each of them was adopted as a tool that regulate competition in respective market, including:

- The Mechanical License (S115)
- Digital Audio Retransmission Compulsory License (S114)
- Cable Retransmission Compulsory License (S111)
- Jukebox Compulsory License (S116)(abolished)
- Public Broadcasting Compulsory License (S118)
- Satellite Retransmission of TV Signal (S119)
- Satellite Retransmission of TV Signal into Local Market (S122)

The Mechanical License allows any person to make and distribute phonorecords of non-dramatic musical work without the consent of the copyright owner upon fixed equitable remuneration.

This provision is compatible with Article 13(1) of the Berne Convention which allows member states to impose 'reservation' or 'condition' on the exclusive rights to authors of musical works.⁵¹⁹ Nonetheless, two requirements need to be met to justify the compulsory license of this sort: (1) the author of the underlying musical work must have firstly authorized an early recording and distribution of the work;(2) the author must receive equitable remuneration;⁵²⁰

⁵¹⁷ Ibid

⁵¹⁸ T Wu, Copyright Communications Policy,(2004) Michigan Law Review, Vol. 103, p. 278, November 2004

⁵¹⁹ Article 13 : Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorised by the latter, to authorise the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

⁵²⁰ Chapter V Mechanical License, (1985-1986)10 Colum.-VLA J.L. & Arts 543

Public Broadcasting Compulsory License allows non-commercial broadcasting entities to (1) perform and display nondramatic musical works and published pictorial, graphic, and sculptural works in their program and (2) produce and reproduce the program and copies or phonorecords of the program.

It has been pointed out that the former part of this provision regarding the performing rights is compatible with the Berne Convention, but the latter part concerning reproduction rights remained arguable.⁵²¹ Firstly, the basic rights in the question is the authors (of literary and artistic works) exclusive right over public performance by broadcasting granted under Article 11 bis which provides: 'Authors...shall enjoy the exclusive right of authorizing: ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work...' And Article 11 bis (2) granted discretions to member states 'to determine the conditions under which the rights...may be exercised...they shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.'

However, this discretionary provision contained in Berne Convention does not cover reproduction rights, moreover, Article 11 bis (3) explicitly excludes the act of 'record' from its application by saying that permission in this article 'shall not imply permission to record...the work broadcast'. Normally limitations imposed on the reproduction right may find its way out from the 'fair use' exception under Article 9(2) which allows unauthorised reproduction in cases where it 'does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.' However, the broader limitation set by the Berne convention is that the use of the mechanism of compulsory license is only justified in circumstances permitted by the convention itself as listed in Article 10 and Article 10 bis, and the convention does not allow any form of compulsory licensing of reproduction right exception in the mechanical license.⁵²² Therefore the Public broadcasting license is in contradiction to the relevant provisions contained in the Berne Convention provisions.

⁵²¹ Chapter VIII, Public Broadcasting Compulsory License, (1985-1986), 10 Colum.-VLA J.L. & Arts 561

⁵²² Ibid,563

Jukebox Compulsory License allows jukebox operators to perform musical works in public without the consent of the author upon fixed equitable remuneration.

The basic right concerning this type of compulsory license is the authors right of public performance under Article 11(1)(i) of the Berne Convention: 'Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising: (i) the public performance of their works, including such public performance by any means or process; However, unlike the public broadcasting compulsory license which finds its justification in the article gives rise to the broadcasting right itself, no such sanction was made to the public performance right in the text of Article 11(1). Therefore it can be assumed that the imposition of compulsory license over these exclusive rights is not permissible.⁵²³ There are other arguments made by scholars intending to justify the jukebox compulsory licenses.⁵²⁴ However it seems that these arguments can hardly provide convincing explanations to rebut the conflict with the Berne Convention. Therefore, the jukebox statutory license ended by the Berne Convention Implementation Act 1988. Thus, copyright owners and jukebox operators can negotiate voluntary agreements provided that the parties can voluntarily agree on a rate.⁵²⁵ Otherwise the Copyright Royalty Tribunal will step in and reinstitute a compulsory arrangement

Cable Retransmission Compulsory License allows cable operators to retransmit over-the-air broadcasts signals without the consent of the original broadcaster upon fixed equitable remuneration.

The underlying right governed by the cable retransmission compulsory license is the authors' right of authorizing 'communication to the public by wire or rebroadcasting or the work by an organization other than the original one' under Article 11bis (1)(ii) of the Berne Convention. Compulsory licensing of such right is permitted under Article 11 bis (2) upon

⁵²³ W. Wallace, *The New U.S. Copyright Law and Compatibility with the Berne Convention* (1997), 14

⁵²⁴ For example, they are the compulsory license should be regarded as 'minor reservation' of the right which does not require specific authorization in the relevant Berne provision; they also argued that this type of compulsory license should be interpreted from an 'anti-monopoly' utility relying on the price setting practice of collecting society. See Chapter III, *Jukebox Compulsory License*, 10 *Colum.-VLA J.L. & Arts* 533 1985-1986

⁵²⁵ Hatch, Orrin G. "Better Late an Never: Implementation of the 1886 Berne Convention," (1989) *Cornell International Law Journal*: Vol. 22: Iss. 2, Article 1. P191

the requirements of securing moral rights and fixed equitable remuneration of the author.⁵²⁶

Satellite Retransmission Compulsory License allows satellite operators to retransmit broadcast signals or cable broadcasts without their consent upon fixed equitable remuneration, however the retransmission to local markets is royalty free upon the must-carry condition.

The basis right concerning satellite retransmission is the same as of cable license, which is the authors' right to authorizing 'communication to the public by wire or rebroadcasting by an organization other than the original one' under Article 11 bis (1) (ii). The technology neutral requirement manifested by the phrase 'by wire or rebroadcasting' encompasses both cable retransmission (by wire) and satellite retransmission (rebroadcasting) activities. Thus this compulsory license is permitted under Article 11 bis (2)⁵²⁷.

Mechanical Reproduction Compulsory License

Cable compulsory license was introduced in 1976. Prior to the 1976 Act, there was only one compulsory license governing the competition between sheet music and piano rolls over musical composition, i.e. the mechanical reproduction compulsory license. The discussion of the first compulsory license will provide a general understanding as to how and why the compulsory license mechanism was initially introduced into the copyright regime. Although each compulsory license contained in the Copyright Act 1976 was created with regards to different distributive activities concerning different types of works, they somehow follow a similar pattern of breaking transaction bottleneck caused by high transaction costs. The analysis of mechanical reproduction license will demonstrate that due to the monopolistic nature of copyright, the recognition of new right driven by the distribution technology development may render the copyright owner to dominate the entire market. With this concern, the legislators would reach a compromise by imposing a compulsory license to break the transaction bottleneck.

⁵²⁶ Article 11 bis (2): It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration, which, in the absence of agreement, shall be fixed by competent authority.

⁵²⁷ Ibid.

In 1909, the first compulsory license in the history of US copyright law was introduced under section 1(e) of the 1909 Copyright Act, together with the first recognition of right of sound recording. S1(e) reads as:

“to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it maybe read or reproduced: Provided, That the provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1,1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights: And provided further, and as a condition of extending the copyright control to such mechanical reproductions, That whenever the owner of musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof”

It can be seen that the definition of the reproduction right in the 1909 Act abolished the criteria adopted in White-Smith that ‘These musical tones which reaches through the sense of hearing can not be said to be copies’⁵²⁸. Thus, recording of ‘melody’, even which cannot be read by naked eyes, also constituted copies in the context of the 1909 Act. Also, the latter part of S2(e) which introduced the mechanical reproduction compulsory license, can be explained in plain language that it allows anyone to make a sound recording of a nondramatic musical composition without the consent of the copyright owner of the musical work, provided that the phonorecord of the musical work have been distributed to the public under the authorization of the copyright owner. This compulsory license was introduced as a condition of extending the copyright control to mechanical reproductions, i.e. the recognition of the right in sound recordings extended from the original copyright of

⁵²⁸ See below.

musical composition.⁵²⁹ Both the recognition of the mechanical reproduction right and the compulsory license was introduced to overturn the Supreme Court decision in *White-Smith Music Publishing Co. v. Apollo Co.*⁵³⁰ of which the court rejected the argument that piano rolls were 'copies' of the sheet music, thus did not infringe the copyright in the musical composition.

In *White-Smith*, the defendant was the manufacturer of player pianos and piano rolls, the plaintiff was the assignee of the composer which produces sheet music that embodies the musical composition. The play piano industry grown dramatically since late 1800s to early 1900s, and had become a major way to distribute musical composition.⁵³¹ The basis of the plaintiff's claim was the copyright conferred to the owners of musical composition since 1831 which giving to the 'author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same'.⁵³² Although the Court recognised that piano roll 'is one of very considerable importance that involving large property interests and closely touching the rights of composers and music publishers,' it nevertheless follow the line of the precedent decisions and held that piano rolls were part of the machine but not 'copies' of the sheet music because it cannot be read by 'eyes'.⁵³³ These musical tones which reach through the sense of hearing can not be said to be copies.⁵³⁴ The rationale of the decision was expressed by the court by reference to the purpose of the copyright statute was to protect the composer against the publication and duplication of the 'tangible thing', rather than to protect of the 'intellectual conception apart from the thing produced'.⁵³⁵

Given the exclusive nature of copyright itself, recognising the mechanical reproduction right may give rise to monopoly of a particular company that acquire the right from the majority of music publishers and dominate the entire music market. In fact that was the purpose of

⁵²⁹ S1(e) 1909 Act.

⁵³⁰ *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1(1908),

⁵³¹ 'The record discloses that, in the year 1902, from seventy to seventy-five thousands of such instruments were in use in the United States, and that from one million to one million and a half of such perforated musical rolls, to be more fully described hereafter, were made in this country in that year.' *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1(1908), p9

⁵³² Musical composition was added into the list of copyright subject matter in 1831. S1.

⁵³³ *Kennedy v McTammany*, 33F 584 ;*Stern v Rosey* 17 App D.C. 562,*White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1(1908), p19

⁵³⁴ *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1(1908), p19

⁵³⁵ *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1(1908), p17,19

the dominant piano roll manufacture Aeolian.Co that financed the music publisher to petition for the recording right in sound recording. At the time of the litigation, Aeolian had been assigned with exclusive rights to manufacture piano rolls of the musical composition from eighty-seven members of the music publishers' association controlling 381,598 compositions.⁵³⁶ The recognition of the mechanical reproduction right would enable the exclusive agreement between music publishers and Aeolian to block small piano roll manufacturers from accessing to the content of musical compositions.

Thus Congress, at the same time, was discussing the proposed amendments to the reproduction right regarding recording and mechanical reproduction given the particular concern of this issue.⁵³⁷ In fact, a bill has had been introduced to the 59th Congress in 1906 proposing the expansion of the reproduction right to include both recording and mechanical reproduction right,⁵³⁸ the representative of New York player piano manufacturers raised the concern that the recognition of the recording and mechanical reproduction right would give monopoly to one company. However, no agreement was reached in the 59th Congress due to dissenting votes. One year later, another two bills were introduced in the 60th Congress in 1907 which provided that the exclusive right in a musical composition to include the right:

‘to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.’⁵³⁹

At the meantime, the White-Smith case went into the Supreme Court, and Congress pended the session of the above discussion till the supreme court issued decision over this issue.⁵⁴⁰ However, since the Supreme Court eventually rejected the broader interpretation of the

⁵³⁶ 11 Russell Sanjek, *American Popular Music And Its Business-The First Four Hundred Years-From 1790 To 1909* 380-83 (1988). Referred by H B Abrams, *Copyright's First Compulsory License*, (2006), 26 Santa Clara Computer & High Tech. L.J. 215,fn10.

⁵³⁷ Harry G. Henn, *The Compulsory License Provisions Of The U.S. Copyright Law*, Copyright Law Revision, Senate Comm. On The Judiciary, 86th Cong., 1st Sess., Studies Prepared For The Subcomm. On Patents, Trademarks, And Copyrights Of The Comm. On The Judiciary.

⁵³⁸ (g) to make, sell, distribute, or let for hire any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any work published and copyrighted after this Act shall have gone into effect, or by means of any such device or appliance publicly to reproduce to the ear the whole or any material part of such work. *Ibid* P3

⁵³⁹ p4

⁵⁴⁰ p4

reproduction right to include recording and mechanical reproduction right, the session resumed in 1908.⁵⁴¹

When the matter came in 1908, Congress eventually reached the agreement that the reproduction right shall include mechanical reproduction, the problem remained between granting an absolute and qualified exclusive right of mechanical reproduction, or limiting the exclusiveness of the right by compulsory license.⁵⁴² The rationale for the introduction of compulsory license again was closely connected with the anti-trust concern that one company would potentially dominate the entire music market and create 'further burden on the music loving people of the country'.⁵⁴³

The first concrete compulsory licensing provision was introduced in a bill in May 1908,⁵⁴⁴ together with seven subsequent bills amending the wording of the provision as well as the royalty rate accorded to the license,⁵⁴⁵ the proposal was successfully settled down in the H.R 28192 bill eventually, which expanded the reproduction right to include the recording and mechanical reproduction right, and imposed an compulsory license on the copyright owner upon a payment of 'two cents' royalty per part manufactured, as incorporated into S1(e) and of the 1909 Act.⁵⁴⁶

One issue that was constantly raised during Congressional sessions was that whether it was unconstitutional to impose compulsory license that limited copyright owners from freely exercising their exclusive right.⁵⁴⁷ Although this issue appeared throughout Congressional discussion of subsequent bills, it was never litigated.⁵⁴⁸ The reason as to why this issue was

⁵⁴¹ P4

⁵⁴² P4

⁵⁴³ P5

⁵⁴⁴ '...And provided further, That whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty equal to the royalty agreed to be paid by the licensee paying the lowest rate of royalty for instruments of the same class, and if no license has been granted then per centum of the gross sum received by such person for the manufacture, use, or sale of such parts, and in all cases the highest price in a series of transactions shall be adopted.' H.R. 21592, 60th Cong., 1st sess. (1908).

⁵⁴⁵ H.R. 21984, 60th Cong., 1st sess. (1908). H.R.22071 60th Cong., 1st sess. (1908); H.R.22138 60th Cong., 1st sess. (1908) H.R 24782 60th Cong., 1st sess. (1908), H.R 25162 60th Cong., 1st sess. (1908), H.R 27310, H.R 28192 60th Cong., 1st sess. (1908).

⁵⁴⁶ Ibid

⁵⁴⁷ Harry G. Henn, The Compulsory License Provisions Of The U.S. Copyright Law, Copyright Law Revision, Senate Comm. On The Judiciary, 86th Cong., 1st Sess., Studies Prepared For The Subcomm. On Patents, Trademarks, And Copyrights Of The Comm. On The Judiciary. P4,19

⁵⁴⁸ Harry G. Henn, The Compulsory License Provisions Of The U.S. Copyright Law, Copyright Law Revision, Senate Comm. On The Judiciary, 86th Cong., 1st Sess., Studies Prepared For The Subcomm. On Patents, Trademarks, And Copyrights Of The Comm. On The Judiciary. P4,19

never raised by litigation as a political issue is that, if the court held that compulsory licensing provisions contained in the copyright act was unconstitutional, the whole act would have to fall, given that the act itself was 'artfully drawn'. Moreover, manufacturers of the mechanical instrument possesses the power of boycott.⁵⁴⁹

Some have argued that although compulsory license was put in place to limit the right owners from controlling the recording and mechanical reproduction of the work, the right itself remained 'exclusive' until the owner exercised the right and activated the compulsory license.⁵⁵⁰ Thus, the mere constitutional phrase of 'exclusive right' should not preclude Congress from subjecting it to compulsory licensing since the principle was not incorporated in the statute to impair existing rights.⁵⁵¹ Instead, the term exclusive right implied authority, rather than limitation on Congress's power to legislate in this regard.⁵⁵² The wording of the constitution provision granted Congress with power either to grant complete exclusivity or provide no protection at all, and compulsory license can be seen as a reasonable middle ground.⁵⁵³ In addition, there is no deprivation of the 'private property right' nature of the exclusive right given that just compensation was secured by the statute.⁵⁵⁴

Congress eventually confirmed the constitutionality of the compulsory license and codified it in S1(e) in the 1909 Act. The rationale was given by Congress with reference to the Supreme Court decision in *Wheaton & Donaldson v. Peters & Griggs*⁵⁵⁵; the recording and

⁵⁴⁹ "Unquestionably this act was so artfully drawn, that if an attack was made upon the compulsory provisions of the act and the court declared them unconstitutional, the whole act would have to fall that would have left the authors in the same plight they were in from 1888 to July 1909...Another reason for the failure to make any attack upon the constitutionality of this proposition was the power of boycott that these reproducer of mechanical instruments possessed."⁵⁴⁹ Harry G. Henn, *The Compulsory License Provisions Of The U.S. Copyright Law*, Copyright Law Revision, Senate Comm. On The Judiciary, 86th Cong., 1st Sess., Studies Prepared For The Subcomm. On Patents, Trademarks, And Copyrights Of The Comm. On The Judiciary.p21

⁵⁵⁰ Harry G. Henn, *The Compulsory License Provisions Of The U.S. Copyright Law*, Copyright Law Revision, Senate Comm. On The Judiciary, 86th Cong., 1st Sess., Studies Prepared For The Subcomm. On Patents, Trademarks, And Copyrights Of The Comm. On The Judiciary. P19

⁵⁵¹ R Cassler, *Copyright Compulsory Licenses- Are They Coming Or Going?* (1989-1990), 37 J Copyright Soc'y U.S.A.231,P237

⁵⁵² R Cassler, *Copyright Compulsory Licenses- Are They Coming Or Going?* (1989-1990), 37 J Copyright Soc'y U.S.A.231,P237

⁵⁵³ i.e. 'Congress shall have Power ... to promote the progress of science and useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'

⁵⁵⁴ Harry G. Henn, *The Compulsory License Provisions Of The U.S. Copyright Law*, Copyright Law Revision, Senate Comm. On The Judiciary, 86th Cong., 1st Sess., Studies Prepared For The Subcomm. On Patents, Trademarks, And Copyrights Of The Comm. On The Judiciary. P53

⁵⁵⁵ 'This right, as has been shown, does not exist at common law; it originated, if at all, under the acts of Congress. No one can deny that when the legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law...'

mechanical reproduction right did not exist in common law, it was created by Congress, thus allowing Congress to impose conditions thereupon:

‘It is true that Congress could not legislate a man's existing rights out of existence, for thereby it would impair the obligation of a contract; but in this case Congress is creating a new property right, and in creating new rights Congress has the power to annex to them such conditions as it deems wise and expedient.’⁵⁵⁶

Jukebox Compulsory License in 1976 Act

After nearly seventy years since the creation of the mechanical reproduction compulsory licence in the music industry, three new compulsory licenses were introduced in the 1976 Act covering cable, broadcasting and jukebox: (1) cable retransmission compulsory license, (2) jukebox public performance compulsory license and (3) non-commercial public broadcasting compulsory license. Given that the primary policy consideration for introducing the public broadcasting compulsory license was the public interest served by public broadcasting stations, such as the carriage of non-commercial public service and educational programming mandated by Congress, which was less concerned with the competition among different industries apart from commercial broadcasters, it would not be discussed in detail in this paper.⁵⁵⁷

The introduction of the jukebox compulsory license followed the logic of the establishment of the mechanical reproduction compulsory license in 1909 Act, i.e. to expand the exclusive right to encompass new methods of distribution, and to impose the compulsory license as a limitation to mediate the anti-trust concern. Also, the jukebox compulsory license was addressed to the same type of copyrighted work as of the mechanical reproduction license, i.e. musical composition, but addressed a different type of use, i.e. composer's right of public performance established in 1856.⁵⁵⁸

⁵⁵⁶ The House Report 1 on the Copyright Act of 1909 To Amend And Consolidate The Acts Respecting Copyright. February, 1909.

⁵⁵⁷ See detailed discussion of the Public Broadcasting Compulsory License in E Smith, The new copyright law, public broadcasting, and the public interest: a response to “public broadcasting and the Compulsory License”(1981), 3 CommEnt L.S. 33 1980-1981

⁵⁵⁸ Bracha, O. (2008) ‘Commentary on the U.S. Copyright Act Amendment 1856’, in Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, available at: www.copyrighthistory.org, accessed in February 2019.

⁵⁵⁸ Ibid.

Recall to S1(e) of the 1909 Act which expanded the definition of reproduction right to include mechanical reproduction, but explicitly exempted jukebox from the scope of right of public performance at the same time:

‘The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.’”

The language of the provision has the effect of limiting the right owner’s control of the public performance of their work to profit only. For example, admission fees were charged for performances in theatres whereas the performance of the work in places such as pubs or restaurants were free from incurring any copyright liability. According to the House Report 1909, composers and copyright proprietors of the musical composition were ‘satisfied’ with this arrangement since they saw public performance in places where no admission fees were charged could be ‘first assistance advertising medium’.⁵⁵⁹

However, the situation changed when jukebox industry started to grow since 1930s, and as a result, copyright owners loss significant amount of income during that period.⁵⁶⁰ The issue of jukebox copyright liability was brought to Congress since 1947, and was carefully reviewed by the House Judiciary Committee in 1963.⁵⁶¹ In the report submitted by the Committee proposed the removal of the jukebox exemption.⁵⁶²

The view of the Judicial Committee was that the little economic importance of the jukebox public performance had become tremendous at the time of 1970s, and it was inequitable to continue maintaining the jukebox exception to the detriment of copyright owners since the performances made by jukeboxes are certainly ‘in public’ and ‘for profit’ given that the

⁵⁵⁹ ‘The exception regarding the public performance of a musical composition upon coin-operated machines in a place where an admission fee is not charged is understood to be satisfactory to the composers and proprietors of musical copyrights. A representative of one of the largest musical publishing houses in the country stated that the publisher finds the so-called "penny parlor" of first assistance as an advertising medium.’ The House Report 1 on the Copyright Act of 1909 To Amend And Consolidate The Acts Respecting Copyright. February, 1909.--Committed To The Committee Of The Whole House On The State Of The Union And Ordered To Beprinted.

⁵⁶⁰ ⁵⁶⁰ in 1933 there were 20,000 to 25,000 jukebox in American, the number increased to 300,000 by the end of 1930s. K Segrave, Jukeboxes, An American Social History, (2002, McFarland, US,1) E Mooney, The Jukebox Exemption, (1958), 10 Copyright L. Symp. 194, 204.

⁵⁶¹ Supplementary Register’s Report on the General Revision of the U.S. Copyright Law (1965) (89th Congress, 1st Session)

⁵⁶² The proprietor of an establishment in which a copyrighted nondramatic musical work is performed publicly by means of a coin-operated machine is not an infringer unless:

(1) alone or jointly with others he owns the machine or has the power to exercise primary control over it; or
(2) he refuses or fails, promptly after receipt by registered or certified mail of a request by the copyright owner, to make full disclosure of the identity of the person who owns the machine or has power to exercise primary control over it.

underlying business carried by the jukebox industry.⁵⁶³ Thus, the right of public performance should be interpreted broadly so as to prevent free-riding.⁵⁶⁴ Since then, the composers and the representatives of the jukebox industry were urged in the House hearings to reach a compromise regarding the royalties that had to be paid.⁵⁶⁵ An agreement was eventually reached on 1967, whereby both parties agreed on the rate of eight dollars per jukebox paid to and distributed by the Copyright Office.⁵⁶⁶ Thus, the dispute between copyright owners and the jukebox industry over S116 eventually ended, which provided that performance of coin-operated phonorecord player infringed copyright owners' right of public performance under S106(4), and unless a compulsory license was acquired following the application procedure set out in S116(b), a royalty fee of '\$8 per phonorecord player' was to be paid to the Register of Copyright.⁵⁶⁷

Cable Retransmission License - Justification

Justifications for compulsory license may be categorised into four groups: legal, philosophical, economic and political.⁵⁶⁸ Discussions of legal justifications focus on the constitutional question of whether the legislature is granted with power to enact laws that limit the private property right.⁵⁶⁹ Philosophical discussion originates from the philosophical justification of copyright itself, i.e. whether it is a natural right that grants absolute control of the work to the creators, which shall not subject to government intervention.⁵⁷⁰ Economic discussion analysis whether the compulsory license has in fact promotes economic efficiency in competition for the overall economy.⁵⁷¹ Finally the political discussion seeks to illustrate the political impact on the establishment of the compulsory licensing mechanism, for example, whether it is the result of industry lobbying or the intention of the government to ease the expansion of copyright populism.⁵⁷² Based on the fact the central issue concerning with both the legal and philosophical discussion is indeed the nature of copyright, the following discussion will combine the two part of analysis under

⁵⁶³ Supplementary Register's Report on the General Revision of the U.S. Copyright Law (1965) (89th Congress, 1st Session)

⁵⁶⁴ Supplementary Register's Report on the General Revision of the U.S. Copyright Law (1965) (89th Congress, 1st Session)

⁵⁶⁵ J. D. Litman, Copyright, Compromise and Legislative History, (1987) Cornell L. Rev. 72 857-904, 873-874

⁵⁶⁶ J. D. Litman, Copyright, Compromise and Legislative History, (1987) Cornell L. Rev. 72 857-904, 873-874

⁵⁶⁷ § 116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players

⁵⁶⁸ R. Cassler, Copyright Compulsory Licenses- Are They Coming Or Going? (1990), 37 J Copyright Soc'y U.S.A. 231

⁵⁶⁹ Ibid p237-241

⁵⁷⁰ Ibid p241-249

⁵⁷¹ Ibid p249-255

⁵⁷² Ibid p255-261

the same title, and divide into three main sections: legal and philosophical justification, economic justification and Political justification.

Legal and Philosophical Justification

The controversial debate over the constitutionality of compulsory licensing began with the creation of the first mechanical compulsory license in the US Copyright Act 1909; however, this issue had never been litigated. As mentioned above, section 8 of the US constitution empowers Congress to ‘... promote the progress of science and useful arts, by securing for limited times to authors and inventors their exclusive right to their respective writings and discoveries.’ At first glance, the only limitation that Congress could impose by legislation is the ‘duration’ of the right, however, the utilitarian rationale of copyright law in the U.S. further suggests an overall ‘regulated, and regulatory concept of copyright’, which targets at the basic exclusivity nature of the right itself.⁵⁷³ There are two dominated views of interpreting this constitutional clause: first, Congress can grant any rights up to an exclusive rights, but does not necessarily include exclusive rights; second, any rights granted by virtue of this clause must be exclusive.⁵⁷⁴ The use of compulsory license poses a question of choosing one or the other since it in fact replaces this exclusive right with a right of remuneration upon governmental fixed royalty fee.⁵⁷⁵ Copyright holders are strong proponents of the second contention, on the other hand, Congress, courts, and copyright users tend to push the limitation on the monopoly control by the copyright holder by relying on the first contention. In fact, the two interpretations have their roots derived from to the utilitarian and natural rights justification of copyright itself. Therefore, if a compulsory license is to be held constitutional on the basis of the first contention, a strong utilitarian argument of the copyright rationale needs to be stressed.

In reality, it is the approach taken by both the courts and legislature when they seek to confer legitimacy of the compulsory licensing in their interpretation. Despite the strong contention from the authors and composers asserting their ‘absolute right of control’ of

⁵⁷³ L Patterson, *Understanding Fair Use*, (1992), 55 *Law & Contemp. Probs.* 249

⁵⁷⁴ B Schaffer, *Are Compulsory License Provisions Of The Copyright Law Unconstitutional?* (1980), *Communication Law Review*, Vol.2, 3

⁵⁷⁵ S Diamond, *The Compulsory License And The Copyright Royalty Tribunal*. (1978), 6 *APLA Q. J.* 46

their works in the joint hearings,⁵⁷⁶ the US Congress established the first mechanical compulsory license in the Copyright Act 1909 by reference to a resolute utilitarian rationale and claiming that copyright is a right 'created' by Congress since it does not exist in Common Law, rather, it originated under the Act of Congress, and Congress can impose limitations on this right:

'This right, as has been shown, does not exist at common law; it originated, if at all, under the acts of Congress. No one can deny that when the legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law.'⁵⁷⁷

Consequently, copyright is seen as a 'statutory right' based on the utilitarian justification rather than a 'constitutional right' on the basis of natural rights justification, such conclusion was explicitly recognised by Congress:

'The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of

⁵⁷⁶ To Amend the Copyright Act : joint hearings before the Committee on Patents, Congress of the United States, sixty-ninth Congress, first session on S. 2328 and H.R. 10353, bills to amend section 1 of an act entitled "An act to amend and consolidate the acts respecting copyright," approved March 4, 1909, as amended by adding subsection.

⁵⁷⁷The House Report 1 On The Copyright Act Of 1909 to amend and consolidate the acts respecting copyright. February 1909. MR CURRIER, From The Committee On Patents, Submitted The Following REPORT. [To Accompany H.R. 28192] Henry Wheaton And Robert Donaldson V Richard Peters And John Grigg 33 U.S. (8 Pet.) 591, 8 L. Ed. 1055 357. See also In the case of Fox Film Corp. V. Doyal, 286 U.S. 123 et al. No. 118 the court stated that : '...But the copyright is the creature of the federal statute passed in the exercise of the power vested in Congress. As this Court has repeatedly said, Congress did not sanction an existing right, but created a new one.'

people, in that it will stimulate writing and invention, to give some bonus to authors and inventors.⁵⁷⁸

Therefore the imposition of compulsory license is constitutional:

‘A suggestion has been made that a compulsory license in copyright legislation would be unconstitutional. The great weight of opinion, however, is the other way, It is true that Congress could not legislate a man's existing rights out of existence, for thereby it would impair the obligation of a contract; but in this case Congress is creating a new property right, and in creating new rights Congress has the power to annex to them such conditions as it deems wise and expedient.’⁵⁷⁹

Since the recognition of first mechanical compulsory license in 1909 established the constitutional validity of compulsory licensing regime as whole, subsequent enactments of compulsory license in the 1976 Copyright Act incurred fewer controversies.⁵⁸⁰ However, a constant requirement is imposed by the constitution itself which requires Congress to ensure any new law it enacts can effectively ‘promote the development of scientific and useful arts’. In assessing the legal effect of the law, either in the form of new rights created, or limitations imposed on existing rights, Congress needs to consider two questions: the benefit it will create to the public, and the detriment incurred by the public if monopoly is granted, then enacted the law that ‘confers a benefit upon the public that outweighs the evils of the temporary monopoly’.⁵⁸¹ Therefore, all new compulsory license need to be proven to serve the constitutional goal of ‘promote the development of scientific and useful arts’. Analysis of the compulsory license from an economic prospect can be used as a measure to determine whether the compulsory license in question is justified in a way of promoting useful arts.

Economic Justification

The concept of ‘transaction costs’ is central to the economic welfare of a capitalist society in which ordinary economic life is carried out through market transactions.⁵⁸² It was set forth

⁵⁷⁸ Ibid

⁵⁷⁹ Ibid,

⁵⁸⁰ B Schaffer, Are Compulsory License Provisions Of The Copyright Law Unconstitutional? (1980), Communication Law Review, Vol.2, 16

⁵⁸¹ Ibid **Error! Bookmark not defined.** House Report,

⁵⁸² J Krier and W Montgomery, Resource Allocation, Information Cost And The Form Of Government Intervention, (1973) 13 Nat. Resources J. 89

as the main economic justification for establishing the cable retransmission compulsory license in the House Report 1976:

In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.⁵⁸³

The reason why the issue of transaction costs was of particular concern for the cable industry at the time of the 1976 revision was that cable industry was a newly emerged industry came in 1950s.⁵⁸⁴ Copyright created bottleneck in the cable distribution market. Compulsory license was thus put in place seeking to correct 'market failure' caused by the high transaction costs.⁵⁸⁵ Therefore the cable industry representative argued for the compulsory license in the 1976 testimony by characterizing itself as a 'voraciously capital intensive business' in its formative stages, thus in need of financial support in the form of subsidy.⁵⁸⁶ On the other hand, the satellite compulsory license was called for by the newly emerged satellite industry in the 1980s so as to ensure it to grow to be an strong competitor against matured cable industry.⁵⁸⁷ Congress's view was that the marketplace for satellite industry was not sufficed and needed a 'temporary, transitional statutory license to bridge the gap until the marketplace can function effectively'.⁵⁸⁸

The question then becomes whether the compulsory license can in fact reduce transaction costs. Basically, transaction costs includes three broad categories of costs: information costs; contracting costs and policing costs.⁵⁸⁹ Information costs are costs incurred during the communication and exchange of useful information process, contracting costs includes

⁵⁸³ Copyright Law Revision: H.Rept. 94-1476 on S. 22. 94th Cong., 2d Sess., 1976, p89

⁵⁸⁴ It did not become a popular TV broadcasting medium until 1980s. Patrick Parsons, Blue skies: A History of Cable Television, (2008, Temple University Press, USA. 8)

⁵⁸⁵ R Merges, Compulsory License V. The Three 'Golden Oldies', (2004), Policy Analysis, No.508

⁵⁸⁶ R Cassler, Copyright Compulsory Licenses- Are They Coming Or Going? (1989-1990), 37 J Copyright Soc'y U.S.A.246

⁵⁸⁷ Cable and Satellite Carrier Compulsory Licenses: Hearing on H.R. 759 and H.R. 1103 Before the Subcomm. On Intellectual Property and Judicial Administration, 103d Cong., 1st Sess. 18-19 (1993) (statement of Ralph Oman, Register of Copyrights, Copyright Office).

⁵⁸⁸ H.R. Rep. No. 887, Part 2, 100th Cong., 2d Sess. 15 (1988), this view is supported by copyright owners. Hearings on H.R. 2848 before the sub 100th cong, 2d sess 50 (1988)

⁵⁸⁹ Ibid, p95

costs associated with negotiating and drafting a contract, policing costs are costs incurred by enforcing and monitoring the resulting agreement.⁵⁹⁰ The 'transaction costs' incurred in the daily cable business is briefed by the national cable industry association in the 1997

Copyright Law review:

'Every cable system in the United States would be forced to anticipate the programming that would be shown, identify the appropriate owner of the copyrighted works, negotiate for the rights to retransmit those works, and acquire the personnel and equipment to black out programming for which rights could not be obtained...'⁵⁹¹

Thus, it seems that compulsory license saved these costs by designating collective societies as the sole agency to deal with cable operator. However, the costs saved are in the short run.⁵⁹² If looking at the broad picture of long-term economic efficiency, transaction costs becomes only one factor to be considered, other criterions such as the issue of externality and competition substitution also need to be assessed.⁵⁹³ The basic line for passing the test of economic efficiency is that: Firstly, it needs to adequately substitute competition, and secondly, it needs to provide both the least expensive control of externalities and transaction costs.⁵⁹⁴

From a jurisprudential perspective, the final resolution found in copyright law is the combination of two institutional arrangements: the assignment of the initial entitlement, i.e. the granting of the right of public performance to the program suppliers, and the measures chosen to enforce the entitlement, the imposition of the statutory licenses.⁵⁹⁵ When Congress decided to expand the copyright owner's right of public performance to control the activity of cable retransmission, it assigned a property right as a new form of entitlement to the copyright owners accumulated to other exclusive rights conferred by the statute; meanwhile, the introduction of the statutory license is a typical example where

⁵⁹⁰Ibid. See also R Lee, An Economic Analysis Of Compulsory Licensing In Copyright Law, (1982), Western New England Law Review, vol 5:203, 214

⁵⁹¹ A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals U. S. Copyright Office August 1, 1997 Report of the Register of Copyrights, p16

⁵⁹² Ibid note **Error! Bookmark not defined.**

⁵⁹³ Ibid note **Error! Bookmark not defined.**

⁵⁹⁴Ibid note **Error! Bookmark not defined.**

⁵⁹⁵ G Calabresi & D Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, (1972), Harvard Law Review, Volume 85, No 6.

Congress chose to impose a liability rule rather than a property rule to protect such an entitlement.⁵⁹⁶ This section will attempt to provide an analysis of the rationales for the two institutional arrangements from an economic perspective.

Prior to the 1976 amendment, copyright owners were unable to control cables' retransmission activity through copyrighting. Instead, the FCC issued several regulations, governing the operational function of the cable systems, such as the number of distant signals that could be imported, or the type of program that could be retransmitted etc. However, Congress decided to settle the issue under copyright law by granting program suppliers the right of public performance to control such activity. This is a typical example of 'the problem of 'entitlement' as referred by Calabresi: 'Whenever a state is presented with the conflicting interests of two or more people, it must decide which side to favour. Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail.'⁵⁹⁷ Therefore the issue in question should be why Congress decided to favour the program suppliers rather than the cable operators and why the copyright law entitled the program suppliers to prevail. Although the broad philosophical justifications that support the discipline of intellectual property as a whole may approach this issue from a 'fairness' basis,⁵⁹⁸ the assignment of the entitlement however has a far reaching implication as an 'institution' within the economic context.

In view of the new institutional economics, 'institutions' are the rules of the game in a society, or more formally, the humanly devised constraints that shape human interaction. In consequence, they structure incentives in human exchange, whether political, social, or economic.⁵⁹⁹ Property as an institution is founded on a 'pluralist' conceptual basis concerning philosophical, social, moral and economic theories, thus defining it has proven to be difficult task since the theories that jointly contribute to the perception of property maybe coherent sometimes, but in conflict upon others.⁶⁰⁰ Nevertheless, William

⁵⁹⁷ G Calabresi & D Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, (1972), Harvard Law Review, Volume 85, No 6. 1090

⁵⁹⁸ For example, under the Lockean natural right theory, it is fair to confer the creators of the program with copyright that cover this new form of dissemination since he is entitled to the fruit of his labour in this newly created market, See the discussion of the philosophical justification of copyright below in Chapter

⁵⁹⁹ D North, Institutions, Institutional Change And Economic Performance, (1990, Cambridge University Press, USA, 1)

⁶⁰⁰ Munzer argued that the prominent theories involves psychological, social and partly normative background theories often seem to be overly simplified and reduced to one single conceptual perspective, for example Lockean theory of labor, Bentham's theory of utility, Hegalian theory of personality, Marx theory of common property, and while each of them

Blackstone provides a commonly recognised but rather abstract definition of property as ‘the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe’.⁶⁰¹

This definition lays down the foundation for the development of the modern theory of property and giving rise to certain perceptible features of property that are practically useful: Firstly, legal conception of property shall refer to ‘relations’, i.e. relations between people with respect to things, rather than mere ‘things’ in itself, whether tangible or intangible.⁶⁰² Secondly, it is in rem in nature, thus imposes duties upon others that are not directly involved in the transactions of the property.⁶⁰³ Thirdly, it is formed by ‘a bundle of sticks’, i.e. a bundle of rights that associated with the entitlement.⁶⁰⁴

Among the bundle of rights that attribute to property, ‘the right to exclude’ takes the defining role.⁶⁰⁵ Although different schools of thoughts gave variant weights to the right to exclude, the Supreme Court took the view that: ‘the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property’.⁶⁰⁶ Some have argued that not only the right to exclude is the most essential

contributes to the collaboration of property, but obscures the validity of the others. See S Munzer, *The Theory of Property*(Cambridge University Press, 1990, P7)

⁶⁰¹ T Merrill, H Smith, *What Happened To Property In Law And Economics?*(2001) *The Yale Law Journal*, Vol. 111, No2,p357-398, p 361

⁶⁰² p16, According to Alchian and Demsets, “...property referred solely to a right, title, or interest, and resources could not be identified as property any more than they could be identified as right, title, or interest.” A Alchian and H Demsets, *The Property Right Paradigm*,(1973), *The Journal of Economic History*, Vol 33, No 1, p17 Merrill emphasised that it is a legal relation between persons that ‘secondarily or incidentally’ involves a thing, rather than ‘a right to a thing’. T Merrill, H Smith, *What Happened To Property In Law And Economics?*(2001) *The Yale Law Journal*, Vol. 111, No2,p358

⁶⁰³ T Merrill, H Smith, *What Happened To Property In Law And Economics?*(2001) *The Yale Law Journal*, Vol. 111, No2,p357-399. See also *An introduction to property theory*, p2

⁶⁰⁴ According to Honore, the bundle of rights that give rise to a full ownership shall include eleven incidents: (1)the right to possess;(2) the right to use ; (3) the right to manage;(4)the right to the income of the thing;(5)the right to the capital (6)the right to security; (7) the incident of transmissibility; (8) the incident of absence of term;(9)the duty to prevent harm,(10) liability to execution; and (11) the incident of residuary.’ Although they See T Merril, *Property and the Right to Exclude*. (1998), *Neb. L. Rev.* 730.736; A Alchian and H Demsets, *The Property Right Paradigm*,(1973), *The Journal of Economic History*, Vol 33, No 1, p17

⁶⁰⁵ Introduction p3

⁶⁰⁶ There are three main school of thoughts over the concept of property: the single – variable essentialism, multiple – variable essentialism and nominalism. The single – variable essentialism treats the right to exclude as ‘the necessary and sufficient condition’ or property; multiple - variable essentialism sees the right to exclude as ‘a necessary but not a sufficient condition’, and on the view of nominalism, the right to exclude is neither necessary nor sufficient to the understanding of property, it is merely a feature that associated with property, which can be modified by virtue of different legal traditions. In Merrill’s article, he leans to the single-variable essentialism, which gives the right to exclude the predominant weight in all the bundle of rights associated with property. He argued that all other incidents can simply derived from the very core concept of right to exclude. The primacy of right to exclude is supported from an logical, historical and social norm bases. See detail in T Merril, *Property and the Right to Exclude*. (1998), *Neb. L. Rev.* 734-737

feature of property, rather, it is the sine qua non, i.e. both necessary and sufficient condition in identifying the existence of property.⁶⁰⁷

Such observation is commonly taken by the economists when defining property rights. If one were to look through the lens of economics, it is easy to understand why 'the right to exclude' is the primary characteristic of property. Economics is the study of how the society manages scarce resources.⁶⁰⁸ Wealth economics proposes that the society ought to allocate resources in a way that maximizes the well-being of the society as a whole.⁶⁰⁹ Although the famous 'invisible hand' observed by Adam Smith would direct economic activities towards an equilibrium state by a process that is automatic, elastic and responsive,⁶¹⁰ it will need to rely on the price system as an instrument to coordinate the operation of the economic system.⁶¹¹ The economic system could then work for itself and adjusted demand and supply, production and consumption spontaneously.⁶¹² However, the price system could only serve as such an instrument to coordinate the operation of the economic system when actually, it can reflect the true value and cost of the goods. When the free rider problem exists, that is, 'a person who receives the benefit of a good but avoids paying for it', the price shall not reflect the true value of the goods because of the existence of the unpaid use by the free-riders.⁶¹³ Thus, it is in need of an institution that empowers the individuals to own and control the resources that are allocated,⁶¹⁴ and by 'own and control' of the resources, one

⁶⁰⁷ T Merril, Property and the Right to Exclude. (1998), Neb, L. Rev. 734-737

⁶⁰⁸ Mankiw, p4

⁶⁰⁹ Mankiw, p10

⁶¹⁰ The invisible hand refers to the unobservable market force that helps the demand and supply of goods in a free market to reach equilibrium automatically. The original context of which the invisible hand was observed for the first time by Adam Smith in his book the Wealth of Nations: "But the annual revenue of every society is always precisely equal to the exchangeable value of the whole annual produce of its industry, or rather is precisely the same thing with that exchangeable value. As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it." A Smith, The Wealth of Nations,(1776, 5th edition, Methuen&Co, London, IV. 2.9), R Coase, The Nature of the Firm, (1937), *Economia*, New Series, Vol.4, No.16, 387

⁶¹¹ R Coase, The Nature of the Firm, (1937), *Economia*, New Series, Vol.4, No.16, 387;Mankiw, p10

⁶¹² R Coase, The Nature of the Firm, (1937), *Economia*, New Series, Vol.4, No.16, 387

⁶¹³ Mankiw, p218

⁶¹⁴ Mankiw,p12

needs to have a legally enforceable right to exclude others from using the resource without their permission.⁶¹⁵

However, when discussing the primitive function of property in the allocation of resources in the economic context, it always refers to 'scarce resources', i.e. resources of which the availability is limited, and that the society cannot produce all the goods and services to accommodate the demand of everyone.⁶¹⁶ According to Plant: "the institution of private property makes for the preservation of scarce goods, tending (as we might somewhat loosely say) to lead us to make the most of them."⁶¹⁷ Since such natural resources is finite in nature, lack of private property rights will lead to depletion and socially wasteful overuse of the resources or congestion.⁶¹⁸ This phenomenon can be illustrated by the well known metaphor of the 'Tragedy of the Commons' where a fixed amount of land owned collectively by the residents in a town would end up in barren due to overgrazing.⁶¹⁹ However, intellectual property is intangible and has its distinctive feature as 'public goods'.⁶²⁰ 'Public goods' is defined as goods of non-excludable and non-rivalrous consumption in nature: non-rivalrous means that one's use of the resource does not compete with the others, non-excludability on the other hand refers to the impossibility from excluding others from enjoying the benefit of the goods.⁶²¹ Thus, a distinction need to be drawn between tangible property and intangible property in this scenario since the 'appropriation' of the intangible property, for example, making a copy of the intellectual goods, would not render it to be 'used up', rather, such activity 'multiplies the resources'.⁶²² As Plant pointed out, "the property in copyright do not arise out of the scarcity of the object but the property rights in copyright make possible the creation of a scarcity of the products which could not otherwise be maintained".⁶²³ Similar arguments have been raised by

⁶¹⁵ W Landes & R Posner, *The Economic Structure Of Intellectual Property Law*, (The Belknap Press OF Harvard University Press, 2003) p12

⁶¹⁶ Mankiw, p4

⁶¹⁷ A Plant, *The Economic Theory Concerning Patens For Inventions*, (1934), *Economica*, New Series, Vol. 1, No. 2, p36.

⁶¹⁸ M Lemley, *Property, Intellectual Property, and Free Riding*.(2005) *Texas Law Review*, Vol. 83, p. 1031,

⁶¹⁹ Mankiw, 213, G Hardin, 'Tragedy of the Commons,' *SCIENCE* 162 (1968):1243.

⁶²⁰ R Posner and W Landes, *Intellectual Property: The Law and Economic Approach*. (2005) *Journal of Economic Perspectives*, Volume 19, Number 2, P 64

⁶²¹ T Cowen, *Public Goods and Market Failures: A Critical Examinations*,(1992, Transaction Publishers,US,3). Shiffrin argued that intellectual product is not only non-rivalrous, rather it is anti-rivalrous because simultaneous use of intellectual product enhance the use of the others. See S Shiffrin, *Intellectual property*, chapter 36 in *A companion to contemporary political philosophy*, edited by R Goodin and others, (2012, John Wollin & Sons, UK, 659)

⁶²² M Lemley, *Property, Intellectual Property, and Free Riding*.(2005) *Texas Law Review*, Vol. 83, p. 1031

⁶²³ A Plant, *The Economic Theory Concerning Patens For Inventions*, (1934), *Economica*, New Series, Vol. 1, No. 2, p36.

contemporary scholars such as Lemley: “Intellectual property, then, is not a response to allocative distortions resulting from scarcity, as real property law is. Rather, it is a conscious decision to create scarcity in a type of good in which it is ordinarily absent in order to artificially boost the economic returns to innovation.”⁶²⁴

Despite the lack of scarcity justification of property over intellectual goods, the institution of intellectual property is necessary to produce incentives for creation.⁶²⁵ Without the right to prevent their intellectual creations from being misappropriated, the creator would not be able to reap pecuniary rewards for the efforts and cost of investment they devoted.⁶²⁶ Thus their incentive to developing new creations would be diminished.⁶²⁷ The problem of diminished incentives resulting from a lack of property regime exists with respect to physical resources, but it would be particularly severe in the case of intellectual creations because of its public good nature. The public good nature of intellectual goods renders it to be easily duplicated, in other words, the marginal cost from duplication is relatively low.⁶²⁸ Thus there exists an asymmetric high production costs vis-à-vis low reproduction costs between the creators and imitators.⁶²⁹ However, by offering the duplicated intellectual products, the imitators become competitors of the original creators in the same market. And market competition will drive the price down to its marginal costs, which is significantly low in the case of intellectual goods, but leaves the large sunk cost that the creators devoted in the invention process uncovered.⁶³⁰ As illustrated by Jeremy Bentham:

‘...that which one man has invented, all the world can imitate. Without the assistance of the laws, the inventor would almost always be driven out of the market by his rival, who finding himself, without any expense, in possession of a discovery which has cost the inventor much time and expense, would be able to deprive him of all his deserved advantages, by selling at a lower price.’⁶³¹

⁶²⁴ Ibid.

⁶²⁵ An Economic Analysis Of Property Rights In Information: Justifications And Problems Of Exclusive Rights, Incentives To Generate Information, And The Alternative Of A Government-Run Reward System,(1998), Fordhan Intellectual property, Media& Entertainment Law Journal, Vol 9:301, p303

⁶²⁶ Although in certain circumstances the authors would continue to create without the monetary rewards, or are willing to pay for their works to be published for publicity, for example in the case of academic publication of journal articles and poets. A Plant, The Economic Aspects of Copyright in Books, (1934), *Economica*, New Series, Vol.1 No.2. p167-195, 168

⁶²⁷ R Posenr and W Landes, The Economic Structure of Intellectual Property Law, (2003, Harvard University Press, US) p13

⁶²⁸ In the Internet age, the cost of producing electronic copies may be zero.

⁶²⁹ Jeremy Bentham, The Works of Jeremy Bentham, vol. 3 (Usury, Political Economy, Equity, Parliamentary Reform) [1843]

⁶³⁰ R Posenr and W Landes, The Economic Structure of Intellectual Property Law, (2003, Harvard University Press, US) p13

⁶³¹ Jeremy Bentham, The Works of Jeremy Bentham, vol. 3 (Usury, Political Economy, Equity, Parliamentary Reform) [1843]

How the prices determined by the original creators are affected by the imitators can be illustrated by the chart below:

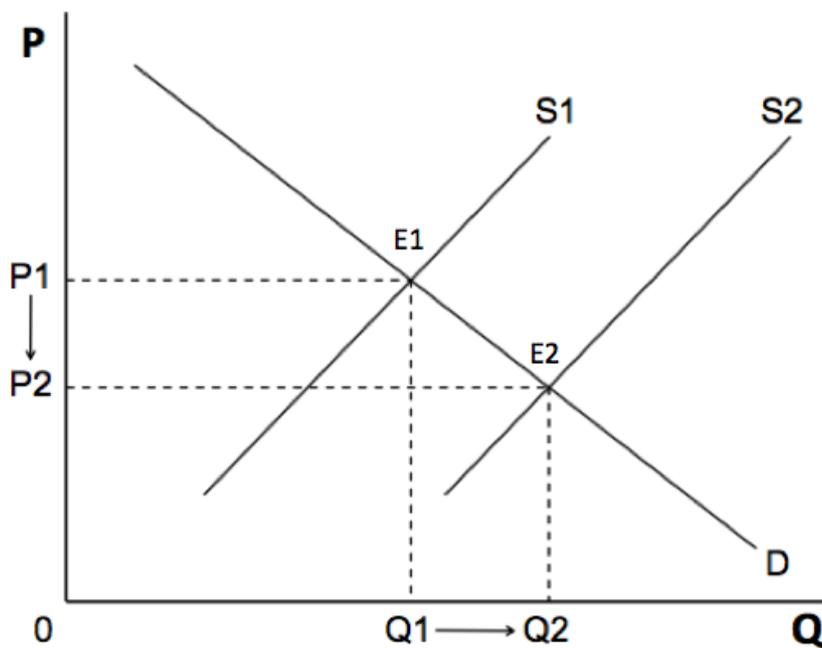


Figure 1

S1 in the above chart illustrates that the supply curve of the intellectual goods in the market where there is no free riders. Without free riders, the original creator is the sole supplier in the market of that intellectual goods, thus the supply curve represents the supply of the intellectual goods that is the total market supply. The producer can thus set the price at P1, at the point of equilibrium E1. However, if the imitators enter the market by providing the same intellectual goods as the original creators, it will raise the total supply from Q1 to Q2. Consequently, the supply curve would move to the right to S2. The equilibrium point would then move down from E1 to E2. And the price that the original creator can charge would be reduced to from P1 to P2.

Applying this chart into the cable market, the supply curve S1 would demonstrate the quantity of supply provided by the program producers to the broadcasting stations. If cable systems started to import distant broadcasting signals and deliver the program to a larger group of audience for free, it raises the total supply from Q1 to Q2, and the price that the program producer could charge would be reduced from P1 to P2.

Coase Theorem

Leaving aside the impact brought by the statutory license mechanism under S111 of the Copyright Act 1976, the mere fact that a new property right was assigned over the programs and delivered by other means, can be seen as an institutional arrangement that the intention to create a market enables transactions to be carried out between copyright owners and cable operators. By doing so, market forces could replace the old FCC regulations and allocate resources in a more efficient way over program production. Since as an administrative agency, the FCC has inherent deficiencies due to the lack of precise monetary measure of benefit and cost provided by the market as well as relevant information to the preference of consumers, which is a decisive factor that would affect the decision making over production.⁶³²

The discussion in the previous section also explains why property rights, primarily the 'right to exclude' within the bundle of rights comprising property, could resolve the problem of cable retransmission within the context of copyright law. The next question that needs to be asked is why assign such a right to the program supplier, to restrict cable operators' use of the program, than to allow cable operators to continue to enjoy the program for free. In other words, why not assign a free 'right to use' to the cable operators over the programs supplied? At the first glance, this question may seem odd to lawyers since the answer is straightforward: the right shall be granted to program suppliers because of the labour they devoted in production.⁶³³ Thus, program suppliers ought to have the natural right over the fruits of his labour.⁶³⁴ However, such conclusion drawn is based on the 'fairness' justification of property rights. Approaching the issue from an economic perspective based on the efficiency criteria may yield a counterintuitive conclusion since economists would see such a problem as one of reciprocal nature: avoiding the harm to B would inflict harm on A.⁶³⁵ Thus, granting the right to the program suppliers to exclude cable operators from retransmitting the program would also increase the cost for the cable operators. And efficiency refers merely to the assessment of benefit maximization rather than the broad

⁶³² R Coase, *The Federal Communications Commission*, (1959), *Journal of Law and Economics*, 1-40; p18.

⁶³³ See the discussion of the labor theory in Chapter 1.

⁶³⁴ Lockean natural rights theory.

⁶³⁵ R Coase, *The Problem Of Social Cost*, (1960), *Journal of Law and Economics*, Vol3, P2

discipline of equality and fairness.⁶³⁶ In other words, if it can be proven that by allowing cable operators to use the program freely maximizes the outcome of production, the efficiency rationale will call for an arrangement that assigns the right to use for cable operators regardless of other philosophical justifications. Although copyright law has settled the initial entitlement by granting the program suppliers' the right of public performance to control cable retransmission activities, the underlying rationale needs to be demonstrated for the purpose of setting out the theme in subsequent analysis of the legal rules that governing such an entitlement, i.e. the imposition of the statutory license, by introducing the crucial factor that Congress put forward in justifying the imposition of the statutory license - the transaction costs.

The concept of 'transaction costs' is central to the economic welfare of a capitalist society in which ordinary economic life is carried out through market transactions.⁶³⁷ It was set forth as the main economic justification for establishing the cable retransmission compulsory license in the House Report 1976:

'In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program materials and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined...to establish a compulsory copyright license...'⁶³⁸

The reason why the issue of transaction costs was of particular concern for the cable industry at the time of the 1976 revision is that cable industry was a newly emerged industry came in 1950s.⁶³⁹ Copyrighting creates bottleneck in the cable distribution market, and compulsory licensing was put in place, seeking to correct 'market failure' caused by the

⁶³⁶ Mankiw, p4. Coater, p83

⁶³⁷ J Krier and W Montgomery, Resource Allocation, Information Cost And The Form Of Government Intervention, (1973) 13 Nat. Resources J. 89

⁶³⁸ Copyright Law Revision: H.Rept. 94-1476 on S. 22. 94th Cong., 2d Sess., 1976, p89

⁶³⁹ It did not become a popular TV broadcasting medium until 1980s. Patrick Parsons, Blue skies: A History of Cable Television, (2008, Temple University Press, USA. 8)

high transaction costs.⁶⁴⁰ The 'transaction costs' incurred in the daily cable business is briefed by the national cable industry association in the 1997 Copyright Law review:

'Every cable system in the United States would be forced to anticipate the programming that would be shown, identify the appropriate owner of the copyrighted works, negotiate for the rights to retransmit those works, and acquire the personnel and equipment to black out programming for which rights could not be obtained...'⁶⁴¹

In order to examine whether the factor of transaction costs can serve as a valid justification for the imposition of statutory license from an economic perspective, the issue of how transaction costs could affect the assignment of the legal entitlement in general need to be explored.

The important role played by transaction costs was observed by Ronald Coase in his groundbreaking literature of 'The Problem Of Social Cost'⁶⁴². He argued that 'when transaction costs are zero, an efficient use of resources result from private bargaining, regardless of the legal assignment of property rights'.⁶⁴³ And Cooter posits a logical corollary to the Coase Theorem and argued that 'when transaction costs are high enough to prevent bargaining, the efficient use of resources will depend on how property rights are assigned.'⁶⁴⁴

Generally speaking, transaction costs are costs of running the economic system.⁶⁴⁵ It includes three broad categories of costs: information costs, contracting costs and policing costs.⁶⁴⁶ Information costs are costs incurred in the process of communicating and exchanging of useful information, contracting costs includes costs associated with negotiating and drafting a contract, policing costs are costs incurred by enforcing and monitoring the resulting agreement.⁶⁴⁷ The existence of such costs can be seen as the 'impediments' to free bargaining, and Coase employed some examples to demonstrate that

⁶⁴⁰ R Merges, Compulsory License V. The Three 'Golden Oldies', (2004), Policy Analysis, No.508

⁶⁴¹ A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals U. S. Copyright Office August 1, 1997 Report of the Register of Copyrights, p16

⁶⁴² R Coase, The Problem Of Social Cost, (1960), Journal of Law and Economics, Vol3, P1-44. In a paper published in 1937, Coase pointed out the role played by transaction costs for the first time within the discussion of internalising externalities. R Coase, The Nature of the Firm, (1937), *Economica*, New Series, Vol.4 No.16 pp 386-405

⁶⁴³ R Cooter & T Ulen, *Law & Economics*, (2012, 6th edition, Addison-Wesley, US,85)

⁶⁴⁴ R Cooter & T Ulen, *Law & Economics*, (2012, 6th edition, Addison-Wesley, US,85)

⁶⁴⁵ K Arrow, *The Organization Of Economic Activity: Issues Pertinent To The Choice Of Market Versus Non-Market Allocation*, 1969, Joint Economic Committee of Congress, 501

⁶⁴⁶ *Ibid*, p95

⁶⁴⁷ *Ibid*. See also R Lee, *An Economic Analysis Of Compulsory Licensing In Copyright Law*, (1982), *Western New England Law Review*, vol 5:203, 214

if there is no transaction costs and the price system works smoothly, the parties will contract to exchange the right to the one who values it the highest.⁶⁴⁸ In such circumstances, the initial assignment of the right will not affect the outcome. Applying the Coase theorem into the context of cable retransmission would require a brief analysis of the examples deployed by Coase in his work.

The first example deployed by Coase is the case of straying cattle that damages crops growing on neighbouring land.⁶⁴⁹ To simplify the task at this stage by ignoring the issue of marginal costs and benefits that was observed in the original hypothetical case, the analysis would refer to Cooter's version of the hypothesis which is based on a comparison of the total costs and benefits.⁶⁵⁰

Assume that a cattle rancher occupies the neighbouring land of a farm and there is no fence on the boundary between the ranch and the farm. The cattle may wander onto the farm and cause damages to the corn growing on the farm. The ultimate solution to the conflict between the rancher and the farmer is to keep the cattle off the farm, it is the legal entitlement that requires an analysis in this case, i.e. who shall be responsible to build the fence and keep the cattle off.

Again, if relying on the standard of 'fairness' in assessing the problem, the conclusion can be reached instinctually that whoever causes the harm shall bear the costs from building the fence. However, Coase pointed out that the problem has a reciprocal nature, i.e. to avoid the harm to one party would inflict harm on the other.⁶⁵¹ Therefore, if answering the question from an efficiency perspective, the answer would be that whichever party that incurs less cost from building the fence should be held responsible. That means as long as the costs incurred by the farmer in building the fence is less than the costs incurred by the rancher, the law should impose the responsibility on the farmer to build the fence himself to prevent the cattle from entering into his land, and if the farmer fails to build the fence and the cattle enters into the land and damages the corn, the farmer shall also bear the damages caused to the corn himself. In these circumstances, the law has in fact assigned a

⁶⁴⁸ Cooter, p85.

⁶⁴⁹ Coase, the problem of social cost, P2.

⁶⁵⁰ Cooter, p82

⁶⁵¹ Coase, the problem of social cost, P2.

right to the rancher to stray on an open range.⁶⁵²

On the contrary, if the rancher is imposed with the responsibility to build the fence and prevent his cattle from entering into the farm, he shall bear the cost from building the fence as well as the damages caused to the farm if he fails to prevent the cattle from entering into the farm. In this circumstance, the law assigns a right to the farmer to exclude the cattle from his property, thus restricting the rancher from grazing into a closed range.⁶⁵³

Now using the arithmetical example to further illustrate the above situation. Assume that the damages caused to the farm costs 100 annually, and the costs incurred by the rancher and the farmer in building the fence is 75 and 50 respectively. And now assumes that the law imposes the responsibility on the rancher to build the fence and constrain his cattle, that means the rancher will be liable for the damages cause to the farm if he fails to build the fence. Thus, he can escape liability from paying 100 by building the fence at a cost of 75, and saving $100-75=25$ in total. Assume that the law adopted the other rule and imposes the responsibility of building the fence on the farmer, the farmer will choose to build a fence to prevent the cattle from causing a more serious damage to the corn at the cost of 100, and the total saving for him would be $100-50=50$. By adopting the efficiency criteria as seen under the second rule, i.e. assigning the right for the rancher to an open range and rendering the farmer responsible for the building of the fence, it is more efficient as the same amount of output can be achieved at a lower cost of 50 rather than 75.⁶⁵⁴ Thus, it can be said that allocative efficiency is achieved if the law makes the farmer responsible for building the fence, or to put it another way, the law assigns the right to the rancher rather than the farmer in an open range.

However, the argument set forth by Coase is that, if transaction costs were zero, the efficient allocation of resources would be achieved regardless of the assignment of legal entitlement. Since Coase adopted the concept of 'transaction costs' in its broadest scope, i.e. it encompasses all impediments to free bargaining, the logical conclusion would be that the efficient allocation of resource would be reached as long as the parties can negotiate freely. The question then becomes how could free negotiation facilitate an efficient

⁶⁵² Cooter, p82

⁶⁵³ Cooter, p82

⁶⁵⁴ Cooter,p13

resource allocation if the legal rules settle upon the other arrangement? Taking the above into consideration, how would the rancher and farmer negotiate and reach an agreement in which the farmer would willingly build the fence even if the law imposes such responsibility on the rancher?

The answer provided by Cooter is that the parties would simply agree to cooperate and create a surplus that can be divided between them.⁶⁵⁵ If the law requires the rancher to build up the fence, that is an assignment of the right to the farmer, the rancher would have to build the fence at the cost of 75. In other words, the value placed by the rancher of the right would be 75. Since the farmer needs only to pay 50 as the cost of building the fence, the rancher may propose an offer to the farmer and pay him a price that is higher than 50 but lower than 75 to have the fence build by the farmer. Since any amount less than 75 would give the rancher a surplus as calculated based on the original value he placed on the right. In the same vein, since the farmer values the right as 50, any price given by the rancher that is higher than 50 would also give him a surplus and induces him to reach an agreement with the rancher. For example, if the rancher agrees to share the surplus with the farmer equally, that is $(75-50)/2=12.5$, the rancher and the farmer will reach an agreement in which the rancher will pay 62.5 to the farmer to build the fence.

The issue of transaction costs have began to affect the final result at this point. Assume that both the farmer and the rancher have to pay to obtain the relevant information regarding the price that the other will have to pay in building the fence, or the parties decide to hire a lawyer to draft the agreement, and assume the cost is 35 in total. Thus, the net gain would be the surplus minor the transaction costs, which is $25-35=-10$. By realizing that the net gain is negative, the parties would not bargain to reach an agreement but follow the legal rules that delineate their rights respectively. However, if the law requires the rancher to build the fence, that is, assigning a right to the farmer to exclude the cattle on his land, then the final result would be that the rancher would have to pay 75 to build the fence. Apparently such outcome is inefficient compare to the arrangement of which the responsibility is imposed on the farmer who would only incurs 50 in building up the fence. In such circumstances, the legal rules play a crucial role in achieving the efficient outcome by assigning the right to the

⁶⁵⁵ Cooter, p84.

rancher and require the farmer to build the fence at a relatively lower cost.

Applying the above example into the context of cable retransmission, it has been argued that if there is no transaction costs, the 'number and nature' of the programs that cable systems import will be the same, whether program suppliers are conferred with the right of public performance to prohibit cable operators from retransmission or not.⁶⁵⁶ However, it should be pointed out that in the case of cable retransmission, the costs incurred by the program suppliers are not limited to the mere cost of production as compare to the single cost of building up the fence in the above example. It also includes the loss from the reduced payment made by the broadcasters that were caused by cable retransmission. The reason as to why cable retransmission would reduce the payment made by broadcasters is that, since the reception of the over-the-air signal is free for the end-users, broadcasters do not generate their income from subscription fee. Rather they are paid by advertisers and the advertising fee is calculated based on the size of the audience group.⁶⁵⁷ At the beginning, cable systems were seen as the supplement of the broadcasters. By delivering the signals to the audience that were otherwise not be able to receive the program in the local market, cable created additional audience group for the broadcasters which were included in the total calculation of the advertising fee.⁶⁵⁸ However, when cable operators started to import distant signals into the local market, cable operators created additional audience group for the distant signals rather than the local signals within the local market.⁶⁵⁹ But the additional audiences to the distant signals shall also contribute to the calculation of the advertising fee paid by the advertisers in the distant market to the broadcasters. However, some advertiser may not value the distant audience as highly as the local audience, and moreover, by importing diverse programs into the local market, some local audience may switch from the local broadcasters to cable television and causing audience fragmentation.⁶⁶⁰ In such circumstance, the number of audience to the

⁶⁵⁶ S Besen and others, Copyright Liability For Cable Television: Compulsory Licensing And The Coase Theorem, (1978), Journal Of The Law And Economics, Vol21, No.1, P79

⁶⁵⁷ S Besen & R Soligo, The Economics of the Network-Affiliate Relationship in the Television Broadcasting Industry, (1973)63 Am. Econo. Rev. 259.

⁶⁵⁸ F Cate, Cable Television and the Compulsory Copyright License, (1989), Federal Communications Law Journal, Vol 42, p193

⁶⁵⁹ T Wu, Copyright's Communications Policy,(2004) Wu, Tim, Copyright's Communications Policy. Michigan Law Review, Vol. 103, p. 314

⁶⁶⁰ A Report Of The Register Of Copyrights, The Cable And Satellite Carrier Compulsory Licenses: An Overview And Analyses. March 1992, P11,

broadcasters may decrease thus reducing the advertising fees that the advertisers are willing to pay to the broadcasters. Therefore whether the value of the program can be increased by cable retransmission will depend on several factors such as the value the additional audience can bring into the distant market, the loss to the original broadcasting stations and the value of the program placed by the cable viewers.⁶⁶¹

Besen deployed a hypothesis where there is a program supplier that provided programs to two broadcasters and one cable system in Market A and Market B.⁶⁶² He proposed two different situations where there is full liability and no copyright liability imposed on the cable operators from retransmitting the programs. The conclusion reached by Besen is that, taking into considerations of the increased in value of the program to the original broadcasters in Market A, as well as the decreased value of the program to the broadcaster in Market B, the program will eventually be shown by the broadcasters and cable operators in both markets whether the total value of the program are increased or decreased to broadcasters, as the cable operators would make up the loss to the program suppliers by way of the profits gained, regardless of whether they are required to pay in order to keep the program on air. In other words, cable operators would be under the obligation to pay the program suppliers licensing fees if the right is assigned to the program supplier. Otherwise they would voluntarily contribute to the license fees received by the program suppliers in order to keep their gain above the cost.

The arithmetical example provided by Besen is that, assuming that the cost of producing the program incurred by the program supplier is 82, and the broadcasters in Market A and Market B are willing to pay 60 and 25 respectively. The total price that the broadcasters are willing to pay is 85, which is more than the cost of producing the program which is 82, thus the program will be produced with a net gain of $85-82=3$. Assuming that a cable operator enters into Market B and increases the value of the program to the broadcaster in Market A to 70, but meanwhile, reduces the value to the program of broadcaster in Market B to 10, the total price that the broadcasters are willing to pay is 80, which is less than the cost of production of 82. However, assuming that cable viewers are willing to pay 10 to see the program, the total price paid to the program supplier will be $70+10+10=90$, which is more

⁶⁶¹ S Besen and others, Copyright Liability For Cable Television: Compulsory Licensing And The Coase Theorem, (1978), Journal Of The Law And Economics, Vol21, No.1, P80

⁶⁶² Ibid.

than the cost of 82, with additional net gain of $90-82=8$. In such circumstance, the loss from the reduced value of the program to the broadcasters is offset by the profits made by the cable operators, thus the program will continue to be produced and be provided to the broadcasters and cable operators.

However, there is a possibility that the profit made by cable is insufficient to cover the loss incurred from the reduced value of the program.⁶⁶³ In such cases, the price paid to the program suppliers will be lower than the cost of production. For example, if the value to the broadcasters are reduced to 65 and 5 respectively, and the profit made by cable is 10, thus the total gain that the program suppliers can receive is $65+5+10=80$, which is less than the cost of 82. Besen then argued that if the program supplier is assigned with the right, he could simply prohibit cable from retransmitting his program to avoid a loss of profit.

However, he failed to explore the situation at this point as to how the same result can be reached if the program supplier is assigned with the right to prohibit cable operators from retransmitting the program. If the program supplier chooses to exercise the right to prohibit cable from doing so, the program will not be carried by cable consequently, which is in contradiction to the conclusion he reached earlier: that the allocation of rights between the supplier and the cable system does not affect whether the program is produced or whether it is carried over cable'. Therefore, in order to complete the analysis, the hypothesis needs to be expanded in this circumstances, cable would offer to buy the right from the program supplier to continue to provide the programs to its audience. The reason is that if cable were to be stopped from carrying the program, it would suffer a loss of 10. However, if the cable operators were to pay the program suppliers the amount that can fully recover the costs from production, that is $10+2=12$, the program supplier would choose not to exercise the right to avoid a loss of 2. In that case, the program supplier would continue to provide the program and the cable would continue to retransmit the programs to the audience.⁶⁶⁴

⁶⁶³ Ibid, p81

⁶⁶⁴ A similar example of the situation where the initial right is assigned with a party but would render the entitlement holder to pay to buy the other party from not taking it back can be found in R Merges' article, 'Contracting into Liability Rules': 'Imagine that A holds an easement in a piece of property that is otherwise owned by B. Imagine further that there is a liability rule in place: if B wants to buy back the easement, she will have to pay 100 to A. Finally, imagine that A values the easement at more than 100. Under these circumstances, Ayres and Talley point out that the holder of the easement (A) will simply pay the owner of the land (B) not to exercise his right to take the easement. The amount of the payment will depend on several factors, including the value to the owner of eliminating the easement and the bargaining savvy of the parties.' R Merges, Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations, (1996), California Law Review, Volume 84, Issue 5, p1304. However, it can be seen that since the profit made by cable operators is

On the other hand, if the right is assigned to the cable operator, that is to say that he can retransmit the signal without incurring any liability, in such a case, he will retransmit until the program supplier pay him from not doing so. However, since the amount paid jointly by the broadcasters and the program suppliers to the cable operator would be 3 in total, which is less than the profit made by the cable operator which is 10, the cable operators may continue to retransmit the programs. Again, it shows that 'the allocation of rights between the supplier and the cable system does not affect whether the program is produced or whether it is carried over cable'.

The above example illustrates that private negotiation is possible and will produce efficient outcome regardless of the assignment of the initial entitlement. However, such example is given based on the assumption that there is no transaction costs incurred by the program suppliers and the cable operators. In the real world, no one would assume zero transaction cost.⁶⁶⁵ In the context of cable retransmission, the existence of transaction cost may block negotiation between the parties if it is too high, more specifically, if it exceeds the surplus of which the transaction costs are subtracted from in order to compute the net value of cooperating.⁶⁶⁶ Thus, in the above example, if the transaction cost between the program supplier and the cable operator is more than $85-82=3$, the parties would not negotiate and the initial delineation of the right will have an effect on the efficiency of the final outcome.

The problem of transaction cost in Statutory License

It might be argued that the amendment made to the 1976 Act which expanded the right of public performance right to encompass the cable retransmission activity has the effect of granting a particular entitlement to the program suppliers that can be justified by an economic efficiency argument. However, along with the conferment of the new right, the 1976 Act made a 'legislative compromise' by imposing a statutory license which forces the copyright owners to license their work for cable retransmission at a statutorily fixed fee.⁶⁶⁷

10, which is insufficient to compensate its portion on the share of the production cost which is 12, cable operators would have to raise its subscription fee to the audience so as to continue to provide the service.

⁶⁶⁵ It has been proven that transaction costs can take up to 50 to 60 percent of the GDP. See E Furubotn & R Richter, *Institutions and Economic Theory: The Contribution of the New Institutional Economics*, (1997, Michigan University Press, U.S.), p47

⁶⁶⁶ Cooter, p85

⁶⁶⁷ *The Cable and satellite carrier compulsory licenses: an overview and analysis*, A report of the register of copyrights of the United States of America, Library of Congress, (1992),.

Such an arrangement not only restricted the right owners from freely exploiting their work, but also imposed a collectively determined value for the transfer of the entitlement.

In this circumstance, the initial rules governing the right granted to the copyright holders switched from a property rule to a liability rule. Why is the liability rule preferable in this particular context of cable retransmission than a traditional property rule that is normally adopted in the copyright legislation?

Why transmute from property rule to liability rule?

Statutory license is a form of limitation imposed by law upon the copyright owner's right of exploitation. According to Ginsburg, the overall limitation regime can be set in three different categories: Subject matter limitations, use limitations and use limitations requiring compensation.⁶⁶⁸ 'Subject matter limitations' exclude certain types of works from overall protection, such as news and legislative documentations etc.⁶⁶⁹ 'Use limitations' immune particular type of 'uses' from infringement, for example the uses of copyrighted works for educational purpose, or where the usage causes merely minor harm to the author that could be neglected, such as viewers' home taping, so long as the conditions are satisfied under the tests set by law.⁶⁷⁰ 'Use limitations requiring compensation' allowing the use of the copyrighted work without the author's consent, but upon a payment of fee set either by law or through mandate negotiation. Compulsory license and statutory license fit into the third category.

Ginsburg further clarifies that in the third category of 'use limitations requiring compensation', the author's rights continue to be protected but are significantly abridged or even transmuted into something different, the transmutation here being from an exclusive right to a right of remuneration.⁶⁷¹ The question that should be asked is why in such circumstances could and should the author's exclusive right be transmuted? In other words, what is the justification for such an arrangement?

⁶⁶⁸ S Ricketson & J Ginsburg, *International Copyright and Neighbouring Rights, The Berne Convention and Beyond*, (2005, 2nd edition, Oxford University Press, US, p756-758)

⁶⁶⁹ For example official texts of legislative, administrative and speeches delivered in the course of legal proceedings etc. *ibid.* p 756.

⁶⁷⁰ *Ibid.*, i.e. Three-step tests encompassed in the fair use provisions.

⁶⁷¹ *Ibid* Ginsburg, 757-758

In order to answer this question, it is necessary to recall to the general theory on property. 'The right to exclude' is the definitional feature of property rights. It emphasises the 'in rem' nature of property compare to the layman's conception of property as merely an 'uncomplicated relationship between a person and a thing'.⁶⁷² Among the bundle of rights that attribute to the conception of property, 'the right to exclude' drew particular attention of the courts and scholars. Different school of thoughts give variant weights to the right to exclude,⁶⁷³ the main argument, however, as manifested by the Supreme Court is that: 'the right to exclude others is one of the most essential right of property', it can be seen as both the necessary and sufficient condition of property, thus forming the very foundation of the institution of property.⁶⁷⁴

Identifying 'the right to exclude' is crucial because it is the most important feature that distinguishes two types of entitlement rules, i.e. property rule and liability rule.⁶⁷⁵ The distinction between property rule and liability rule is well illustrated by Melamed and Calabresi in their ground-breaking work of 'Property rules, Liability Rules, and Inalienability: On view of the Cathedral'. In this article, Calabresi scrutinized the underlying rationale from choosing the two protective regimes from an economic perspective based on efficiency and distributive justice.

Property rule and liability rule are defined by Calabresi as: '...an entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.' On the other hand, 'Whenever someone may destroy the

⁶⁷² G Alexander & E Penalver, *An Introduction to Property Theory*, (2012, Cambridge University Press, USA, 3).

⁶⁷³ In which the bundle of rights includes eleven incidents: (1)the right to possess;(2) the right to use ; (3) the right to manage;(4)the right to the income of the thing;(5)the right to the capital (6)the right to security; (7) the incident of transmissibility; (8) the incident of absence of term;(9)the duty to prevent harm,(10) liability to execution; and (11) the incident of residuary.' See T Merril, *Property and the Right to Exclude*. (1998), *Neb, L. Rev.* 730.

⁶⁷⁴ For example the single – variable essentialism treats the right to exclude as 'the necessary and sufficient condition' or property; multiple - variable essentialism sees the right to exclude as 'a necessary but not a sufficient condition', and on the view of nominalism, the right to exclude is neither necessary nor sufficient to the understanding of property, it is merely a feature that associated with property, which can be modified by virtue of different legal traditions. In Merril's article, he leans to the single-variable essentialism which gives the right to exclude the predominant weight in all the bundle of rights associated with property. He argued that all other incidents can simply derived from the very core concept of right to exclude. The primacy of right to exclude are supported from an logical, historical and social norm bases. See detail in T Merril, *Property and the Right to Exclude*. (1998), *Neb, L. Rev.* 734-737

⁶⁷⁵ G Calabresi &D Melamed,*Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, (1972), *Harvard Law Review*, Volume 85, No 6.

initial entitlement that he is willing to pay an objectively determined value for it, the entitlement is protected by a liability rule.⁶⁷⁶

Therefore, under a property rule, the owners have the right to exclude all potential buyers in a voluntary transaction, i.e. only if an agreement is reached between the owner and the 'buyer' regarding the methods of transfer or license of right and the payment thereto, the buyer cannot acquire the entitlement through any other means. Under a liability rule, the owner loses the right to exclude as long as a collective decision of the value of the entitlement is made, normally by the legislature or law enforcement body, e.g. an arbitrator. Anyone who is willing to acquire the entitlement need only satisfy the payment requirement laid down by law, and the owner will be unable to impose any conditions upon the transaction.

Statutory license is a typical example where the governing framework is converting from property rule to a liability rule.⁶⁷⁷ Calabresi pointed out that there exists two main justifications of moving from a property rule to a liability rule: economic efficiency and distributional goals.⁶⁷⁸ In terms of economic efficiency, liability rule may solve the transaction cost problem that would otherwise render the failure of the market to operate under the property regime.⁶⁷⁹ Distributive goals is rather complicated since it encompasses a broad scope of preferences that may differ from each social norm regarding the notion of 'equality', thus rendering it difficult or impossible to measure, based on a single and universal criteria.⁶⁸⁰ This section will mainly focus on the discussion of the economic efficiency justification.

The Issue of The Entitlement Rule

In the previous section, the issue of transaction costs was briefly mentioned in terms of the initial assignment of entitlement. It has been argued that if transaction costs are too high to prevent bargaining, the efficient use of resources will depend on how property rights are assigned.⁶⁸¹ However, even though the initial entitlement is assigned, transaction costs

⁶⁷⁶ Ibid, 1092

⁶⁷⁷ L Bently & B Sherman, *Intellectual Property Law*, (2009, Third edition, Oxford University Press, US, 270)

⁶⁷⁸ Ibid, 1106-11

⁶⁷⁹ G Calabresi & D Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, (1972), *Harvard Law Review*, Volume 85, No 6. 1107

⁶⁸⁰ Ibid. 1107

⁶⁸¹ Calabresi, P1106-1110

continue to exist when parties negotiate to transfer or recombine the legal entitlements. Again, if transaction costs are too high to prevent the parties from negotiating the value of the entitlement, the market will fail to operate by relying on the price system. In other words, even though such transfer would benefit the parties and maximizes the outcome, such transfer would not occur.⁶⁸² In such circumstances, the state may intervene to correct the market failure by switching the rule that governs the transaction from a property rule to a liability rule, thereby setting collective determined value of the entitlement to facilitate the transactions.⁶⁸³

The example given by Calabresi involves the eminent domain of public owned land.⁶⁸⁴ He proposed two situations in which liability rule shall prevail, i.e. either the market failed to establish or is too expensive to operate.⁶⁸⁵ He argued that since both the buyers and the sellers have the incentive to hide their true valuation, the hold-out problem caused by the sellers as well as the free-load problem caused by the buyers would block the transaction from happening.⁶⁸⁶ In such circumstances, liability rule is preferable where the price, either in the form of the collectively determined price charged to the buyers or the 'benefits' tax applied to the sellers, would bring about the transfer.⁶⁸⁷ On the other hand, even by solving the hold-out and free-load problem by way of the market, certain measures would be imposed by the parties to facilitate the conclusion of an agreement. Nonetheless, if the costs from carrying out such measures exceeds the costs of collective valuation, liability rule shall remain as the efficient solution compared to the market.⁶⁸⁸ In other words, the choice between a property or liability rule shall be made to 'bring us closer to the Pareto optimal result the perfect market would reach.'⁶⁸⁹

Applying the entitlement theory into the context of cable retransmission market, some arguments proposed by Calabresi may support a strong liability rule regime.⁶⁹⁰ For example, unlike the case discussed above which involves only one program supplier, two broadcasters

⁶⁸² Calabresi, P1106-1110

⁶⁸³ Calabresi, P1106-1110

⁶⁸⁴ Calabresi, P1106-1110

⁶⁸⁵ Calabresi, P1106-1110

⁶⁸⁶ Calabresi, P1106-1110

⁶⁸⁷ Calabresi, P1106-1110

⁶⁸⁸ Calabresi, P1106-1110

⁶⁸⁹ Calabresi, p1097

⁶⁹⁰ But Merges provides persuasive arguments in favor of establishing of private institutions to exchange the program content in multimedia industry as a more effective means to reduce transaction costs than the compulsory licensing mechanism. See detailed discussion below.

and one cable operator in two television markets, there might be a large number of program suppliers and TV broadcasters in multiple markets.⁶⁹¹ In such circumstances, the total transaction costs, i.e. the costs incurred from identifying the owners of the program, negotiating the terms of each license and the subsequent monitoring will be tremendous.⁶⁹² As mentioned above, when transaction costs exceeds the value of the transaction itself, it would prevent the transaction from happening. Furthermore, due to the public good nature of the television programs, the program suppliers and broadcasters would be unable to exclude cable operators from retransmitting their programs without permission, or the cost of exclusion would be high.⁶⁹³ Therefore, the market valuation, i.e. the price negotiated with the cable operators that are willing to acquire licensing, is inefficient since it would not reflect the true value of the program given the free use of the free riders. When collective valuation is more efficient than market valuation, as Calabresi proposed, an argument for liability rule can readily be made.⁶⁹⁴

⁶⁹¹ Besen, p83

⁶⁹² The high transaction cost incurred from acquiring license from individual program suppliers have been summarized by the public broadcasters who strongly advocated the adoption of the public broadcasting compulsory license in the 1976 Act: '... (T)he administrative costs of securing permission will be overwhelming, which may force local stations to choose between using copyrighted works without clearance or avoid use of copyrighted materials altogether. It is not unrealistic to assume an annual cost of from \$25,000 to \$50,000 for a clearance office for the smallest station in the system-with substantially larger amounts for larger stations-if copyright licenses are required for local as well as national production and broadcast. We can conservatively estimate that, for example, an average of ten pieces of copyrighted material would be used in each hour of local programming in the system. With 29,000 hours of local programs, this would result in 290,000 separate clearances with copyright proprietors unless workable clearance mechanisms are established. This would require additional staff, telephone calls, letters, extended negotiations, and recordkeeping at a high cost to the system. We do not believe that it is appropriate to squander public broadcasting's scarce resources in administrative overhead with no benefit to the public or the copyright holder. Indeed, the result can only be less programming of lower quality and less use of copyright material to the benefit of no one.' See Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 868 (1975) (statement of Eric H. Smith, Associate General Counsel, Public Broadcasting Service) at R Cassler, Copyright Compulsory Licenses- Are They Coming Or Going? (1989-1990), 37 J Copyright Soc'y U.S.A.231,P249

⁶⁹³ This paper will not cover the issue of technology protective measures adopted by the broadcasters, however, it should be noted that the employment of the technology protective measure will also incur costs to the broadcasters which will have to be taken into account in the cost-benefit analysis.

⁶⁹⁴ Calabresi, p1107

Collective Management System and Collecting Societies

Unlike the US copyright law that endorses compulsory license to regulate cable retransmission activity, cable retransmission in the EU is subjected to a mandatory and extended collective management regime established in the Cable and Satellite Directive 1993.⁶⁹⁵

The aim of the Cable and Satellite Directive is to eliminate national obstacles of free-movement of services and enhance a pan-European television market.⁶⁹⁶ Therefore, it created two legal instruments to serve this goal: first, it established a 'right of satellite communication' which directly limits the scope of copyright clearance obligation based on the country of origin principle; second, it imposed a compulsory copyright management system to promote collective licensing and avoid black-outs.⁶⁹⁷

Article 9(1) of the Cable and Satellite Directive requires all right holders to license their cable retransmission only through collecting societies.⁶⁹⁸ Moreover, the Directive extended the mandatory collective management to non-members of the collecting societies.⁶⁹⁹

Mandatory collective management system can be seen as an institutional development aiming at achieving the same result of reducing transaction costs and preventing holding-up problem, so as to facilitate collective licensing agreements between right holders and cable operators.⁷⁰⁰

Mandatory and extended collective management mechanisms impose less degree of limitation upon the copyright owners' exercise of their exclusive right compare to compulsory license, because collecting societies, acting on behalf of the copyright owner,

⁶⁹⁵ Council 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.

⁶⁹⁶ Recital 2

⁶⁹⁷ P Hugenholtz, Copyright without Frontiers: is there a Future for the Satellite and Cable Directive? Published in Die Zukunft der Fernsehrichtlinie/The Future of the 'Television without Frontiers' Directive, Proceedings of the conference organised by the Institute of European Media Law (EMR) in cooperation with the European Academy of Law Trier (ERA), Schriftenreihe des Instituts für Europäisches Medienrecht (EMR), Band 29, Baden-Baden: Nomos Verlag 2005. See detail discussion of the right of communication to the public and the right of making available in Chapter 5.

⁶⁹⁸ Article 9(1): Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.

⁶⁹⁹ Article 9(2): Where a right holder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights.

⁷⁰⁰ P Goldstein, International Copyright, Principle, Law, and practice, (2001, 1st edition, Oxford University Press, NY) 309, T Riis and J Schovsbo, Extended collective licenses and the Nordic experience: it's a hybrid but is it a Volvo or a lemon? (2010) 33 Colum. J.L. & Arts 471,478.

retain the right to refuse to license provided that such refusals are not made in bad faith.⁷⁰¹ Thus, acquisitions of copyright for cable retransmission in the EU are to be achieved only by agreements.⁷⁰² As indicated in the Recital of Cable and Satellite Directive⁷⁰³ : ‘the principle of ‘contractual freedom’ on which this Directive is based will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission of certain language versions are concerned.’⁷⁰⁴ The Directive makes it clear that statutory license should not be imposed on authors, performers, producers and broadcasting organizations across all the member states since it may distort effective competition.⁷⁰⁵ It then goes one step further by making an explicit contradictory provision to the U.S. cable compulsory license which requires cable operators ‘to obtain the authorization from every holder of right in each part of the programme retransmitted...the authorizations should be granted contractually....’.⁷⁰⁶ Although the establishment of ‘impartial mediators’, a neutral person whose task is to ‘assist negotiations’,⁷⁰⁷ can be seen as an additional measure set forth to facilitate successful conclusion of agreements, the contractual nature of the acquisition of cable retransmission rights remains unaffected.⁷⁰⁸

EU Provisions Over Cable Retransmission

Prior to the establishment of mandatory collective management system in 1993, the EU considered both mandatory collective management and the statutory licensing approach to

⁷⁰¹ Bad-faith refusal was prohibited by Article 12(1) of the Cable and Satellite Directive 1993 which provides that: ‘Member states shall ensure by means of civil or administrative law, as appropriate, that the parties enter and conduct negotiations regarding authorization for cable retransmission in good faith and do not prevent or hinder negotiation without valid justification.’ M Eechoud & Others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, (2009, Kluwer Law International, NY)121. Similar provisions could be found in national law of member states that imposes general obligations on all collecting societies. For example, S11 of German Law on Collective Management(CAL) requires collecting societies to grant licenses to any person so requesting on equitable terms, which implies a limitation of contractual freedom of the collecting societies as explicitly provided by S6(1). However, it has been pointed out that the limited right is stronger than a statutory license given that the collecting societies acting in the former case retain the right to negotiate the amount of remuneration with the users. See S Lewinski, *EU Challenges And Solutions In The Field Of Collective Management Of Copyright And Related Rights*, (2014),1 Soc. Persp. - J. Legal Theory & Prac. 104, 107

⁷⁰² See Europa summary of EU legislations: ‘Copyright and related rights: satellite broadcasting and cable retransmission’ at http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/126031_en.htm accessed in June 2018

⁷⁰³ COUNCIL 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

⁷⁰⁴ Recital 16

⁷⁰⁵ Recital 21

⁷⁰⁶ Recital 27

⁷⁰⁷ Report From The European Commission On The Application Of Council Directive 93/83/Eec On The Coordination Of Certain Rules Concerning Copyright And Rights Related To Copyright Applicable To Satellite Broadcasting And Cable Retransmission, Brussels, 26.07.2002, COM (2002) 430 final. p9

⁷⁰⁸ Recital 30

regulate cable retransmission.⁷⁰⁹ The EU commission in the Green Paper on Television Without Frontiers 1984 pointed out that voluntary contractual agreements might be feasible in situations where broadcasters hold the copyright of the program for initial transmission, i.e. where programs were produced by the broadcasting stations.⁷¹⁰ However, it recognized that the high transaction cost problem might not be sufficiently resolved by merely relying on contracts given the number of individual copyright holders is too large.⁷¹¹ Although such rights could be acquired through collecting societies, there existed the risk to secure all individual rights simultaneously while they were broadcasted.⁷¹² Thus, legislation was necessary with several possibilities, i.e. mandatory collective licensing, compulsory licensing or statutory licensing.⁷¹³

The Commission went through the three possible proposals and acknowledged that the initial emplacement of the mandatory collective system may involve a long preparing period, given the tremendous amount of collective agreements that needed to be reached among the right holders and the collecting societies themselves regarding the sum of remuneration.⁷¹⁴ However, mandatory collective management has an overriding advantage of putting the collective societies in a better position to negotiate the level of remuneration than statutory licensing; Statutory license, on the other hand, requires complex calculation and formulation of royalty rate for 'different types of works, performance and related rights', which the Commission deemed as impossible to be laid down by legislation.⁷¹⁵ However, it is still preferable than compulsory license because statutory licensing system can be put in place by a 'simply change of law', i.e. a set of rates fixed by the statute, compulsory license on the other hand requires complicated enforcing procedure of entitlement that involve further prolonged negotiations for specific terms and rates.⁷¹⁶

⁷⁰⁹ Television Without Frontiers – Green Paper On The Establishment Of The Common Market For Broadcasting, Especially By Satellite And Cable, COM(84) 300 final, Brussels, 14th June 1984,p319.

⁷¹⁰ Television Without Frontiers – Green Paper On The Establishment Of The Common Market For Broadcasting, Especially By Satellite And Cable, COM(84) 300 final, Brussels, 14th June 1984,p319.

⁷¹¹ Ibid, p317

⁷¹² The Commission also pointed out that if separate contracts have to be signed with each copyright holder, it could lead to the position where a single failure of negotiation would block the retransmission of the whole programmes. Ibid, p317

⁷¹³ P318.

⁷¹⁴ Television Without Frontiers – Green Paper On The Establishment Of The Common Market For Broadcasting, Especially By Satellite And Cable, COM(84) 300 final, Brussels, 14th June 1984,p319.

⁷¹⁵ Television Without Frontiers – Green Paper On The Establishment Of The Common Market For Broadcasting, Especially By Satellite And Cable, COM(84) 300 final, Brussels, 14th June 1984,p319.

⁷¹⁶ Television Without Frontiers – Green Paper On The Establishment Of The Common Market For Broadcasting, Especially By Satellite And Cable, COM(84) 300 final, Brussels, 14th June 1984,p319.

Nonetheless, the EU commission eventually settled the issue with a mandatory and extended collective management system in the Cable and Satellite Directive 1993. The logic behind the imposition of this system was to lay down, at foremost, a contractual agreement-based licensing system as against compulsory or statutory licensing. Then requires such agreement to be reached only by collecting societies on behalf of the copyright holders. And finally extending the authority to license on behalf of copyright holders who are not members of the collecting societies. The term 'mandatory' further prohibits copyright holders, either members or non-members, from 'opt out' from the collecting society.⁷¹⁷ This logic was implemented through Article 8(1), Article 9(1) till Article 9 (2).

Article 8(1) laid down the contractual basis by providing that:

'Member states shall ensure that when programs from other member states are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.'

Article 9(1) imposed the mandatory collective management system:

'Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.'

Article 9(2) went on extended the mandatory collective management to non-members of the collecting society:

'Where a right holder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights.'

On the international level, the legal basis for the imposition of collective management system for cable retransmission right is found in Article 11bis (2) of the Berne Convention:

⁷¹⁷ Normally extended collective management would leave the right holders with option to opt out. T Riis and J Schovsbo, Extended collective licenses and the Nordic experience: it's a hybrid but is it a Volvo or a lemon? (2010) 33 Colum. J.L. & Arts 471,478 P11

‘It shall be a matter for legislation in the countries of the union to determine the condition under which the rights mentioned in the preceding paragraph may be exercised...They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which... shall be fixed by competent authority.’⁷¹⁸

Collective management of copyright, in comparison with individual exercise of copyright, means licensing performed by a Collective Management Organization on behalf of a plurality of rights holders.⁷¹⁹ The collective management organizations act as a centralized clearance faculty to authorize copyright and related rights as well as monitor subsequent uses of the work if exercise of the right on an individual basis is not manageable or effective, such as in the case where the works concerned are used by a great number of users at different places and at different times.⁷²⁰ A basic definition of collective management is given by Ficsor : ‘In the framework of a collective management system, owners of rights authorize collective management organizations to monitor the use of their works, negotiate with prospective users, give them licenses against appropriate remuneration on the basis of a tariff system and under appropriate conditions, collect such remuneration, and distribute it among the owners of rights.’⁷²¹ In this vein, it might be argued that collective societies also act as the ‘trustees’ for the authors and right-holders.⁷²²

Within the EU, although the EU Directive 2014/26 on Collective Management of Copyright and Related Rights⁷²³ contains no definition of collective management, however, Article 1(1) of the German Law on Collective Rights Management (LACNR) defines collective rights management as: ‘managing exploitation rights, exclusive rights or remuneration rights granted under the copyright act...jointly and for joint exploitation on behalf of several

⁷¹⁸ Regarding musical works. Article 13(1) of the Berne Convention provides that: ‘Each country of the union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorised by the latter, to authorised the sound recording of that musical work, together with such words, if any but all such reservations and conditions shall apply only in the countries which have imposed them and shall not... be prejudicial to the rights of these authors to obtain equitable remuneration which... shall be fixed by competent authority.’

⁷¹⁹ P Landolt, *Collective Management of Copyright and Related Rights*, (2006, Kluwer Law International,UK,1)

⁷²⁰ M Ficsor, *Collective Management of Copyright and Related Rights*, (2002, World intellectual property organization,17)

⁷²¹ Ibid note **Error! Bookmark not defined.**

⁷²² C Graber, *Collective Rights Management, Competition Policy And Cultural Diversity: EU Law Making At A Crossroads*, (2012), *The WIPO Journal*, 2;

⁷²³ Directive 2014/26/EU of The European Parliament And Of The Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

authors or holders of neighbouring rights.⁷²⁴ It is an alternative to the individual exercise of copyright institutionalised by collecting societies, and the Collective management of Copyright and Related Rights Directive provides definition of collecting societies in Article 3(a) as also known as collective administration, is a system institutionalized by collecting societies that act as representations of copyright owners in copyright licensing and distributing of royalties. 'Collecting societies' is defined by Article 3(a) of the EU Collective Management of Copyright and Related Rights Directive as:

'Collective management organisation' means any organisation which is authorised by law or by way of assignment, license or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one right holders, for the collective benefit of those right holders, as its sole or main purpose, and which fulfils one or both of the following criteria:

- (i) it is owned or controlled by its members;
- (ii) it is organised on a not-for-profit basis.

However, in a study of Collective Management of Copyright and Related Rights conducted by Dr Ficsor, he emphasised that the collective management system must contain certain 'collective elements', which distinct it from the mere agency-type rights clearance:

'The term "collective management" only refers to those forms of joint exercise of rights where there are truly "collectivized" aspects (such as tariffs, licensing conditions and distribution rules); where there is an organized community behind it; where the management is carried out on behalf of such a community; and where the organization serves collective objectives beyond merely carrying out the tasks of rights management In contrast, "rights clearance organizations" are those which perform joint exercise of rights without any collectivized elements in the system; simply a single source is offered for users to obtain authorization and pay for it.'⁷²⁵

As mentioned above, both the institutional arrangements of mandatory collective management as well as the extended collective management were put in place to reduce

⁷²⁴ D Gervais, *Collective Management of Copyright and Related Rights*, (2010, 2nd edition, Kluwer Law International, UK) 225.

⁷²⁵ D Gervais, *Keynote: The Landscape Of Collective Management Schemes*, (2011). *Columbia Journal of Law & The Arts*, 423; M Ficsor, *Collective Management of Copyright and Related Rights*, (2002 World Intellectual Property Organization, Geneva) 22

transaction costs in the cable retransmission market.⁷²⁶ However, besides the well-perceived economic goal, they may also serve other social and cultural objectives such as preservation of national cultural identity that goes beyond the mere 'legal technical machinery' for the management of rights.⁷²⁷ A historical review of the collecting societies is necessary in this context to explain the initial justification for the establishment of collecting societies and their main functions.

The first collecting society was established in France in 1851 dealing with authors' right in non-dramatic musical works⁷²⁸⁷²⁹. The triggering event occurred in 1847, when a composer and lyric writer consumed in a restaurant and discovered that their song was publicly performed for several times by the orchestra.⁷³⁰ They brought a suit against the restaurant claiming that the restaurant publicly performed the song without their consent constituted an infringement of their exclusive right of public performance, thus they were entitled of remuneration.⁷³¹ This is the first case brought in court concerning authors' right of public performance since its codification in French copyright law in 1791.⁷³² The court ruled in favour of the composer and lyric writer.⁷³³ Until then, author's right of public performance obtained both judicial and legislative recognition for the first time. However, although the judicial interpretation effectively set up the legal ground for authors to exercise their right, the authors realized that the individual enforcement was impossible in practice given that

⁷²⁶ P Goldstein, *International Copyright, Principle, Law, and Practice*, (2001, 1st edition, Oxford University Press, NY)309, D Mendis & V Stobo, *Extended collective licensing in the UK- one year on: a review of the law and a look ahead to the future*, (2016), *European Intellectual Property Review*, 209; Hargreaves Review, *An independent report of Ian Hargreaves, Digital Opportunity – A review of Intellectual Property and Growth*, (2011), p36,37

⁷²⁷ M Ficsor, *Collective Management of Copyright and Related Rights*, (2002 World Intellectual Property Organization, Geneva) 20-21.

⁷²⁸ *Socitg des Auteurs et Compositeurs et Editeurs dc Musique*(SACEM).

⁷²⁹The very first collecting society was established in 1777 dealing with authors' right as against theatres for 'under-remunerated use of their works', i.e. *Bureau de legislation dramatique*(SACD). However, it has been argued that SACD was not fully fledged collective management organization and different from the modern concept of collecting societies. See M Ficsor, *Collective Management of Copyright and Related Rights*, (2002 World Intellectual Property Organization, Geneva) 18-19

⁷³⁰ M Ficsor, *Collective Management of Copyright and Related Rights*, (2002 World Intellectual Property Organization, Geneva) 19

⁷³¹ N Bortloff, *Collective Management of Rights in Musical, Literary and Dramatic Works in Europe*, (1997) 6 *Ger. Am. L.J.* 67, 68

⁷³² N Bortloff, *Collective Management of Rights in Musical, Literary and Dramatic Works in Europe*, (1997) 6 *Ger. Am. L.J.* 67, 68

⁷³³ N Bortloff, *Collective Management of Rights in Musical, Literary and Dramatic Works in Europe*, (1997) 6 *Ger. Am. L.J.* 67, 68

the infringements could happen at a number of different places at different times.⁷³⁴ As a result, they joined together and formed the first collecting society.⁷³⁵

The authors' initial concern that it was impossible for the individuals to police and monitor the uses of their works which is in fact a fundamental economic argument of high transaction cost, in particular, the policing cost. As mentioned above, transaction cost includes three broad categories of costs: information costs; contracting costs and policing costs.⁷³⁶ Information costs are costs incurred during the process of communication and exchange of useful information, contracting costs includes costs associated with negotiating and drafting a contract, policing costs are costs incurred by enforcing and monitoring the resulting agreement.⁷³⁷ Moreover, collecting societies also function by serving certain cultural and social goals, especially in civil law and developing countries.⁷³⁸ For example, collecting societies in France has been seen as an issue of solidarity which promotes strong bargaining positions for authors(against end users and producers), safeguard remuneration against users(including both end-users and producers), as well as cross-subsidize less successful works in internally.⁷³⁹

Major developments of collecting societies were also witnessed from their market practice and functional evolution. For example, three new features demonstrate their expanded roles in the market impact both right holders and users. i.e. reciprocal agreements between societies (both national and international), extensive collective management and new managing schemes for new uses.⁷⁴⁰

Reciprocal representative agreements, although recently have been accused of conflicting with EC competition rules,⁷⁴¹ was seen as the most efficient way of clearing rights for the

⁷³⁴ M Ficsor, *Collective Management of Copyright and Related Rights*, (2002 World Intellectual Property Organization, Geneva) 19

⁷³⁵ M Ficsor, *Collective Management of Copyright and Related Rights*, (2002 World Intellectual Property Organization, Geneva) 19

⁷³⁶ *Ibid*, p95

⁷³⁷*Ibid*. See also R Lee, *An Economic Analysis Of Compulsory Licensing In Copyright Law*, (1982), *Western New England Law Review*, vol 5:203, 214

⁷³⁸ It has been argued that the social and cultural functions of collecting societies are of particular importance in developing countries where creative capacity needs to be strengthened. ⁷³⁸ M Ficsor, *Collective Management of Copyright and Related Rights*, (2002 World Intellectual Property Organization, Geneva) 19

⁷³⁹ R Hilty & T Li, *Control Mechanisms For CRM Systems And Competition Law*, (2016), Max Planck Institute for Innovation and Competition Research Paper No. 16-04, p5

⁷⁴⁰ J Sterling, *World Copyright Law*, (2003, Sweet & Maxwell, London)501

⁷⁴¹ P Torremans, *Copyright Law – A Handbook of Contemporary Research*, (2007, Edward Elgar Publishing, USA) 257

users by way of one-stop-shop, i.e. blanket licensing.⁷⁴² Under reciprocal representative agreements, collecting societies authorise each other to represent their members in the others' territory to license their repertoires.⁷⁴³ It largely reduces the transaction costs for the users by simplifying the process of identifying and communicating with foreign copyright owners. However, such corporation requires uniform principles and methods for collecting societies operate in different countries.⁷⁴⁴ Thus, collecting societies join together and form a confederation of societies on an international level,⁷⁴⁵ and harmonise their internal management measures such as the royalty collection and distribution systems.⁷⁴⁶ The reciprocal agreement normally functions in the following procedure: the collecting societies that entered into the agreement authorise each other to license their repertoires in the other territory, collect the usage data from the users, process the data and collect royalties, and then exchanging both the dataset and royalties with each other.⁷⁴⁷ In rare cases, they skip the process of data and royalty exchange, and keep the royalties generated by the use of foreign works as their own revenues.⁷⁴⁸ However, it was deemed unfair for the owners of the work and used only as 'temporary arrangement' to further reduce internal administrative cost in transit period.⁷⁴⁹

Extended collective management, on the other hand, has been seen as another mechanism that further reduces transaction costs.⁷⁵⁰ Different from traditional collective management system, extended collective management essentially extends the authority of collecting societies to non-members. In other words, if a collecting society represents a substantial

⁷⁴² J Drexl, Copyright, Competition and Development, (2013), Max Planck Institute for Intellectual Property and Competition Law, Munich, P218

⁷⁴³ J Drexl, Copyright, Competition and Development, (2013), Max Planck Institute for Intellectual Property and Competition Law, Munich, P218

⁷⁴⁴ D Gervais, Collective Management of Copyright and Related Rights, (2010, 2nd edition, Kluwer Law International, UK) 225. P8

⁷⁴⁵ Such as the International Confederation of Societies of Authors (CISAC), it now has 239 member societies from 123 countries. See <http://www.cisac.org/Who-We-Are>, accessed in July 2018.

⁷⁴⁶ D Gervais, Collective Management of Copyright and Related Rights, (2010, 2nd edition, Kluwer Law International, UK) 225.

⁷⁴⁷ Besides the usages data, collecting societies keep data pools of two other types of information, identification and ownership. After receiving the usage data from the users, collecting societies process the data by matching it to the identification data and the ownership data, and apportion the data from users, then pass the data and royalties to the other collecting societies. D Gervais, P8

⁷⁴⁸ D Gervais, Collective Management of Copyright and Related Rights, (2010, 2nd edition, Kluwer Law International, UK) 225.

⁷⁴⁹ *ibid*

⁷⁵⁰ BIS1054 Impact Assessment, Extended Collective Licensing (ECL) (2012), p.1, http://www.legislation.gov.uk/ukia/2014/189/pdfs/ukia_20140189_en.pdf Accessed in July 2018.

number of rights holders,⁷⁵¹ it would be authorised by law to act for all right holders, both members and non-members, in that particular category of right, unless the right holder choose to specifically opt out from the system.⁷⁵² By doing so, it streamlines the right clearance procedure and ensures access to works in cases where users were unable to identify the right holders, for example, of orphan works.⁷⁵³ From an institutional point of view, ECL utilises collecting societies by maximizing possible royalties from the absent right holder who would otherwise not be compensated.⁷⁵⁴ The Hargreaves Review, which supported the adoption of extended collective management in the UK, pointed out that it is a licensing regime that benefits all parties involved: ‘which can be good for users by providing legal certainty, good for creators because it delivers remuneration, and good for consumers because it extends access to works.’⁷⁵⁵

Economic Analysis of Collecting Societies

It has been argued that individual copyright owners are rarely capable of trading with the lowest transactions costs since they are not specialist administrators or negotiators.⁷⁵⁶ Collective management systems enable individual copyright owners to join together and use the shared revenue to hire specialist administrators so as to take advantage of natural savings when total transactions costs are pooled.⁷⁵⁷ When each member of the collective societies bears only a fraction of the cost, individual transactions becomes feasible.⁷⁵⁸ On the other hand, the function of collective societies gathering ‘the same sources of information need to be investigated to determine the initial information cost otherwise

⁷⁵¹ ‘To represent a substantial number of right holders’ can be seen as a precondition for the authorisation of ECL. For example, S50(1) of the Danish Copyright Act made clear provisions that ECL management organisations must comprise ‘a substantial number of authors of a certain type of works which are used in Denmark’ in order to exercise its authorisation over non-members. T Riis & J Schovsbo, *Extended Collective Licenses in Action*, (2012), *International Review of Intellectual Property and Competition Law* 930, 936

⁷⁵² T Riis and J Schovsbo, *Extended collective licenses and the Nordic experience: it’s a hybrid but is it a Volvo or a lemon?* (2010) 33 *Colum. J.L. & Arts* 471,478.

⁷⁵³ A Strowel, *Symposium: Collective Management of Copyright: Solution or Sacrifice? The European ‘Extended Collective Licensing’ Model*,(2011) 34 *Colum. J.L. & Arts* 665,665

⁷⁵⁴ BIS1054 *Impact Assessment, Extended Collective Licensing (ECL) (2012)*, p.1, Available at : http://www.legislation.gov.uk/ukia/2014/189/pdfs/ukia_20140189_en.pdf Accessed in July 2018, T Riis & J Schovsbo, *Extended Collective Licenses in Action*, (2012), *International Review of Intellectual Property and Competition Law* 930, 931.

⁷⁵⁵ Hargreaves Review, *An independent report of Ian Hargreaves, Digital Opportunity – A review of Intellectual Property and Growth*,(2011),p36,38

⁷⁵⁶ R Watt, *Copyright And Economic Theory, Friends Or Foes?* (2000,Edward Elgar, USA,162)

⁷⁵⁷ R Watt, *Copyright And Economic Theory, Friends Or Foes?* (2000,Edward Elgar, USA,162)

⁷⁵⁸ R Watt, *Copyright And Economic Theory, Friends Or Foes?* (2000,Edward Elgar, USA,164)

incurred to the users when they seek for potential trading partners.⁷⁵⁹ Moreover, it saves the administration costs by providing members with monitoring services to check on licensees' use of the work and take enforcement actions when necessary.⁷⁶⁰

However, although collective management has been seen as an institutional development attempting to solve the transaction cost problem, it nonetheless gathered constant criticisms from those who strongly opposed to its anti-market rationale that deprives the freedom of contract of both copyright holders and users.⁷⁶¹ Furthermore, the collective licensing model has the inherent operational structure that is in conflict with the competition law principles, i.e. the joint selling of copyright holders is a typical practice of cartel, more importantly, it constituted an abuse of dominant position if the collecting society holds a SMP and charges the users of an unreasonable license fees.⁷⁶² Due to the fact that most of the anti-competitive claims are made based on economic reasoning, this section will seek to evaluate the economic arguments that are pro and oppose to the establishment of collective management system from an competition point of view, and reach an conclusion as to whether the benefits of the institutional arrangement of collective licensing can in fact offset its costs and produce ultimate efficiency compare to individual licensing. Thus laying down the foundation for the comparative analysis of efficiency between collective management system and the statutory licensing scheme.

Collective licensing has long been categorised as a form of natural monopoly. Natural monopoly is defined by Poser as '...if the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly'.⁷⁶³ The reason as to why the lowest cost can only be achieved where there is a single firm is because of the tremendous fixed cost, also known as high sunk cost that are associated with production, therefore competition would lead to inefficiencies where the

⁷⁵⁹ M Besen & S.N.Kirby,'Compensating Creators of intellectual property- collectives that collect,' 1, cited by C Handke & R Towse, see above note **Error! Bookmark not defined.**,p3

⁷⁶⁰ P Landolt, *Collective Management of Copyright and Neighboring Rights*, (2006, Kluwer Law International, the Netherland, 99)

⁷⁶¹ For example the issuing of blanket licenses that forces the users to purchase the license that covers the entire repertory rather than the specific work that the user was intend to buy.

⁷⁶²A Katz, *The Potential Demise of Another Natural Monopoly Rethinking the Collective Administration of Performing Rights*, (2005), *Journal of Competition Law and Economics*, Vol,1, No, 3, 7

⁷⁶³ R Poser, *Natural Monopoly And Its Regulation*, (1968), 21 *Stanford Law Review* 548. This definition is similar to the one provided by Mankiw in the *Principle of Economics* as : 'a monopoly that arises because a single firm can supply a good or service to an entire market at a smaller cost than could two or more firms.' G Mankiw, *Principles of Economics*, (2014,7th edition, Cengage Learning,US)302

output at any level is achieved on a relative higher costs accumulatively rather than from a single firm.⁷⁶⁴ Typical natural monopoly occurs in the industries, or at least in certain segments of those industries that provide public utility or common carriers services, for example, electricity, railway, and telecommunications.⁷⁶⁵ The sunk costs in these cases are the investment made on the initial construction and consequent maintenance of the network infrastructures. Such sunk costs is normally tremendous so that to deter new entrance from entering into the market, therefore only one firm would dominate the entire market under regulatory scrutiny.⁷⁶⁶ If there already exists other firms besides the natural monopoly, the market will unify the small firms either by way of merger into the monopoly firm, or the small firms would naturally be driven out of business eventually.⁷⁶⁷

From an economic perspective, a necessary condition and definitional element for the existence of natural monopoly is that the cost function must be, in the mathematical term, 'sub additive'.⁷⁶⁸ Cost sub additive is best illustrated by the equation below. It shows the relationship between total cost of output and cost of individual firms if competition exists in a monopoly market:

$$C(Q) < C(q_1) + C(q_2) + C(q_3) + \dots + C(q_n)^{769}$$

In this equation, 'C' stands for 'Cost'; 'Q' stands for the total 'Quantity' output; 'q_{1,2,3...n}' stands for the individual output produced by each firm from 1 to n; 'C(q₁)+...C(q_n)' thus indicates the combination of cost of output of each individual firm. Thus, the equation illustrates the situation where cost C of the output of centralized production Q by one firm is less costly than splitting production up among n competing firms.⁷⁷⁰

⁷⁶⁴ Joskow explains the natural monopoly situation by using the equation of : $C(Q) < C(q_i)$ P Joskow, Regulation of Natural Monopolies,(2006), edited chapter in A. Mitchell Polinsky & Steven Shavell (eds) Handbook of Law and Economics forthcoming 2007,pp8,23

⁷⁶⁵ Telecommunications market now contains several subordinate markets besides the primitive mode of voice telephony services, some of those markets remain natural monopoly, such as the wholesale interconnection market provided by the backbone network incumbents, others, for example to access retail market and the information service carried upon the incumbents networks are now opened for competition. K George, & C Lynk, Industrial Organisation: Competition, Growth and Structural Change, (1992, 4th edition, Psychology Press, London,366)

⁷⁶⁶ P Joskow, Regulation of Natural Monopolies,(2006), edited chapter in A. Mitchell Polinsky & Steven Shavell (eds) Handbook of Law and Economics forthcoming 2007,29

⁷⁶⁷ R Posner, Natural monopoly and its regulation, (1968), 21 Stanford Law Review 548

⁷⁶⁸ M Bleaney & D Greenaway, A Guide to Modern Economics, (1996,Routledge, London,325)

⁷⁶⁹ $C(Q) < \sum C(q)$

⁷⁷⁰ This cost function is called, in mathematical language, subadditivity. However, it has been argued that subadditivity of the cost function is 'the necessary and sufficient condition for natural monopoly only when all firms have access to the same technology and when market coordination between separate firms is unable to achieve the same economies as internal coordination within a single firm. See D Evans and J Heckman, A Test for subadditivity of the cost function with an application to the bell system. The American Economic Review, Vol. 74, No. 4. (Sep., 1984), pp. 615-623. P Joskow,

Besides, there are two other factors that may give rise to natural monopoly, i.e. economies of scale and economies of scope.⁷⁷¹ Economies of scale means 'the property whereby long run average total cost falls as the quantity of output increases'.⁷⁷² That means when output increases, the average cost declines because the fixed costs are spread over more units.⁷⁷³ On the other hand, economies of scope exists 'if a given quantity of each of two or more goods can be produced by one firm at a lower total cost than if each good were produced separately by different firms.'⁷⁷⁴ It happens where several goods are being produced, and some of them require the shared facilities, thus it is less expensive to produce them together rather than separately.⁷⁷⁵

Copyright Collective Organizations in China

Recall to the discussion over the entitlement theory contained in previous chapter, Merges strongly advocates for the establishment of private institutions, i.e. copyright collective organizations by the copyright owners to replace the government mandated statutory license scheme in breaking transaction bottlenecks caused by high transaction costs. He argued that the exchange rules set by knowledgeable industry participants in collecting societies could reflect the expertise of the industry and could better deal with high volume of transaction compare to the one-size-fit all fixed rate contained in the statute.⁷⁷⁶ Moreover, the collective valuation mechanism contained in collecting societies is more flexible since the internal rules can be adjusted frequently upon the agreement of members, whereby contract terms and rates contained in the statutory license is hard to change or get rid of.⁷⁷⁷

State-Established Nature of Collecting Societies

However, such advantages of collecting societies in outperforming statutory licensing scheme over efficiency are less apparent in China. The reason is that copyright collective management system, similar to the statutory licensing scheme contained in the Copyright

Regulation of Natural Monopolies,(2006), edited chapter in A. Mitchell Polinsky & Steven Shavell (eds) Handbook of Law and Economics forthcoming 2007,8.

⁷⁷¹ Ibid, Posner.

⁷⁷² 273

⁷⁷³ Ibid, Posner.

⁷⁷⁴ K Train, Optimal Regulation-The economic Theory of Natural Monopoly. (1995, The MIP press, London,8)

⁷⁷⁵ K Train, Optimal Regulation-The economic Theory of Natural Monopoly. (1995, The MIP press, London,8)

⁷⁷⁶ Merges, p1293

⁷⁷⁷ Ibid.

Law of China, has several distinctive 'Chinese Characteristic' originated from 'state-established' nature of the collecting societies.⁷⁷⁸ For example, rather than granting copyright owners with autonomy over the management of the collecting societies, all the internal rules were established by relevant copyright administrations of the government, meanwhile, rates and other terms of exchange set by the collecting societies are subject to the administrative approval.⁷⁷⁹ Moreover, the 'quasi-official' features of the existing collecting societies guaranteed them with dominant positions in respective licensing market whereby the law prohibiting any private individuals or organizations from establishing collecting societies 'unless' approved by the state, nor engaging in the mass licensing similar to the function performed by the collecting societies.⁷⁸⁰ On the other hand, copyright owners are forced into the collecting societies due to the difficulties from enforcing their right individually. However, relevant provisions contained in the law prohibits them from licensing their work individually once they become members of the collecting societies.⁷⁸¹ Currently there are five collecting societies in China: Copyright Collecting Society of Literary Works (CCSLW)⁷⁸², China Film Copyright Association (CFCA)⁷⁸³, Music Copyright Society of China (MCSC)⁷⁸⁴, China audio-video Copyright Association (CAVCA)⁷⁸⁵ and Images Copyright Society of China (ICSC)⁷⁸⁶. They were established by the Administrative of Copyright in the year of 2005 and 2006, upon the enactment of the Regulation of The Collective Administration Of Copyright 2004. The regulation was amended twice, once in 2011 and another in 2013. The market entry restriction contained therein remained the same nonetheless.

Administrative Monopoly created by Law

Article 6 in the Regulation of the Collective Administration of Copyright 2013(hereinafter 2013 Regulation) prohibits any organizations or individuals from 'engaging in the activities of collective administration of copyright' except the organization for collective

⁷⁷⁸ Xiong Qi, Reconstructing the Value Conception of Copyright Collective Management Scheme in China. (2016), Journal of Law and Society. Issue 129, Vol 3. P97.

⁷⁷⁹ *ibid.*

⁷⁸⁰ Zhang xiufeng & Others, Comparative study of collective management system in China and the US, (2012), China Academic Journal Electronic Publishing House, p14

⁷⁸¹ Article 20, Regulation on the Collective Administration of Copyright 2013.

⁷⁸² <http://www.prccopyright.org.cn/>

⁷⁸³ <http://www.cfca-c.org/>

⁷⁸⁴ <http://www.mcsc.com.cn/>

⁷⁸⁵ <http://www.cavca.org/>

⁷⁸⁶ <http://www.cpanet.org.cn/html/zhuzuoquanxiehui/guanyuxiehui/ruhuixize/index.html>

administration of copyright established under this Regulation. The requirements that need to be satisfied in establishing a collective administration of copyright is set out in Article 7 and Article 8 regarding the eligibility of the applicants as well as the information that shall be included in the article of association. Although Article 7 provides that any 'Chinese citizens, legal person or other organizations that lawfully enjoy copyright or a copyright related right may promote the establishment of an organization for collective administration of copyright', Article 9 and Article 10 set out two administrative provisions that require all the applications for the establishment shall be approved by the 'copyright administration department under the State Council', and register at the 'civil affairs department under the State Council'.⁷⁸⁷ It has been argued that the approval and registration requirement set above has the effect of preventing all private organizations or individual from successfully applying for the establishment without 'facilitation' of the above mentioned department in the government.⁷⁸⁸

Assuming that there is no approval from the State Council and that Article 7 and Article 8 set out a market entry requirement from the outset by prohibiting any private entities from establishing collecting societies, the latter part of Article 6 extends further by putting a restriction on the activities carried out by any private companies from 'engaging in the collective administration of copyright'. In addition, Article 20 of the 2013 Regulation prohibits the copyright owners from exercising the rights individually once entered into an agreement with the collecting societies over the authorization of the right specified therein.⁷⁸⁹ This provision strengthens the power of the collecting societies already

⁷⁸⁷ Article 9 provides that: 'Whoever applies for establishing an organization for collective administration of copyright shall submit to the copyright administration department under the State Council the materials testifying the fulfillment of the conditions as prescribed in Article 7 of this Regulation. The copyright administration department under the State Council shall, within 60 days as of receipt of the materials, make a decision on whether approving the application or not. If it approves the application, it shall issue a permit for collective administration of copyright; if it does not grant the approval, it shall state the reason therefor.'

Article 10 provides that: 'The applicant shall, within 30 days after the copyright administration department under the State Council issues a permit for collective administration of copyright, make registration in the civil affairs department under the State Council in accordance with the relevant administrative regulations on registration and administration of social organizations.'

⁷⁸⁸ Ibid, Xiong, *Reconstructing the Value Conception of Copyright Collective Management Scheme in China*. (2016), *Journal of Law and Society*. Issue 129, Vol 3. P97, The fact that only five collecting societies have been established in China may support this claim.

⁷⁸⁹ Article 20 provides that: 'An obligee shall not, after concluding a contract for collective administration of copyright with the organization for collective administration of copyright, and within the time limit stipulated in the contract, exercise by himself or permits others to exercise the rights that are stipulated in the contract to be exercised by the organization for collective administration of copyright.'

conferred by Article 6 in claiming the exclusivity of the right against any entities that carry out the same function.

Such provision gained further support from both the administrative departments as well as the Court. The State Administration of Copyright emphasized its power to issue administrative injunctions in 'Notice on the prohibition of unauthorized collective management activity' issued in 2005⁷⁹⁰. Moreover, in the case of Audio-Visual Network Co. v. Qiao Sheng Entertainment (2015)⁷⁹¹, the court held that the plaintiff, an intellectual property agency, by issuing blanked license that covers the playing right acquired from the producers of several sound recordings to the defendant, an entertainment companies provided the Karaoke service, violates Article 8 of the 2013 Regulations by engaging in copyright collective administration without authorization.

Administrative Monopoly v. Natural Monopoly

Therefore, it can be seen that the framework established in the Regulation 2013 set out rigorous market entry requirements and granted the collecting societies with 'administrative monopoly' in the mass licensing market. Some have argued from the economic efficiency standing point that the nature of natural monopolies of collective management organizations may justify the imposition of administrative monopoly established by the existing regulatory framework.⁷⁹² Such argument is based on a misunderstanding of the concept of the natural monopoly in the context of welfare economics, since welfare of monopolized market includes both the welfare of consumers and producers.⁷⁹³

Recall to the definition of natural monopoly provided in the previous chapter, natural monopoly exists "...if the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly".⁷⁹⁴ And in the case of copyright collective management system, the costs are lowered by economies of

⁷⁹⁰ The State Administration of Copyright, [2005] Decree 49

⁷⁹¹ Peoples' High Court of Suzhou Province (2015), case no.00100.

⁷⁹² Li Tao, Valuation Foundation of the Monopolistic Collective Management System, (2016), Journal of Intellectual Property China, Vol 6, p45

⁷⁹³ G Mankiw, Principles of Economics, (2012, Cengage Learning, US), 313

⁷⁹⁴ R Poser, Natural Monopoly And Its Regulation, (1968), 21 Stanford Law Review 548.

scale and scope where the long run average total cost falls as the quantity of output increases.⁷⁹⁵

Although government may create a monopoly by granting an enterprise with an exclusive right to sell some goods or services, for example, copyright and patents,⁷⁹⁶ monopoly creates social cost as well.⁷⁹⁷ Applying the cost and benefit analysis to this case, it might be argued that the total costs falls based on the reduction of transaction costs are the benefits generated by collective management system as an administrative monopoly. At the same time, it brings costs to the copyright holders, and in the particular case of China, the loss suffered by the copyright owners as well as the users.

The loss suffered by the copyright owners may be caused by the lack of the efficiency of the collective valuation system. Merges argued that collective valuation system outperforms the statutory licensing scheme because the exchange terms and rates can be adjusted frequently. However, given that collecting societies are established by the State Administration of Copyright rather than copyright owners, and the regulation further secured the dominant position of collecting societies in respective licensing markets, there is nor a lack of 'market motivation' for the collecting societies to provide 'optimal protocols' for users nor an improvement to the internal operational efficiency by adjusting the rate frequently.⁷⁹⁸

In the 2013 Regulation, the general assembly of the collective organizations are assigned with the responsibility to 'formulate internal management systems', 'formulate and amending the royalty charging rates', 'formulating and amending the royalty transfer measures' and 'deciding on royalty transfer plans and the administrative fee' under Article 17(2). However, no guidance on the formulation method was provided. It has been pointed out that the assignment of the powers to the general assembly in the formulation of rate schedules without guiding principles may harm the interest of other members by enabling the members of the General Assemble to abuse their powers.⁷⁹⁹ Thus, rather than the fee

⁷⁹⁵ Ibid.

⁷⁹⁶ The benefits of the copyright are the increased incentive for creative activity, but at the same time, it increases the costs for others from using the works, and creates social costs. Ibid.

⁷⁹⁷ Ibid, G Mankiw, Principles of Economics, (2012,Cengage Learning, US,)P302

⁷⁹⁸ Lin Xiuqin & Huang Qianxin,Choice of Mode of Copyright Collective Management in China, (2016),Journal of Intellectual Property, issue 9, P57

⁷⁹⁹ Guobin Cui, Copyright Law-Cases and Materials, (Peking University Press, China, 2004.)545,

set in the law under statutory license, the law shall provide guidance as to the internal measures adopted by the collecting societies over rate setting and royalty distribution, so as to ensure that the fees are formulated on a rational basis.⁸⁰⁰

Thus, similar to the conclusion reached in the previous section, the proposal for deploying the collective management system in dealing with the issue of cable retransmission in China will face the difficulties inherited from the underlying 'administrative monopoly' nature of the collecting societies. In order to mediate the problem, it is strongly advice that the government should restore the value conception of copyright collective management as means of reducing transaction costs are participants of the market rather than a tool deployed by the government to control market transactions.⁸⁰¹ Thus, market entry requirements contained in the regulation shall be removed, allowing private entities to join in the market. Once competition is introduced into the market, efficiency will be improved by driving the price down to marginal cost, thus reducing the overly high price that is charged to the users. At the same time, copyright users may choose from several competition collective societies, forcing the collecting societies to establish a rational and transparent royalty distribution mechanism.⁸⁰² On the other hand, the law should set specific provision over the royalty distribution method and procedure, as well as the duty to provide comprehensive and transparent statement of account over the administrative cost charged to the users. In the Music Industry Report of China 2017, it has been shown that the Music Collecting Society of China generated 170 million yuan of gross revenues last year, which is 80 times lower than the ASCAP and BMI in the US. However, the administrative cost reflected by the ratio based on the royalty distribution and total revenues generated is 16.7%, which is the highest amongst all collecting societies in the ten countries under the survey, and is higher than the administrative cost of ASCAP and BMI which is 12.26% and 13.43% respectively.⁸⁰³ Given the administrative nature of the collecting societies, it is unlikely that autonomy would be granted to copyright owner over the management. Thus, market competition and a concrete set of regulations over the internal management

⁸⁰⁰ Ibid.

⁸⁰¹ Ibid, Xiong. Lu Haijun, Legal status of Copyright Collecting Societies in China, (2007), Journal of Politic and Law, Issue 2. P71

⁸⁰² Cui Guo bin, Controlling the monopoly of Copyright Collective Management organizations. (2000) ,Journal of Tsinghua Legal Studies, Vol 6, p114

⁸⁰³ The University of Media Communication of China, Music Industry Report of China 2017, p56,57.

procedure are both needed to improve efficiency and to protect the interests of their members.

Nonetheless, it has been argued that the new Digital Copyright Identifier (DCI) system established by the State Administration of Copyright may replace the collective management system dealing with high volume transactions in China. In general, The DCI system is an online copyright transaction system that serves as an exchange platform where copyright owners and users can acquire authorizations and pay remunerations on the platform without the involvement of collecting societies.⁸⁰⁴ Upon registration, each work will be assigned with a unique DCI code and issued with certificate of authentication. Users of the work can explore the index embedded in the system and search for the works he wants to use. The copyright owners would either set a standard term of contract in the work portfolio that includes the rate schedule, or leave contact details where the user can immediately contact with the copyright owners and negotiate for the terms for use. In the former case, the agreement can then be reached immediately when the user clicked the 'agree' button. Moreover, the platform has a built-in online payment system that allows the users to make quick payment which further solves collection and distribution problem. Such system has reduced transaction costs incurred from identifying the copyright owners as well as the cost incurred from individual negotiating.⁸⁰⁵ According to an interview conducted with the official from DCI under State Administration of Copyright, large internet and social media have registered more than millions of the works this year and a large scale of transactions have already occurred on the system. However, since the establishment is in its early stage, the system has not been established nation-wide. User may have to go through all the local DCI to search for the works he wanted to use. Nonetheless, according to the State Administration of Copyright, a national-wide DCI is expected to be completed before 2019.

Cable retransmission issue under the Copyright Law 2010

Compare to the US compulsory licensing scheme and the EU mandated collective

⁸⁰⁴ SAPPRFT official News Publications, DIC Will Become The Infrastructure Of Online Copyright Transaction. 2017-03002

⁸⁰⁵ SAPPRFT: DCI System, Solution for Mass Authorisation, 2016, <http://www.ncac.gov.cn/chinacopyright/contents/4509/276762.html> accessed in Feb 2019.

management system, Copyright Law 2010 of China contains no explicit provision that limits the copyright owners' right of exploitation over cable.

The right of Broadcasting Article 10(11)

Under the Copyright Law 2010, copyright owners are conferred with the right to authorize or prohibit cable retransmission of his work under the right of broadcasting provided under Article 10(11):

'Copyright includes...the right of broadcasting, that is, the right to broadcast a work or disseminate it to the public by any wireless means, to communicate the broadcast of a work to the public by wire or by rebroadcasting, and to publicly communicate the broadcast of a work by loudspeaker or any other analogous instrument transmitting signs, sounds or images;'

Although the wording of Article 10(11) does not refer to 'cable retransmission' explicitly, the second sentence i.e. '...to communicate the broadcast of a work to the public by wire or by rebroadcasting' is broad enough to encompass the activity of cable retransmission in analogue to the provision contained in the US copyright law under S101 which provides that: '...to transmit or otherwise communicate a performance to the public... by means of any device or process'.⁸⁰⁶ Moreover, supplementary regulations made similar provisions which emphasize that the copyright owners enjoy a right of broadcasting over cable retransmission. For example, Article 3 of the Interim Measures 2011 provides that:

The term "playing" as mentioned in these Measures refers to the initial playing, re-playing and relay by radio stations and TV stations with or without cable.

Thus, once the broadcasters invoked the broadcasting license of sound recording, it is implied that the license for 'playing the sound recordings' would encompass both initial playing and cable retransmission.

Despite the fact that the copyright law confers the copyright owners with a right to control cable retransmission, according to the interview conducted with the official in the Department of Copyright of China Central Television, copyright owners do not normally exercise this right separately from the authorizations granted for the initial broadcasting.⁸⁰⁷

⁸⁰⁶ House Report 94-1476

⁸⁰⁷ The interviewee preferred to remain anonymous.

As demonstrated in the previous chapter that the traditional broadcasting system, including wireless broadcasting stations, cable stations and Satellite is owned and regulated by the State Administration of Press, Publication, Radio, Film and Television,(SAPPRFT), SAPPRFT is in fact a super enterprise that dominates the entire traditional broadcasting market in China. As a result, the distinction between the initial broadcasting market and the retransmission market, including both secondary transmission made by either cable systems or the satellites is blurred. And copyrighted contents, once authorized by the copyright owners, become an input for the production of the programs that are transferred internally among between broadcasting and cable stations. Contrary to the market structure based on copyright transactions as between wireless broadcasting and cable broadcasting station in the US and EU, the subject matter of transaction between the wireless broadcasting stations and cable broadcasting stations in China are the broadcasting time and the services provide over the infrastructures. According to an interview conduct with the official from the SAPPRFT,⁸⁰⁸ wireless broadcasting stations located in other provinces need to pay a form of ‘landing fee’ to the local cable operators to have their programs broadcasted to the cable audience. However, no evidence suggested the landing fee would be passed onto the copyright owner.

On the other hand, the dominant position of broadcasting stations grants them with a strong bargaining power as against copyright owners when negotiating a license.⁸⁰⁹ Normally the broadcasting stations would designate a standard license, which is broad enough to encompass the initial transmission and secondary transmissions made over all the media platforms by all possible means. However, royalties are paid for different ‘packages’ of retransmissions rather than by individual uses. The royalty fees set for the packages by the copyright owners have proven to be much lower than the fees applied for other transmitting platforms that does not belong to the SAPPRFT system, i.e. private websites.

As can be seen from the discussion above, the issue of cable retransmission encountered less debate in China due to the underlying state-owned nature of the broadcasting and cable stations. It is the common practice in China that broadcasting stations acquire an

⁸⁰⁸ The interview was conducted in April 2017. The interviewee preferred to remain anonymous.

⁸⁰⁹ Ibid, Xiong.

authorization that encompass, either explicitly or implicitly, both the initial transmission as well as secondary transmission made by cable.

Such conception extends to application of the broadcasting statutory licensing regime whereby it is often assumed that cable retransmission statutory license is implied in the provisions set for the broadcasting statutory license which was granted primarily over the initial transmission. In fact, Chinese scholars have been criticizing the acquiescence made by law over the enforcement of a copyright owners' right against cable retransmission activity. However, they argued that the problem is difficult to resolve. As copyright owners are hardly guaranteed with remuneration over the initial transmission made by the broadcaster, it would be practically difficult for them to claim a separate payment for the secondary use. From the copyright owners' perspective, the dominant position of the broadcasting stations significantly impaired the incentives from asserting an individual right of cable retransmission against the broadcasters.⁸¹⁰

Nonetheless, if the legislators follow the US approach and incorporate a separate cable retransmission statutory license in the new law, the implementation of which would face the same difficulties as of the broadcasting statutory license regarding remuneration collection due to the deficiencies contained in the design of the system mentioned above. In order to mitigate the problem, legislators shall seek to establish a concrete administrative structure within the statutory licensing scheme so as to ensure that the broadcasting stations will provide sufficient information in fulfilling the accounting obligation. The State Administration of Copyright may serve as the administrator that oversees the implementation of the statutory license, similar to the function performed by the Registry of Copyright in the US. On the other hand, copyright owners shall be granted with the ground to sue against broadcasting stations in the circumstances where the broadcasting stations fail to comply with the conditions set in the procedural rules or make payment in

⁸¹⁰ In the case of Shimao Zhu & Peisi Chen v. China Central Television (1999) Case No 108, the plaintiff, Zhu and Chen brought a claim against China International Television Corporation, asserting that China International Television published and distributed eight comedy shows that they performed in the Spring Festival Gala Evening organized by China Central Television without their authorization. Zhu and Chen are the creators, i.e. the authors of the scripts, as well as the performers of the comedy shows. China International Television Corporation is a company that was invested by the China Central Television for the publication and distribution of the programs they produced. In this case, the court ruled in favor of the plaintiff and issued an injunction against China International Television corporation with damages. However, the two performers were banned from all the shows held by China Central Television since then. Thus, it might be reasonably argued that the dominant position of the broadcasting stations in China has the effect of deterring copyright owners from asserting their rights so as to keep an ongoing corporative relationship with the broadcasters who is the only TV program producers that were authorised by the SAPPRT.

accordance to the rates set in law. Remedies such as injunctions and damages shall also be made available that restrains the broadcasting stations from continuing to invoke the statutory licenses unless payment is made.

Copyright Provisions Concerning Broadcasting

It can be seen from the above discussion that the state owned nature of traditional broadcasting stations and cable broadcasting stations in China somehow mitigates the problem of copyright over cable retransmission. However, technology development brought the internet service providers and telecommunication operators into the competition of broadcasting services against traditional broadcasters. According to the Cable Television Industry Report issued by SAPPFRFT, traditional cable broadcasters lost 1 million subscribers this year to the IPTV and the internet television services.⁸¹¹ The total number of IPTV and internet television subscribers is now 0.13 billion with growing increase of 16 million on a semi annual basis.⁸¹² However, since telecommunication operators in China are state-owned too, the competition in the IPTV market between the broadcasting stations and the telecommunication operators are regulated by the Regulations issue by the SARFT, whereby requiring that all the IPTV services must be carried out in corporation of the broadcast controlling platform established by the SARFT subject to licensing regime.⁸¹³ Linear transmission of TV broadcast by private enterprises using the by over-the-top set up box are prohibited by regulation issued by SAPPFRFT as well.⁸¹⁴ Regarding internet services provided by private enterprises, broadcasting stations seek to control the transmission of their broadcasts through copyright law. Thus China is confronted with the similar copyright issues as of the US in the 1976 Copyright Act, i.e. whether copyright owners right of public performance, or the right of communication to the public in the context of EU law, can sufficiently cover the activity of internet transmission.

In the US and EU, similar problem of internet retransmission has been settled in case law concerning the right of public performance and right of communication to the public. The US case of *ABC v. Aereo* and the EU case of *ITV v. TV Catchup* are important in setting the theme for the discussion of the right of broadcasting and right of communication to the public-and thus shall be discussed further in details.

⁸¹¹ SARFT Report on the Cable Television Industry Development, Second Season, released date: 2nd of August.

⁸¹² Ibid.

⁸¹³ SAPPFRFT Decree No 6, Regulation on Linear Transmission of Audiovisual Service, 2016

⁸¹⁴ SAPPFRFT Documentation 181, Notice On The Licensing Requirements Of Internet Television Broadcasting Services. 2014

US Right of Public Performance and EU Communication to the Public – Aereo Case study

Background: On June 25 2014, the US Supreme Court ruled in favour of the broadcaster on a 6-3 vote and held that Aereo infringed the broadcaster’s public performance right by retransmitting the over-the-air programs on the internet without authorisation.⁸¹⁵ This case again sparks the clashing between copyright law development and technology innovation.

Aereo is an internet based company that sells services to its subscribers based on a monthly fee to watch free-on-air television programs online. The petitioners, including television producers, marketers, distributors and broadcasters, who own copyrights in most of the underlying works that have been retransmitted,⁸¹⁶ brought a suit against Aereo for the infringement of their public performance right. The court ruled in favour of the plaintiff on the ground of Aereo’s ‘overwhelming likeness to cable companies’ targeted by 1976 Copyright amendment, and held that Aereo did perform petitioner’s copyrighted works publicly.

The public performance right is set forth in S106 of the US Copyright Act 1976, which provides that: ‘...the owner of copyright has the exclusive rights ... to perform the copyrighted work publicly;’ S101 of the 1976 Act, which is also known as the ‘Transmit Clause’, further defines the activities of public performance as: ‘...to transmit or otherwise communicate a performance to the public... by means of any device or process, whether the members of the public capable of receiving the performance... in the same place or in separate places and at the same time or at different times...’.The decision eventually came down to answering two essential questions: (1) did Aereo perform? (2) did Aereo perform publicly?⁸¹⁷

In deciding the first question, the court spent lengthy text by stressing the ‘overwhelming likeness’ of Aereo’s system from a cable system, which was the target of the 1976 amendment, and held that Aereo’s activities should fall within the licensing scheme as of those activities carried out by Cable companies. Since before the 1976 amendment, cable’s retransmission activities were free from copyright liability based on two case decisions: *Fortnightly Corp. v United Artists Television Inc.*, 392 U.S. 390 and *Teleprompter Corp. v.*

⁸¹⁵ American Broadcasting co. v. Aereo,inc 573 US (2014) No. 13–461. Argued April 22, 2014—Decided June 25, 2014

⁸¹⁶ Some works are not copyrighted works because they are already in public domain.

⁸¹⁷ American Broadcasting v Aereo Inc 573 US (2014) p4

Columbia Broadcasting System, Inc., 415 U.S. 394.⁸¹⁸ The court laid down a rule in the two cases that CATV providers did not ‘perform’ the copyright work because they were ‘more like a viewer than a broadcaster,’ and ‘broadcasters perform, viewers do not perform’.⁸¹⁹ For the purpose of clarity, the court drew a line between broadcasters and CATV providers based on their functional distinction: ‘the broadcasters procured programs and propagated them to the public and that CATV providers simply carried whatever program they received without editing them. However, Congress amended the Copyright Act in 1976 to overturn the above rulings for the purpose of bringing cable activities into the scope of the Act. Three major changes were made to effectuate their intents:

- (1) Firstly, the line between ‘broadcasters’ and ‘viewers’ was removed by broadening the definition ‘perform’ in S101 to cover both broadcasters and CATV’s activities irrespective of the editorial function requirement.⁸²⁰
- (2) Secondly, the Act enacted the ‘transmit clause’ specifying that ‘to transmit a performance to the public’ also constitutes a ‘public performance’.⁸²¹ Congress further clarified in the House Report that ‘not only rendition or showing’ of the work, which is normally exercised by broadcasters, constitutes a public performance, but also ‘any further act by which that rendition or showing is transmitted or communicate to the public’, which is precisely the function of a cable system, also fell within the scope of public performance.⁸²²
- (3) Thirdly, Congress created a complex compulsory licensing regime (ss111-119) in order to render cable retransmissions to subject to a license based on payment of fee.⁸²³

So far, it can be seen that the court sought to follow the legislative trend and used the ‘cable-likeness’ argument as a legal foundation to catch Aereo’s activities under the

⁸¹⁸ The court laid down a rule in the two cases that CATV providers did not ‘perform’ the copyright work because they were ‘more like a viewer than a broadcaster,’ and ‘broadcasters perform, viewers do not perform’

⁸¹⁹ Ibid.p9For the purpose of clarity, the court drew a line between broadcasters and CATV providers based on their functional distinction: ‘the broadcasters procure programs and propagate them to the public and CATV providers simply carry whatever program they receive without editing them

⁸²⁰ S101 now provides: to perform a work means...[in the case of a motion picture or other audiovisual work], to show its images in any sequence or to make the sounds accompanying it audible.

⁸²¹ S101 (2) : ‘to transmit or otherwise communicate a performance of the work to the public, by means of any device or process, whether the members of the public capable of receiving the performance...receive it in the same place or in separate places and at the same time or at different times.’

⁸²² Copyright Law Revision(House Report No.94-1476) (1976) p63

⁸²³ S111, Ibid, p7-8

Copyright law. However, three other dissenting judges argued that this methodology set a 'shakiest' foundation of interpretation.⁸²⁴ Judge Scalia pointed out that there existed severe shortcomings of the court's interpretive methodology, i.e. the interpretation of Congress intent from one single piece of House Report shows inherent defect, moreover, the 'cable-likeness' argument itself fails as reasoning since there is indeed significant difference between the cable and Aereo systems.⁸²⁵ Finally, Judge Scalia expressed the concern that this judgment may have a negative impact on the 'technological neutral' principle in the future copyright jurisprudence: "... and whatever soothing reasoning the Court uses to reach its result ('this looks like cable TV'), the consequence of its holding is that someone who implements this technology 'perform[s] under that provision'".⁸²⁶

Leaving aside the controversy over the court's interpretive methodology, the second dissenting argument from Judge Scalia went into the substantive copyright law as to whether Aereo 'performed' under the definition provided in S101. This may bring up a comparative analysis of the public performance right in US and the right of communication to the public in the EU since, (1) assuming the Aereo case happened in the EU, the right of communication to the public would be the primary source that governing the transmission activity in question. (2), although it seems the EU court may reach the same conclusion and finds Aereo liable, how the court interpreted the right to deal with the technology issues involved would be different.

Evolution of the 'Public Performance right' and 'the right to communicate to the Public'

Before copyright law settled down with eight different types of subject matters and six exclusive rights, it experienced a long process to synthesis itself in order to keep pace with technology development.⁸²⁷

'Public performance right' was firstly established in the Dramatic Literary Property Act 1833 in the UK.⁸²⁸ And the right covers 'dramatic work' only, i.e. a play. Prior to the 1833 Act, authors of plays were merely provided with a right-to-copy, i.e. a reproduction right in

⁸²⁴ Aereo decision, p7.

⁸²⁵ Ibid, P8

⁸²⁶ "... and whatever soothing reasoning the Court uses to reach its result ('this looks like cable TV'), the consequence of its holding is that someone who implements this technology 'perform[s] under that provision'. P9

⁸²⁷ L Bently & Others, *Copyright and Piracy: Interdisciplinary Critique*, (2010, Cambridge University Press,84).

⁸²⁸ Deazley, R. (2008) 'Commentary on Dramatic Literary Property Act 1833', in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org, accessed in Oct 2014.

publications under the Statute of Anne and Copyright Act 1814.⁸²⁹ As a result, copyright owners of dramatic work were unable to assert copyright against theatres for unauthorised performance of the play since the scope of the right was limited to cover the activities of publication only. In the case of *Coleman v. Wathen*,⁸³⁰ the judge made it clear that because 'there is no publication involved in a performance, the plaintiff did not have a claim on the infringement of the copyright'.⁸³¹ The effect of this decision was that a play remains under the control of the author only if it is unpublished, and once the play (e.g. a playwright) is published and printed as books, it might be performed by anyone without the consent of the author.⁸³² Therefore, the Dramatic Literary Property Act established the public performance right as a legal basis upon which to prevent the unauthorised performance of a play.⁸³³

Upon the invention of recording and broadcasting technologies, a performance is not limited to live performance in the theater, but could also be fixed into tapes or directly broadcasted by radio waves to audiences not present at the scene of the play. The former activity is primarily addressed by the reproduction right which enables the authors to control the copies for the purpose of public distribution; the latter, i.e. exploitation by electronic transmission, falls within the scope of public performance right.⁸³⁴

The provision of the public performance right can now be found in S106(4) and S101 of the US Copyright Act 1976.

Firstly, S106(4) provides the owners of copyright in 'literary, musical, dramatic and choreographic works, pantomimes and motion pictures and other audiovisual works' with an exclusive right to 'perform the work publicly'.⁸³⁵

S101 then defines 'to perform' as 'to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual

⁸²⁹ The Statute of Anne provides that : 'the Author of any Book or Books... shall have the sole Right and Liberty of Printing such Book and Books for the Term of One and twenty Years...'; And under the Copyright Act 1814,

⁸³⁰ *Coleman v. Wathen* (1793) 5 D. & E. 245.,

⁸³¹ 'There is no evidence to support the action in this case. The statute for the protection of copy-right only extends to prohibit the publication of the book itself by any other than the author or his lawful assignees. It was so held in the great copyright case by the House of Lords. But here there was no publication.' *Ibid.* note 828

⁸³² *Ibid.* note 828

⁸³³ *Ibid.*

⁸³⁴ H Hansen, *US Intellectual Property Law And Policy*, (2006, Edward Elgar Publishing, UK.46)

⁸³⁵ The wording in S106 reads: 'the owner of copyright under his title has the exclusive right to do or to authorise...in case of literary musical, dramatic and choreographic works, pantomimes and motion pictures and other audiovisual works, to perform the work publicly.'

work, to show its images in any sequence or to make the sounds accompanying it audible.’ However, since the Act is meant to capture the activity of ‘public performance’ only, i.e. not private performance, S101 went further to define ‘to perform publicly’ as:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Part (2) of S101 is also known as the Transmit Clause, which was enacted in 1976 when Congress amended the Copyright Act. It should be noted that this clause is two-fold: first, to define the activity of ‘performing’ and ‘who’ is performing; second, to decide what audience constitutes public.

With respect to the first utility, i.e. in defining what is ‘performing’ and who conducts the activity of ‘performing’, Congress made the following statement in the House Report when they drafted the Transmit Clause:

‘...for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, it would not be actionable as an infringement unless it were done “publicly, as defined in section 101.’⁸³⁶

Therefore, the Transmit Clause made it clear that broadcasting, transmitting, re-transmitting shall be regarded as ‘performing’; accordingly, broadcasters, local affiliates,

⁸³⁶ Copyright Law Revision (House Report No. 94-1476)

and cable operators are the ones who carry out the activity of performing. Although S101 provides the definition of 'to transmit' which means: 'to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent...', this definition has the mere effect of distinguishing a transmission from a live performance to audiences present at the scene, and does not change the nature of the activity 'performing' within the meaning of the public performance right.⁸³⁷ Thus, both 'transmitting a performance to the audiences not present at the scene' and 'live performing' fall under the scope of the 'public performance right' under S106 of the US Copyright Act 1976.

EU: On the other hand, the right of communication to the public is provided in Article 3(1) of the Information Society Directive⁸³⁸:

Article 3 Right of communication to the public of works and right of making available to the public other subject matter:

1. 'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - (a) for performers, of fixations of their performances;
 - (b) for phonogram producers, of their phonograms;
 - (c) for the producer of the first fixation of their films, of the original and copies of their films;
 - (d) for broadcasting organizations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.'

⁸³⁷ The situation is different in the EU where the location of the audience can sufficiently affect the right of public performance or communication to the public.

⁸³⁸ Directive 2001/29/EC Of The European Parliament And Of The Council Of 22 May 2001 On The Harmonization Of Certain Aspects Of Copyright And Related Rights In The Information Society.

Notably, the scope of the right is clarified by the Recital 23 to cover only the communication to the public NOT present at the place where the communication originates: ...This right should be understood in a broader sense covering all communication to the public not present at the place where the communication originates.

UK: The right of communication to the public is incorporated into S20 of UK CDPA 1988:

Infringement by communication to the public

(1) The communication to the public of the work is an act restricted by the copyright in –

- a. A literary, dramatic, musical or artistic work,
- b. A sound recording or film, or
- c. A broadcast.

(2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include –

- a. The broadcasting of the work
- b. The making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

Therefore, the definition of ‘communication’ within both the EU and UK context excludes the act of ‘live performance’ from their scope. Live performances are thus fall under the scope of other the ‘right of performance’, also known as the ‘performing right’ under S19 of the CDPA 1988:

S19 Infringement by performance, showing or playing of work in public:

(1) ‘the performance of the work in public is an act restricted by the copyright in a literary, dramatic or musical work.

(2) In this Part ‘performance’, in relation to a work –

- a. Includes delivery in the case of lectures, addresses, speeches and sermons,
and

- b. In general, includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film or broadcast of the work.
- (3) The playing or showing of the work in public is an act restricted by the copyright in a sound recording, film or broadcast.
- (4) Where copyright in a work is infringed by its being performed, played or shown in public by means of apparatus for receiving visual images or sounds conveyed by electronic means, the person by whom the visual images or sounds are sent, and in the case of a performance the performers, shall not be regarded as responsible for the infringement.’

Therefore, the definition of ‘performance’ within the UK copyright law can be distinguished from the US definition based on the fact that the latter covers both transmissions by broadcasters and retransmission of cable operators,⁸³⁹ whereas in the UK, such activities will qualify as the ‘communication’ under S20 of the CDPA.

On the international level, the UK approach of classifying the act of live performance into the ‘right of public performance’ seems to comply with the Berne Convention as compared to the US approach. Article 11(1)(i) and (ii) of the Berne Convention each sets out the right of public performance and communication to the public of a performance which provides:

- (1) ‘Author of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising:
- (i) the public performance of their works, including such performance by any means of process;
 - (ii) any communication to the public the performance of their works.’

The WIPO Guide to the Berne Convention further clarifies that ‘public performance’ under Article 11(1)(i) covers ‘live performance’ given by singers or actors on the spot, as well as performance by means of recording.⁸⁴⁰ Any transmission of the performance, except linear transmission,⁸⁴¹ is regarded as ‘public communication’ under Article 11 (1)(ii).⁸⁴²

⁸³⁹ Ibid.

⁸⁴⁰ WIPO Guide to the Berne Convention, (World Intellectual Property Organisation, Geneva, 64)

⁸⁴¹ Non-linear transmission encompasses the activity of ‘broadcasting’ which is dealt by Article 11 bis below.

⁸⁴² WIPO Guide to the Berne Convention, (World Intellectual Property Organisation, Geneva, 65)

‘Broadcasting’ which encompasses the activity of linear transmission is controlled by the right of broadcasting under Article 11bis⁸⁴³.

It is worth noting that although the Berne Convention distinguished linear and non-linear transmission and provided two separated rights i.e. the ‘right of broadcasting’ and the ‘right of communication to the public’ to control these two activities individually, the UK CDPA 1988 does not stipulate the right of broadcasting. Instead, both linear and non-linear transmission fall into the scope of the right of communication to the public, but with a distinction maintained by providing another ‘making available right’ in S 20(2)(b) to control non-linear transmission under the broad title of communication to the public.⁸⁴⁴ This approach originated from the WIPO Copyright Treaty 1996, Article 8 of the WIPO Copyright Treaty provides that: ‘... authors of literary and artistic works shall enjoy the exclusive right of authorising 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 the members of the public may access these works from a place and at a time individually chosen by them.’ Recital 25 of the Information Society Directive further clarifies that unlike broadcasting, which is linear transmission that encompasses immediate reception, ‘making available right’ targets at the activity of interactive on-demand transmission, i.e. non-linear transmission.⁸⁴⁵ Although it has been argued that this right is assumed to cover most internet transmissions,⁸⁴⁶ nonetheless, as long as the transmission is linear, i.e. the public can receive the transmission simultaneously, it falls within the range of broadcasting and thus controlled by the right of communication regardless of the communication platform.⁸⁴⁷

⁸⁴³ Article 11 bis Broadcasting and related rights: 1. Broadcasting and other wireless communications, public communications of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments; Compulsory Licenses; 3. Recording; ephemeral recordings: (1) Authors of literary and artistic works shall enjoy the exclusive right of authorising (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of sings, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by sings, sounds or images, the broadcast of the work.

⁸⁴⁴ Ibid.

⁸⁴⁵ Recital 25...It should be made clear that all right holders recognised by this Directive should have an exclusive right to make available public copyright works or any other subject-matter by way of interactive on-demand transmission. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

⁸⁴⁶ Bently & Sherman, *Intellectual Property Law*, (2009, 3rd edition, Oxford University Press, UK, 150)

⁸⁴⁷ See the discussion of *ITV v TVCatchup* below.

Case Law: The case of *ITV Broadcasting v. TV Catchup*⁸⁴⁸ demonstrates how the EU solves the problem of re-transmission activity by applying the right of communication to the public under article 3 of the Copyright Directive and S20 of the CDPA 1988.⁸⁴⁹ The underlying issue of the case is similar to *Aereo* in which free-to-air broadcasts were retransmitted on the internet without authorisation from the broadcasters. Nonetheless, the way how the EU court interpreted the ‘communications to the public right’ manifests the ‘effect based analysis’ vis-à-vis the US ‘method-based analysis’ of the retransmission activities.⁸⁵⁰ That is to say, when the U.S. court is trapped with transmission technologies and seeks to confine copyright law principles thereupon, the EU court circumvents the detailed technology questions and focuses merely on the cumulative effect of the transmission.⁸⁵¹ In other words, the legal questions securitized by the US and EU court respectively are ‘how the work is transmitted’ and ‘who the work are transmitted to’.

The defendant, TV Catchup, is an internet based company that provided a live streaming service allowing its subscribers to watch free-on-air broadcasts online. The claimants are broadcasters who own copyrights in the underlying works that form the broadcasts and the broadcasts themselves. The defendant adopted technical measures which allow the service to be accessible only to users resident in the UK with a valid TV license, the broadcasters alleged that their exclusive right of communication to the public has been infringed by the defendant’s activities of (a) communication of the works to the public and (b) by making, or authorising the making of, transient copies of the works in the defendant’s servers and on the screens of users.⁸⁵²

The main difference between TVCatchup technology and the *Aereo* system is that the latter uses individual antenna to catch the over-the-air broadcast signals for individual subscribers, i.e. a ‘one antenna per user model’, while TVCatchup uses a centralized antenna to catch the signal but converts it into individual streams, i.e. ‘one stream per user model’⁸⁵³. In fact, the reason as to why *Aereo* adopted such a model is to intentionally avoid

⁸⁴⁸ Case C-607/11 *ITV Broadcasting Ltd v TV Catchup Ltd* 2013

⁸⁴⁹ Case C-607/11 *ITV Broadcasting Ltd v TV Catchup Ltd* 2013

⁸⁵⁰ Y Sun, ‘Problems and Future of Internet Streaming Copyright Infringement’, (2013), PKU Intellectual Property Law Review, p9

⁸⁵¹ *Ibid* p10

⁸⁵² *Ibid* p1.

⁸⁵³ The defendant adopted a transmission technology comprises four different groups of servers that enable the broadcasts to be retransmitted and shown on the screens of users’ computers or other devices which are connected to the internet, the servers include(1) acquisition servers,(2)encoding servers, (3)origin servers and (4)edge servers. The whole process

copyright liability. Since the court has already recognized the legality of network DVR⁸⁵⁴ and ‘rabbit-ear’ antenna installed on individuals’ rooftop,⁸⁵⁵ the Aereo CEO Chet Kenoji came up with the idea of combining them together to form one single transmission: “...when the appellate court ruled that the network DVR was legal I said I just found my answer because if network DVR is legal and if I can provide network DVR with an antenna I solved my broadcast access problem.”⁸⁵⁶

In *ITV v. TVCatchup*, The CJEU did not spent lengthy texts analyzing the function of TVCatchup system, rather, it focused on several key issues that triggered the act of ‘communication’ based on precedent case law.⁸⁵⁷ Firstly, the court considered whether there was ‘communication’ within the meaning of Article 3 of the Information Society Directive, factors that were taken into account by the court included: (1) the retransmission was made by using a specific technical means different from that of the original communication. (2) The nature of the intervention made by TVCatchup was to expand the circle of the audience instead of mere technical means to ensure or improve reception of the original transmission;(3) The retransmission was made by an organization other than the original broadcaster; on this basis, the court concluded that there was communication within Article 3 (1) of the Information Society Directive. Furthermore, in deciding whether the communication was made to the ‘public’, the court referred to the ‘indeterminate’ and ‘large’ number of potential recipients and immediately reached the conclusion that the transmission was made to the public.⁸⁵⁸ With respect to the one-to-one connection, the CJEU disregarded the question of whether the transmission was made individually, but focused on the cumulative effect of such transmission: ‘...that technique does not prevent a large number of persons having access to the same work at the same time’,⁸⁵⁹ and

works as follows: firstly, the original broadcast signals are captured by an aerial and then passed to the acquisition server; the acquisition server extracts the video streams from the signal and hand over the video-only streams to a encoding server which converts them into different compression standard that can be transmitted on the internet; the origin server then prepares the streams in a variety of formats that correspond to different type of end-users devices. Finally, the origin server pass the adjusted stream to the edge server upon users’ request, and the edge server creates individual streams to the user’s devices. *ITV Broadcasting Ltd v TV Catchup Ltd*, p7, *ibid* note 36

⁸⁵⁴Supra Cablevision

⁸⁵⁵ M Litvinov, *Is Aereo the 21st century Rabbit Ear? or it’s just tying loopholes?*(2013), 18 *Intell. Prop. L. Bull.* 1, 3

⁸⁵⁶ <http://www.cnet.com/news/aereos-founder-has-broadcast-tv-in-a-headlock-now-what-q-a/>

⁸⁵⁷ *Airfield NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA(Sabam)* (2011) CJEU; *Football Association Premier League Ltd v QC Leisure* [2012], *Sociedad General de Autores y Editores de Espana v Rafael Hoteles* [2006].

⁸⁵⁸ *ITV v TVCatchup*,

⁸⁵⁹ *ITV v TVCatvhup*. P10 para 34

concluded that the transmission was made to the public.

In the *SGAE v Rafael Hoteles SL* case,⁸⁶⁰ the ECJ following Article 27 of the Preamble to the Information Directive and the interpretation of Article 11, “Right of Communication to the Public” at the WIPO Copyright Treaty Diplomatic Conference, found that the mere provision of physical facilities is not sufficient to constitute transmission within the meaning of the Information Society Directive. In this case, the defendant was the owner of a hotel in Spain and the plaintiff was the collective management organization of copyright in Spain. The defendant maintained a large central antenna at its hotel, which was used to receive television signals and distribute them to television sets in all rooms via cable networks. The initial controversy in the case was whether the installation of televisions in the guest rooms to enable tenants to watch television programmes constituted an act of dissemination to the public. The Court of Justice held that the mere provision of physical facilities did not constitute “transmission” within the Information Society Directive, but the act of “distributing” a radio signal after the hotel set up a central antenna to receive that signal to a television set in a single room constituted “transmission” because the transmission gave the user real access to the work.⁸⁶¹ At the same time, ECJ identified the hotel as the new public. This is due to the use of cable networks to retransmit wireless signals received from the central antenna, creating an “additional audience”. At the beginning of the authorization, the author argued that the dissemination of his authorization was limited to the authorized direct audience, that is, the owner of the hotel and his family members. Therefore, even if only a few guests of the room receive the transfer at a certain time in each room of the hotel, all the cumulative effects transmitted in the same manner must be considered during the same time period, as well as the successive effects of the transfer for the same room.

In the *Airfield* case⁸⁶², the defendant Airfield, a satellite television service provider, entered into a contract with a broadcasting organization to add several channels from that organization to Airfield's satellite channel package, which authorized Airfield to transmit its programmes synchronously. The joint plaintiff is the collective management of copyright of

⁸⁶⁰ Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SL* [2007] Bus. L.R. 521

⁸⁶¹ *Ibid*, para 25.

⁸⁶² Joined Cases C-431/09 and C-432/09 *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) Airfield NV v Agicoa Belgium BVBA* [2012] E.C.D.R. 3

two acting authors and audio-visual producers. The plaintiff claimed that the act of Airfield constituted a rebroadcast of programmes containing the works of its members, and therefore its transmission was subject to the plaintiff's authorization. According to ECJ, Article 2 of the Satellite and Cable Television Retransmission Directive alone gives the copyright holders the right to “their works to the public via satellite”, and therefore Airfield is required to obtain authorization from the copyright holders for transmissions resulting from the transmission of intervention by satellite, in addition to the authorization obtained by the broadcasting organization. The Satellite Directive, which provides a more technical definition of the act of “transmission to the public by satellite”, provides in article 1, paragraph 2, paragraph 1, that “communication by satellite to the public” in this Directive is “the act of directing, under the control and responsibility of the broadcasting organization, a signal containing a programme that is directed to the public into an uninterrupted chain of communication from the ground to satellite and sent back to the ground.” The third paragraph goes on to state that “if the signal is encrypted and the decoding procedure is provided by the broadcasting organization or, under its authorization, by a third party to the public, the act is an act of “transmission to the public by satellite”. On this basis, ECJ concluded that the entire transmission process: the broadcast organization transmits the signal to the Airfield satellite, which then transmits the satellite to the terrestrial subscribers constituted a single “transmission”, but as Airfield intervened not only to optimize the reception of the original signal, the real effect was to expand the audience.⁸⁶³ Therefore, the broadcasting organization is authorized by the copyright holder not to cover Airfield's satellite transmission behavior.

It can be seen from the above cases, court has been persistent in adopting the ‘effect-based’ approach and reached conclusions that adhere the ‘technology neutral’ principle. As a result, the legal principles laid down in cases concerning a particular type of transmission technology can be applied horizontally across all types of communications networks. Before the court starts scrutinizing the fact in each of these case, the objective of the Information Society Directive are emphasized which is ‘to provide a high level of protection for intellectual property’.⁸⁶⁴ In order to do so, the right of communication to the public should

⁸⁶³ Ibid, para 76

⁸⁶⁴ Recital 4 Information Society Directive

be interpreted in a broad sense to cover all communication to the public not present at where the communication was originated.⁸⁶⁵

In those cases concerning the right of communication to the public, there are certain important factors to be taken into account by the court. For example, in the *Airfield* case, technical intervention by a third party was held to be a communication to the public and fell within the authors' control. The alleged infringement concerning retransmission of TV programs by satellite. The initial authorisation was given by the authors to a broadcaster which incorporated the copyrighted works into its broadcasts, the broadcaster then subleased their broadcasts to a satellite television provider which included the broadcasts into their satellite package. The authors sued the satellite television provider for the infringement of right of communication to the public of their works. The court ruled in favour of the authors and laid down a ground rule that any intervention of the communication that makes the work accessible to new public constitutes an individual communication to the public, therefore requiring an individual authorisation by the copyright owner.⁸⁶⁶

It is clear from the wording of the judgment that the degree of intervention is irrelevant as long as the works are made accessible to a new public. In this case, there are two types of transmission concerned by the court, direct transmission and indirect transmission. Within the direct transmission process, *Airfield* was only involved in providing a decoder card at the completing point of transmission which enabled the subscriber to decode the broadcast, the main process of transmission, i.e. scrambling and sending the signals were conducted by the broadcaster itself. Within the indirect transmission, the broadcasting organizations sent the signal to *Airfield* by fixed link, and *Airfield* would then complete the whole transmission process at later stages. The court held that the direct and indirect transmission each constitutes a single communication to the public by satellite,⁸⁶⁷ therefore, a person who triggers such a communication or who intervenes when it is carried out must be authorised

⁸⁶⁵ Ibid Recital 23.

⁸⁶⁶ Joined Cases C-431/09 and C-432/09 *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA(SABAM)* [2012]E.C.D.R. 3, p2

⁸⁶⁷ If the court found that each of the transmission entails two independent communications, (i.e. a communication occurred between the broadcaster and the satellite provider, and another communication initiated by the satellite provider to the public), then the satellite provider would not be required to obtain authorisation from the author concerning the second communication as long as the broadcaster agreed with the satellite provider to do so.

by the copyright owner.⁸⁶⁸ Hence, it is not the degree of intervention in the process of transmission that matters but the decisive factor is the effect of the transmission, i.e. whether the transmission made the work accessible to a new public, which has not been taken into account by the author. The court found that this transmission made the works accessible to a new public not considered by the author: that it was the public besides those who are capable of receiving the broadcast through the original over-the-air signal.⁸⁶⁹ Thus, the satellite subscribers are the additional public to the original free-to-air TV audiences, and the satellite providers' intervention expand the circle of public to include those satellite subscribers, it shall obtain authorisation from the author to do so.

In order to decide whether there is an intervention, the court also looks from the technological perspective. In TVCatchup, the court concluded that if there is a retransmission made by a specific technical means different from the original communication, the retransmission constitutes a communication within the meaning of Article 3 of the Information Society Directive.⁸⁷⁰ As a result, it is unnecessary to consider whether the transmission was made to a new public, as long as it was intended for a 'public', the conditions laid down within Article 3(1) are fulfilled.⁸⁷¹ Moreover, the profit-making nature of the defendant may also suggest that such communication required to be separately and individually authorised by the author.⁸⁷² In a later case concerning the ITV and TVCatchup,⁸⁷³ the court specified that despite the TVCatchup retransmitted a broadcast is made for reception in the area in which it is re-transmitted by cable and forms part of a qualifying serve, such act constitutes a communication to the public under Article 3(1).

However, in the case of Rafeal Hotel concerning the distribution of TV signal throughout hotel rooms by different technical means, i.e. cable, the court made it clear that such act

⁸⁶⁸ Ibid, P2

⁸⁶⁹ Since the primary way of transmitting the works are through free-to-air broadcasting, therefore, public who are capable of receiving the broadcasts are the public targeted by the broadcasting organisation. And the satellite package subscribers who can access the broadcasts through satellite transmission are deemed as a public 'additional' to the original public. P11.

⁸⁷⁰ ITV v TVCatchup, p3

⁸⁷¹ ITV v TVCatchup, p3

⁸⁷² The court held that : '...it is not irrelevant that a communication within the meaning of art.3(1) of Directive 2001/29 is of a profit-making nature...However, it has acknowledged that a profit-making nature is not necessarily an essential condition for the existence of a communication to the public...' ITV v TVCatchup, p10,p11.

⁸⁷³ C-275/15, ITV v TVCatchup [2017] ECLI:EU:C:2017:144

constituted communication to the public within the meaning of article 3(1) regardless of the difference of technique was used to transmit the signal.⁸⁷⁴

In this case, the primary issue does not concern with the technologies, rather, it is the private nature of individual hotel rooms that challenges the definition of 'public'. Due to the fact that neither the Information Society Directive nor the WIPO Treaty defines the term public, member states are given discretion to define the term within domestic law. The court listed the key factors that come into the consideration are: (1) the circle of potential recipients ;(2) its economic significance to the author; (3) the existence of economic benefit to the person making the communication.⁸⁷⁵ Regarding the first factor, it is assumed that the circle normally implies the 'direct audience within the family circle'.⁸⁷⁶ And it has been argued that the economic weight of the guests of a hotel room is too slight to constitute a new public, nonetheless, the court thought that the 'cumulative effect' of making the works available to the potential recipients in hotel rooms is 'very significant', thus qualifying.⁸⁷⁷

In summary, EU case law has developed a relatively rigorous set of criteria for the recognition of the "right to communicate to the public", which gives the right holder a high degree of protection. In setting these standards, the European Court of Justice sought to avoid confining the interpretation of the right to a particular technology, and sought to build on a broad "technology-neutral" criterion that was still applicable in the context of network integration. In the United States, the persistence of "technology-dependent" means of regulating rights in the United States in the history of copyright legislation, such as a series of compulsory licensing provisions, makes certain technologies the benchmark for judging infringements. As in the Aereo case, the communication of Aereo was "similar to cable TV". Assuming that the Aereo case took place in the European Union, the Court of Justice, through these criteria, can directly determine Aereo's communication to the public, without the need for a thorough examination of its technical means. Nowadays, technologies that are deployed for transmission evolves quickly, it is clear that the United States technology-dependant approach will face difficulties in interpreting newly developed transmission

⁸⁷⁴ Rafeal Hotel, p1

⁸⁷⁵ Rafeal Hotel, p 11, see also Bently & Sherman, Intellectual Property Law, (2009, Oxford University Press,UK,152)

⁸⁷⁶ Ibid p11. '... although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the single within the family circle.'

⁸⁷⁷ Ibid,p11,p19

activities in this regard. On the other hand, since China's traditional television industry, such as cable television and satellite television, was fully controlled by the State Administration of Radio, Television and Radio, China avoided copyright disputes arising from a large number of cross-network audiovisual programmes. However, with the rise of the Internet as a competitor to traditional television, the issue of copyright began to emerge. In order to avoid the difficulties now facing by the United States in identifying the infringing activities, a series of criteria established by the European Union can be used as a model for interpreting and revising information network rights in China's copyright law.

China

In the current version of the Chinese Copyright Law 2010, copyright owners are granted with a right of broadcasting under Article 10(11) which provided:

‘the right of broadcasting is the right of broadcasting or publicly communicating a work by wireless means, communicating to the public of the work of broadcasts by wire or rebroadcast, or communicating the work of the broadcast by loudspeaker or other analogous instruments that deliver signs, sounds or images to the public.’

This provision was drafted in accordance to Article 11bis of the Berne Convention on ‘Broadcasting and Related Rights’.⁸⁷⁸ Given that the Act did not provide definition of the terms ‘broadcasting’, ‘rebroadcast’ or ‘broadcast’, these terminologies are often construed in accordance to other international treaties that contain relevant definitions, such as Rome Convention⁸⁷⁹ and WIPO Performances and Phonograms Treaty.⁸⁸⁰ According to Article 3(f)&(g) of the Rome Convention, ‘Broadcasting’ refers to ‘transmission by wireless means for public reception of sounds and of images and sounds’, and ‘rebroadcasting’ is defined as ‘simultaneous broadcasting by one broadcasting organization of the broadcasts of another broadcasting organization’. Therefore, the method of broadcasting is limited to wireless means only, and in this vein, rebroadcasting shall be interpreted as simultaneous retransmission by wireless means only as well.

Based on the above interpretations, the right of broadcasting under Article 11(10) of the Chinese Copyright Law covers three main types of activities as stipulated in each sentence:

⁸⁷⁸ Wang Qian, *Copyright Law*, (2015, Renmin University Press, Beijing, p189)

⁸⁷⁹ International Convention For The Protection Of Performers, Producers Of Phonograms And Broadcasting Organizations.

⁸⁸⁰

the first sentence of ‘broadcasting or publicly communicating a work by wireless means’ refers to wireless broadcasting; the second sentence ‘communication to the public of the broadcasts by wire or rebroadcast’ refers to secondary transmission of broadcasts by wire or wireless means, including rebroadcast and retransmission made by cable or the internet, however such rebroadcast must be made simultaneously with the initial wireless broadcasting; and the third sentence refers to public performance of the broadcasts.⁸⁸¹

Traditional cable retransmission activity thus falls into the second category.

China adhered to the traditional civil law authors’ rights (‘droit d’auteur’) system and granted broadcasters certain rights as ‘neighbouring rights’ within the copyright law.⁸⁸² In the current version of Copyright Law 2010, broadcasters’ rights are laid down under Article 45 which reads:

‘A radio station or television station shall have the right to prohibit the following acts without authorization therefrom:

- (1) To rebroadcast its radio or television broadcast; and
- (2) To fix its radio or television broadcast on a sound recording or video recording and to reproduce the sound recording or video recording.’

It must be pointed out that China is not a member of the Rome Convention 1961⁸⁸³, however, it joined the World Trade Organization (WTO) in 1995, therefore is a member of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS). Thus, it must fulfil its international obligation under the TRIPS Agreement with respect to the protection granted to broadcasting organizations under Article 14(3):

⁸⁸¹ Wang Qian, *Copyright Law*, (2015, Renmin University Press, Beijing, p189)

⁸⁸² The different approaches adopted by common law and civil law systems in treating neighbouring rights have their underlying philosophical reasons. Since civil law countries leaned to recognize authorship in ‘flesh-and-blood’ authors and works that ‘bears the impress of an author’s personality’, which reflects a typical natural right and personality rationale of copyright as a whole, they rejected authors’ rights in performance, phonograms and broadcasts which are deemed as ‘entrepreneur’s works’, and created the neighbouring rights regime instead. Whereas common law countries such as the US and UK encompassed such subject matters into the list of copyrighted works, but conferred the right holders with a narrower scope of exclusive rights and a shorter duration of protection. However, such difference has a less consequential effect compared to the literary meaning given the harmonizing influence of international treaties, such as Rome Convention, WIPO Performances and Phonograms Treaty (hereinafter WPPT) and the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) with respect to neighbouring rights. Nonetheless, the different status given to such subject matters by the two systems may cause a dilemma when they come under the obligation to protect ‘literary and artistic work’ of each other under Berne Convention. See Paul Goldstein and Bernt Hugenholtz, *International Copyright: Principles, Law and Practice*, (2013, OUP, USA, P21,22)

⁸⁸³ International Convention For The Protection Of Performers, Producers Of Phonograms And Broadcasting Organizations.

Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same.

Regarding cable retransmission, although Article 45(1) of Chinese Copyright Law 2010 granted broadcasting organizations with the right to prohibit 'rebroadcasting' of their broadcast, however, according to Article 14(3) of TRIPS, 'rebroadcasting' is limited to wireless means. Moreover, if referring to the discussion on the right of broadcasting under Article 10(11) above, it can be seen that the wording of Article 10(11), particularly the second part that specifies the act of 'communicating to the public of the work of broadcasts by wire or rebroadcast,' clearly distinguishes 'rebroadcast' from 'communication to the public by wire'. Therefore, only the retransmission made by wireless means constitutes a 'rebroadcast' in the context of Article 45(1). However, in a Report published by the National Law Committee in Oct 2001 amending the Copyright Law 2010, the Director of the National Law Committee specified that the right of rebroadcasting can control rebroadcasting both by wire and wireless means, but not yet to control the rebroadcast via the internet.⁸⁸⁴

Moreover, although Article 45 of Chinese Copyright Law does not grant broadcasting organizations a right of communication to the public as specified in Article 14(3) of the TRIPS Agreement, however, the latter part of Article 14(3) clarified that '*...where members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts...*'. Therefore, as long as the copyright owners of the underlying programs are provided with adequate rights that enable them to control the communication to the public of their works, China fulfils its obligation thereunder irrespective of the omission from providing the same neighbouring rights to broadcasting organizations. As mentioned above, Article 10 (11) and (12) of the Copyright Law confer the copyright owners with 'the right of broadcasting' that enable the copyright owners to control the communication to the public by wire.

Cable Broadcasting

However, the issue of initial cable broadcasting is rather complicated in the context of Chinese copyright law. The reason is that the wording of Article 10(11) refers to

⁸⁸⁴ Ibid, Wang.

communication to the public of ‘the work of broadcasts’ by wire, and according to Article 11bis of the Berne Convention, that the activity of ‘broadcasting’ is limited to ‘wireless diffusion’. In this vein, ‘works of broadcasts’ shall refer to those that have been broadcasted by wireless means. Hence, the initial broadcasting of cable falls outside the scope of the right of broadcasting because rather than broadcasting by wireless means, the works that forms part of cable originated programs are communicated to the public by cable, i.e. wire. Moreover, unlike in the EU and US where such activity falls into the scope of ‘the right of communication to the public’ and ‘the right of public performance’ of the copyright owners of the underlying programs, Article 10(12) of the Copyright Law 2010 granted copyright owners with ‘a right of communication on information network’ that merely controls ‘interactive transmission’, i.e. on-demand services. Article 10 (12) provides:

‘the right of communication on information network, that is, the right to communicate to the public a work, by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them’

Since broadcasting of cable entails linear transmission which is non-interactive, i.e. members of the public can only receive the program that are pre-scheduled and cannot access these works at a time individually chosen by them. Thus, copyright owners cannot invoke Article 10(12) to control cable broadcasting of their works.

Nonetheless, it is generally agreed among scholars that there is no difference between traditional wireless broadcasting and cable broadcasting in terms of the activity of communication to the public from a jurisprudential perspective, thus such activities shall be controlled by other rights conferred to the copyright owners in the copyright law.⁸⁸⁵ Since the specific rights conferred to the copyright owners depends on the types of works, thus, cable broadcasting of literary, dramatic, musical and choreographic work fall into the scope of performing right under Article 10(9) of Chinese Copyright Law 2010 which provides:

‘the right of performance, that is, the right to publicly perform a work and publicly broadcast the performance of a work by various means’.

⁸⁸⁵ Wang Qian, *Copyright Law*, (2015, Renmin University Press, Beijing, p191)

Regarding cinematographic work, Chinese copyright law does not grant the owners of cinematographic works with a performing right but a 'showing right' under Article 10(10). However, the showing right is defined as:

‘the right to show to the public a work, of fine art, photography, cinematography and any work created by analogous methods of film production through film projectors, over-head projectors or any other technical devices;

This definition is interpreted as imposing a limitation on the equipment used for the showing to 'film projectors, over-head projectors or any other technical devices' only, thus excludes electronic transmission made by cable.⁸⁸⁶ Such interpretation derives from a comparative reading of the terminologies used in Article 10(9) of the right of performance which refers to the non-restrictive term of 'by various means'.⁸⁸⁷ Therefore copyright owners of cinematographic works cannot invoke the right of showing to prevent cable broadcasting. In this circumstances, only the 'catch-all provision' under Article 17 which stipulates 'any other rights a copyright owner is entitled to enjoy' can apply.

Internet Transmission

The Right of Broadcasting and The Right of Communication on Information Network

Besides cable broadcasting, the current copyright law also contains loopholes concerning internet TV. Basically, there are two types of internet transmission deployed for Internet TV services, linear and non-linear transmissions. From the user's standing point, such technology effectuates two types of services the users receive online, streaming TV and video-on-demand. The former is a form of non-interactive service where the programs are broadcast on a pre-set schedule such as IPTV and over-the-top services, whereas the latter enables the users to watch any program at a time individually chosen by them, i.e. video-on-demand.

As mentioned above, there are two exclusive rights under Chinese copyright law that are designated to govern broadcasting and interactive transmission activities respectively: the right of broadcasting under Article 10(11) and the right of communication on information network under Article 10(12). Recall to the discussion regarding cable broadcasting above,

⁸⁸⁶ Wang Qian, Copyright Law, (2015, Renmin University Press, Beijing, p189)

⁸⁸⁷ Such difference is more explicit in the original Chinese text which reads as '通过...等技术设备' and '用各种手段'.

the right of broadcasting under Article 10(11) fails to cover the initial transmission of broadcast by cable since the wording of Article 10(11) which specifies: ‘...the right of broadcasting is the right of broadcasting or publicly communicating a work by wireless means, communicating to the public of the work of broadcasts by wire or rebroadcast...’ sets a limitation on the application of this right to initial broadcasting made by wireless means only. Although the latter part includes the activity of communication to the public by wire, however, the subject matter is limited to ‘work of broadcasts’, in other words, works that are broadcasted by an initial transmission. As a result, the latter part can merely govern secondary transmission of the work made by wire, rather than the initial transmission of the work by cable.

This loophole remains the same when dealing with internet broadcasting. Although IPTV or Over-the-Top services deploy linear transmission technology and provide non-interactive TV similar to traditional broadcasting, however, the internet cannot satisfy the ‘wireless’ requirement contained in Article 10(11) for initial broadcasting. Case law suggests that the internet shall fall into the categorization of ‘wire’ in the context of Article 10(11), in this vein, the same problem of initial transmission made by cable will arise and creates a dilemma between the classification of initial transmission and secondary transmission made by the same method under Article 10(11). In the case of *China International Broadcasting Network co. v. Baidu co.*(2013)⁸⁸⁸ The plaintiff is an audiovisual content production company invested by China Central Television(CCTV) and is the publisher of the fixation of programs created by CCTV. CCTV organized and produced the ‘Spring Festival Gala’ in its studio and broadcast the event on the eve of spring festival 2012. The defendant is an Internet company that provided the ‘live broadcast’ of the ‘Spring Festival Gala’ online simultaneously to the CCTV live broadcast on television. CCTV acquired both the right of broadcasting and right to communicate to the public through information network from relevant copyrights of the shows performed. The court found that activity of the defendant fell into the scope of the right of broadcasting under Article 10(11) as ‘real-time broadcasting online’ as distinct from the ‘non-linear transmission’ required by the right of communication through information network as laid down in Act 10(12). However, the court drew a line between broadcast and rebroadcast as ‘initial transmission’ and

⁸⁸⁸ *China International Broadcasting Network co. v Baidu co.*(2013) Case no. 3124 Beijing First Intermediate Court.

‘secondary transmission’, and emphasized the ‘wireless’ nature of the initial transmission under Article 10(11). Based on this distinction, the court found that if the defendant retransmitted the program by capturing the initial wireless broadcast signals generated by CCTV, such activity infringed CCTV’s right of broadcasting under Article 10(11). On the other hand, if the initial broadcast was made by wire, for example, by cable systems, CCTV may invoke the catch-all provision under Article 17(1) that provides all other relevant rights enjoyed by the copyright owners.

Since Article 10(11) also includes the right to communicate to the public of the work of broadcast by wire, thus, the right of broadcasting can merely enable the copyright owners to prevent unauthorised secondary transmission of their works by cable or online, rather than the initial broadcasting.

On the other hand, although the right to communicate on information network under Article 10(12) was incorporated into the current version of Copyright Law 2010 intended to govern internet transmission activities by providing for both wire and wireless means, however, this provision can only apply to non-linear interactive transmissions which allow the members of the public to access these works from a place and at a time individually chosen by them. Since internet TV broadcasting is a form of non-interactive linear transmission made online based on pre-set schedules of either the broadcasting organizations or audiovisual websites, thus cannot fall into the scope of Article 10(12).⁸⁸⁹

Broadcasters’ Right

As mentioned above, Article 45 of the Copyright Law 2010 granted broadcasters with the right to prohibit the acts of rebroadcasting, fixation and reproduction of the fixation without authorization. And it is also made clear in previous discussion that the term rebroadcasting is limited to wireless means only. However, case law suggests that courts sometimes gave different interpretations as to the scope of the right whether the activity of ‘rebroadcasting’ shall extent to the online environment. In the case of CCTV vs Wangyi,⁸⁹⁰ Wangyi is an online video website that rebroadcasted the programs from China Central Television(CCTV), the court held that Wangyi infringed the broadcasters’ right of CCTV by rebroadcasting the

⁸⁸⁹ Wang Qian, On the Application of the Right to Perform in the Network Environment: A Study of Comparative Law, (2017)No. 6,

⁸⁹⁰ Tianhe District Court of Guangzhou Guangdong Province (2012) Judgement No. 817 Vol. Hui Tian Fa Zhi Min Chu.

programs of CCTV without authorisation. This judgement suggests that the court in this case interpreted Article 45 to cover internet rebroadcasting. However, in the case of Jiaying Huashu vs. Jiaying Telecom,⁸⁹¹ Jiaying Huashu acquired the broadcasters right from Heilongjiang TV, and sued Jiaying Telecom from rebroadcasting the programs of Heilongjiang TV via the IPTV system of Jiaying Telecom. The court held that ‘Broadcasting organizations’ right to prohibit rebroadcasting ... shall not extent to online rebroadcasting... and broadcasting organizations cannot control the online distribution (of the program).’.

It needs to be pointed out that one of the decisive factor contributed to this ruling is the national ‘Network Convergence Plan’ as discussed in previous chapters. In the judgment, the court made specific reference to the Network Convergence Plan by stating that ‘...if extending the rebroadcasting right of the broadcasters’ rights to the internet, it will hinder the implementation of the network convergence policy in our country... and prevents telecommunication operators from carrying IPTV service, which is contrary to the underlying notion of the policy.’ The Zhejiang Medium Court upheld this decision and the appeal was dismissed.

The contradictions regarding the scope of the right of rebroadcasting is likely to be settled in the new Copyright Law that is expected to be published next year. In the latest version of the Copyright Amendment Proposal released in 2012, the scope of the right was ascertained by the wording of the new right of rebroadcasting under Article 41(ex Article 45) which reads ‘*A radio station or television station shall have the right to prohibit the act ...to rebroadcast ... by wireless and wire means...*’. Whereas the old Article 45 granted broadcasting organizations the right to prohibit ‘rebroadcast of their broadcast’, the new Article 42 made explicit provisions as to the technical means i.e. ‘wireless and wire means’ of rebroadcasting, by doing so, rebroadcasting on the internet is included in the latter part of the definition of ‘rebroadcast by wire’.⁸⁹²

Hence, similar to the US approach as demonstrated in the Aereo case above, the court adopted a technology reliance approach over the interpretation of the right of broadcasting

⁸⁹¹ Nan Hu District Court of Jiaying Zhejiang Province(2011) Civil Judgment No.24. Vol. Jia Nan Zhi Chu.

⁸⁹² in an interview conducted with an CCTV officer, it is told that legislators and the Copyright Administration of China in the latest hearing of the copyright amendment held early this year confirmed with the broadcasting organization group that the new right of rebroadcast shall extend to the internet in the new Copyright Law.

under Article 10(12) based on the difference of initial transmission made by wireless vis-à-vis wire means. However, such technological division seems less clear in the right of communication through information networks to the public since the interpretation over the latter focuses on the transmission function, i.e. linear and non-linear transmission rather than the method. The different interpretive method causes confusions to the nature of the right of communication to the public through information networks as well.

In the case of *LeTV v. Su Yuan Plaza*⁸⁹³, the plaintiff is an audiovisual services website and the defendant is a hotel that provide Video-On-Demand services over its hotel rooms TV sets, both of them have signed contracts with the producer of a film called 'Red Cliff' acquiring the 'right to communicate the work through information network' so as to play the film on their website and on the hotel room TVs legally. However, instead of granting the contracting parties with the same right of 'communication through information network', the producer in fact 'split' the right into 'the exclusive right of communication through internet' and 'the right to communicate to public through broadcasting network', and signed them away to the plaintiff and defendant respectively. The plaintiff brought claim against the defendant alleging that the defendant infringed 'the exclusive right of communication through information network' conferred to the plaintiff. However, the case was later settled down and the plaintiff withdrawn the claim prior the court's interpretation was given.

Some academics provided comprehensive analysis regarding the technology issues involved in this case and reasonably concluded that, the plaintiff has had a valid claim against the defendant because the main delivery process of the audiovisual program was in fact completed on the internet i.e. IP based network, whereas the broadcasting network was simply involved in the final step where the audiovisual programme landed on and enabling it to reach the customer through TV cable.⁸⁹⁴ Therefore, communication through the broadcasting network can be deemed as a form of communication through the information network which addresses the internet.⁸⁹⁵

⁸⁹³ Beijing LeTV Information Technology Ltd v. Beijing Su Yuan Plaza Ltd (2010) Beijing West City Peoples' Court
⁸⁹⁴ HD Wen, Recognising the communication method over Information Network Communication Right Infringement, (2011), Science Technology and Law Vol.92, No.4, pp50-54

⁸⁹⁵ Ibid

Another similar case can be found in *Ningbo Success Ltd. v. Beijing Shiyue Ltd.*⁸⁹⁶ In this case, the court held that the defendant, an online video sharing website infringed ‘the right of communication through information network conferred to the plaintiff under Article 10(12) CL 2010 over a popular TV series despite the fact that it was communicated to the public based on fixed timetables, i.e. linear transmission. Such activity was not covered by the ‘right of broadcasting’ set out in the 2010 law⁸⁹⁷ which requires communicating the work by ‘wireless means’, on the other hand, it fell outside the range of activities covered by Article 10(12) which ought to enable the public to access the work at a time individually chosen by them. The court failed to provide any interpretation explaining why Article 10(12) was cited as the legal ground for the decision, the reason might be that even though there is a ‘catch-all’ provision under Article 10(17) which recognises all other form of possible copyrights that is not particularly defined in this law (such as a very broad term of right of exploitation),⁸⁹⁸ but it set a *locus standi* requirement in its application: according to the context of this article it only applies to ‘Copyright Owners’ vis-a-vis a single property right holder over the work.⁸⁹⁹ In this case the plaintiff is neither the author nor producer of the work, instead, it is an audiovisual service website which acquired only the exclusive right of ‘communication through information network’ from the producer (Edco Film Ltd) over the work based on contractual terms, hence is incapable of qualifying as the copyright owners to claim after Article 10(17).⁹⁰⁰

However, case law shows that the technology reliance approach in setting up the two distinct rights not only causes troubles in understanding and interpreting the nature of the right within the background of network convergence, but also leaves the activity of linear transmission on the internet uncovered by both of the rights in question.

In recognizing this loophole, the amending proposal sought to include ‘wireless means’ under the right of broadcasting, thus render the linear transmission fall into the scope of the

⁸⁹⁶ *Ningbo Success Multimedia Telecommunications Ltd v. Beijing Shiyue Network Technology Ltd.* (2008), The Second Intermediate Court of Beijing.

⁸⁹⁷ Article 10(11)

⁸⁹⁸ Y Li, ‘Copyright protection in China’, ed. chapter in ‘Chinese Intellectual Property and Technology Law’ R Kariyawasam, Chinese Intellectual Property and Technology Laws (2011, Edward Elgar Publishing, UK) 83

⁸⁹⁹ Article 10(17): other rights to be enjoyed by copyright owners.

⁹⁰⁰ Y Hu, ‘Breaking The Bottleneck In The Implementation of ‘the Right of Communication through information network’, http://www.sipo.gov.cn/albd/2008/200807/t20080728_413057.html

broadcasting right. Nonetheless, the new provisions maintained the technology division contained in the old law.

Case Study: Similar to the standards for the identification of infringing activities in EU case law, China developed a series of cases regarding the criteria that shall be deployed concerning online infringement. In China, the debate is mainly concerning with the linking technology. In an Internet environment, the concept of links is similar to rebroadcasting because both acts are based on the principal relationship of a copyright owner, licensor, secondary disseminator.⁹⁰¹ Although the transmission technology is different, there is no difference in terms of the nature of the act and the effect of the transmission of the work, so the nature of the infringement should not be differentiated under copyright law. In the traditional mode of transmission, right holders authorize the work to the broadcasting organization, while secondary disseminators spread the work more widely through the use of the broadcasting organization's signals. Even if the secondary communicator receives the signal from the broadcasting organization and further disseminates it, it shall not affect the right of rights-holders to benefit from the secondary transmission.

In the EU, the case of Svensson⁹⁰² is the first case that dealt with the issue of linking in term of communication to the public. In the case of Svensson, a group of journalists brought an action against the defendant, a website owner, claiming that by providing a clickable link to redirect the users to the articles they wrote and originally published on another website, the defendant made their works available to the public without authorization.⁹⁰³ In this case, the Court continued to follow the purpose of article 10 of recitals 4 and 9 in the preamble to Directive 2001/29, which should be interpreted broadly to establish a high standard of author protection, and continued the two-tier test established in the previous cases, first, whether the act constitute communication under the Article 3(1), and second, whether the communication is made to public. The Court held that there is no communication to the public in this case based on the fact that both websites operated the plaintiff and defendants can be accessed freely by all potential visitors without any restriction, therefore, there is no 'new public' involved in the communication made by the defendant.

⁹⁰¹ Cui Guobin, Forget about the Server Principles, Intellectual Property (2016), vol8 p10

⁹⁰² Ibid, para8

⁹⁰³ Ibid , para8

The judgement of this case are relatively straightforward and clear in the context of the European Union law by adopting the new public test. However, it is interesting to notice that in the judgement, the court made it clear that 'it is irrelevant whether the website which provides the link and redirects the internet user to another website gives the impression that the users are receiving the content from the former rather than the another website'.⁹⁰⁴ That means the user's subject impression as to who the service provider is shall not be seen as a criteria that identifies the act of right to communicate to the public. But in China, this issue has generated extensive debate among scholars and judges.

In fact, the issue of legal characterization of linking in China started to receive public attention as early as 2009. Wangqian introduced the discussion of "serve standard" into the public's perspective in his article on the online environment.⁹⁰⁵ Until now, many standards have evolved and been referred by the courts in judgements, including the new public standard in the EU, substantive presentation standards, substantive substitution standards, server standards. In practice, there are similar cases where the court has given different judgments because of different standards.

Wang Qian put forward the following points in the Paper of 2009 as mentioned above: only the act of uploading the work to the server which is open to the public can constitute the act of communication to the public through internet under Article 10(13). The subjective user perception standard, i.e. the impression of the user as referred by the court in Svensson, is in contradiction to the rationale of WCT and China's copyright.⁹⁰⁶ He argued that because the right to communication through networks under Chinese copyright law derives from Article 8 of the WCT, it should be interpreted in accordance with its right to disseminate information networks. Since article 8 of the WCT limits the control of rights to "make the work available to the public", that is, acts that place the work in a state that can be accessed by the public, which is an objective act and established fact.⁹⁰⁷ However, setting links simply expands the scope of dissemination of the works that are already "publicly available" on the server, which has always been "publicly available".⁹⁰⁸ Therefore, only the

⁹⁰⁴ Ibid , para 30

⁹⁰⁵ Wangqian, On the Criteria for the Identification of Direct Copyright Infringement in the Network Environment (I)(2009) East Methodology, No.2,

⁹⁰⁶ Wangyi v Feihu21 (2014), Hui Tian Fa Zhi Min Chu Zi No.217-245,

⁹⁰⁷ Ibid.

⁹⁰⁸ Ibid

act of uploading can constitute an infringement of the right to communication to the public through information networks.⁹⁰⁹

The server standard raised by Wang has its origin in the US case *Perfect 10, Inc. v. Amazon*⁹¹⁰. In this case, the defendant is an online image search engine service provider. When the user clicks on the thumbnail, the original image is presented by framed linking. The plaintiff requested the court to issue a temporary injunction prohibiting the defendant from providing thumbnails of the plaintiff's images on third party websites without authorisation. The court of first instance held that there are two different criterias for determining whether a link constitutes a direct infringement of exhibition rights and distribution rights: (i) server test, where only websites that store and upload infringing documents constitute direct infringement; and (ii) incorporation test, provided that the defendant passes the embedded A framed link that visually incorporates the images from others' websites onto the defendant's web page would constitute direct infringement.

The court in this case explicitly adopted the server test, the court found that: 'the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information... The district court referred to this test as the "server test."⁹¹¹

The concept of 'server test' is now codified in several judicial guidance and regulation as a clear standard for defining the act of communication to the public through information network.

Article 4 b of the Beijing Higher People's Court on Adjudicating Certain Issues Involving Copyright Disputes in Internet Environment (1) (Trial) (2010) provides that:

'Whether the conduct of a network service provider constitutes a communication through the information network, shall determined based on whether the works, performances, audio and video products disseminated are uploaded by the network service provider or otherwise placed on a publicly accessible web server. '

⁹⁰⁹ *Ibid.*

⁹¹⁰ *com, Inc.*, 508 F.3d 1146 (9th Cir. 2007)

⁹¹¹ *Id.* at 834-839

Also in Supreme People's Court on Certain Issues Concerning the Application of Law in Cases of Infringement of the Right to Dissemination of Information Networks (2013), Article 3, paragraph 2 provides that:

'The People's Court shall determine that if works, performances, audio and video recordings are uploaded to a web server, set up shared files, placed in an information network using file sharing software so that the public can download, browse or otherwise acquire at a time and place chosen by individual, the People's Court shall consider that it has implemented the provisions of the preceding paragraph[infringement].

In 2005, Chinese record companies and music copyright holders have filed numerous lawsuits against major Internet service providers for online streaming.⁹¹² These cases are similar to the fact that major websites use aggregate searches to provide end-users with free music streaming services by linking. However, despite the similarity of the facts of the case, the courts sometimes adopted different standards.⁹¹³ Moreover, with the development of the Internet and the increase of Internet users, the problem of online transmission of audition programs is becoming more and more serious, and the technical mode of links is becoming more and more, such as framed linking, embedded links and Inline links.⁹¹⁴

The user perception standard refers to the user's subjective perception, that is, whether the content was delivered on the website that set the link caused the impression to the user that he obtained works from the current site. This identification criterion is based on the user as the subject of determination.⁹¹⁵ However, because it adopts subjective criteria, it

⁹¹² Shanghai Busheng Music and Culture Communication Co. Ltd. v. Baidu (first instance judged by Beijing Haidian District People's Court Civil Judgment (2005) Haiminchu No. 14665, second instance mediation concluded), and "Zhengdong Records Co., Ltd. and other seven major record companies v. Baidu" in 2005 (first instance judged by Beijing First Intermediate People's Court Civil Judgment (2005), No. 7978 of Zhongminchu character No. 594 of the Civil Judgment of the Beijing Higher People's Court, No. 594 of the Civil Judgment of the Beijing Higher People's Court, and "Zhejiang Pan-Asia Electronic Commerce Co., Ltd. v. Baidu" in 2006 (No. 1 of the First Judgment, No. 6273 of the First Intermediate People's Court of Beijing, No. 6273 of the First Intermediate People's Court, No. 6273 of the First Judgment, No. 118 of the Beijing Higher People' In 2007, 11 major record companies, such as Mercury Records Co., Ltd. v. Yahoo (judgment No. 02629 of Beijing Second Intermediate People's Court Civil Judgment No. 2, judgment No. 1184 of Beijing Higher People's Court Civil Judgment No. 2007) and Zhejiang Pan-Asian Electronic Commerce Co., Ltd. v. Baidu, occurred in 2007. (The Second Pan-Asian v. Baidu Case (Judgment of the First Trial See Beijing High People's Court Civil Judgment (2007) Gao Minchu No. 1201)

⁹¹³ Wangyi v Feihu21 (2014), Hui Tian Fa Zhi Min Chu Zi No.217-245, see detail below.

⁹¹⁴ Ibid, Cui.

⁹¹⁵ Yinliang Liu, Infringement of the Right of Information Network Communication - From User Perception Standards to Provision Standards, Law, 2017 (10), p106

creates great uncertainty and instability.⁹¹⁶ By relying on the subjective test of user perception, this criteria can easily allow the link provider to escape from liabilities, for example, if the party who set the link indicates the source of the work on the web page, it may be exonerated. As a result, the criterion is not widely accepted as a criterion for the determination of a violation.⁹¹⁷

The substantive substitution standard can be summed up as that, by selection, editing, collation, circumvention of technical measures and deep linking, the detriments suffered by copyright owners and benefits gain by the website that set the links is no different from a direct provision of the works to users, then the act shall constitute an communication to the public through information networks.⁹¹⁸The substantial presentation standard on the other means that the website that provides the links presents the work of others as part of their own web page through framing technology, so that the user does not need to visit the original website to view the content.⁹¹⁹

Some have argued that when discussing the characterization of aggregation links, the essence of copyright, which is the distribution mechanism of the benefits derived from the work, shall serve as the underlying rationale in choosing the appropriate standards.⁹²⁰ In this context, communication cannot be limited to the technical dimension alone, but rather to the market elements that are integrated into the content of communication. Therefore, when discussing the criteria to be adopted, the criteria should not be judged solely by the technology used in linking process, but rather by looking at the market relationship between rights and communicators.⁹²¹

It is important to mention that while the link behavior allows the advantages of Internet connectivity to be amplified, multichannel content is collected and integrated and saving users time for searching.⁹²² However, unlike the usual linking that redirecting users to the original site, framed linking and deep linking make the work directly present on the site that

⁹¹⁶ Ibid.

⁹¹⁷ Liu Jiarui, "Why History Choosing Server Standard", 2017 Journal of Intellectual Property ,vol2.

⁹¹⁸ Wang Yanfang: On the Criteria for the Recognition of Infringement of the Right to Dissemination of Information Network, Chinese and Foreign Law 2017 Issue No. 2

⁹¹⁹ Ibid.

⁹²⁰ Yang Ming, Qualitative Study on Aggregate Link Behaviour, (2017) Journal of Intellectual Property, Vol 4. P3

⁹²¹ Ibid.

⁹²² CUI Guobin. Copyright Regulatory System with Framed Links,(2014) Journal of Intellectual Property, Vol 5, 74-93.

provides the link. As a result, users will stay on the website when browsing the content through a framed link. The interest of both the rights holders and the authorized website will be injured.

For right holders, the behavior of linking websites to present works on their website is consistent with the behavior of authorizing them to the original website. Whether or not the right holder grants exclusive authorization to the original site, he will subsequently lose control over the work if another website provides the linking to the original licensee. As a result, it will inevitably lead to a decrease in the value of the authorization.⁹²³

For the authorized website, since most free sites generate incomes through advertising. In this case, the original site and the site that provides the link receive the same benefits in the process of dissemination, i.e. advertising income based on user traffic and click-rate. And the site that provides the link renders the user directly skip the advertisement on the original site page causing user fragmentation of the original site and consequently lowers the advertising revenue of the original site.⁹²⁴ Unlike the website that provides the links, the original site still bears both the loss of advertising revenue despite and the cost of content authorization.

Therefore, if adopting the server principle, i.e. identifying infringement based on the uploading behavior, the act of linking that directly harms the advertising interest of the original website will not be deemed infringement.

In the case of *Shanghai Jidong v. Wuhan Broadcasting Co.*,⁹²⁵ the plaintiff is a film studio that obtained the exclusive right of communication to the public through information network from the producer of a TV show. The defendant, Wuhan Radio and Television, runs an online video site. The plaintiff entered into an agreement with a third party website, assigning the right to disseminate the information network to the third party website provided that the third party may only broadcast the play on its broadband application platform and no further distribution is permitted. The third party entered an agreement with the defendant, provided access of the server and allows the defendant website to set up a framed link of the TV show.

⁹²³ Ibid, Liu.

⁹²⁴ Ibid, Cui.

⁹²⁵ *Shanghai Jidong v. Wuhan Broadcasting Co., Ltd.*, (2012), E Wu Han Zhong Zhi Chu Zi case no.00003

The court explicitly adopted the server standard and held that the defendant's act of extracting the play from the server of a third party website did not constitute an infringement of the plaintiff's right of communication through the information network, on the grounds that the public access to the third party website and uploading the TV show to the server are two separate acts of a different legal nature.⁹²⁶ From a technical point of view, viewing of the works through the site is not necessarily equivalent to the act of placing the works on a web server that is open to the public.⁹²⁷ The works broadcast on the site are the result of direct retrieval of the show from the server, and broadcast from the web server of a third party. It is also possible that the site in question does not store the work on its web server.

Also the court held that because it is the third party which uploaded the TV show to its server, and by referring to the server standard, it is the third party that communicates the work to the public through information network.⁹²⁸ However, since the communication was authorised, and the defendant merely accessed the third party's server and retrieved the show therefrom, the third party did not communicate the work to the public. Hence the third party website therefore did not violate the agreement with the plaintiff that prohibits further distribution.⁹²⁹

It can be seen from this case that even if the plaintiff was attempting to control the further dissemination of his work through contract, the server standard would exempt both liabilities of both the licensee and any third party that framed link the work. Therefore, it may imply that once the right holder assigns the communications right away, he may lose all subsequent control over similar uses of the work. Therefore, the application of the server standard will significantly reduce the validity of the original license.

Therefore, in terms of balancing the interests of individual market players, the substantive presentation standard can target the essence of the conflict of interest more accurately. In the analysis of the problem, the substantive presentation standard takes into account the market interest of all parties involved and focuses on the interaction between them, i.e. the consequences of the transformation of the link provider's status from service provider to

⁹²⁶ Ibid.

⁹²⁷ Ibid.

⁹²⁸ Ibid.

⁹²⁹ Ibid.

content provider, rather than relying on the underlying technologies and ignores the effect brought to the market.⁹³⁰ Technology dependant approach of interpretation can easily leave loopholes in the law, such as the independent transmission technology deployed in the Aereo case discussed above. It has been noted that there is an open secret in the Chinese network industry, where well-known web service providers work with third party users who upload their works to other websites and provide links to the former without to avoid liability.⁹³¹

In the case of Tencent v. Yilianweida⁹³² Tencent, the plaintiff Tencent, an online company obtained the exclusive right to communicate to the public through information network of a TV episode. The defendant edited and categorized a large number of TV shows and film on the mobile application it operated, and made the work directly available to the public via a link on the front page. The defendant claimed that the TV show was not store on the server of the application, therefore, according to the server standard the linking provided shall not constitute a communication to the public.⁹³³

In this case, the court adopted the “substantive alternative standard” and held that the act of the defendant constitutes a communication to the public. The court took into account the business logic behind the rights-holders and the business logic of the platform and held that the act of the defendant went beyond the mere provision of search or link services, thus creating a deep relationship between the user's search choice and the specific video on the linked website. And moreover, it expands the scope of network distribution of the domain names and diverts traffic and revenue from the plaintiff, thus, it objectively plays the role of “providing” video content to users on the aggregation platform, and produces a substantial substitution effect, but does not pay the cost of obtaining distribution authorization from the rights holders in the first place.⁹³⁴ However, the court overturned the decision and reverse back to the server standard.⁹³⁵

⁹³⁰ Ibid.Liu

⁹³¹ Ibid, Cui.

⁹³² 2016 Jing73 Zhong143

⁹³³ Ibid.

⁹³⁴ Ibid.

⁹³⁵ 2016 Jing73 Zhong143

Conclusion

It is inapplicable and practically unrealistic for China to adopt statutory licensing system to regulate the radio and television market as in the United States or the European Union.

First, there is no functioning cable retransmission market under the monopoly of state television stations and cable operators. Radio broadcasting and cable television are usually considered the same market, and the existence of a statutory license system to regulate cable TV competition in the rebroadcasting market is unnecessary. Moreover, regulator of broadcasting industry as well as a major market player participated in the competition in online market, the regulatory power enables it to enact laws and regulations to extend the monopoly of state-owned enterprises to the Internet, causing the same dilemma as in the traditional broadcasting industry.

At the same time, statutory licensing system under Chinese law is inherently deficient attributes to its 'Chinese characteristics', therefore can hardly achieve its fundamental legislative objectives and to balance the interests of rights and users. The procedural provisions under the current statutory licensing regime are not sufficient to support the proper functioning of the system. In the absence of a detailed statutory licence fee, the right holder loses control over the work under the system but are not guaranteed with proportionate remuneration. Monopoly created by the semi-governmental, semi-corporate nature of copyright collective organizations has led to chaos in their internal management, and further weakens the legality and reduce the efficiency of statutory licensing regime. Statutory license were more transformed into a simple restriction on rights-holders, but at the same time fail to guarantee the right holders' right to remuneration. Provisions concerning online transmission in Chinese copyright law also contains loopholes. The standard adopted by the court in identifying infringement cannot provide adequate protection to the copyright owners.

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