



 IPKey

CHINA

**STUDY ON RESEARCH AND
COMPILATION OF LEGISLATION ON
COPYRIGHT PROTECTION IN CHINA**

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Funded by the European Union
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EXECUTIVE SUMMARY

The aim of this study is to examine which forms of copyright infringement in China affect European copyright holders, whether these infringements can be kept under control under the current, recently reformed Chinese copyright system, to identify the remaining protection gaps and to formulate recommendations as to what can be done to further narrow them, wherever possible based on European model law, in particular Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter “DSM Directive”).

The study comprises a survey and a “desk study” review of legislation and case law. The survey aims at exploring the impact of Chinese copyright infringement on European copyright holders in worldwide comparison and the experiences they made with copyright transactions and enforcement in China. For this, numerous European and international right holder organizations as well as a few individual right holders were asked to distribute a questionnaire among their members. Unfortunately, the survey yielded only very few responses, which are far from being representative but nevertheless helped to confirm several findings of the desk study and also provided additional insights. In spite of the low number of responses, the study is not without empirical support. It could rely, inter alia, on a previous survey of European IP intensive industries undertaken under the auspices of the European Union and a very comprehensive report of China’s National Copyright Administration (hereinafter “NCAC”) on domestic online copyright protection, which contains plenty of statistical data. These empirical insights and the responses to this study’s

survey form the basis of the first part of the study, an assessment of those forms of copyright infringement in China to which European copyright holders are mostly exposed. It identified, inter alia, differences between Chinese infringements that impact on copyright holders worldwide, irrespective of whether or not they are present on the Chinese cultural market, and types of infringement that are primarily of concern from a Chinese domestic perspective. Whereas the former are committed by technically highly specialized, malicious online piracy platforms targeted at specific user groups, e.g., viewers of sports live events or scholars seeking cheap access to academic publications, the latter primarily originate from user uploads on platforms that correspond to the “online content sharing service providers” addressed by the DSM Directive. Of course, also European right holders, especially those who license to or, to a lesser extent, directly market their content within China, are affected by such user uploads. IFPI, for instance, described it as the most rampant type of unauthorized use in its response to this study’s survey. However, as the Chinese sharing services are primarily targeted at domestic users while users outside China are rather drawn to platforms of the worldwide dominating US service providers, they do not seem to stand out as major sources of infringement in worldwide comparison. This is at least the impression that can be gained from the available material.

A second, legal part analyses how current Chinese law and legal practice react to those unauthorized uses that have been extracted from the above reports, surveys, etc., as being especially threatening to European right holders. It identifies several positive developments in legislation and recent case law, for example with regard to the broadened definition of protected works. The potentially beneficial effects of these recent amendments on European right holders will be illustrated by two hypothetical case studies. Very promising is, furthermore, new secondary legislation in the area of civil procedures, in particular on evidence requirements and provisional measures. However, this second part also identified several problematic areas, primarily online content sharing service provider liability and e-commerce sale of devices that can be used for infringing purposes. Two more hypothetical case studies will illustrate how these shortcomings may impact on European right holders. China’s copyright system is criticized for numerous further shortcomings mostly in the area of enforcement, such as non-deterrent damages, onerous evidence requirements and procedural practices that discourage right holders from requesting preliminary measures and evidence preservation. All these issues have been tackled by very recent amendments to the Copyright Act and to the secondary legislation. The second part of the study explains these reforms and their potential effect in judicial practice in detail, but as the amended law has not yet been tried and tested in court, recommendations on how to further improve it could not be made.

The third, final part of the study will make concrete recommendations to EU officers on how to approach Chinese representatives in future consultations regarding a further improvement of the Chinese copyright regime in the interest

of European creative industries. These include the adoption of important elements of the new European provider liability under Art.17 of the DSM Directive in the prevailing Chinese “notice and take down” regime, recommendations on how to motivate especially the Supreme People’s Court to introduce new provisions on the liability of e-commerce providers for hosting offers of goods that can be used for infringing purposes and a new instrument that enables right holders to effect the immediate takedown of infringing content. Convincing Chinese authorities of the latter two reform proposals will be especially difficult however, as corresponding European model legislation or best practices do not (yet) exist. Therefore, this third part will also refer to supporting Chinese domestic policies, statements and court judgments that may nevertheless motivate the Chinese partners to consider their adoption.

1. An attempt to grasp the dimension of the impact of Chinese copyright infringement on European right holders

1.1 External view on China’s contribution to worldwide copyright piracy and its effect on European right holders

1.1.1 Chinese infringement in global comparison

Until the mid-2000s, Chinese copyright and neighbouring rights infringement was among the most controversially debated trade-related intellectual property (IP) topics between China and the US, to a lesser extent also the EU. Tensions eased respectively were overshadowed by other IP-related conflicts, however, as the use of works, legitimate as well as infringing, shifted to the internet. Before that, China has been the main source of worldwide physical piracy, which can only flourish in safe localities where illegal optical disc factories, etc., can be operated without being disturbed by authorities. Now that works and other protected content are mostly consumed through the internet, this type of infringement has largely ebbed away¹ and China is no longer the world’s primary source of copyright piracy.

This does not mean that China has become a paradise for IP holders in general, however. The EU Commission’s Counterfeiting and Piracy Watchlist 2020² still identifies China as a major source of worldwide traded counterfeit products, which are sold worldwide through e-commerce platforms or on physical

¹ In its response to this study’s survey, IFPI describes the physical piracy by way of distributing CDs or thumb drives loaded with infringing content as a matter of concern, but most rampant and damaging to its members would be user uploaded content on sharing sites.

² https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159183.pdf.

markets, whereby only a few of these e-commerce platforms or markets are operated from or located in China. Perceived as an even greater threat by European and US trade representatives is the highly sophisticated infringement of technical know-how and patents and, associated with it, administrative pressure on foreign companies to reveal their most advanced technical achievements to authorities or directly to competitors (so-called “forced technology transfer”). The US China Economic and Trade Agreement of January 2020 (Phase One; hereinafter “Phase One Agreement”), to a lesser extent also the EU China Comprehensive Agreement on Investment (CAI) of December 2020, centre on these issues, while copyright plays a secondary role. Art.1.29 of the Phase One Agreement deals with two rather minor copyright-specific litigation aspects, namely facilitation of the plaintiff’s proof of authorship and the defendant’s obligation to prove that he has been legally authorized to use the disputed work. Another provision of the Phase One Agreement, Art.1.13 on “Combating Online Infringement”, is not limited to online infringement of copyright but encompasses e-commerce trade in counterfeit goods. As far as copyright is concerned, it does not require fundamental changes to the current Chinese provider liability regime but only a few modifications, which will be further outlined below.³ Copyright issues have also gradually disappeared from the top of the USTR’s recurring entry on China in the “Priority Watch List” of its annual Special 301 Report.⁴ In the 2021 report, only one paragraph deals with copyright infringement, highlighting unauthorized video-on-demand (VOD) showing of audio-visual content in so-called “mini VOD” theatres throughout China and platforms that make available academic journal articles or facilitate unauthorized access to such content. A US-based scientific publishing house confirmed the latter in its response to this study’s survey,⁵ marking China as a hot spot of various types of infringement, inter alia, selling data that enable access to content of scientific publishers.

The USTR’s allegations are obviously based on a preceding report published by the International Intellectual Property Alliance IIPA,⁶ which mentions a few more types of online copyright infringement, namely “...piracy applications (apps) and devices, piracy websites, unauthorized camcording, piracy on cloud storage services (e.g., *Baidu Pan*) and social media platforms (e.g., *Baidu Tieba*, *WeChat*, and *Weibo*), unlicensed content available on user-uploaded content (UUC) platforms (e.g., *Bilibili*, *Miaopai*), including short-video streaming websites (e.g., *Douyin*, *xigua*, *Kuaishou*)...” as well as continuing “traditional” piracy in form of making unauthorized physical copies of books and audio/audio-visual recordings and distributing them worldwide. Unfortunately,

³ See 2.7.1.2.2.

⁴

[https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20\(final\).pdf](https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf).

⁵ More in the subsection below.

⁶ <https://iipa.org/files/uploads/2021/01/2021SPEC301CHINA.pdf>; contrary to its title, the IIPA is an umbrella organization of creative US industries.

however, both the USTR and IIPA do not provide information about the gravity of the impact of these persistent forms of Chinese copyright infringement on US copyright holders. Also, further important information is not given, for instance, how “piracy on cloud storage services” is actually being committed.

An initial impression of the impact of global copyright infringement on EU right holders as well as of the Chinese contribution to it can be obtained from the 72 replies to an earlier EU consultation on which the above Watch List is based.⁷ Roughly three fourths of the responses came from industries affected by the distribution of counterfeit products, one fourth from copyright intensive industries (broadcasting organizations, publishers, music industry, film and audio-visual content producers and the organizations representing them).⁸ Two online service providers also submitted responses, mainly to counter allegations that they would not actively enough suppress infringement committed by their clients or users, the US-based company *Cloudflare*, a provider of secure data delivery services through its own servers, which is accused of supporting the concealment of infringing sites, and the Chinese company *Alibaba*, parent of the e-commerce platforms *AliExpress* and *Taobao*, which are both criticized for not being responsive enough to requests to take down offerings of counterfeit products. Both *Cloudflare* and *Alibaba* countered these accusations with reference to their constant endeavours to crack down on infringing use of their platforms through content technical measures, cooperation with the authorities, etc.

As far as the territorial origin of worldwide online infringement is concerned, organizations such as the Anti Audio-visual Piracy Alliance (AAPA), the *International Federation of Phonogram Industries* IFPI (which is not a European organization, however), the *Federation of European Book Publishers*, the *Interactive Software Federation of Europe* (ISFE) or the UK Collecting Society *PRS for Music* identified China as one among many other sources. The majority of infringing sites identified are located in Russia, the MENA region and Sub-Saharan Africa. Even several EU member states are mentioned as hot spots of infringing activity, inter alia, Sweden as a host country of several infringing web services and Germany, where consumer electronics shops in the proximity of larger train stations are reported to sell physical devices that enable infringement, e.g., broadcast signal decryption devices. The responses, furthermore, hint at a symbiotic relationship between the numerous directly infringing online services throughout the world and the well-established US-based tech companies (*Facebook*, *Twitter*, *YouTube*, *Google*, *Apple*), which

⁷ https://trade.ec.europa.eu/consultations/index.cfm?consul_id=262; the responses, mostly anonymous, are listed here: https://circabc.europa.eu/ui/group/e9d50ad8-e41f-4379-839a-fdfe08f0aa96/library/3962473c-d9fb-4223-a470-ec8c05e4a785?p=1&n=10&sort=modified_DESC.

⁸ Inter alia, the Anti Audiovisual Piracy Alliance (AAPA), the International Federation of Phonogram Industries (IFPI)

would, inter alia, host tutorials on how to access infringing content and tolerate user-uploaded guidance to infringing sites.

Several Chinese online pirates were reported by the European publishing industry in context with the unauthorized making available of e-books. The *Federation of European Book Publishers* and the UK's *Publisher's Association*, spotted several unauthorized E-book online trading platforms such as "b-ok.org" (allegedly renamed into "Z-Library")⁹ or "Doc88.com", "Docin.com" but they identified a lot more of such platforms outside China.¹⁰ The UK-based *Premier League* indicates two Chinese streaming piracy sites of concern in a longer list of streaming platforms located throughout the world that provided unauthorized access to football live broadcasts. Apart from streaming platforms on which pirates installed infringing channels, infringing sports broadcast streaming would also occur via dedicated server providers (which, in turn, also hosted infringing streaming platforms). As a special measure to counter unauthorized real-time streaming within the shortest possible time, *Premier League* recommended new EU legislation that would not only oblige the hosting platforms or servers to expeditiously react to a notification of infringement, but to provide right holders with "takedown tools" that would enable them to quickly block infringing streaming by themselves immediately upon detection. This is an interesting proposal but as the EU does not yet seem to have corresponding rules or best practices in place, it should be rather difficult to get the Chinese authorities excited about such a "right to intrude", even if real-time streaming of sports events is a major problem not only for the European sports event industry but also for Chinese domestic right holders. In China, unauthorized real-time is heatedly debated at latest since the Beijing Olympic Games in 2008. Therefore, the third and last part of this study will nevertheless try to identify a way to convince the Chinese legislature to introduce legislation that would at least promote such technical cooperation between providers and right holders.

Another sports broadcasting and event organizing company, *BEin*, also sees its business mainly threatened by streaming platforms, but all the platforms it indicates are located outside China, mostly in the MENA region and in Sub-Saharan countries. It also hints at a China-related problem, however, namely that the physical devices needed to decode encrypted broadcasting signals are mostly developed and manufactured in China and then distributed worldwide. Auxiliary infringement by offering such physical equipment was even disputed in an US court, which found that the Chinese manufacturer of set top boxes that provided access to encrypted broadcasts infringed upon the rights of a Swedish provider of encryption technologies, inter alia, under the Digital Millennium

⁹ A visit to their website leaves doubts whether the platform is operated only from China, there rather seems to be an international team behind it.

¹⁰ A third respondent from the publishing sector, the International Federation for Reproduction Rights Organization IFRRO, an association of collecting societies, named infringing platforms in numerous countries (among them the US), but not a single one in China.

Copyright Act (DMCA).¹¹ Infringement would probably also have been found by courts in Europe and China, which both prohibit the distribution of devices that enable the circumvention technical protection measures, as will be discussed in more detail in the legal part of this study. *BEin*, furthermore, points to worldwide e-commerce marketplaces, first and foremost China's *Alibaba*, which tolerated the sale of physical devices that enabled unauthorized IPTV streaming, etc., on their platforms, as a major matter of concern. Other right holders, also in response to this study's survey, voiced similar concerns. Therefore, a possible liability of e-commerce platforms that tolerate offers of equipment that can be used for infringing purposes will be further discussed in the second, legal part of this study and in the final recommendations.

1.1.2 The potentially mitigating effect of censorship on the unauthorized use of foreign works

The above explanations have demonstrated that at least from the perspective of European creative industries, worldwide online infringement that has its origins in China stands out in certain areas but is by far not as dominant as Chinese physical copyright piracy has been one or two decades ago. Online infringers are located everywhere around the world, even within the EU. Chinese pirates that stand out in worldwide comparison are technically highly specialized and concentrate on specific consumer groups, e.g., subscribers of infringing sports channels, academics gaining unauthorized access to scientific publications, etc. Also, a good part of commercial activity that damages the interests of European copyright holders is focused on manufacturing physical devices and providing technical infrastructures that enable or facilitate infringement. Chinese content sharing platforms, or, in EU terminology, online content sharing service providers, are occasionally mentioned in context of worldwide infringement but they do not seem to play a major role, whereas the explanations in the subsequent section will show that they are a main source of online copyright infringement within a Chinese domestic context.

This difference between the main types of worldwide perceivable Chinese infringement and Chinese domestic infringement may at least partly be traced back to the fact that global online consumption of works is "partitioned" between China and the rest of the world. In China, large US-based content sharing platforms such as *YouTube* are blocked, while *Youku* and others have taken over their role and predominantly cater to Chinese domestic online consumers. Also, even if the content shared on these Chinese platforms is theoretically made worldwide available, not too many non-Chinese users, which are largely "locked in" in the worldwide dominating, US-based "Big Tech" social media environment, will access them.

¹¹ *Nagravision SA v. Gotech Int'l Tech. Ltd.*, 882 F.3d 494 (5th Cir.)

Moreover, there is much to suggest that the above-mentioned “partitioning” is reinforced by the rather harsh Chinese censorship, which, in turn, would also explain the relative worldwide inconspicuousness of Chinese infringers. The Great Firewall, an army of censors and the deployment of increasingly sophisticated technical means to trace undesired content ascertain that only reviewed works can be transmitted or otherwise distributed within China. That censorship may have a reinforcing effect on copyright enforcement has first been hinted at in the course of the WTO dispute settlement procedure WTO WT/DS362/R (2007 – 2009), in which the US requested that China shall delete a provision from its former Copyright Act, which denied copyright in “forbidden” works, including foreign movies, books, etc., that waited for censorship approval before being allowed to be published or distributed in China. China counter-argued, amongst many other things, that being deprived of copyright protection would not make a difference for foreign right holders, as the distribution of not or not yet approved works would be prohibited, anyway. The US nevertheless referred to piracy in connection with not yet approved works. China finally lost this part of the WTO dispute and had to remove the “forbidden works” provision from the Copyright Act, which it did in the course of the Copyright Act amendment of 2010. One can assume, however, that now, after more than a decade of rapid advancement of content surveillance technology along with the shift of content consumption to the internet, the chances that an online platform can make unexamined content available or let its users do so without being detected and prosecuted are much lower.

Therefore, providers who, for instance, stream a non-licensed live broadcast from Europe to Chinese online viewers bear the risk of not only being held liable for copyright or neighbouring rights infringement, but also of being prosecuted for violating censorship law. They could try to escape such risk by taking technical measures to ascertain that foreign content cannot be accessed within China, hoping that such precautions will afterwards placate the authorities. In its response to this study’s survey, a company engaged in the organization of broadcast sports events actually confirmed that Chinese infringing streaming platforms actually applied such measures but also implied that this was probably due to avoid scrutiny of local copyright enforcement rather than out of fear to be held accountable for breaking censorship laws.

Whatever be the case, such precautionary measures enhance the costs of infringement. It is therefore at least conceivable that in China, in addition to stricter copyright enforcement, also censorship keeps a larger number of potential infringers away from foreign content than in other parts of the world, where censorship is either absent or technically less advanced. This censorship context would, of course, not apply to the unauthorized use of already approved content, which is only a matter of copyright enforcement, either by a local copyright administration upon a right holder’s complaint¹² or a civil trial or, in

¹² More about administrative enforcement below at 2.8.1.4.

case of large-scale infringements, in criminal court.¹³ Domestic statistics, which will be discussed in the subsequent section, show that online copyright infringement within China is indeed far from being wiped out. Consultations with the European Chamber of Commerce in China (EUCCC), however, left this author with the impression that European copyright intensive engagement in China that would contribute to such domestic content is almost non-existent, and the two EUCCC's Intellectual Property Working Group's position papers of 2019/2020 and 2020/2021 confirm this impression, as concerns regarding patents, trade secrets, trademarks and general civil and criminal procedural law aspects dominate whereas copyright law and practice do not seem to be a major issue.

One main reason for the absence of European film producers, broadcasters, etc., should be harsh restrictions on foreign investment in the cultural sector. Art.4 of China's Foreign Investment Act of 2019¹⁴ delegates the formulation of negative lists that prohibit or restrict investment in certain sectors to the State Council. The two negative lists enacted in 2019 and 2020¹⁵ subsequently lessened investment restrictions in a variety of sectors, not least to placate the US and the EU, but left the strict bans on foreign investment in the copyright intensive dissemination of culture, entertainment and information untouched. According to the 2020 negative list, foreign investment in electronic publication¹⁶ as well as in news organizations, editing and publishing of books, newspapers, periodicals, audio-visual products and electronic publications, in any kind of broadcasting, including video-on-demand, in the production of radio and TV programmes, in the production, distribution and import of films as well as in cinema chains, in the auctioning, selling or exhibition of cultural relics and in artistic performance groups¹⁷ is categorically prohibited. This ban does not seem to extend to investment the musical sector. IFPI's response to this study's survey revealed that its members do not only license to China but actually invest there, in form of joint ventures as well as wholly foreign owned enterprises. The largest part of audio-visual content, literary works, etc., from abroad should have found its way to China through licensing, however. This is also confirmed by the response of a scientific publisher to this study's survey, which operates a wholly foreign-owned subsidiary in China but solely for licensing purposes, i.e., it is not permitted to engage in any publishing activities on its own.

¹³ Criminal copyright enforcement will be treated below at 2.8.1.3.

¹⁴ The texts of the law and its implementing regulations, as well as an English translation of the Foreign Investment Law can be obtained from the MOFCOM's site <http://www.mofcom.gov.cn/article/i/jyj/k/201912/20191202925792.shtml>.

¹⁵ The latest list of 2020 is available at http://www.gov.cn/zhengce/zhengceku/2020-06/24/content_5521520.htm.

¹⁶ Category 7 of the negative list.

¹⁷ All under Category 12: "culture, sports and entertainment".

1.2 The Chinese internal view: prevailing forms of domestic copyright piracy

The following explanations will provide an overview of the general online copyright protection situation in China, irrespective of whether foreign, European or domestic content is subject matter of infringement. Separate figures on the infringement of foreign works are not available, unfortunately.

According to the English summary of the 2020 Report on Digital Copyright Enforcement¹⁸ prepared by the National Copyright Administration of China (NCAC), the “Sword Net Action”, a recurring annual administrative campaign on cracking down on online piracy and copyright infringement,¹⁹ which is also lauded by IFPI in its response to this study’s survey, removed 3.239.400 links to pirated content and effected the shutdown of 2.884 infringing websites and apps. Apart from these administrative campaigns, copyright litigation in court is growing impressively. According to the Supreme People’s Court’s Annual Intellectual Property Protection Report of 2020,²⁰ 313.497 copyright cases were newly accepted in all instances in 2020, an increase by 6.97 percent over 2019 (“only” 28.528 patent cases and 78.157 trademark cases were accepted in 2020), among them 4.380 copyright contract disputes, 309.104 disputes related to the attribution of copyright holdership and infringement (it can be assumed that almost all of these cases were actually infringement cases), and 13 declaration of non-infringement suits.

The full text of the NCAC’s 2020 report on online copyright protection is not or not yet publicly available,²¹ only the above summary, so that the following explanations regarding the domestic infringement situation have to be based on the preceding 2019 report.²² Accordingly, the Chinese economy strongly depends on a functioning copyright system, the value of domestic copyright intensive industries amounting to 7.37 percent of the GDP, an increase by nine percent over 2018. This growth would be due to an increased copyright awareness of online users, who would now mostly be willing to pay for online work consumption, especially for music. Between 2013 and 2018, revenues from the online consumption of music alone are reported to have increased by 458 percent. As will be further explained below, however, other categories of works, in particular images, audio-visual works and literary works, are more frequently exposed to various types of infringement.

¹⁸ <http://english.ipraction.gov.cn/article/ns/202106/346653.html>.

¹⁹ More about administrative enforcement in general, which is a Chinese specialty, at 2.8.1.4.

²⁰ Which has been published in April 2021 but is not yet available on any official website; instead it can be found on unofficial sites like http://www.h2l.cn/news/202104/newsif_16838.html.

²¹ The above summary seems to be based on a presentation prepared by the NCAC http://m.cyol.com/gb/articles/2021-06/01/content_G9WbNSzwx.html.

²² <http://www.ncac.gov.cn/chinacopyright/upload/files/2020/9/1618442444.pdf>.

It can be assumed that copyright-intensive sectors and, subsequently, the importance of a functioning copyright system grew disproportionately during the pandemic year 2020, in which long-lasting lockdowns entailed an above-average increase in consumption of online content worldwide and certainly also in China, especially in the first half of 2020. Unfortunately, as said, the full text of the NCAC's 2020 report on online copyright protection, by which this assumption could be verified, is not yet published.

The NCAC report, furthermore, voices concerns about rampant worldwide online piracy through platforms hosted on servers outside China, where the (presumably Chinese) operators would find it easier to conceal their identities. To solve the problem of Chinese content being pirated from abroad, the NCAC calls for strengthened cross-border enforcement. It does not further elaborate on the concrete form such cross-border collaboration could take. Mutual recognition and execution of civil judgments may be a thinkable route, but corresponding agreements between China and the EU respectively its member states could hardly be copyright specific.²³

As far as online copyright litigation is concerned, the NCAC report counts 6.906 online copyright cases in 2019, a considerable increase over the roughly 4.900 cases in 2018²⁴ but still astonishingly low in comparison with the almost 300.000 newly accepted copyright cases altogether, online, and analogous, according to the above SPC's report on judicial intellectual property protection. An explanation for this discrepancy could not be found. One reason may be that the NCAC's report limits "online copyright cases" to cases in which specifically the "infringement of the online transmission right" (i.e., the "making available right") were in the centre of the dispute and not, e.g., the question whether the content at issue formed a work in the meaning of copyright, even if they were also infringed by way of online transmission. Whatever be the case, the increase in online copyright litigation in 2020 should be even greater, considering that at least in the first half of the year most Chinese had to stay at home due to the pandemic, presumably consumed more online content than in normal times and therefore provided more opportunities for profitable online infringement.

The statistics, furthermore, reveal that more than ninety percent of online copyright lawsuits were won by the plaintiff, albeit only partly, in that in most cases the court did not support all of the plaintiff's claims. The awarded damages were notoriously low. The NCAC report does not further elaborate on the reasons, but the most likely reason should be that courts in IP cases normally adhere to the "statutory damages" method of calculating the

²³ More below

²⁴ Ca. 1700 of them litigated in a new category of courts at the lowest basic court level, the Internet Courts established in Beijing, Hangzhou and Guangzhou, as will be further outlined below at 2.8.1.1.

compensation amount. This method and recent legislative endeavours towards a more realistic damage calculation will be explained later.²⁵ The highest damages were awarded for infringement of audio-visual works (50.000 RMB on the average), the lowest for the unauthorized redistribution of news (13.000 RMB on the average). Damages for the unauthorized use of images is also reported to be notoriously low, about 800 to 2500 RMB per image, which, especially in case of unauthorized use of images from abroad, would not even suffice to cover the foreign plaintiff's litigation costs, as proof of right holdership, etc., from abroad would have to go through complicated and costly notarization and legalization procedures.²⁶ Meanwhile, these procedures have been considerably alleviated, as will be further explained below.²⁷

The vast majority of online copyright cases actually accounts for unauthorized making available of images (44 percent, while more than 90 percent of the infringement cases documented in connection with China's leading micro-blogging platform *Weibo* pertain to images), followed by literary works (33 percent) and audio-visual subject matter (19 percent). Copyright in images is collectively administered by the Images Copyright Society of China (ICSC), which joined CISAC in 2019 but apart from that, little is known about its activities.²⁸

Literary works are the second largest subject matter of domestic infringement. However, the predominant forms of domestic unauthorized use are not unauthorized online transmission of E-books as bemoaned by EU stake holders or unauthorized access to academic articles as bemoaned by the USTR, IIPA and the academic publisher who responded to this study's survey, but the online transmission of press and online journal articles. When copying such literary works, infringers frequently committed so-called "manuscript laundering", i.e., they slightly amend the copied text so that it cannot be traced, for instance, by plagiarism detection software. This practice demonstrates that the online pirates must be under a relatively high pressure of prosecution, otherwise they would not apply such elaborate measures. Mostly affected by this type of infringement should be press publishers (hardly European or other

²⁵ More below at 2.8.1.2.1.

²⁶ Whereby, if only one or a few images are infringed upon, even calculation in license analogy, which is more realistic than the court-preferred method of „statutory damages“, does not generate high compensation amounts; in its decision of 10 July 2019 (1865 *Jin 01 Min Zhong* (2019), https://mp.weixin.qq.com/s/fG9uVVgWDtg9_ON1o_hw4g), for instance, the Tianjin Intermediate People's Court calculated the damage to be paid to the plaintiff, holder of exclusive licenses to use certain images from *Getty Images* and therefore endowed with the right to proceed against infringing use in its own name, in analogy to the fees to be paid to *Getty Images* for various uses in different resolutions but the total compensation calculated in license analogy also amounted to only a few hundred RMB.

²⁷ More at 2.8.1.2.2.

²⁸ More at 2.5.

foreign press publishers, however, who are not allowed to engage in China and whose foreign websites should be blocked in China, anyway). The NCAC puts its hopes in block-chain technologies to curb such practices, which would in future enable connecting “laundered” text versions with the original source.

Only three percent of the disputes in 2019 dealt with the infringement of musical works, which, as indicated, implies that unauthorized use of music is comparably, albeit not totally under control. Also, the report does not clarify whether these three percent also include Karaoke-related disputes, which may also be subsumed disputes pertaining to audio-visual works. One reason for the relative inconspicuousness of music copyright piracy may be the strong rigidity with which the Music Copyright Society of China (MCSC), China’s collective management organization (hereinafter: CMO) in charge of administering the rights of music authors, and the China Audio-Video Copyright Association (CAVCA), which specializes in administering the rights in the mechanical Karaoke performance of music, represent the interests of their members. Both will be treated further below.²⁹ Copyright in video games is also frequently infringed upon but predominantly prosecuted in criminal court. With 68 percent, wilful commercial-scale infringement of copyright in video games accounts for the largest part of criminal online copyright cases in 2019. Also, 36 percent of all criminal copyright cases of 2019 accounted for online copyright infringement. The NCAC report does not indicate the criminal cases in absolute numbers but in the light of the above-mentioned fact that only a small fraction of more than 300.000 civil copyright disputes per year pertains to online infringement, criminal prosecution seems to have been of special importance in the fight against online copyright infringement, already at a time when the Criminal Code itself did not even specify unauthorized online transmission as a criminal act.³⁰

As far as the various types of online infringement are concerned, the NCAC report states that the vast majority (47 percent in 2019) is committed through sharing websites that can be accessed from all types of receiving devices, the main work types affected by such infringement being images and literary works. 27 percent of online infringement is reported to have been committed with help of the instant messaging and multi-purpose app *WeChat* and 12 percent with help of other apps. More than half of the documented online infringements via *WeChat* pertained to literary works, followed by images. Copyright in cinema movies are also reported to be frequently infringed upon, mostly by bootlegging in movie theatres and subsequent online transmission (bootlegging should have been less relevant at least in the first half of 2020, due to the pandemic), leaking audio-visual content from its original source (presumably by circumventing technical protection measures), transmitting movies first published abroad and making the movie available in parts on mini-blogs and

²⁹ At 2.5.

³⁰ More at 2.8.1.3.

other platforms. The NCAC also bemoans that 87 percent of infringing audio-visual content is being made available through servers located abroad. 58 percent of infringing sites specialized on audio-visual content would be operated from foreign servers, more than half of them from the US. The NCAC's statements are partly confirmed by the responses to this study's survey, according to which Chinese infringers would indeed increasingly relocate their platforms to servers abroad to remain undetected, which would actually speak for the strength of China's prosecution of unauthorized online use. On the other hand, if it can be assumed that the audio-visual content suspected of being made available from abroad without authorization has already been approved for distribution within China, the blocking of copyright infringing content does not seem to be as effective as the blocking of non-approved, censored content.

Another type of frequently occurring infringement in China is unauthorized online streaming of broadcasts but the NCAC report does not specifically refer to the real-time streaming of live sports events, which has been a hotly disputed issue over the past years, as will be further explained below in the context of protected works. It instead indicates apps and physical devices offered by third parties that enable decoding and subsequent access to encrypted content as a major problem. The NCAC also reported that it has cracked down on several sellers of IPTV devices and that several local copyright administrations fined providers of apps that enabled infringing streaming. It furthermore quotes court decisions that confirmed indirect infringement liability of those who enabled infringement, e.g., by providing links to streamed content, and even a criminal conviction of a provider of deep links to such content.³¹

According to the NCAC, 40 percent of criminal online infringement, i.e., serious infringements prosecutable under Articles 217 and 218 of the recently amended Criminal Code,³² is organized, the average duration of imprisonment of individuals convicted for criminal copyright infringement being 2.23 years, the average fine to be paid amounting to 500.000 Yuan, which is considerably higher than the average compensation amounts that plaintiffs can expect in civil cases. This may change, however, as will be outlined below, due to the introduction of punitive damages of up to five times and a trend towards a more right holder-friendly damage calculation.

Infringement in China is not only prosecuted in civil and criminal court but also by specialized administrations, a Chinese peculiarity.³³ The local copyright administrations under the supervision of the central NCAC are in charge of such administrative enforcement. Normally, they act upon a right holder's complaint

³¹ Unfortunately, the filing numbers were not indicated so that the decisions could not be traced.

³² More about criminal enforcement below at 2.8.1.3.

³³ More at 2.8.1.4 below.

but according to the NCAC's above report, a large part of online copyright infringement is prosecuted *ex officio*, increasingly with help of sophisticated content recognition technology. Upon detection of infringement, the administrations delete, for instance, infringing links on their own or notice right holders. A good part of the enforcement work is also "outsourced" to the major content sharing platforms, i.e., those which would most likely fall under the application of Art.17 of the DSM Directive. Partly under the guidance of the NCAC, platforms such as *Alibaba* or *WeChat* established cooperation mechanisms with right holders to facilitate the removal of infringing content, also by using intelligent content recognition technologies. *Alibaba's* response to the above EU consultation confirms this, pointing to its own in-house monitoring technology that even won several technology awards. Public resistance against such technologies as in Europe, asserting that their deployment would unduly restrict freedom of expression and information, does not exist in China. Also, technical collaboration between content sharing platforms and right holders seems to be already in the works, which could facilitate the introduction of the mentioned "takedown tools" as proposed by a company engaged in sport event organization with a view on EU legislation. *Alibaba* already grants right holders privileged access to its sites to monitor the progress of anti-counterfeiting and piracy measures, takedown procedures, etc., but does not yet permit them to take down infringing content on their own. Possible legislative measures to further promote the technical collaboration between internet service providers and right holders will be discussed in greater detail in Part 3 of this study.

In sum, the NCAC's report brought to light that the intensity of online infringement in 2019 varied depending on the work category. Whereas music copyright piracy seemed to be largely under control, the owners of copyright in other work categories such as images, motion pictures and literary works (mostly press articles) still suffer under mass infringement. It furthermore revealed that unauthorized use within China and Chinese worldwide infringement of foreign and European content differ in terms of both the subject matter of infringement (e.g., mostly press articles in China versus academic publications and e-books abroad when it comes to infringement of literary works) and the predominant types of infringement (mostly content sharing within in China versus technically sophisticated, highly specialized infringement of foreign content, for which infringers, if caught, can be held directly liable).

To further improve the situation, the NCAC recommends enhancing the liability of platform operators for acts committed by their users but not in a manner that certain online content sharing service providers shall conclude licensing agreements with the right holders as in the EU under the DSM Directive (Art. 17). The NCAC rather suggests a higher duty of care under the persisting safe harbour regime, in that large operators with a strong capacity to technically monitor the user activity on their platforms should not as easily be allowed

escape liability than smaller ones.³⁴ That is, Chinese authorities are not averse to an increased liability of large online content sharing service providers with the capability to apply content recognition technologies pertaining to the highest industrial standards. This comes close to the gist of Art.17(4) DSM Directive, which conditions the release of online content sharing service providers from liability, amongst others, on having “made their best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works and subject matter for which rightholders have provided them necessary and relevant information”. The NCAC’s view that large service providers shall deploy especially refined technical measures is also almost congruent with the Commission’s Guidance³⁵ on Art. 17 of the DSM Directive, according to which “larger service providers with a significant audience may be expected to deploy more advanced solutions/technologies than other service providers, with limited audiences and resources.” Chances are therefore good that the Chinese authorities and the judiciary will positively respond to EU recommendations that secondary law (SPC Interpretations and administrative provisions to be enacted by the State Council) shall regulate especially strict monitoring obligations of economically and technically capable sharing platforms,³⁶ as will be further outlined in part 3 of this study on recommendations to European trade officers.

Interestingly, the drafters of the NCAC report back in 2019 obviously expected that the liability of service providers will be directly regulated by the Copyright Act after its third amendment. As we know today, the amended Copyright Act remained silent on such liability, which instead continues to be regulated by general tort law in combination with secondary copyright-specific administrative and judicial provisions.³⁷

Finally, as mentioned, the NCAC also emphasizes in its recommendations the need for a stronger international collaboration in the area of enforcement. A larger cross-national effort of EU and Chinese authorities to prosecute cross-border infringements is likely to fail due to the very different law enforcement systems. In the EU, enforcement is almost exclusively a matter of courts and an alternative administrative enforcement route as in China does not exist. Joint campaigns like an EU-China “sword net action” are therefore hardly conceivable. However, recent developments in the area of mutual recognition and execution of foreign judgments give reason to hope that improvements can be achieved in a more specific area. Reportedly, the number of foreign judgments recognized in China as well as of Chinese judgments recognized by foreign courts, inter alia, of EU member states, is on the rise, mostly based on

³⁴ The NCAC also refers to a corresponding court decision but unfortunately does not indicate where to find it.

³⁵ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:288:FIN>.

³⁶ More about this below at 3.1.

³⁷ See below 2.7.1.

the principle of reciprocity and not on corresponding agreements.³⁸ To put such mutual recognition on a more stable base that would assure that, for instance, a Swedish court executes a Chinese judgment against a Chinese piracy site operated from Sweden, it may be a viable option to work towards an agreement with China on the mutual recognition of court decisions and arbitral awards. It is beyond this author's expertise to assess whether and in how far the EU Commission could prepare the ground or even take part in the formulation of such agreements, but most likely this is a matter of national legislation by single member states. Also, such agreements can hardly be concluded with regard to specific subject matter such as copyright, but they would have to comprise all areas of civil law. Therefore, the option of a better cooperation in the area of mutual recognition and execution of judgments and its potentially positive effect on international copyright protection should only be touched on briefly at this point, without further deepening it.

1.3 Additional insights from the survey of this study

As explained, the survey that accompanied this study yielded only a few responses, which are not sufficiently representative to provide a comprehensive picture of the dimension of copyright infringement that specifically affects European creative industries. Apart from IFPI, which represents the worldwide phonogram industry, replies from the sports event sector and the scientific publishing sector basically confirm the findings from the above analyses. All responses described Chinese copyright infringement as "substantial" even though an accurate account of the dimension of Chinese infringement in worldwide comparison could not be given.

Accordingly, the most harmful form of unauthorized use of sports event broadcasts in China would be real-time streaming but also the making available of replays. A company specialized in the organization of sports events qualified China as a key centre for all kinds of infringing acts, direct infringement by way of real-time streaming or making available of replays, as well as preparatory acts that enable or facilitate infringement. The latter comprised manufacturing of physical "illicit streaming devices", management of the technical infrastructure within which thirds commit the actual infringement, supply of audio-visual content to resellers and removal of legitimate watermarks attached by right holders, which aim at identifying infringers. That is, a good part of the indicated acts is hard to subsume under the catalogue of exclusive rights in Art.10 Copyright Act that cannot be carried out without the right holder's permission, and also only limitedly subsumable under other acts prohibited

³⁸ Articles 281 and 282 of the Civil Procedures Act regulate that Chinese courts can recognize and enforce foreign judgments on the basis of a corresponding agreement or reciprocity; clarifying SPC interpretation are in the works since 2017 at the latest, see *Song Jianli*, Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments, *Zeitschrift für chinesisches Recht (ZchinR)* 2017, 279, an online version can be found here <http://cicc.court.gov.cn/html/1/219/199/203/1048.html>.

under the Copyright Act. This, furthermore, raises questions with regard to e-commerce marketplaces on which physical devices that enable infringement are traded. Later on, the study will provide recommendations towards including e-commerce platforms on which such devices are offered in the circle of online operators who bear liability for the acts committed by the users/clients, being well aware, however, that the persuasiveness of such recommendations may be lowered by the non-availability of corresponding best practices or model legislation in Europe.

In contrast, most of the infringements described as significant by the scientific publishing sector are easily subsumable under the Copyright Act's exclusive rights catalogue. These are the "simple" making available of scientific research articles online without authorization, the offering of access to infringing offline repositories of pirated content and the offering of unauthorized access to the publisher's content platforms on local online marketplaces against a fee. Also, Chinese websites would specialize in copying content from the also highly dubious, albeit non-Chinese shadow libraries *Sci-Hub* and *Library Genesis* and making them domestically available. These kind of infringements, which would be subsumable under the Copyright Act's internet transmission right and also fall under the prohibited circumvention of technical protection measures, are highly specialized, targeted forms of infringement committed by the respective service providers themselves, not by users of content sharing platforms.

IFPI, which responded on behalf of the phonograms industry, clarified, however, that user uploads on Chinese sharing platforms do also significantly impact on copyright and neighbouring rights holders. It describes the sharing of music, especially via short form videos on platforms and via apps as "rampant". That is, the Chinese regime on the liability of content sharing service providers should be of great significance also for European right holders, albeit not in all copyright-relevant sectors. Apart from that, infringement would also occur via streaming sites, peer-to-peer/file-sharing sites, direct download sites, linking sites, apps that aggregate infringing content and cyberlockers. Moreover, physical piracy, particularly in form of CDs and USB drives pre-loaded with digital files sold via online marketplaces, would still be a matter of concern, in spite of a recently introduced "notice and take" down liability regime for e-commerce providers that tolerate the sale of IP infringing products on their platforms, which will be treated later in the legal section of this study.³⁹

The responses to the survey do also confirm the NCAC's statement that infringing operators in China spend considerable effort to conceal their identities, which, once again, implies that the domestic pressure of prosecution is considerably high. As already mentioned, a sports event company responded that Chinese infringers restricted their offers of non-Chinese content to non-Chinese channels or sold outside China, and that this was probably due to

³⁹ At 2.7.1.3.

avoid scrutiny of local copyright enforcement rather than prosecution under censorship law, which also speaks in favour of the effectiveness of Chinese copyright enforcement.

1.4 Interim conclusion

The above attempts to delineate and quantify the importance of Chinese copyright protection for European right holders can be condensed as follows:

- Chinese worldwide online copyright infringement is substantial in certain sectors but as a whole it does not stand out in international comparison;
- Chinese online copyright infringement that primarily affects foreign right holders abroad is technically sophisticated and highly specialized, e.g., making the content of academic databases accessible to certain user circles, and includes accessory acts such as the manufacturing and distribution of physical devices that enable access to technically protected content and should in most cases form apparatus used for the circumvention of technical protection measures, the manufacturing and distribution of which is prohibited under Chinese law;
- Within China, infringement in form of user uploaded content on domestic sharing platforms is dominant and primarily affects those European right holders who market their content in China, mostly via licensing to domestic partners;
- Censorship along with foreign investment restrictions in the cultural and educational sectors prevents European copyright holders from direct engagement within China and may also be one reason why foreign content that is not also licensed for distribution, etc., in China is moderately exposed to Chinese infringement;
- Some NCAC recommendations on how to improve copyright protection in China gives reason to hope that Chinese authorities will be open to input from EU representatives.

2. Recent reforms to the Chinese copyright system, their importance for European creative industries and possibilities of further alignment with EU copyright law

2. China's legal and institutional environment for the protection of European copyright

2.1 Basic features of Chinese Copyright Act

Since its enactment in 1991, the Copyright Act's structure remained basically unchanged. With a few exceptions, it is rooted in the Continental European author-orientedness in that it distinguishes between author's copyright and the neighbouring rights of performers and entities engaged in the dissemination of works, acknowledges the moral rights of authors, grants them a comprehensive, non-exhaustive bundle of economic rights while exceptions and limitations are statutorily defined and must also pass the three-step-test and, finally, acknowledges collective management as an important pillar of copyright protection.

In 2020, the Copyright Act underwent a third major overhaul, which, inter alia, enhanced the scope of subject matter that can be protected as works, improved the protection of the neighbouring rights of broadcasting organizations and phonogram producers and significantly strengthened enforcement. It also introduced several online-specific provisions, e.g., on technical protection measures, but most of them are not really new but have been transferred from already existing secondary law. Also, not only the amended Copyright Act entailed improvements, but also new secondary law on civil and criminal prosecution. For the sake of brevity, the following explanations will be limited to those aspects of China's copyright system that are of importance for European creative industries.

2.2. Author-orientedness and the status of individual authors

The following explanations will be rather short, since detailed explanations about the legal position of individual authors vis-à-vis employers and other commercial exploiters will, due to the mentioned underrepresentation of European copyright intensive industries on the Chinese market, produce little that would be worth knowing for this study's target group.

As mentioned, the Chinese Copyright Act adheres to the *droit d'auteur* tradition in that it is centred of the author of the work, albeit tainted with a few peculiarities that put it closer to the US copyright tradition, especially when it comes to works made for hire. Art. 18 (1) Copyright Act on occupational works appears to be quite employee-friendly on a first glance, in that it assigns copyright to the author and grants the employer a mere right of preferential use within its scope of business and sets a period of two years in which the author is banned from offering his work to any other party for using it in the same way. Art. 18 (2), however, drastically limits this author-friendliness, stipulating that, apart from the author's right to be named, all copyright in works created under the supervision of the employer and by using its material facilities belongs to the employer. Art. 18 also mentions several types of works of commercial nature, such as drawings, maps, software and, since the third amendment, works

| Recent reforms to the Chinese copyright system, their importance for European creative industries and possibilities of further alignment with EU copyright law

created in the context of employment within newspapers, magazines, news reporting services and broadcasting organizations, in which copyright holdership is categorically granted to the employer. Copyright in occupational software works is separately regulated in the rather old State Council's Software Regulations, Rule 13 stipulating that a software work shall be regarded as created in the context of employment (and copyright consequently be assigned to the employer if only one of three prerequisites is met, namely (1) that the software results from a task explicitly assigned in the course of employment, (2) that the software is a foreseeable or natural result of the normal occupational duties or (3) that the software has been developed mainly with help of the fund, equipment, not publicly available documentation or other material or technical facilities provided by the entity that claims to be the employer. Even though none could be identified in the course of this study, certain European companies that are specialized in works of highly commercial character such as software or whose non-copyright related main economic activity generates copyright protected by-products such as drawings, should nevertheless be active on the Chinese market and employ local creators. These companies should welcome the above employer-friendly provisions.

According to Art.11 (3) Copyright Act, which remained largely unchanged during the preceding three Copyright Act amendments, legal persons or organizations without legal personality can even become "authors" of works made under their supervision, which would mean that firms can assert moral rights in lieu of the actual author. The available case law implies, however, that this provision is rarely applied in practice.

Quite author-friendly is the acknowledgement of moral rights in Art.10 (1) No.1 – 4 Copyright. Moral rights include the right to be named, the right to decide about the first publication of the work, the right to prevent distortions of the work and, uniquely, the right to amend the work, which is comparable but not tantamount to a right of the author to withdraw his work. These rights are generally inalienable, with the exception of the above situations in which a legal person or an employer assumes them, and there are also modifications when it comes to cinematographic works with numerous creative contributors.

As far as the provisions on the improvement of the status of individual authors and performers vis-à-vis exploiters in Chapter 3 of the DSM Directive is concerned, the author of this study is of the opinion that they should not be a central topic in coming consultations with Chinese representatives. As explained in the first section of this study, the Chinese environment for copyright-intensive European engagement, which can only be undertaken by the corporate sector and not by individual authors and performers, is already difficult enough. Should China ever open up to foreign investment, e.g., in the publishing or film sector, the conquest of the Chinese cultural market would likely be hindered by a contract adjustment mechanism as in Art.20 of the

Directive or an author's or performer's right to revoke a license due to insufficient exploitation pursuant to Art.22, not least because such new mechanisms and instruments, which have not yet been tried and tested in courts, would create new legal uncertainty.

2.3 Protected works

The third Copyright Act amendment transferred the definition of protected works from Rule 2 of the Implementing Regulations⁴⁰ to Art. 3 Copyright Act and opened it remarkably to include thus far unprotected subject matter. The amendments to the notion of copyright protected works may be of even greater importance for European copyright holders than the various enforcement-related improvements, which will be treated later.

According to Art.3 Copyright Act, any "intellectual achievement" can henceforth be protected as work, a much broader term than the previous "creation", in that it is clearer now that anything that requires intellectual labor can be protected without having to meet certain levels of artistry. The new definition, furthermore, replaces the prerequisite in said Rule 2 of the Implementing Regulations that works must be "reproducible in tangible form", by the prerequisite that they shall be "expressed in a certain manner".

Under this much broader definition, more creations will be subsumable under "protected works" and alleged infringers will find it harder to deny the work character of, e.g., content that has never been intended to be fixated in any form or content that does not exceed certain levels of artistry. Finally, the catch-up provision in Art.3 No. 9 Copyright Act according to which, apart from the work categories defined in the preceding No.1 – 8 (e.g., literary works, audiovisual works., etc.), "other works" shall be protected, has been liberalized in that such "other works" do no longer have to be defined by law or administrative regulation. Instead, it henceforth suffices if they pertain to "other intellectual achievements that comply with the characteristics of a work."

With regard to specific content, this broadened work definition has been anticipated by the judiciary even prior to the Copyright Act reform. Until a few years ago, courts required at least subject matter for which an alternative protection instrument existed, such as design protection if an object of applied art was disputed, or the video producer's neighbouring right if audio-visually recorded subject matter was at issue, to express an especially high degree of creativity that distinguished such works from the subject matter protected under these alternative instruments. Several recent court decisions, however, initiated

⁴⁰ The Implementing Regulations have not yet been adapted to the amended Copyright Act, so that their last amended version of 2013 is currently still in force, their Rule 2 for the time being co-existing with the new, broader definition in Art. 3 Copyright Act.

a remarkable paradigm shift in the specific area of sports event broadcasts, which may also benefit European sports broadcasters and sports event companies.

As explained, several respondents to the EU Commission Consultation on the Counterfeit and Piracy Watchlist 2020 pointed at Chinese infringing streaming platforms that transmitted live sports broadcasts worldwide. Quite damaging should also be the effect of such unauthorized re-transmissions on the market position of European right holders within China, e.g., the revenues they obtain from licenses to China's sports channels CCTV 5 and CCTV 5+.

During the Beijing Olympics 2008, a gap in the protection of sports events became apparent when internet streaming providers throughout the country transmitted the Olympic sports events in real-time. Unlike TV series or cinema movies, real-life events such as sports broadcasts or game shows are most exciting and suspense-packed when they are live broadcast, whereas hardly anyone wants to watch a replay. Unauthorized live streaming therefore generated substantial losses to sports broadcasters and other right holders. For a long time, however, they failed to succeed in court. First, courts categorically denied sports broadcasts the character of original works,⁴¹ as which they would have been protected against any kind of commercial exploitation due to a non-exhaustive list of commercial rights. Next, sports broadcasts also remained unprotected under the neighbouring right of broadcasting organizations, as courts interpreted their re-broadcasting right purely technically, as traditional broadcast outside the internet and therefore as not covering the real-time internet transmission. An internet transmission right was not available for broadcasting organizations before the third Copyright Act amendment of 2020 but even if it had been, it would, according to its definition in Art. 10 (1) No. 12 only have covered transmission in a manner that the recipients can view the content at a location and *at a time* chosen by themselves, which does not apply to real-time transmissions of live events⁴² (this definition has remained unchanged after the amendment). Finally, also protection under the video producer's neighbouring right was denied in most instances, as the term

⁴¹ Exemplary are two decisions rendered by the Beijing Intellectual Property Court on 30 March 2018, 1818 *Jing Zhi Min Zhong Zi* (2015), <http://www.jintiankansha.me/t/uFHjVrPibT> and 1055 *Jing Zhi Min Zhong Zi* (2015), http://www.iprdaily.cn/article_19189.html, which both overruled the back then quite daring previous-instance decision of two local courts that attested sports broadcasts a sufficiently high degree of originality in terms of camera work, etc., to qualify them as works.

⁴² Last confirmed by the Hangzhou Intermediate People's Court in its second instance decision of 10 September 2020, (2019) 浙 01 民终 10859 号, https://mp.weixin.qq.com/s/_uJvQ93WuAWjEAtJ8_lzSA, with regard to IPTV re-transmission.

“recording” already implies that the subject matter of such neighbouring right must be fixated, which is normally not the case if the content is broadcast live.⁴³

One major obstacle to the protection of sports broadcasts as works has been the mentioned tendency to require a higher degree of artistic originality from subject matter for which, in principle, alternative protection existed, such as the neighbouring right in unoriginal video recordings.⁴⁴ However, as seen, especially for live broadcasts such alternative protection was virtually non-existent.⁴⁵ One reason why the judiciary has been reluctant to subsume live sports events under the protected works has also been that the most applicable work category would have been “cinematographic works and works created by virtue of an analogous method of film production” pursuant to Art.3 No.6 Copyright Act before the amendment. The amendment of 2020 renamed this category into “audio-visual works”, which should render it easier to include a greater variety of subject matter in this work category, including audio-visually broadcast sports events. It remains to be seen, however, whether the coming Implementing Regulations will continue to require audio-visual works to be fixated on any material in order to be protected, as Rule 4 No.11 of the Implementing Regulations of 2013, which are currently still in force but outdated. Such requirement may become problematic with regard to the real-time streaming of broadcasts, which at the point of time at which they are broadcast, are at best ephemerally recorded. On the other hand, this fixation requirement has not prevented the Beijing Intellectual Property Court to acknowledge a live sports broadcast at least as a neighbouring rights-protected audio-visual recording. The broadcast in this case would have met the fixation requirement that, as a matter of course, also applies to audio-visual “recordings”, as the replays during the broadcast evidenced that the broadcast content was actually recorded.⁴⁶

⁴³ In one of the above decisions of 30 March 2018 (1055 *Jing Zhi Min Zhong Zi* (2015)), the Beijing Intellectual Property Court regarded the broadcast at issue as audio-visually recorded and therefore as neighbouring rights protected because it was broadcast with a delay and therefore had to be somehow fixated, and the defendant’s streaming as infringement of the plaintiff’s reproduction and internet transmission rights..

⁴⁴ Most pronouncedly expressed by the Sichuan Higher People’s Court in its decision 176 *Chuan Zhi Min Zhong* (2019) of 29 November 2019 (<https://mp.weixin.qq.com/s/NhIKO8q74C-FlaiKw2Uw7w>) with regard to works of applied art, stating that only subject matter that expressed an extraordinarily high degree of originality shall be protected as applied art, whereas the creators of all other subject matter shall rather apply for design protection.

⁴⁵ Seagull Haiyan Song, ‘China’s Copyright Protection for Audio-Visual Works – A Comparison with Europe and the U.S.’, *IIC* (2015), 410 (426) provides a plethora of partly contradicting court decisions that try to draw a line between audiovisual subject matter worthy of copyright protection and non-creative neighbouring protected audio-visual recordings.

⁴⁶ Decision of 30 March 2018, 1055 *Jing Zhi Min Zhong Zi* (2015).

Newer case law, albeit being still based on the previous Copyright Act, is even more positive about the protection of sports event broadcasts. On 23 September 2020,⁴⁷ the Beijing Higher People's Court overturned one of the above Beijing Intellectual Property Court decisions,⁴⁸ stating that the sports broadcast at issue actually made enough use of leeway for expressing creativity by way of switching between camera positions, close-up views, replays, narration, etc. The most recent decision in this matter has been rendered by a lower court, the Haidian District Court of Beijing City, on 16 March 2021,⁴⁹ which, in an extremely rare move for a Chinese court, even quoted the above Higher People's Court decision to support its own reasoning. The following case study should illustrate the potential outcome of a corresponding court decision for a European broadcaster of sports events.

Case study I

Facts: The Irish private sports broadcaster *O'Hoolihan* Inc. has concluded an exclusive contract with the Irish Rugby League to broadcast the whole 2021 season to paying clients. In autumn 2021, *O'Hoolihan* finds out that its broadcasts are streamed in real-time by the Shanghai based company *Qiubo*, an internet provider specialized on sports event streaming, obviously after having circumvented its technical protection measures that block non-paying parties from access. *O'Hoolihan* decides to proceed in the Shanghai Intellectual Property Court.

Plaintiff's arguments: The plaintiff's broadcast would be sufficiently original to form a work according to Art.3 Copyright Act, either an "audio-visual work" according to Art.3 No.6 Copyright Act or a non-specified "other intellectual achievement" under No.9 of the same provision, the plaintiff should therefore enjoy full copyright protection against any kind of commercial use. But even as a broadcasting organization, it would be protected either against the "re-broadcasting" according to Art. 47 (1) No.1 Copyright Act, as the use of the internet to retransmit the broadcast in real-time would have the same effect as a traditional wireless broadcast or cable broadcast, or against the internet transmission right according to Art. 47 (1) No.3 Copyright. Alternatively, the plaintiff can also be protected as producer of an audio-visual recording according to Art.44 Copyright Act, as the live broadcasting would involve constant simultaneous recording. The defendant shall refrain from further streaming and compensate the plaintiff for significant losses, as it made the plaintiff's rugby broadcasts available throughout the world. The defendant shall, furthermore, be

⁴⁷ 128 *Jing Min Zai* (2020), https://mp.weixin.qq.com/s/QQwXNLPuO7HLH_OYmiy2bg.

⁴⁸ The one regarding the broadcast of the Brazil Soccer Championship of 2014 that granted no protection at all, not even under the video producer's neighbouring right.

⁴⁹ (2019) 京 0108 民 初 21297 号 ; <https://mp.weixin.qq.com/s/ZBFMvitVJSxudodmOjHPVA>.

held liable for the circumvention of the plaintiff's blocking mechanisms that kept non-paying viewers away and bear the civil consequences as regulated by Art.49 (1) Copyright Act.

Defendant's response: The plaintiff's allegations are without merit, its broadcast would not even come close to a work in the meaning of copyright, and as a mere broadcasting organization it would only be protected against the simultaneous wireless or cable re-broadcasting and against the internet transmission in a manner that the viewer can choose the location and time of reception. The plaintiff would, furthermore, not enjoy protection of as a producer of an audio-visual "recording". Even if the broadcast involved recordings, the internet-retransmission of a live broadcast and not the transmission of durable audio-visual fixations, which are subject matter of protection under the producer's neighbouring right, are at issue in this case. As no copyright and neighbouring right protected subject matter has been infringed upon, the plaintiff's claim of additional civil liability for the circumvention of technical protection measures shall be rejected.

Court's reasoning: The plaintiff's broadcast forms a copyright protected work in the meaning of the catch-up provision of Art.3 No.9 of the Copyright Act ("any other intellectual achievements that meet the characteristics of a work"). It would already have formed a work under the former Copyright Act, and this is even more so after the third Copyright Act amendment. The combination of the plaintiff's choice of camera positions, the timing of close-ups and replays, the background stories about the players, their relationship, etc., would certainly form an "intellectual achievement" as required by Art.3 No.9 of the amended Copyright Act, the creators having made sufficient use of the available leeway for selection and arrangement. Even if the defendant's act has not infringed upon one of the specified rights listed in Art. 10 (1) such as the internet transmission right, its act can nevertheless be subsumed under the "other rights the copyright holder shall be entitled to enjoy" according to Art. 10 (1) No.17 Copyright Act. In addition, the defendant has circumvented the plaintiff's technical protection measures and shall bear the corresponding civil liability according to Art.49 (1) in combination with Art.53 (6) Copyright Act. The defendant shall refrain from further retransmitting the plaintiff's works. As neither the plaintiff's losses nor the defendant's illegal revenues or a reasonable license revenue can be calculated, the court, in consideration of the circumstances of the case, determines a statutory damage of 500.000 Yuan pursuant to Art. 54(2) Copyright Act.

Lessons from the case: Civil courts are increasingly creative and self-confident when interpreting the law, frequently to the favour of right holders. The tendency towards acknowledging sports event broadcasts as works has already started prior to the amendment of the Copyright Act, and the broadened work definition in Art.3 Copyright Act is rather supportive of this new tendency. The above decision qualifies the plaintiff's sports even broadcast as an unspecified "other work"

according to the catch-up clause in Art.3 No.9 of the non-exhaustive catalogue of work categories, unlike the preceding, already mentioned “real” decision of the Beijing Higher People’s Court, which subsumed the broadcast at issue under “works created in a manner similar to cinematography” according to the old Copyright Act (the amended Copyright Act only refers to “audio-visual works”) and regarded the requirement that such works must be “recorded on a medium” according to Rule 4 No.11 of the Implementing Regulations as fulfilled because recordings would take place, anyway, as a technical component of the broadcast. As the above fictional decision is based on the new Copyright Act, which is no longer coordinated with the old and outdated Implementing Regulations, which are officially still in force, the fictional judge in the above decision has taken the safer route and subsumed the plaintiff’s broadcast under “other intellectual achievements”, which are not specifically required to be recorded on a medium. Finally, the case study has also pointed to a persisting problem, notoriously low damages amounts calculated by the “statutory damages” method, which are capped at 5 Mio. Yuan under the amended Copyright Act and shall be applied only if a more realistic calculation according to the actual damage, the profit from infringement or in license analogy is not possible. In fact, however, courts in almost all IP cases resort to this calculation method originally intended as “last resort” as will be further explained below in the context of enforcement.

It should be noted that in spite of the described positive signals towards an acknowledgement of sports events as audio-visual works, a representative of the European sports even sector in its response to this study’s survey showed sceptical as to whether this newer case law has actually initiated a new trend. It remains to be hoped that the Supreme People’s Court at some point will signal its agreement with these lower-court decisions, for instance by including them in its annual list of the “Ten landmark IP cases and 50 important IP cases”. However, even then, such adoption or even a final SPC judgment in a similar case will not create definite legal certainty, as China’s legal system adheres to the statutory law tradition and does not acknowledge precedents as binding sources of law.

Should the above nevertheless evolve to a new trend, courts may also rethink their denial of protection for further subject matter under the new general definition of works. Thus far, for instance, the Chinese judiciary categorically denied protection in TV show formats,⁵⁰ which would form non-protectable

⁵⁰ See Beijing Haidian District People’s Court of 2005 summarized at <https://www.chinacourt.org/article/detail/2006/01/id/192117.shtml> (exact date, filing number and original text not available); Item 10 of the Beijing Higher People’s Court’s Answers to Several Questions with regard to the Handling of Copyright Disputes pertaining to Variety Shows (announcement 62/2015), available on Baidu upon entering the Chinese title “北京市高级人民法院关于审理涉及综艺节目著作权纠纷案件若干问题的解答”, categorically excludes show formats as mere ideas from copyright protection.

mere ideas and also lacked “reproducibility” as required by Rule 2 of the Implementing Regulations. As explained, the third Copyright Act amendment has replaced this requirement by the requirement that a work shall be “expressible in a certain manner”. “Expressible in a certain manner” is, in principle, also a TV show format, namely by being recurrently played over several TV shows. It should also be noted that even under the previous version of the Copyright Act, the judiciary found that the sequence of events, character interaction, etc., of a work expressed in literary form possessed a high enough level of distinctiveness to be *per se* protected against the adoption in another work.⁵¹ The third amendment may have pushed the pendulum further towards a protection of TV show formats within the “idea-expression” dichotomy, as will be demonstrated by the following case study:.

Case study II

Facts: French TV production firm *Soleil* has developed a new song contest show format, *Réanimation*, which is distinct from existing song contest formats in that it aims at giving long-forgotten popstars from the past a chance to resume their former careers. In each season, three former popstars compete with each other over several weeks in that they first sing each other’s hits of the past in chronological order, the song presentations being accompanied by interviews with the stars, their former companions and rivals, clips of their concerts, background stories about scandals and the like. In the show’s finale, each of the three stars presents a newly composed song and the winner gets a record deal. The show is first broadcast in France and soon enjoys high popularity, in France and abroad. *Soleil* licenses the format and the know-how to realize it to several European countries and the US. About one and a half years after the show premiere in France, *Soleil* is notified about the song contest *Fuhuo* on Chinese TV, which is based on exactly the same format without the slightest deviation. *Soleil* decides to proceed against the Chinese broadcaster in the Beijing Intellectual Property Court, not least due to an expected loss of revenues, as it had planned to license the format to another Chinese TV show producer.

Plaintiff’s arguments: *Soleil* claims full-fledged copyright in the format, which would be much more than a mere idea, namely a tightly structured composition of elements, and both the selection of elements and their composition would express a high degree of originality, therefore meeting the requirements under Art.3 Copyright Act. *Soleil* refers to an earlier decision of the Beijing Higher People’s Court according to which the transplantation of the sequence of events, interaction between characters, etc. from a literary work to another work formed infringement, as the entirety of these structural elements, even though not yet an immediately

⁵¹ Decision of the Beijing Higher People’s Court, 1039 Gao Min (Zhi) Zhong Zi (2015); summarized in English in WIPO Collection of Leading Judgments on Intellectual Property Rights, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1065.pdf, 104 et seq.

reproducible manifestation, possessed sufficiently high degree of distinctiveness to constitute a work on its own. Also, *Soleil*'s format could be qualified as dramatic work under Art.3 No.3, but would in any case form an unspecified "other work" according to Art.3 No.9.

Defendant's response: The plaintiff's work formed a mere idea, and there is good reason why copyright protection does not extend to mere ideas. A copyright protection that allowed a French TV show producer to prevent a TV show in faraway China targeted at an entirely Chinese audience and therefore, when it comes to the concrete expression, entirely different from the original show, would be plain overprotection. Also, Chinese court decisions of the past, as well as the Beijing Higher People's Court's Answers, would support the defendant's view that show formats should be categorically excluded from copyright protection.

Court's reasoning: The Copyright Act amendment opened the definition of protected subject matter to include thus far unprotected content. Mere "simple" ideas shall remain unprotected but an entirety of creative thoughts and ideas, comprised of a fixed sequence of events that creatively enhances the audience's excitement by combining storytelling and video clips with live performed songs and finally culminating in a spectacular finale, is of an individuality and uniqueness that renders it clearly distinct even from similar song contest formats. The plaintiff's format shall instead be regarded as result of intellectual labour that "can be expressed" as required by Art.3 Copyright Act, and therefore as a copyright protected work. The court, furthermore, supports the plaintiff's claim that the defendant infringed upon his copyright in that it adopted the TV format without permission in all its elements one-by-one, not just the basic idea of having former popstars competing with each other, but the sequence of events and all the other dramaturgic elements of the original format. The defendant shall refrain from further broadcasting *Fuhuo* and compensate the plaintiff for economic losses.

Lessons from the case: China has its peculiar legal environment that, in spite of much criticism of the past, can sometimes be more favourable to right holders than copyright in European member states. That courts in the majority of EU member states are reluctant to grant copyright protection in TV show formats should therefore not lead to the conclusion that such protection is even less possible in China. Also, as Chinese courts rarely base their decisions on precedents, it is possible to reach a favourable result even where preceding case law spoke another language, as in the present case (especially where the corresponding legal provisions, here on the definition of protected works, have changed in the meantime, in a manner that favours the plaintiff's claims). Parties who nevertheless wish to invoke precedents are advised to quote cases decided by the same court or, even better, by the higher-ranking court in the same jurisdiction. In this case, the plaintiff quoted the mentioned "idea-expression-dichotomy" decision of the Beijing Higher People's Court, the next higher instance

after the Beijing Intellectual Property Court in non-technical IP cases as the current one.

It must be stressed that the above example is purely hypothetical. Its purpose is to illustrate the potential effect of the broadened work definition. As the amended Copyright Act has only recently entered into force, it is currently impossible to predict whether or not the courts will stick to their view that TV show formats are non-protectable ideas. Actually, a good part of this study is highly speculative as most of the laws and secondary provisions on which it is based have been amended only recently and the amendments have not yet been tried and tested in practice.

2.4 New commercial rights and limitations

The Chinese Copyright Act is also similar to Continental European copyright regimes in that the list of economic rights in Art. 10 (1) No. 5 – 17 is non-exhaustive, its last No.17 referring to “any other rights Copyright holders shall be entitled to enjoy”. Under this open catalogue, Chinese courts qualified the unauthorized internet upload and transmission of works as infringing act already in the late 1990s, even before it was explicitly listed as such in the course of the Copyright Act reform of 2001. The catalogue of rights is complemented by a list of limitations in Article 24 (1) No.1-13 and several legal licenses, just as in other Continental European copyright systems.

Previous drafts recommended a US-style “fair use” addition to the list of limitations, which would have stipulated that any other uses shall be permission and remuneration-free, provided that certain conditions were met. What made (and still makes) things worse, at least in the view of Continental European copyright traditionalists, is that several court decisions factually acknowledged fair use in that they found certain uses outside the Copyright Act’s enumeration of limitations to be non-infringing, as they would not interfere with the author’s normal exploitation of the work or otherwise prejudice his legitimate interests, and the like.⁵² Such user-friendly adjudication was probably sparked by public criticism of an allegedly too inflexible limitations regime that would suppress so-called “user generated content” (meaning the use of works to create new works, e.g., the parodistic collage of snippets of a movie with a song).

When amending the Copyright Act in 2020, however, the legislature refrained from introducing a full-fledged fair use provision. Instead, obviously to placate the above public scepticism towards copyright, it added a new No. 13 to the limitations catalogue, which henceforth allows permission and remuneration

⁵² Corresponding case law summarized by this author in Peter Ganea, Copyright, in: Peter Ganea/Danny Friedmann/Jyh-An Lee/Douglas Clark (edited by Christopher Heath), Intellectual Property Law in China, 2nd ed. 2021, Kluwer Law, 360 et seq.

free use under “any other circumstances [apart from those enumerated in the preceding No.1-12] regulated by law or administrative provisions”. This liberalization, which significantly facilitates the introduction of new limitations by mere decree, is certainly not in the best interest of copyright holders but in legislative practice, new limitations beyond the Copyright Act’s catalogue of limitations were already introduced by administrative provisions even before the amendment.⁵³ However, at least a full-fledged fair use provision, which would have significantly enhanced the non-predictability of court decisions, could be avoided. New limitations cannot be freehandedly established by court but shall at least be regulated by secondary statutes. Of course, there is a certain danger that courts continue adjudicating in the above-mentioned manner i.e., acknowledging permitted uses even in absence of a clear corresponding limitation, as they have done before. As shown above with regard to online streaming of broadcasts, Chinese courts are increasingly self-confident in creating judge-made law, sometimes to the advantage of right holders, sometimes less so.

2.5 Collective management

Collective management is another Continental European copyright feature. Especially the DSM Directive of 2019 affirms the role of collective management as a mechanism to balance the interests between authors and users with regard to a variety of uses. One main feature is that the Directive now explicitly allows its members the establishment of collective licensing with extended effect, and in connection with Art.17 on the obligation of certain online content sharing service providers to conclude license agreements with right holders, such collective licensing with extended effect may, within the boundaries of Art.12 of the Directive, further facilitate the coming into existence of a sufficiently broad license coverage that both the online content sharing service providers can engage in their businesses and users upload content without having to fear prosecution as infringers.

The Chinese Copyright Act amendment added two new paragraphs to Art.8 on collective licensing. Art. 8 (2) now clearly entitles CMOs to collect fees from users, that the standard of such fees shall be determined through negotiations with “user representatives”, that the NCAC may be called upon to resolve the dispute, and if party is not satisfied with the NCAC’s judgment, it may further proceed in court. Alternatively, in case of a dispute, parties may directly file suit in court. The provision seems to especially force users into an obligation to negotiate, they cannot just do nothing if a CMO approaches them. A bit opaque

⁵³ The State Council’s “Internet Regulations”, which will be treated in more detail below at 2.7.1.2.1, contain several limitations that exceed the scope of permission and remuneration free uses pursuant to the Copyright Act’s catalogue of limitations

respectively in need of further definition remains the term “user representatives” as those who are under the obligation to negotiate, whether it also includes online content sharing service providers like *Youku* or *Bilibili*, as “representatives” of their actual individual users, who would then be under the obligation to negotiate. Such an understanding would render the provision somewhat close to the gist of Art.17 of the DSM Directive, which obliges online content sharing service providers to conclude license agreements with right holders (or with their CMOs, depending on the category of work and use at issue).

It remains to be seen how the more detailed secondary legislation, in particular the forthcoming State Council’s Regulations on Collective Copyright Administration, which, according to Art.8 (4) Copyright Act, shall elaborate detailed provisions on collective management, will interpret this provision. A new paragraph (3) to the Copyright Act commits collecting societies to regularly report to the public about the collection and distribution of fees, deductions and other circumstances as well as to provide rights information for right holders and users and obliges the NCAC to lawfully conduct control and administration of collecting societies.

The current Regulations were enacted on 28 December 2004 and last amended on 12 December 2013.⁵⁴ As they may soon be amended again to bring them in conformity with the Copyright Act, the following explanations will only summarize them. Their current version regulates, inter alia, the minimum requirements for the establishment of a CMO and the principle that only one CMO can be in charge of a specific form of work exploitation throughout China and that in the rare case where two CMOs come into question for the administration of one right (e.g., in case of Karaoke playing, one CMO in charge of musical works, the other in charge of audio-visual works) they should determine which one shall be in charge in consultations. That is, CMOs are not allowed to compete with each other in the same field of copyright exploitation, which is quite distinct from the European regime since the enactment and implementation of the Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights. Of course, certain aspects of collective management that are of importance for a union of nations, such as multi-territorial licensing, are hardly transplantable to a nation-state like China but China’s present regime appears to be quite conservative also in comparison with other nation-states, such as Japan, where the Act on the Collective Administration of Copyright and Neighbouring Rights of 2000 promotes competition between several CMOs (albeit with little success so far).

⁵⁴ Current version in Chinese available here: http://www.gov.cn/gongbao/content/2011/content_1860740.htm; an English translation of the first version of 2004 can be obtained from the WIPOLex database at <https://wipo.lex.wipo.int/en/legislation/details/6340>.

With respect to their interaction with copyright holders and users, the Chinese Regulations put CMOs under an obligation to contract with right holders who want to have their rights administered, as well as with those who are willing to obtain a permission to use. Once an author has become a member of a CMO, he can no longer exercise the entrusted rights on his own.⁵⁵ He can withdraw membership anytime, but this will not impact on ongoing licensed uses of his work. The duration of use under such a license, which must be non-exclusive, shall not exceed two years but may be renewed. The license fees are, as now explicitly regulated by the Copyright Act, a matter of negotiation between the CMO and the user (or its “representative”) unless the NCAC has determined a fee standard for a specific legal license.⁵⁶

Finally, the Regulations commit CMOs to transparency and financial discipline especially with regard to the deduction of administrative revenues, the percentage of which shall decrease as the total revenue grows. Not only members, users or otherwise related parties may report a CMO’s unlawful conduct but also members of the general public. The authority in charge of controlling them is the NCAC, as now also regulated by the new paragraph 3 to Art.8 Copyright Act.

Chinese collective management is a fast-growing sector, albeit still of moderate size in worldwide comparison. The oldest and most influential CMO, the Music Copyright Society of China (MCSC) had more than 10.000 members and managed to collect almost RMB 405 million (ca, EUR 53.3 million) in licensing fees in 2019, more than half of it (almost RMB 214 Mio) for digital uses.⁵⁷ RMB 12.3 Mio were collected from abroad through reciprocal agreements with roughly 80 CMOs, which is three or four times less the amount that MCSC paid to the top ten foreign CMOs in the same year. The major share of revenues obtained from abroad account for neighbouring East Asia but there are also considerable payments from European CMOs such as the French SACEM or the German GEMA. The main recipients of payments from MCSC are CMO’s in neighbouring Asia, especially those of Hong Kong and Taiwan, but a good part of revenues is also distributed to the two US organizations ASCAP and

⁵⁵ This contradicts an earlier reply of the SPC to a lower court, according to which CMO members could assert their rights in court on their own if the CMO remained passive, 35 Fa Min (1993); see also remarks of Yahong Li, ‘Music Copyright Society of China has Legal Right and Standing to Bring Lawsuit in its Own Name’, in Kung-Chung Liu (ed.), *Annotated Leading Copyright Cases in Major Asian Jurisdictions* (City University of Hong Kong Press, 2019), 98 et seq.

⁵⁶ Such standards exist for the following legal licenses: use in textbooks for school education, reprinting in newspapers or periodicals, making of sound recordings of published musical works, broadcast of published works and broadcast of sound recordings.

⁵⁷ The MCSC’s annual reports (Chinese and English) can be downloaded from this site: http://www.mcsc.com.cn/about/annual_report.html.

BMI. Considerable are, furthermore, the revenues transferred to South Korean and Japanese CMOs, which demonstrates a relative popularity of music from these neighbouring countries. From Europe, only the GEMA made it among the top ten recipients of MCSC payments. The amounts of fees collected and distributed by the MCSC are not yet overwhelming in comparison with the annual transaction volumes of the well-established European CMO's, but their annual growth is impressive. The MCSC is also a quite active enforcer of copyright, In 2019, it participated in 381 copyright cases, 123 of them accounting for mechanical reproduction and internet infringement.

After the State Council's Regulations on Collective Management were enacted, more CMOs came into existence, the mentioned CAVCA in 2005, the China Written Works Copyright Society (CWWCS) in 2008, the Image Copyright Society of China (ICSC) in 2008 and the China Film Copyright Association (CFCA) in 2009.

The CAVCA as the CMO in charge of "audio-visual copyright" (in fact, however, almost exclusively for copyright in Karaoke music videos) also shows impressive growth. In 2019, it collected 279 Mio. RMB in revenues, the greatest part accounting for use in Karaoke bars, followed by Karaoke video-on-demand, "Mini Karaoke" playing with special machines/receiving devices and IPTV smart TV Karaoke playing, altogether an increase of 44 percent over 2018 from administering 135.916 works of only 276 members.⁵⁸ Its membership mainly consists of larger companies from the media and recording sector, which explains their low number.

Many non-members obviously feel capable enough to proceed on their own against infringing Karaoke playing – the CAVCA 2019 annual report refers to an "explosion of commercial lawsuits" filed by non-members against CAVCA-licensed Karaoke establishment operators. Apart from that, the CAVCA is, according to its own report, also exposed to multiple counterstrikes from the Karaoke business, accusing it of abusing its market dominance in violation of the Antimonopoly Act. That CAVCA is a rather active CMO that represents its members with vehemence has not remained hidden from foreign right owners. IFPI, as mentioned, responded to this study's survey that their members are in the process of negotiating with CAVCA about the administration of their newly introduced remuneration right for the mechanical public performance of their recordings.

Several recent court decisions that resulted from the above-mentioned surge in Karaoke-related copyright litigation are quite interesting, as they have significantly lessened the amount of compensation to be paid by those Karaoke

⁵⁸ CAVCA's annual report of 2019 in Chinese and English can be downloaded from here <https://www.cavca.org/newsDetail/1389>.

establishment operators that have concluded a license with CAVCA for the use of Karaoke works that were not administered by CAVCA.⁵⁹ The Higher People's Court of Zhejiang Province is even reported to have quasi-codified this practice in an *Opinion on Implementing Reform and Innovation in the Area of Intellectual Property Litigation*, upon consultations with CAVCA. In a more recent case that involved the unauthorized use of music belonging to a non-member of the above MCSC by an MCSC-licensed user, the Guangdong Higher People's Court rendered a similar decision,⁶⁰ justifying the lowered compensation, inter alia, with the user's proven subjective willingness to pay for the use of music, the objective fact that it had actually paid fees to MCSC and the argument that right owners shall have an incentive to participate in collective management, which would facilitate copyright transactions.

The above partial releases from liability somewhat resemble the result the drafters of the DSM Directive envisaged when they regulated the obligation of online content sharing service providers to seek authorization to use from right holders, the licenses concluded with, and fees paid to CAVCA and MCSC being loosely comparable with having made "best efforts to obtain authorization" pursuant Art.17 (4) DSM Directive. That is, the idea of a lessened liability of users who, in spite of having endeavoured to obtain authorization from as many right holders as possible, still used a work without authorization, is not alien to the Chinese judiciary. Part 3 of this study will present recommendations with a view to expanding the awakening consciousness of the Chinese judiciary that "best efforts to obtain authorization" shall be considered when determining liability for the mass use of works on content sharing platforms.

Another CMO, the CWWCS in charge of administering copyright in written works, has raised public attention shortly after its coming into existence, when it clashed with Google over its books project in 2009. In 2020, it collected 22.4 Mio. RMB in fees, roughly three quarters for the internet use and other commercial rights it administers, one quarter for uses under legal licenses.⁶¹ According to the mentioned NCAC's 2020 report about digital copyright protection, the CWWCS, has been quite successful in establishing itself a one-

⁵⁹ So for instance the Guangdong Higher People's Court in a decision of 2021; according to the case summary on CAVCA's website <https://www.cavca.org/newsDetail/1507>, the court also opined that the standard fees established by collecting societies shall generally serve as reference for the determination of compensation claimed in copyright infringement litigation of corresponding work uses are at issue; see also CAVCA's Acting Director General Zhou Yaping's presentation on the occasion of the IP Key roundtable in Shanghai, https://ipkey.eu/sites/default/files/ipkey-docs/2019/Session-3.2_ZHOU-Yaping-%E5%91%A8%E4%BA%9A%E5%B9%B3-EN%26CN.pdf

⁶⁰ Decision of 6 August 2020, (2019) 粤民再 277 号; <https://mp.weixin.qq.com/s/yCYFw27Cg6yqwoxwSNDYmQ>.

⁶¹ See CWWCS' annual report, entirely in Chinese <http://www.prccopyright.org.cn/staticnews/2021-05-10/210510140951719/1.html>.

stop-shop for digital book licensing, having signed 279 of corresponding agreements with more than 100 publishing houses and cultural companies about the collective licensing of digital books.⁶²

It should be noted that not all categories of protected content that is owned by European copyright “industries” come into question as subject matter of collective management. European film producers, for instance, would most likely manage their rights on their own, also in China. The same may be true with regard to Chinese film producers, which would explain why little is known about the activities of CFCA,⁶³ which is in charge of administering copyright in cinematographic works. The greatest part of MCSC’s and CWWCS’s membership is composed of individual creators, only a few are publishers and therefore commercial entities. The same applies to CMOs in Europe, e.g., to the German GEMA and VG Wort. Others like CACVA are, due to the nature of the works they administer, more open to corporate members. CAVCA, as explained, is currently approached by IFPI members who wish to be represented with regard to the new phonogram producer’s right to obtain remuneration for the public performance of phonograms.

Rule 22 (1) of the Regulations allows foreigners or stateless persons to entrust a Chinese collecting society with the administration of their copyright in China “through a reciprocal representation agreement with a foreign collecting society of the same category”. Para. (2) of the same provision defines “reciprocal representation agreement” as an agreement between a Chinese and a foreign organization in the same field that entrusts each other with the representation of their members in their respective country/region. The provision is a bit open to interpretation, as it does not become clear whether a “normal” reciprocal agreement between two societies to collect fees on behalf of each other is sufficient or whether a farther-reaching agreement that is explicit about mutual representation is required. In general, however, it should be possible for a resident or national of an EU member state to be represented by a Chinese CMO. Even then, however, it must be kept in mind that only three out of the five currently active CMOs appear to be active, whereas not much is heard about the other two, the Image Copyright Society of China (ICSC) and the China Film Copyright Association (CFCA). In its 2019 report on online copyright protection, the NCAC refers to a newly established private-public alliance of, *inter alia*, film industry associations and large platforms like *Alibaba* to proceed against online film piracy but does not even mention the CFCA as a participant in this alliance. That little is also known about ICSC’s activities are especially lamentable because, as explained above, images are the most infringed-upon copyright

⁶² A corresponding function or link on its website <http://www.prccopyright.org.cn/default.aspx> could not be found, however.

⁶³ Its website <http://www.cfca-c.org/> does not contain information about members, collected and distributed fees, etc.

protected subject matter in the online environment. The NCAC report also hinted at infringements associated with the images of foreign right holders when it stressed the difficulty to have even the expenses for notarization and legalization covered by the low damage amounts.

Whereas among the other three, rather active CMOs, the MCSC mainly represents individual authors and composers and the CAVCA specializes in a very specific type of audio-visual works, namely Karaoke music videos, the CWWCS could theoretically also represent the interests of European publishers of written works, which, as outlined, are mildly concerned about the unauthorized online distribution of e-books by infringing Chinese platforms. CWWCS's statute⁶⁴ does not limit membership to Chinese individuals or publishers but only requires a minimum number of publications that must have been legally distributed in China, i.e., must have gone through censorship review to be copyright protected, a requirement that is obviously still based on the pre-2010 version of the Copyright Act.⁶⁵

2.6 Neighbouring rights

As many European right holders which are exposed to online infringement worldwide (and, to a lesser extent, from China) are broadcasting enterprises, producers of audio-visual content, etc., neighbouring rights should also be shortly mentioned here. In spite of much criticism, the legislature did not change the peculiar arrangement of the corresponding Chapter IV of the Copyright Act. The 2020 amendment only changed its title to "Rights Related to Copyright", even though the previous title "Publication, Performance, Sound Recording, Video Recording, Broadcast" would have better reflected its content, which is not only about "rights" related to copyright but forms a unique mix of neighbouring rights, specific contract law regulating the rights and obligations of the parties, e.g., to a publishing or a performance contract, and circumstances under which a work can be used without permission but under payment of a remuneration (legal licenses).

2.6.1 The specific neighbouring right of publishers in the "typographical design"

According to Art.37 Copyright Act, publishers enjoy a right to prohibit or to allow the use of the typographical design of the books or periodicals they publish. This right, which is granted for a term of ten years after the first publication, exists irrespective of whether the content of the publication itself is copyright protected. It basically forms a basis on which publishers can proceed against

⁶⁴ <http://www.prccopyright.org.cn/staticnews/2010-01-28/100128150538781/1.html>, the requirements pertaining to members are regulated on p. 3.

⁶⁵ See above 1.1.2

the use of unauthorized copies of their publications, previously pirated physical books but today it may also be effectively worked against the internet circulation of scanned copies. This right obviously does not play a major role in copyright practice; corresponding case law does not seem to exist.

The Chinese publisher's right is not to be confused with the press publisher's right in Art. 15 of the DSM Directive, and China's limitations regime points in an opposite direction, allowing as much permission and remuneration free use of press publications as possible. Art. 24 (1) No. 4 Copyright Act makes full use of Art. 10*bis* of the Berne Convention, allowing newspapers, periodicals, broadcasting organizations "and other media" to reprint or rebroadcast already published or broadcast material on current issues regarding political, economic or religious questions. However, the copyright holder may object to such uses in advance. Rule 6 No. 7 of the State Council's *Regulations on the Protection of the Internet Transmission Right* of 18 May 2006 (hereinafter "Internet Regulations"; last amended on 30 January 2013)⁶⁶ extends this permission and remuneration freedom to the internet environment, allowing the transmission to the public of articles on current issues regarding politics and economics (not religion, however). Unlike the Copyright Act with respect to reprint and rebroadcast, the Internet Regulations do not entitle the copyright holder in the press publication to object to such uses. That is, the largest part of written material published online by press publishers should be freely transmissible by internet service providers. It should be noted, however that the permitted use under Rule 6 No. 7 of the Internet Regulations, is limited to press articles on current issues that have been *published online*. At least the unauthorized scanning of printed press articles and their subsequent making available should therefore infringe upon the copyright holder's reproduction and online transmission right in Art. 10 (1) No. 12 Copyright Act and the mentioned publisher's right in allowing the use of his typographical design. If the mere content of the publication is reproduced with help of Optical Character Recognition software and then presented online in a different typographical arrangement, the publisher's right in the typographical design can no longer be invoked, but still the copyright holder's reproduction and internet transmission rights, presumably in most cases by the publisher who should have become the copyright holder under the mentioned, specific publishing contract provisions.

That China will ever adopt an EU-style press publisher's right that even extends to excerpts apart from "very short extracts" of press articles is hardly conceivable. It would, again, be widely perceived as an obstacle to the further

⁶⁶ http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=194533; Art. 64 delegates the enactment of these provisions, as well as of provisions on software copyright protection to the State Council, they are a binding source of law for local copyright administrations as well as for the People's Courts.

flourishing of domestic information society providers. In the light of the entirely state-controlled Chinese press landscape, along with the mentioned censorship and ownership restrictions regime that almost completely bans European or other foreign publishers from circulating their content, in particular the journalistic publications on which the DSM Directive's protection is centred (Recital 56), the author of this study does not believe that endeavours to align Chinese and European law in this area will generate any beneficial effects for European copyright holders.

2.6.2 Performers

The third amendment has significantly enhanced the scope of rights enjoyed by the “classical” neighbouring rights owners. Performers enjoy commercial exploitation rights, which are exhaustively listed, and, as natural persons, also moral rights, which in contrast to the moral rights of authors are largely unlimited, also when it comes to film actors who, unlike authors of dependent film contributions, can theoretically prohibit the distortion of their appearance if a film theatre movie is, for instance, adapted to be shown on TV screens. This does not seem to have caused major problems in practice, however.

As far as the performer's economic rights are concerned, the third Copyright Act amendment has endowed performers of audio-visual performances with a rental right to bring the Copyright Act in compliance with the Beijing Treaty on Audio-visual Performances. Performers still do not enjoy a right to be remunerated for the broadcast of their recorded performance (in sound or video), not to mention a right to control such broadcast. China has filed corresponding reservations that it will not apply Art.15(1) of the WPPT on a single equitable remuneration to performers and phonogram producers for the broadcasting or other communication to the public of their phonograms published for commercial purposes⁶⁷ and Art.11(1) and (2) of the Beijing Treaty on the performer's exclusive right in the broadcast and the communication to the public of their performances fixed in audio-visual recordings or a right to be remunerated for such use.⁶⁸

2.6.3 Producers of phonograms and audio-visual recordings

Just as EU copyright law, China grants a neighbouring right not only to producers of phonograms, which would comply with worldwide minimum standards, but also to producers of audio-visual recordings. The latter have already been mentioned in context with “audio-visual works”, respectively the difficulty to distinguish between a creative audio-visual work and a non-creative mere audio-visual recording. Previous Copyright Act amendment drafts indeed

⁶⁷ https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_66.html.

⁶⁸ https://www.wipo.int/treaties/en/notifications/beijing/treaty_beijing_5.html.

suggested to abolish the neighbouring right in audio-visual recordings, so that presumably also less “artistic” audio-visual subject matter would have henceforth been protected as works, but the final amendment of 2020 retained it. The exclusive neighbouring rights in both phonograms and audio-visual recordings are regulated in Art.44(1) Copyright Act. An additional exclusive right to broadcast is contained in Art.48 exclusively for producers of audio-visual recordings, as an obligation of the broadcasting organization to seek the producer’s permission and to remunerate it. Phonogram producers did not even enjoy a right to be remunerated for the broadcast of their phonograms until 2020, when the Copyright Act amendment finally endowed them with the right to obtain remuneration for the dissemination of their phonogram by wire or by wireless means and also for the communication of the phonogram to the public by sound transmission devices (e.g. Karaoke devices). As repeatedly mentioned, this new legal license prompted a significant number of IFPI members to enter into negotiations with CAVCA about the collection and distribution of the remuneration.

2.6.4 Broadcasting organizations

The neighbouring rights of broadcasting organizations are listed in Art.47 (1) Copyright Act. The third Copyright Act partly rearranged, partly expanded them. They comprise the right to prohibit the rebroadcast of the radio or TV broadcast, the right to prohibit its fixation as well as further reproductions of such first fixation and, newly, the right to prohibit the broadcast’s internet transmission. As already mentioned, however, this right can hardly be invoked against one of the most debated forms of unauthorized use, the real-time internet transmission, because the definition of the internet communication right in Article 10(12) Copyright Law presupposes that the protected content made available in a manner that the members of the public can access the work from a place *and at a time individually chosen by them*.

2.7 Internet-specific copyright law

2.7.1 Making online available and the liability of internet service providers

The Copyright Act regulates the mentioned internet transmission right in Art. 10 (1) No.12 but does not contain a single provision on the liability of internet service providers for infringing online transmissions by their users, even after its third amendment. Provider liability is instead regulated by more general Civil Code provisions on tort and by copyright-specific secondary administrative and judicial provisions, as will be further outlined below.

2.7.1.1 The internet transmission right

The term “online transmission right” (actually “information network transmission right”) in Art. 12 (1) No. 12 Copyright Act at a first glance implies that copyright holders are only protected against the actual transmission of the work, but its definition as “offering the work publicly by wire or by wireless means in a manner that the public can obtain the work at an individually chosen time and from an individually chosen location” clarifies that it actually includes the “making available” of the work. Rule 3 of the Supreme People’s Court’s *Provisions on Several Problems Related to the Application of Law to Civil Cases Relating to the Handling of Infringements of the Dissemination Right through Information Networks* (hereinafter: Network Interpretations; amended on 23 December 2020 to adapt them to the new Civil Code)⁶⁹ stipulates that the courts shall establish infringement of the internet transmission right if the protected content is made available, inter alia, by uploading it on a server, by setting up shared files, by the use of file sharing software, etc., in a manner that members of the society can individually obtain it at a time and from a place chosen by them by way of downloading, browsing or other means. This definition is quite open and allows judges to subsume a variety of uses, also not yet known future uses, under the internet transmission right. In a decision of 21 October 2016,⁷⁰ the Beijing Intellectual Property Court interpreted this Rule 3 as not encompassing the provision of links to already legally uploaded content, i.e., it basically limited infringing online transmission to making previously unavailable content newly available on the internet, thereby overturning the preceding Beijing Haidian District Court’s decision, which held the defendant, an internet service provider, liable for infringement, inter alia, due to the high degree of his organizational involvement in providing the links.⁷¹ The Beijing Intellectual Property Court’s decision is quite similar to the findings of the EUCJ in the Svensson case (C-466/12), which found that even embedding content that has been made available with the right holder’s consent in the own site via frame linking would not be copyright infringing. Of course, also in China, only linking to legally uploaded works and other protected content does not give rise to infringement liability but not providing links to content that has been uploaded in an infringing manner.

⁶⁹ Original version of the Network Interpretation at http://www.cac.gov.cn/2014-10/11/c_1112781468.htm; 2020 amendments at <http://www.court.gov.cn/fabu-xiangqing-282671.html>.

⁷⁰ 143 *Jing 73 Min Zhong* (2016) (http://blog.sina.com.cn/s/blog_6e3ff8d00102xf5.html), commented by Szu-Ting Chen, ‘Providing Hyperlinks to Watch Illegal Videos on YouTube Does not Communicate Works to the Public in Taiwan’, in Kung-Chung Liu (ed.), *Annotated Leading Copyright Cases in Major Asian Jurisdictions* (City University of Hong Kong Press, 2019), 54 et seq.

⁷¹ More about the aspect of the provider’s active involvement in infringement in the following subsection b).

As will be further outlined below,⁷² infringing online transmission gives comparably frequent rise to interim injunctions, which are otherwise rarely applied to other types of IP.

2.7.1.2 Internet service provider liability

As mentioned, the Copyright Act, even after its third amendment, is silent on the liability of internet service providers for acts committed by themselves or by users of their services. Such liability, the classical “notice and take down” liability in case of infringing user uploads, is instead regulated in the new Civil Code’s Book on Tort, Articles 1194 – 1197 (1195-1197 specifically on the liability of all types of internet service providers for the infringing use of their platforms by users), for all kinds of online infringements of civil rights. Copyright-specific interpretations of these general civil provisions can be found in two secondary provisions, the mentioned State Council’s Internet Regulations, which are now largely outdated, and the SPC’s Network Interpretations, which, as mentioned, have been adapted to the latest higher-ranking legislation.

The mentioned Civil Code provisions provide for a “notice and take down” mechanism, which, when it comes to the liability of big and influential online content sharing service providers like *Bilibili*, is quite different from the new Regime under Art.17 of the DSM Directive. Article 1195 provides that a notification of rights infringement to a internet service provider shall contain initial evidence of infringement and the infringed party’s personal information and that in a next step, the provider shall notify the alleged client and take the necessary blocking measures, both expeditiously because otherwise the provider will be held jointly and severally liable for the grown damage from infringement (i.e. obviously only the additional damage that occurred after the notification). On the other hand, also the right holder will be held liable for damages that he caused to provider and user due to a wrongful notification. Art.1196 Civil Code, unlike the preceding Art. 36 of the Tort Liability Act, newly regulates a procedure that allows the user to file an objection with the provider, which must be accompanied by initial evidence of non-infringement. The objection must then be forwarded to the right holder, with a request to take administrative or court action. In other words, after notifying the provider about the alleged infringer, the right holder is under pressure to act (but only if the user objected), by filing suit against the alleged user. If the provider does not receive a notification that further action has been taken in time, he *shall* (not “may”) lift the blocking measures expeditiously. That is, Chinese internet service providers do factually have to (or are at least advised to) establish a procedure to deal with complaints, similar to the complaint and redress mechanism regulated in Art.17 (9) of the DSM Directive. Art. 1197 Civil Code, finally, clarifies that not only providers who clearly know but also those who

⁷² At 2.8.1.2.3.

should have known of the infringement (but did not comply with their duty of care) shall be held severally and jointly liable.

It should be noted that Art. 42 of China`s E-Commerce Act of 2018⁷³ contains a similar provision with specific regard to online infringements of IP in general, not only copyright, by e-commerce platforms but as the copyright specific Network Interpretations and Internet Regulations refer to the more general tort provisions, the E-Commerce Act will not be examined any further at this stage. Instead, the service provider liability provisions of the above two secondary provisions will be discussed in greater detail.

That the Copyright Act itself is silent on a copyright-specific provider liability but delegates its regulation to secondary law, gives, at a first glance, reason to hope that a regime as under Art. 17 DSM Directive, which obliges large online content sharing service providers to seek the authorization from right holders, can be easily and flexibly introduced by a new SPC Interpretation or amendments to existing secondary law. This would be rather unrealistic, however, as China, unlike the EU, has its own homegrown large internet service providers, at least one local counterpart for virtually each of the US tech giants and correspondingly little interest in burdening its national champions with overly strict liability provisions. Even if the past months have demonstrated that the Chinese authorities are by no means hesitant to take a hard line on their national high-tech champions such as *Tencent* or *Ant Technologies*, they would hardly do so indirectly through modifications to copyright law. This does not mean, however, that not at least elements of the new EU regime can be transplanted to the current Chinese system. The above explanations have shown that the NCAC is not averse to idea of imposing a stricter duty of care on large and powerful content sharing providers, in a manner that would come close to the gist of Art. 17 (4) DSM Directive, according to which providers can only escape liability if they, inter alia, in accordance with high industry standards of professional diligence, have ensured the unavailability of infringing content on their premises. Moreover, as shown above in context of CAVCA-licensed Karaoke bar operators, at least the Chinese judiciary sympathizes with another idea on which Art.17 of the DSM Directive is grounded, namely that due efforts to seek the authorization from right holders shall be rewarded by a reduced risk of being held accountable for infringement. Part 3 of this study on recommendations to EU trade officers will therefore seek to identify a modes of transplating such European concepts to existing Chinese law.

2.7.1.2.1 The State Council`s Internet Regulations

⁷³ In English accessible on the IP Key site https://ipkey.eu/sites/default/files/documents/resources/PRC_E-Commerce_Law.pdf

As mentioned, the Internet Regulations have not yet been adapted to the new Civil Code and therefore still refer to the previous, rather rudimentary civil regulation of ISP liability provision in Art.36 of the Tort Liability Act of 2009, which is no longer effective. Their current version distinguishes between different kinds of internet service providers, which bear different degrees of liability depending on the technical features of their service, in a manner that somewhat resembles Articles 12–15 of the EU E-Commerce Directive 2000/31/EC. According to Rules 20 and 21 of the regulations, those services which provide access to protected content at a user's request or automatically transmit content at a user's request (which should correspond to the providers of "mere conduit" according to Art.12 of the E-Commerce Directive) as well as caching services that automatically store protected content received from other web services shall not be liable for compensation if they enable access to infringing content, provided that the transmission and access provider does not select or alter the content and ensures that it is made available to no other parties but the specific requesting user, and that the caching service provider does not alter the cached content, ensures that its service does not impact on the interaction between the original web service and the user and that it automatically modifies, deletes or screens protected content if such content is modified, deleted or screened by the original web service. Expedient taking down of infringing content upon a right holder's notice is not required as another prerequisite. In court practice, service providers that host or facilitate access to infringing content sometimes escape liability by being classified as such passive providers of purely technical services. In a decision of 27 February 2019,⁷⁴ the newly established Hangzhou Internet Court, a court on the lowest level in the court hierarchy, relied on the above Rule 20 to free *Tencent* from liability for hosting on its *Wechat* instant messenger app a so-called mini program (i.e., a program that can only be accessed online from the user's handheld device and is not stored on it) that incorporated copyright infringing content. In the court's opinion, *Tencent* formed a mere provider of automatic access or transmission services" pursuant to Rule 20 and would therefore not bear liability for infringing content on the mini programs hosted on *WeChat*. Also, to block access to the infringing content, users would have to be disconnected from the entire mini program at issue, which would go beyond the "necessary" measures required by the old Article 36 Tort Liability Law (now Article 1195 of the new Civil Code). The decision appears quite daring, considering the high degree of assistance *Tencent* providers to third party developers of mini programs that are embedded in its *WeChat* environment.

A third category of services, namely those providing users with "information storage space", which, however, are to be understood as hosting/content

⁷⁴ Unfortunately, only excerpts of the decision were made available on the pkulaw site: http://www.pkulaw.cn/Case/pal_a3ecfd5d734f711d853207585d4cbb24c71f77d095387105bdfb.html?match=Exact.

sharing services and not to be confused with cloud services, as well as providers of linking and searching services, bear a higher liability risk. Pursuant to Rule 22, they may escape liability for compensation only if they clearly indicate that their business is that of hosting user content and are also transparent in that they publish the name of their business, a contact person and a website address, do not alter/manipulate the hosted content, do neither know or have reason to know about infringing content uploaded by users, do not yield an immediate profit from the uploaded content and, most importantly, have reacted in a timely manner to a right holder notification. The notice and take down procedure is further detailed in Rules 14–17 of the Regulations. A fourth category of providers, namely those providing link or search services, is mentioned in Rule 23. They can escape liability in a similar manner as host providers, by expeditiously removing links to infringing contents, provided that they neither knew nor had to know about the infringing character of the content to which they guided their users. This provision is quite interesting in that it obviously includes services in the “notice and take down” liability that do not host infringing content on their own servers but facilitate access to content hosted elsewhere. It apparently contradicts the so-called “server rule”, according to which only providers that actually store the infringing content can be held liable, and to which the majority of Chinese courts is reported to adhere. Rule 23 would then also be applicable to the operators of the “piracy apps” mentioned in the IIPA report, which, for instance, enable smart phone users to gain access to infringing content stored outside the environment in which the app is operated.

The rather old Regulations do not further mention a certain degree of duty of care to be observed especially by the latter two types of service providers, or even technical measures such as content recognition technologies to be employed, for instance, to avoid liability as providers who “had reason to know” of infringement. The “notice and take down” procedures in Rules 14-17 cannot be treated in every detail. Interesting about them is that they oblige providers to allow users who think that they have been wrongly alleged of infringement to file an objection to the taking down/link removal, which must be accompanied by initial evidence about non-infringement (Rule 16). Upon receipt of a correct objection, the provider shall restore the taken down content or blocked link and inform the right holder, who may then file suit, but shall not again request taking down or blocking (Rule 17). Also, according to Rule 14, right holders may be held liable for untruthful notices.

2.7.1.2.2 The judicial Network Interpretations

The SPC`s Network Interpretations have already been adapted to the new Civil Code and should therefore be of more practical relevance than the above administrative Regulations, even if the latter have sometimes been applied by courts, for instance, by the Hangzhou Internet Court in its above decision.

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Unlike the administrative Regulations, the judicial Network Interpretations aim at providing courts throughout the country with criteria on how to weigh the facts of each individual case against each other to arrive at a fair judgment, e.g., whether the defendant's claim that he had no reason to know about the infringing use on its platform is tenable or not.

Rule 3 of the Interpretations defines the "offering" (i.e., the making available) of protected content by internet service providers as "putting the work, performance or sound or video recording in state that members of the public can download, view or otherwise obtain it at a time and from a place individually chosen by them through uploading, file sharing, using file sharing software or other methods". The definition seems to be open enough to not only encompass the hosting of infringing content on the provider's own servers but also the facilitation of access to content hosted elsewhere, e.g., through file sharing software or through the "piracy apps" bemoaned by the IIPA report. That is, just as the Internet Regulations, also the Network Interpretations do not require adherence to the mentioned "server rule".

Rule 4, 1st sentence of the Interpretations contains a general rule that internet service providers and other parties who cooperated in making available protected content to the public shall bear joint liability for infringement, but the 2nd sentence exempts providers *who can prove* that they merely offered automatic access or transmission services, storage space, browsing, linking and text sharing technology from such liability. That is, the Interpretations a) unlike the Internet Regulations do not exhaustively predefine certain providers that are exempted from infringement liability but are more neutral in technological respect, and b) stress that the provider shall bear the burden of proof that the nature of his service precluded any collaborative relationship with the user.

Rules 7–9 of the Network Interpretations establish the criteria that shall be applied by the People's Courts to assess the provider's involvement in a third parties' infringement so as to decide whether it can escape to the safe harbour under the notice and take down principle or shall be held liable for infringement. Central is whether the service provider committed an act that can be interpreted as "abetting and aiding". According to Rule 7 (2), "abetting" shall be established if the provider encourages users to infringe a copyright holder's online transmission right by word, by recommending technical assistance or by awarding scores or other inducements, and "aiding" shall be established according to Rule 7 (3) if the provider does not take down, block, etc., content while knowing or having reason to know about the infringement or if he offers technical assistance to commit infringement. Rules 8 and 9 clarify the circumstances under which a court shall assume that the provider has known or should have known about a user's infringement. Rule 8 clarifies that failure to actively search for infringement alone does not yet give rise to liability, and if

the provider can provide evidence that it has taken appropriate and effective technical measures (such as content recognition technologies) to prevent infringement but still could not prevent the infringing upload, etc., it shall not bear liability. Rule 9 provides that courts shall assess according to the following criteria whether the provider “should have known” about the infringement:

- the information management abilities that the provider has had in light of the nature and method of his services and their potential of generating infringement;
- the popularity of the disseminated content and the corresponding apparentness of infringement;
- the degree of active involvement of the provider in selecting, editing, modifying or recommending, etc., the content uploaded on his platform;
- whether the provider has actively taken measures to prevent infringement;
- whether the provider has put in place a convenient procedure of receiving complaints about infringement and of timely and reasonably responding to them;
- whether the provider has taken appropriate measures against users who repeatedly used his services to commit infringement;
- other factors.

Under specific circumstances, the provider bears a higher duty of care. According to Rule 11, the duty of care shall be significantly higher if the provider earns an immediate profit from the protected content made available on its site. Immediate profit means direct payments in return for making available, e.g., under a pay-per-view scheme, but not revenues from advertisement, service fees, etc., that are not bound to the specific infringing content. Where popular film and TV works are hosted without authorization, courts shall find that the provider ought to have been aware of the infringement if it actively listed, catalogued, indexed the uploaded works or provided short descriptions or content summaries of them and rendered them easily downloadable, browsable or otherwise obtainable through its site (Rule 10). Also, where a popular film or TV work is placed on the provider’s main site or another location where it can be easily found or where the provider has actively engaged in its selection, editing, etc., or where any kind of protected content is made available in a manner that its use without authorization becomes apparent and no appropriate measures have been taken to prevent such use, courts shall assume that the provider should have known about the infringement (Rule 12).

Rules 13 and 14 are specifically about the “notice and take down” obligation. Pursuant to Rule 13, courts shall assume that the provider has clearly known about the infringing use of its platforms if it does not, upon being notified by the right holder in written form, per facsimile, e-mail, etc., expeditiously take the necessary measures and forward the notification to the allegedly infringing user in accordance with the prima facie evidence provided by the right holder and the nature of its services. Whether the provider has reacted “expeditiously” shall

be determined, inter alia, on the basis of the form and clarity of the right holder's notification, the difficulty of taking down, the nature of the provider's service, the famousness and the number of the disputed works, etc. (Rule 14).

On 24 August 2020, the SPC published its *Reply to Several Questions Pertaining to Online Infringements of Intellectual Property Disputes*,⁷⁵ which provide further details about the interplay between right holder, service provider and user in the course of the notice and take down procedure, albeit not limited to copyright law but including all kinds of IP. Therefore, the Reply also includes e-commerce platforms as potential intermediaries in its observations. Why it would make sense to also regulate e-commerce platforms specifically with regard to their role as intermediaries that facilitate copyright infringement will be discussed below in the context of technical protection measures. The Reply also implements a good part of the US requirements set forth in the mentioned Art. 1.13 of the Sino-US Phase One Agreement on "Combating Online Infringement",⁷⁶ Pursuant to Rule 2 of the Reply, the service provider or e-commerce platform who does not react to a right holder's take down request shall be held jointly and severally liable for the increased damage. The service provider or platform shall lift the blocking, etc., if he has not received a right holder's notification about filing suit in court, etc., within a reasonable period of time after the alleged user issued a counter-notification of non-infringement. The blocking, etc., shall be prolonged if the right holder does not file suit for reasons beyond its control, e.g., difficulties to have evidence notarized, etc., (which should be good news especially for foreign right holders, albeit the notarization and legalization requirements have recently been lessened)⁷⁷, but not exceed 20 working days (Rule 3). These 20 days are also required by Art.1.13 2 c) of the Sino-US Phase One Agreement. Not very clearly formulated is Rule 4 of the Opinion, according to which the court shall support the plaintiff's claim for punitive damages, which can amount to up to five times the actual damage amount,⁷⁸ if the service provider or e-commerce platform lifts the takedown due to a bad-faith notification (obviously about non-infringement from the alleged user) and thereby causes damage to the right holder. As the person acting in bad faith is obviously the alleged user, not the provider or e-commerce platform, and Art. 54 (3) of the amendment Copyright Act presupposes "intentional" infringement and serious circumstances for punitive damages, they should be claimed from the infringing user, not from the provider, but this does not become entirely clear from the provision's wording. The provision obviously aims at implementing the requirement in Art. 1.13 2 d) of the Phase One Agreement, according to which notifications and counter-notifications submitted in bad faith shall be penalized. Quite favourable for right holders is

⁷⁵ <http://gongbao.court.gov.cn/Details/1e25d4d7107b8c691497c1ed531adb.html>.

⁷⁶ See 1.1.1

⁷⁷ See 2.8.1.2.2

⁷⁸ More about punitive damages below at 2.8.1.2.

Rule 5 of the Opinion, which deals with the case that a plaintiff issued a notification, which afterwards during the trial turns out to be inconsistent with the facts of the case. If the plaintiff can prove that it issued the notification in good faith and requests exemption from liability (under Art. 1195 Civil Code), the courts shall support such request, obviously even if it caused damage to the notified provider and the alleged user(s). Also this new provision is obviously due to the Phase One Agreement, which requires that liability for erroneous takedown notifications submitted in good faith shall be eliminated (Art. 13. 2 b).

Case law on internet service provider liability is abundant but not (yet) very coherent, also because some decisions like the above mentioned one in the *Tencent* case rely almost exclusively on the Internet Regulations while other courts prefer the application of the SPC's Network Regulations or simple refer to the applicable Civil Code provisions in their decisions, without reference to the secondary law. The mentioned court specialization is unlikely to entail a more uniform adjudication, as the majority of online copyright infringement does not pertain to the "technical subject matter" for which now the Supreme People's Court's IP Court assumes country-wide second-instance jurisdiction. It seems, however, that if the plaintiff is lucky enough to have his cases treated in one of the newly established specialized IP Courts, the chances are higher that the judges will be sympathetic to his claim. For the sake of brevity, only a few cases related to the internet transmission right and to the service provider's liability for infringement by its users can be discussed at this stage. In its decision of 13 January 2016,⁷⁹ the Shanghai Intellectual Property Court found that a party that embedded in its own site a content that had been infringingly uploaded by another party had committed accessory infringement, especially because it actively enticed viewers to remain on its own video website instead of switching to the site on which the infringing content was originally uploaded, which would have generated a significant direct economic benefit for the defendant. It seems that the decision was partly based on the Network Interpretation's provisions even though the court did not refer to them. Also, the decision obviously rejected the mentioned "server rule", in a similar manner as the more recent decision of the U.S. District Court for the Southern District of New York in *Nicklen vs. Sinclair*⁸⁰ of 30 July 2021, holding a party liable that displayed infringing content hosted elsewhere. Another decision rendered by the Beijing Intellectual Property Court on 25 November 2019⁸¹ actually referred to the Network Interpretations when it held the defendant liable for hosting the plaintiff's font software, while it had "selected and arranged" the infringing content according to Rule 9(3) Interpretations, so that it was found to have "abetted and aided" pursuant to Rule 7 of the same Interpretations, On the other

⁷⁹ 213 *Hu Zhi Min Zhong Zi* (2015)

⁸⁰ <https://www.leagle.com/decision/infcco20210423b69>.

⁸¹ 494 *Jing 73 Min Chu* (2018), <https://mp.weixin.qq.com/s/ivewkjfpREBc1xQGoAViQ>.

hand, the provider`s duty of care does not extend to the obligation to examine the scope of a licensee`s authorization to use. In a case decided by the Beijing Chaoyang District People`s Court on 20 November 2019, the licensee had sublicensed to the provider the internet transmission, while the original license did not cover the authorization to sublicense.⁸² According to the court, the provider had no “reason to know” that the sub-licensor had exceeded the scope of his own licence.

China`s current service provider liability regime is very different from that of Art.17 of the DSM Directive especially with respect to large and well-established online content sharing service providers. It centres on the question whether the provider has expeditiously taken the infringing content down upon a right holder`s notification whereas the DSM Directive centres on the obligation of providers to obtain the authorization from right holders to have their works made available on their respective platforms. Depending on the type of work at issue, such authorization could either be granted directly by the right holders or by the CMOs that represent them. Should, after all, unauthorized content still be found to have slipped through to a provider`s platform, it may escape liability by expeditiously taking down such content, but only if it has indeed undertaken best efforts to seek the authorization and also ensure, in accordance with high industry standards of professional diligence, the unavailability of unauthorized content for which rightholders have provided them necessary and relevant information (Art.17(4) of the Directive). In China, in turn, any provider who neither knew nor ought to have known about the infringing content on its site can escape liability if it only expeditiously takes the infringing content down. Under the current legal framework, a typical case related to the liability of online content sharing service providers could proceed as follows:

Case study III

Facts: German film producer *Fritz Studios* has produced its first blockbuster *Goethe reloaded*. Shortly after the movie is officially launched in China, *Fritz Studios* is notified about it being made available on China`s leading video sharing platform *Shipinku*, not the entire movie in one piece but divided into nine parts that shall be shown over a period of two months, as indicated in the “content description” on *Shipinku*`s site in which the movie is prominently listed as “hot stuff” together with five other entries of popular audio-visual content. The *Goethe reloaded* film poster immediately catches the eye as soon as the user opens

⁸² 12496 *Jing 0105 Min Chu* (2019); <https://mp.weixin.qq.com/s/Ze-hXImQ-QEazZ2SAILcvq>); accordingly, an internet service provider who has been authorized to transmit protected content by the holder of a broadcasting license, which, however, did not encompass the right to sublicense, had no reason to know about the infringing character of the internet transmission and could therefore not be held liable for damages. In other words,

Shipinku's main page. Shown is the movie's original poster as distributed by *Fritz Studios*, but overwritten in Chinese and titled *Xin Guode*, which slightly deviates from the film's official Chinese title and also wrongly transliterates the name *Goethe*. The first two episodes have already been made available on *Shipinku*, and each has been viewed by ca. 500.000 users. *Fritz Studios* requests *Shipinku* to immediately take the infringing content down and to close the channel of the user who uploaded the film parts. *Shipinku* reacts by informing the corresponding user and by taking the content down within four days, weekend included, but cannot prevent the upload of a third episode within these four days. According to the statistics on *Shipinku*'s site, 350.000 users viewed this third episode before the infringing user's channel is finally closed down. *Shipinku*'s measures do not satisfy *Fritz Studios*, which is of the opinion that *Shipinku* should have taken greater care to prevent the infringing uploads right from the beginning, immediately after the first episode's infringing upload. *Fritz Studios* wants to hold *Shipinku* jointly and severally liable and files suit in the Guangzhou Intellectual Property Court.

Plaintiff's arguments: The defendant has not reacted expeditiously to the plaintiff's notice and therefore enabled its damage to further increase. In addition to that, the defendant had neglected its duty of care in that it has not sufficiently controlled whether its platform hosted infringing content. The movie parts have been prominently displayed on the defendant's main site and attracted such a huge number of viewers that the defendant should have been alarmed about possibly infringing content. Our movie is worldwide known, even has been nominated among "best foreign movies" for the coming Academy Awards. The defendant operates China's leading audio-visual content platform, which bears a high danger of infringement, it has the resources to apply latest state of the art – technology to browse its platform for infringing content, and the presence of our movie on its platform should have immediately caught its attention. These are all factors to be considered when deciding whether the defendant should have known about infringement according to Rules 8 and 9 Network Interpretations, and according to Rule 11 of the same Interpretations, the defendant bore an even higher duty of care as our movie forms a popular cinematographic work and has been prominently placed on the provider's main site. Therefore, the defendant should not only be held liable for the damage that arose from uploading the third episode, but for the total damage that resulted from showing all three episodes, as a provider that should have known about the infringement according to Art.1197 Civil Code.

Defendant's response: The plaintiff's claims shall be dismissed. We reacted to its notification within the shortest possible time, and we could only do so because we have put in place an effective mechanism for receiving and processing complaints. We do also permanently browse our platform for infringing content and therefore bear no liability for infringement by our users pursuant to Rule 8 of

the Network Interpretation. We do, furthermore, cooperate with the NCAC, which regularly provides us with updates on copyright protected content that is legally published and distributed in China, and take measures against repeat users, all factors that should be considered to our benefit according to Rule 9 of the Network Interpretations. That the movie parts had been prominently displayed on our site is regrettable but can be explained by the precautions that the infringing user, who, by the way, has been permanently banned from our site, has taken, by splitting the movie up in several parts, by obscuring the original Chinese film title and by uploading the content under the category “hot stuff” and not “hot movies”, which would have rendered it easier for us to detect the infringing content. Under “hot stuff”, all kind of audio-visual, mostly user generated content such as tutorials, influencer videos, etc., is automatically listed and rises automatically in the popularity list as the number of viewers grows until it shows up on the main site among the five most popular “hot stuff” videos, without any involvement from our side.

Court’s reasoning: This court supports the plaintiff’s claim that the defendant should have taken greater care to clear its platform of infringing content from the beginning. The plaintiff’s movie is highly popular, and the defendant is, as the plaintiff correctly pointed out, under a greater duty of care to prevent infringements of such audio-visual works pursuant to Rule 11 of the Network Interpretations. The measures that the defendant has taken were, at least with regard to the plaintiff’s work, anything but “appropriate and effective” according to Rule 8 Network Interpretations. This court does, furthermore, not support the defendant’s excuse that it would not have been possible to detect the infringing content due to its obfuscation by splitting it up and listing it under a different title. This court also rejects the defendant’s argument that its own internal platform organization, which provided infringing users with the option to list movie parts under “hot stuff” instead of under “hot movies”, prevented it from detecting the infringing content. If the court accepted this, service providers could henceforth seek to avoid liability by deliberately structuring their services in a manner that aggravates the later detection of infringing content. It should have been clear from the use of a movie poster that the infringing content, that was even prominently listed on the defendant’s main site, most likely formed a cinematographic work, irrespective of whether it was listed under “hot stuff”, “hot movies” or whatever, and this, as well as the fact that hundreds of thousands of viewers clicked on it, should have triggered the defendant’s internal infringement prevention mechanisms to which the defendant itself proudly alluded. Insofar, the defendant has neglected its duty of care and shall be treated as a provider who should have known about the infringement according to Art. 1197 Civil Code. This court, finally, does not support the plaintiff’s claim that the defendant has not timely reacted upon the plaintiff’s notification, as four days, including a weekend, are expeditious enough in the light of the international dimension of the case. This has no effect on the defendant’s liability, however, who should have been taken greater care to prevent

infringement on its platform at a much earlier point of time than at the time of receiving the plaintiff's notification.

The compensation amount can only be determined as "statutory damage", as the defendant's profit from the infringement cannot be assessed and the plaintiff failed to prove its claim that its damage shall be equivalent to the revenue lost due to approximately 500.000 fewer cinemagoers. As not even one third of the movie has been shown on the defendant's platform, the plaintiff's calculation does not convince the court. Considering the circumstances of the case, the gravity of infringement as well as of the defendant's failure to prevent it, the court determines a compensation amount of 150.000 Yuan.

Lessons from the case: *Shipinku* is an "online content sharing service provider" in the meaning of Art.17 DSM Directive. The decision demonstrates that the current Chinese regime already gives courts a number of factors to consider that are also central to the DSM Directive's new liability regime, in particular whether the provider has done enough to ensure the unavailability of infringing content on its platform, inter alia, in the light of the nature of its service, the famousness of the work at issue, etc., which, in spite of many differences, comes close to the gist of Art.17(4) b). The greatest difference is, however, the complete lack of an obligation on providers to seek the authorization of right holders as prescribed by Art.17(4) a) of the Directive. A user's (not yet provider's) efforts to obtain licenses from large numbers of right owners through their CMO can, as discussed in the context of Karaoke bars, become a reason to lessen compensation liability also under the current Chinese case law. However, in the present case, due to the nature of the film business, *Shipinku* would have had to try to seek authorization directly from the film producers and not from any CMOs representing them, and most likely would never have obtained a single one, at least not an authorization that allowed uploads of recently released, highly popular content. If a European court had assessed the dispute under the DSM Directive, it would probably have found that *Shipinku*, even if it failed to obtain authorization from *Fritz* to have its cinematographic works uploaded, met the prerequisite "best efforts to obtain authorization according to Art.17(4) a) DSM Directive.⁸³ Also, that it took the infringing content down within only four days would probably have met the "expeditious take down" prerequisite in Art. 17(4) c) of the Directive. However, *Shipinku* would have failed to meet the Directive's third prerequisite in Art.17(4) b), namely "best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works and other subject matter for which the rightholders have provided them with the relevant and necessary information", and therefore been treated as infringer because all three prerequisites a), b) and c) have to be met cumulatively. As seen, it also failed to do so under the Chinese regime, here, however, under the prerequisite that the provider "ought not to have known" about the infringing activity on its platform, one of the prerequisites for "not knowing" being efforts to keep infringing content non-

⁸³ So the EU Commission's Guidance on Art.17.

available. As explained, the SPC's Network Interpretations require an especially high duty of care from providers that host famous movies and TV works. Moreover, unlike Art.17(4) b) of the DSM Directive, the Chinese provisions require such duty of care irrespective of whether the right owner provided them with the "relevant and necessary information". In the present case, however, the defendant *Shipinku* itself admitted that it had been provided with such information at least indirectly, when it referred to its cooperation with the NCAC, which provided it with regularly updated lists of audio-visual content that is legally published and distributed in China. These lists should also have included *Fritz Studios*' new movie. Finally, the case once again demonstrates the difficulty of damage assessment and the tendency in the courtrooms towards "statutory damages". The situation is aggravated by the fact that *Shipinku* as an online content sharing service provider does not directly generate a revenue from the making available of certain works on its platform, but indirectly from advertisement, which renders the calculation according to the infringer's profit extremely difficult. That is, also the new Copyright Act's facilitation of evidence in cases in which final and conclusive proof of damage is under the defendant's control, which will be treated below in the section on enforcement, is unlikely to entail more realistic compensation amounts in provider liability cases.

As seen, the current Chinese provider liability regime, in spite of following an entirely different mechanism, is capable of achieving results that are similar to those envisaged by the new DSM Directive's liability regime. In their coming consultations with Chinese representatives, EU trade officers should nevertheless try to further align the current Chinese liability regime with the gist of Art.17, without fundamentally changing it. A gateway for such adjustment may be the Network Interpretations' open catalogues of factors that courts shall consider when determining whether a provider "ought to have known" about the infringement, as will be further outlined in the final Part 3 of this study.

2.7.1.3 Technical protection measures and protection of rights management information

The previous Copyright Act regulated technical protection measures and the legal protection of rights management information rather rudimentarily, while the State Council was expected to formulate more detailed provisions, which it finally did in the mentioned *Internet Regulations*. The 2020 Copyright Act amendment transferred these administrative provisions with several adjustments to Articles 49 - 51 Copyright Act. Art. 49(2) Copyright Act now prohibits the intentional circumvention or deletion of technical protection measures and, since the amendment of 2020, also the manufacturing, import or offering to the public of devices or parts that enable circumvention or deletion and the, again, "intentional" offer of technical services that enable thirds to

circumvent or to delete technical protection measures. That is, manufacturing, import or offering to the public do not have to be “intentional” to be prohibited. Whereas unintentional manufacturing of circumvention devices should hardly be possible, it may well be that a hardware shop owner or internet trader sells such devices without knowing that they can be used for gaining unauthorized access to infringing purposes. Such trades would nevertheless be held liable.

The enumeration of such the prohibited manufacture, etc., in the Chinese Copyright Act is not as detailed as Art.6.2 of Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (“Infosoc Directive”), which also lists “distribution, sale, rental, advertisement for sale or rental or possession for commercial purposes” as prohibited acts. More worrying, however, is that the current Chinese regime fails to provide a definition of what kind of devices are actually copyright-relevant, only those that can be used for no other uses but circumvention or also devices, which – in the language of Art.6.2 of the Infosoc-Directive, “are promoted, advertised or marketed for the purpose of circumvention, have only a limited commercially significant purpose or use other than to circumvent or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention“. Art. 49(3) Copyright Act merely defines technical protection measures as effective technologies, devices or parts that prevent or limit the unauthorized browsing or appreciation or the making available on the internet of works and neighbouring rights protected content but does not define the “devices or parts” that can be used for their circumvention. This is especially regrettable for the holders of copyright and neighbouring rights in broadcast subject matter, which suffer under the online sale of all kinds of equipment that is primarily used, often even clearly advertised as enabling the decryption of protected broadcasting signals, etc. but does not necessarily be solely usable for such infringing purposes. Therefore, a clarification that also the manufacturing and distribution of devices that are specifically advertised as serving infringing purposes or can only limitedly be used for non-infringing purposes shall be prohibited, should be included in the topics to be tackled by European officers in their talks with Chinese representatives.

There is, furthermore, no clear regulation on the liability of e-commerce platforms for not proceeding against offerings of devices that enable copyright infringement without directly infringing a specific right holder`s copyright, most notably apparatus that can be used to circumvent technical protection measures. The wording of Articles 41 – 45 of the E-Commerce Act of 31 August 2018,⁸⁴ which regulate a “notice and take down” procedure specifically for IP-

⁸⁴ Downloadable in English from

https://ipkey.eu/sites/default/files/documents/resources/PRC_E-Commerce_Law.pdf#:~:text=Article%20%20This%20Law%20is%20formulated%20with

infringing goods, is rather centred on counterfeits, etc., that directly infringe upon a specific IP right, not on devices that enable others to gain unauthorized access to protected content. Art.42 of the E-Commerce Act states that “an IPR holder shall be entitled to notify the e-commerce platform operator to take such necessary measures as deletion, blocking, disabling the link, termination of transaction and service if the IPR holder believes that there is any *infringement upon its or his IPR or IPRs*.” This leaves little doubt that the IP infringing subject matter that can give reason to a “notice and take down” request is limited to subject matter that directly infringes upon a specific IP right, e.g., an unauthorized work copy. Also, the SPC’s Guiding Opinions on Adjudicating Intellectual Property Cases Related to E-Commerce of 10 September 2020⁸⁵ do not contain a corresponding clarification. Under the current regime, the following scenario is conceivable:

Case study IV:

Facts: The Irish pay-TV sports broadcaster *O’Hoolihan* Inc. has won the lawsuit against a Chinese live streaming platform (case study II). However, it wants to proceed further against the sale of so-called Internet card sharing devices that had enabled, inter alia, the defendant to decrypt *O’Hoolihan*’s satellite signals and to re-transmit them through the internet to an enlarged audience. *O’Hoolihan*’s further research brought to light that these devices are made by several manufacturers in Guangdong province and then advertised on and sold via the leading Chinese e-commerce platform *Maimai Mayi*. *O’Hoolihan* decides to not only proceed against the manufacturers of the devices, who clearly violated Art.49(2) Copyright Act, but to also notify *Maimai Mayi* about the sale of such devices through its platform in accordance with Art.42 of the E-Commerce Act. *Maimai Mayi* refuses to take the incriminated offerings down, however, whereupon *O’Hoolihan* files suit in the Beijing Intellectual Property Court.

Plaintiff’s arguments: The devices advertised on and sold via the defendant’s e-commerce platform would clearly serve no other purpose but unauthorized access to content protected under the Copyright Act. Their offering to the public would be clearly prohibited under Art.49(2) Copyright Act, and therefore *Maimai Mayi* would bear the liability to expeditiously block access to any advertisements of such devices on its platform pursuant to Art.1195 (2) Civil Code as well as pursuant to Art.42 (2) E-Commerce Act.

Defendant’s response: The plaintiff cannot prove that “there is any infringement of its rights” by the devices currently offered on the defendant’s

[%20a.promoting%20the%20continuous%20and%20sound%20development%20of%20e-commerce.](#)

⁸⁵ <http://www.court.gov.cn/fabu-xiangqing-254931.html>.

platforms. Also, there is no evidence that the devices per se can be used for no other than illegitimate uses, as asserted by the plaintiff. Neither the Civil Code nor the E-Commerce Act, and least of all the Copyright Act would regulate a duty of e-commerce platforms to take down offers of goods that were not clearly IP infringing themselves, such as counterfeits of trademark protected goods.

Court's reasoning: The court dismisses the plaintiff's claims. With good reason, protection of technical measures under the Copyright Act is limited to several preparatory acts beyond the actual circumvention or deletion of protection measures per se, namely the manufacturing, import or offering of devices, etc, or the offering of auxiliary services. Also, the language of the Civil Code and E-Commerce Act provisions quoted by the plaintiff leaves no doubt that the e-commerce platform's liability only extends to immediately IP infringing goods, such as trademark counterfeiting products, but not to devices that could be used for infringing purposes, without directly infringing upon a specific intellectual property right. Such liability would clearly overstrain the capabilities of e-commerce platforms and endanger the healthy growth of domestic e-commerce businesses.

Lessons from the case: The case revealed that there is no clear liability of e-commerce platforms for tolerating on their platforms the sale of decryption devices that are mainly aimed at enabling unauthorized access to protected content, irrespective of how well aware they were about the fact that these goods can be used for infringing purposes. The available legal provisions may be open enough to allow an interpretation that subsumes such passivity under Art.49(2) Copyright Act, but it is unlikely to be applied by a court if it sees the well-being of an important domestic industry sector at stake. In our example, the court invoked the "balance of interest" argument that copyright shall not be overprotected at the expenses of other economic or creative activity. The same protection gap exists in many other countries, but in China it is especially problematic because, as explained, European and US copyright intensive industries described Chinese e-commerce platforms as a major cause for the worldwide availability of physical equipment that can be used for infringing purposes. An extension of the liability of e-commerce providers for the sale of such devices on their platforms under Chinese law would help to suppress their worldwide circulation at an initial stage, when they are not yet offered on global online markets.

As several European right holders have described Chinese e-commerce platforms (*AliExpress*, etc.) as intermediaries that enable the circulation of devices used for infringing purposes, EU trade officers should work towards clear and unambiguous provisions in secondary law (SPC interpretations and administrative provisions) that e-commerce platforms shall bear a certain duty of care with regard to circumvention devices offered on their platforms. Corresponding proposals will be made in Part 3 of this study.

| Recent reforms to the Chinese copyright system, their importance for European creative industries and possibilities of further alignment with EU copyright law

Art.50 of the amended Copyright Act, furthermore, adopted a list of limitations respectively circumstances under which the direct circumvention of technical protection measures shall be permitted from the Internet Regulations in slightly amended form.⁸⁶ Permitted are a) classroom teaching or distribution of material for scientific purposes among teachers or researchers, provided that the work is already published and cannot be obtained through ordinary channels (online or offline), b) making otherwise unattainable works accessible for visually impaired people (the original version of this limitation has been adapted to the terminology of the Marrakesh Treaty), c) official use by administrative and judicial organs, d) testing the security functions of a computer and its system or network and, newly introduced, e) encryption research and “research on” software reverse engineering. That is, only circumvention for the purpose of enabling research on reverse engineering is permitted, but not for enabling reverse engineering *per se*, whatever this difference means in practice. Finally, according to Art.217 No.6 of the amended Criminal Code, also the intentional circumvention or destruction of technical protection measures shall be punished if the circumstances are serious but not the sale or otherwise making available of software or hardware that enables such circumvention, etc.

Very few published court decisions on technical protection measures could be found. The available, not too recent case law reveals that courts are rather strict about proof that effective technical protection measures were actually deployed and that the defendant circumvented or deleted them.⁸⁷ Also, there is a not all too reliable possibility that the circumvention of technical protection measures might be qualified as unfair competition if it enabled access to non-copyright or neighbouring rights protected subject matter.⁸⁸

⁸⁶ The provision also clarifies that the circulation of devices, etc., for infringement and the infringement of the legitimate rights of right holders is not covered by this privilege.

⁸⁷ See, e.g., Decision of the Wuhan Intermediate People’s Court 59 Wu Zhi Chu Zi (2007), upheld by the Higher People’s Court of Hubei Province, 23 E Min San Zhong Zi (2008); unfortunately the full texts of the decisions could not be found but the Intermediate People’s Court’s decision is summarized and commented in the master’s thesis of Liu Guicen, Case Studies of Technological Protection Measures for Computer Software, submitted to Shanghai Jiaotong University on 25 April 2011, accessible upon subscription on the database www.cnki.net, at <http://kreader.cnki.net/Kreader/CatalogViewPage.aspx?dbCode=cdmd&filename=1011299489.nh&tablename=CMFD2012&compose=&first=1&uid=>; even stricter with regard to such proof but then quite generous in that it granted alternative protection under unfair competition law for non-copyright protected subject matter, a decision of the Beijing Higher People’s Court No.1 of 2006 (8569 Yi Zhong Min Chu Zi (2006), http://www.cnipr.net/article_show.asp?article_id=4454)

⁸⁸ The above decision of the Beijing Higher People’s Court acknowledged such protection, a decision of the Shanghai Higher People’s Court of 2007 denied it (110 Hu Gao Min San (Zhi) Zhong Zi (2006), http://www.law-lib.com/cpws/cpws_view.asp?id=200401177969).

As mentioned, the previous Copyright Act's provisions on the manipulation of rights management information were similarly rudimentary. They only prohibited removal or alteration of such information and left more detailed provisions, e.g., on how to deal with the further exploitation of the works from which the rights management information was removed, etc., to the State Council's Internet Regulations. The Copyright Act amendment of 2020 transferred these administrative provisions to Art. 51 Copyright Act. It prohibits not only the intentional removal or alteration of rights management information, unless such removal or alteration is unavoidable for technical reasons, but also the offer of works and other protected content to the public while knowing or having reasonable grounds to know that the rights management information therein have been manipulated or removed. Going beyond the requirements of the World Performances and Phonograms Treaty WPPT, the Chinese Copyright Act does not limit this protection to performers and phonogram producers but also includes producers of audio-visual recordings and broadcasting organizations in it.

2.8 Enforcement: infrastructure, procedures and damages

In the area of enforcement, significant amendments were made to procedural law (evidence, pre-trial and in-trial injunctions as well as evidence preservation), damage calculation and criminal prosecution. Quite important are also the institutional rearrangements within the judiciary to enhance IP specialization in the courtrooms, which will be treated in the following subchapter.

2.8.1 Enforcement in court

2.8.1.1. Institutional reforms: court specialization and its effect on copyright protection

IP specialization in Chinese courtrooms is on the rise. An increasing number of Intermediate and Higher People's Courts is equipped with IP chambers, three IP Courts on Intermediate Court level with exclusive jurisdiction over "technical" IP (i.e., patents, know how, plant varieties, semiconductor layout designs but also "software", which would also be copyright relevant) have been established in the industrial centres Beijing, Shanghai and Guangzhou, latter with jurisdiction over entire Guangdong province.⁸⁹ In 2018, the SPC has

⁸⁹ Corresponding decision of the NPC's Standing Committee at <https://wipolex.wipo.int/en/text/343717>.

established within its own premises a central “IP Court”⁹⁰ with exclusive second instance jurisdiction after the Intermediate People’s Court level, again, over all “technical” IP cases. That is, all cases dealing with technical IP throughout the country will in the second instance be bundled in this new IP court. In 2020, a fourth regional IP court has been established in the Free Port of Hainan. According to Rule 3 of the SPC’s Provisions on the Jurisdiction of the IP Courts in Beijing, Shanghai and Guangzhou,⁹¹ however, the local Intermediate People’s Courts shall no longer accept any IP cases, including copyright cases, irrespective of whether they are technical or not, so that in fact the IP Courts in these three locations have taken over first and – if a case was first dealt with by a basic-level court – second instance jurisdiction of all IP. According to the NCAC’s mentioned report on online copyright infringement, this entailed a high concentration of copyright litigation in the two Intellectual Property Courts in Beijing and Shanghai, which gives reason to hope that the above-mentioned incoherence of litigation related to the liability of internet service providers will soon be a matter of the past. In 2019, the Beijing IP Court’s copyright caseload increased by 37 percent over the previous year, that of the Shanghai IP Court even by 50 percent. In the following instance, however, “traditional” copyright is still dealt with by the Higher People’s Courts, whereas the SPC’s new IP Court has exclusive jurisdiction over all software copyright cases, which pertain to technical subject matter.

Another new kind of court, namely the “Internet Courts” on the lowest Basic People’s Court level, should also be mentioned, as they are highly relevant for copyright litigation. These new courts are internet courts in twofold respect, in that they deal with all kind of internet-related disputes, among them online copyright infringement, and it that all kind of documents, evidence, briefs, etc., can be exchanged online and trials are publicly transmitted through the internet. Online copyright disputes are often litigated in these Internet Courts in the first instance. The Hangzhou Internet Court, which already rendered a few noticeable copyright decisions, such as the above mentioned one regarding *Tencent’s* liability for allowing infringing content on mini programs operated by thirds, has been the first one, established in 2017. Further Internet Courts followed in Beijing and Guangzhou. According to the mentioned NCAC online copyright enforcement report, the three courts have treated 1700 online copyright cases, which appears to be quite impressive (but does not say much about the quality of the decisions, see the above *Tencent* case), and copyright litigation accounted for the greatest part of their case load (Beijing: 46 percent; Hangzhou: 41 percent; Guangzhou: 66 percent). Also, not least due to the use of advanced IT technology in preparation of and during hearings, the duration

⁹⁰ Corresponding SPC provisions at <https://www.chinacourt.org/law/detail/2018/12/id/149825.shtml>.

⁹¹ <https://wipolex.wipo.int/en/text/350716>.

of Internet Court lawsuits is reported to be comparably short, an average hearing lasting two fifths of the duration of a hearing in a “traditional” court.

2.8.1.2 Reforms to civil procedures

2.8.1.2.1 Reversal of burden of evidence in damage calculation

As illustrated in the above case studies, the damage amounts thus far awarded by courts were notoriously low, mostly because courts preferred the determination of “statutory damages” over other calculation methods. Statutory damages can be quite free-handily determined by court if calculation according to the actual damage, the infringer’s profit or – since the 2020 amendment – license analogy⁹² is not possible (Art. 54(1) Copyright Act). That is, they were initially intended as a last resort if a more realistic damage calculation method could not be applied but in judicial practice over the past decades, “statutory damages” became the most frequently applied method of damage determination in all areas of IP, and these amounts regularly fell short of the actual damages. Statutory” about these damages is only that the Copyright Act caps their maximum amount, previously at 500.000 RMB, after the third amendment at 5 Mio. RMB (Art.54 (2) Copyright Act). The situation was (and partly still is) aggravated by the fact that according to Art.54 (3) Copyright Act, courts shall only add the plaintiff’s “reasonable” costs of prosecuting infringement to the damages, not the actual ones, which are in most cases much higher than what the courts determine as “reasonable”. Recently, a trend to include the actual expenses for lawyers, experts, etc., in the plaintiff’s compensation can be observed but this trend is purely judge-made, as the Copyright Act provision on “reasonable” damages remained unchanged.

What the third amendment entailed, however, was the mentioned drastic tenfold increase of the maximum statutory damage and, most importantly, a facilitation of the plaintiff’s burden of proof with regard to the actually claimed damage, so that courts should henceforth find it harder to justify the application of statutory damages by claiming that they had no other calculation method at their disposal. According to a new para.4 to Art.54, courts shall order the infringer to hand out the account books and other material under his control that are necessary to calculate the damage if the plaintiff has exhausted all possibilities to prove his damage claim on his own. If the infringer does not cooperate or furnishes fabricated material, the court can determine the damage on the basis of the plaintiff’s claims and the (incomplete) evidence he provided. A prerequisite for the application of this reversal of burden of proof is, however,

⁹² Even before the amendment, damages were occasionally calculated in license analogy – see examples given by Peter Ganea, Copyright, in: Peter Ganea/Danny Friedmann/Jyh-An Lee/Douglas Clark (edited by Christopher Heath), Intellectual Property Law in China, 2nd ed. 2021, Kluwer Law, 397 et seq.

that the infringer actually has the relevant documents under its control. As seen in context of the liability of online content sharing service providers, this is hardly the case if the actual infringement is committed by a user and the provider only earns an indirect profit from advertising on its platform.

That courts predominantly determine compensation as “statutory damages” is an overarching problem of IP litigation in general. As explained, the Chinese legislature has endeavoured to tackle this problem, which affects Chinese right holders as much as foreign ones, but it may take some time for the new provisions to be reflected by case law.

2.8.1.2.2 Lessened legalization/“consularisation” requirements

Good news for European IP holders in China is the significant mitigation of the requirement previously contained in Rule 11 of the SPC’s *Several Provisions on Evidence in Civil Litigation*⁹³ that all evidence from abroad, prior to being introduced in court, had to be notarized abroad and then authenticated by the Chinese embassy or consulate, which formed a considerable burden especially for foreign litigants. This provision has already been significantly mitigated in the course of an overhaul of the Provisions in 2019⁹⁴ (now contained in Rule 16). Rule 8 of the newer, more specific *SPC Provisions on Evidence in Civil Intellectual Property Litigation* (hereinafter “IP Evidence Provision”) of 16 November 2020⁹⁵ contains an even further-reaching stipulation, which exempts evidence that has previously been acknowledged by an effective People’s Court judgment or arbitration award, publications or patent documents that can be obtained from official or public sources and documents that can be otherwise authenticated from any authentication requirements. Pursuant to Rule 9 of the same Provisions, evidence that can be introduced or authenticated through stipulation or witness testimony under penalty of perjury shall at least be exempted from “consularisation” formalities. The latter provision implements Art.1.30 of the mentioned US-China Phase One Agreement. In spite of these improvements on paper, the USTR still criticizes that some courts handled the “consularisation” requirement in the old fashion, and that the Beijing Intellectual Property would even reject notarized and “consularised” evidence.⁹⁶

⁹³ Version _____ of _____ 2001 at <http://gongbao.court.gov.cn/Details/0d82ddc253c5a8a44fba92ea600bb.html>.

⁹⁴ <http://www.npc.gov.cn/npc/c30834/201912/9bce4fdad6734765b316f06279aba6b8.shtml>

⁹⁵ <http://www.court.gov.cn/fabu-xiangqing-272241.html>.

⁹⁶ [https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20\(final\).pdf](https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf) (p. 42).

In this context, it should be mentioned that IFPI's replied to this study's survey that owners of copyright in foreign content that has been legally exported to China and is legally published there should not find it too difficult to prove at least right holdership, as the indications made to obtain approval from the authorities are normally accepted in court.

2.8.1.2.3 Interim measures and evidence preservation

As already mentioned, interim measures, especially "behavioural injunctions" that order the respondent to refrain or to undertake certain acts, but to freeze property, etc., have, at least until recently been rarely applied by Chinese courts, mostly due to the difficulty to prove the urgency of the requested measure. The overhaul of the Civil Procedures Act of 2012 (last amended in 2017), which now contains much more detailed provisions on in-trial and pre-trial evidence preservation (Art. 81) as well as behavioural measures that can be requested to order a party to refrain from or to carry out a certain act or to detain or freeze property (Art. 100 regulates measures in general, Art. 101 specifically pre-trial measures), has not significantly improved the situation. At least at the rare occasions when courts actually granted an injunction or issued an evidence preservation, they henceforth referred to the general, more right holder-friendly provisions of the Civil Procedures Act and no longer to the specific provisions of the Copyright Act and other IP laws that were limited to pre-trial measures and regulated, for instance, a very short period of only 15 days from the order in which the requesting party had to file suit in court (the Civil Procedure Act regulates a period of 30 days).

Since its most recent amendment of 2020, the Copyright Act does no longer contain specific provisions on pre-trial measures but only refers to the general civil procedural rules in its Articles 56 and 57 on pre-trial interim measures and pre-trial evidence preservation. Very detailed IP-specific provisions are, however, regulated by two newer SPC Interpretations: on 12 December 2018 the SPC enacted its *Regulations on Several Questions Pertaining to the Application of Law to Behavioural Injunctions in Intellectual Property Litigation* (hereinafter "Injunction Provisions")⁹⁷ that interpret the Civil Procedures Act only with regard to injunctions to stop or to undertake certain actions, not the preservation of property, on 16 November 2020 the mentioned IP Evidence Provisions that regulates evidence preservation (in-trial and pre-trial) in Rules 11-18.

In the following, only a few peculiarities of China's new regime on interim measures and evidence preservation shall be highlighted. In general, if a party requests an in-trial measure, it does not necessarily have to deposit a security. The situation is different if a pre-trial interim measure is requested, which is

⁹⁷ <http://gongbao.court.gov.cn/Details/3485741fc1d04e68f9df633dc791e6.html?sw>.

associated with a higher degree of urgency, so that the court has to decide about the measure within 48 hours. To compensate for the likelihood of an erroneous issuance of a behavioural measure, the requesting party is required to deposit a security (not so in case of pre-trial evidence preservation, which bears a lower danger of significant losses). Rule 6 instructs courts to assess several factors to determine whether “special urgency” is given that justifies quick measures in case of an in-trial injunction request pursuant to Art.100 (3) Civil Procedures Act or a pre-trial measure according to Art.101 Civil procedures Act. Especially in copyright cases, special urgency shall be acknowledged where personal rights such as the right to decide about first publication of the work are endangered or where a very popular TV program, for which “timeliness” is of high relevance, is about to be infringed upon. The latter should include live broadcasts, especially of sports events, for which a timely takedown before the end of the live event is essential but even the most benevolent judge will hardly be able to order an immediate takedown within such a very short time. For such cases, specific instruments would be needed, which, in terms of quickness and rigidity would even go beyond the current “notice and take down” regime, such as the mentioned “takedown tools”.

Rule 7 Injunction Provisions lists further factors to assess when deciding about an injunction in general (i.e., irrespective of whether it is urgent or not). The basic requirements are proof of the need for a preliminary measure and a legal basis for such measure, inter alia, proof of right ownership. Courts shall, furthermore, assess the existence and the stability of the right in question (which is quite important in the patent area, not so much in copyright cases), the danger of irreparable damage or the difficulty of a later execution of the court decision if the injunction is not issued, whether the opponent’s damage from the injunction would be higher than the damage at the side of the requesting party if the injunction is not issued (“balance of convenience” test) and, finally, whether the injunction has the potential to damage the public interest. The latter is hardly conceivable in copyright cases but may become relevant in the patent area if, for instance, an injunction may result in a reduced supply of essential goods.⁹⁸ Quite relevant in the copyright area should be the “balance of convenience” test, that the courts shall compare the damage caused to the defendant by the injunction with the damage caused to the plaintiff from not issuing the injunction, the latter frequently being tantamount with the amount of compensation the latter can expect if he wins the case. As discussed, the compensation amounts awarded by Chinese judges have been criticized as too low in the past decades, mostly due to the preferred “statutory damages” determination method. As also mentioned, the Copyright Act

⁹⁸ See, e.g., the frequently quoted *Wuhan Jingyuan vs. Japan Fuji Water* decision of 2009, Min San Zhong Zi No. 8, whereby in this case not a pre-trial or in-trial injunction was at issue but a final decision to order the defendant to stop the infringing activity would have endangered the local supply with energy.

amendment of 2020 facilitated the calculation of more realistic, higher damage amounts (Art. 54 (4)). The amendment, furthermore, introduced punitive damages⁹⁹ of up to five times the actual damage (Art. 54 (1)) in case of intentional infringements of serious gravity and, as mentioned, increased the highest possible “statutory damage” by a factor of ten, from 500.000 to 5 Mio RMB (Art. 54 (2)). All these developments should henceforth affect higher compensation amounts, which will then have to be anticipated by judges that have decide about an interim injunction request, and be compared with the potential respondent`s losses under the balance of convenience test.

Rule 10 of the Provisions regulates further criteria to determine whether there is a danger of irreparable damage if no measure is taken, among them whether an unpublished work is about to be published or the infringement of other personality rights/more rights is imminent, whether there is a danger of uncontrollable damage increases and whether the right holder`s market position is at risk. Assuming that in the above case study III *Shipinku* had not reacted to *Fritz Studios`* notification, *Fritz Studios* would probably have had no problems to convince the court of the necessity of ordering *Shipinku* to immediately block the infringing user`s channel so as to prevent the making available of further episodes, which would cause even greater damage.

Requests for interim measures shall be accompanied, inter alia, by a written statement substantiating the reasons for the request, proof of solvency in connection with the security to be paid later on, etc. (Rule 4). The court may also raise the amount of the security if the potential damage to the respondent turns out to be higher than expected (Rule 11 (3)). An interim measure cannot be averted by depositing a countersecurity, unless the respondent agrees (Rule 12). The Provisions contain further stipulations several subject matter, for instance, the duration of an interim measure, the capacity of licensees to request such measures, counter-request by the respondent and local jurisdiction in case of requests for a pre-trial injunction, which, however, cannot be treated here for the sake of brevity.

Interim measures are not yet a popular enforcement instrument but with specific regard to online copyright infringement cases, they seem to be increasingly applied by court and also the SPC seems to be willing to promote this protection instrument more actively. Three out of six leading copyright cases selected by the SPC for publication in the Collection of Leading Judgments on Intellectual Property Rights – People`s Republic of China (2011–2018; co-edited with WIPO)¹⁰⁰ deal with provisional measures. One of them issued by the Wuhan

⁹⁹ More below at 2.8.1.2.

¹⁰⁰ Available as download from the WIPO site: <https://www.wipo.int/publications/en/details.jsp?id=4477>.

Intermediate People`s Court¹⁰¹ ordered a cloud music platform to stop disseminating allegedly pirated music through its services. The court`s main argument for the issuance was the likelihood of substantial damage to the right holders due to the rapidly growing popularity of the respondent`s service, a criterion that the SPC now, in its above provisions, explicitly lists among the factors to be considered. In the famous Guangzhou Intellectual Property Court`s *Blizzard* decision of 9 March 2015,¹⁰² the court issued another injunction against the web dissemination of a “clone” of the famous computer game *World of Warcraft*, inter alia, due to the likelihood that the requesting party will win the dispute and the danger of irreparable harm.

As mentioned, intellectual property specific provisions on evidence preservation, be it in-trial or pre-trial, are separately regulated in Rules 11-18 of the SPC`s IP Evidence Provisions. Unlike Art.81 of the Civil Procedures Act, the legal provision on which they are based, the IP Evidence Provisions do not distinguish between evidence preservation in general and pre-trial evidence preservation, even though the main IP laws, including the Copyright Act in its very general stipulation in Art.57, limit provisional measures to the pre-trial phase, obviously to confirm its compliance with the corresponding TRIPS requirements. There is no reason to assume, however, that evidence preservation cannot also be requested during the trial, then solely based on the Civil Procedures Act. Evidence preservation in the pre-trial phase and therefore at a point of time at which the responded is not yet aware of the legal calamities that are coming his way should be much more effective, however. According to Rule 11 of the IP Evidence Provisions, the court shall examine the requesting party`s initial evidence about the necessity of such measures, whether the requesting party is in fact not able to obtain such evidence on its own, the likelihood that the evidence may get irretrievably lost and the impact of such evidence on the later evidence procedures and on the respondent. Pursuant to Rule 12, the court shall endeavour to keep the burden for the respondent as small as possible. Non-cooperative respondents shall, according to Rule 13, bear the “negative consequences”, which could mean that the court may, at least to a certain extent, content itself with the initial evidence provided by the requesting party during the trial. Whether the refusal to hand out passwords also falls under such uncooperative behaviour is unclear. The court may, according to Rule 15, instruct the parties to be present when the measure is taken. It may furthermore, if so requested by the parties, call persons with special knowledge to participate or it may consult technical experts at its own initiative. According to Rule 15, also uninvolved third parties may become

¹⁰¹ 00005 *E Wu Han Zhing Zhi Jin Zi* (2014), summarized in English in WIPO Collection of

Leading Judgments on Intellectual Property Rights, 93 et seq.

¹⁰² 2-1 *Yue Zhi Fa Zhu Min Chu Zi* (2015), summarized in English in WIPO Collection of Leading Judgments on Intellectual Property Rights, note 90, 98 et seq.

subject of evidence preservation measures. Proceedings, seized materials, participants, etc., have to be documented in the very detail. Pre-trial evidence preservation is an important enforcement instrument in software copyright cases, where important evidence is mostly composed of digital data that can be easily deleted.¹⁰³

2.8.1.2 Punitive damages

As mentioned, Art.54 (1) of the amended Copyright Act newly provides that in case of serious and intentional infringement, courts may determine a punitive damage of up to five times the actual amount of the right holder's actual damage, of the infringer's profit or of the compensation calculated in license analogy (but not of the amount calculated as "statutory damage"). Since the third Copyright Act amendment, all Chinese intellectual property laws, the Patent Act, the Trademark Act and even the Unfair Competition Act with regard to trade secret infringements, regulate punitive damages. Further guidance on how courts shall apply this new remedy, which is alien to European copyright systems, is contained in the *SPC's Interpretation on the Application of Punitive Damages in Civil Intellectual Property Litigation* of 7 February 2021.¹⁰⁴ Rule 2 of the Interpretation clarifies that it is up to the right holder to apply for punitive damages and to furnish evidence about the actual damage amount, the applied calculation method and the grounds for its request. Rule 3 contains a non-exhaustive catalogue of criteria that should help courts to consider whether the IP infringement at issue was indeed "intentional", one of the two prerequisites for applying punitive damages. Copyright-relevant among them are, in particular, that courts shall consider whether the infringer continued the infringing act in spite of being notified or warned by the right holder and whether the act constitutes copyright piracy or trademark counterfeiting. Apart from this, courts shall comprehensively assess, inter alia, the type of intellectual property at issue, its stability (mostly relevant in the patent area) and the famousness of the products at issue. The latter should also be applicable to copyright cases in that, for instance, a high level of intent shall be assumed where the infringed subject matter at issue forms a famous cinematographic work. Rule 4, furthermore, provides courts with non-exhaustive list of criteria to consider when determining whether also the circumstances of the infringement are serious enough to justify punitive damages. Copyright-relevant among them are a) whether the infringer repeatedly committed the same kind of infringement after having been sanctioned by administration or court, b) whether the defendant's business is based on infringement and c) whether the infringement

¹⁰³ See Mark Cohen's summary of data driven reports on China's IP enforcement, inter alia, with regard to software litigation at <https://chinaipr.com/2020/07/13/an-update-on-data-driven-reports-on-chinas-ip-enforcement-environment/>.

¹⁰⁴ In Chinese: <https://www.ccpit-patent.com.cn/zh-hans/node/12431/12430>.

generated an extraordinarily high infringer's profit or resulted in an extraordinarily high loss. Rule 5 clarifies that the plaintiff's litigation expenses shall not be included in the basis amount for the calculation of punitive damages, i.e., only the amount calculated as actual damage, as infringer's profit or in license analogy shall be considered. The multiple of the punitive damages, i.e., whether the amount shall be up to two, three or five times the damage amount calculated in license analogy, etc., shall be assessed under consideration of the gravity of the infringer's "subjective guilt" (for instance, the maliciousness of intent) and the seriousness of the circumstances (Rule 6). Finally, and quite importantly, Rule 6 also clarifies the interdependence between punitive damages and the fine determined in a criminal or administrative intellectual property infringement case. True to the principle that criminal prosecution shall be given priority in cases that are both criminally and civilly relevant, the Interpretation stipulates that once a criminal conviction (or administrative order) to pay a fine has become effective, the defendant's request in the subsequent civil trial to mitigate or even annul the punitive damage due to such fine shall not be considered. However, the court may on its own consider such previous fine when determining the multiple of the punitive damages.

As far as European right holders are concerned, punitive damages should be relevant especially for those who suffer under the mentioned, targeted infringement by specialized streaming platforms or services that deliberately offer access to technically protected content, whereas it would be difficult to prove that a sharing provider that enabled users to upload infringing content had a sufficiently high degree of malicious intent.

2.8.1.3 Criminal enforcement

To comply with Article 61 of the TRIPS Agreement that obliges member states to regulate criminal liability at least for commercial-scale trademark counterfeiting and copyright piracy, the Criminal Code of 1997 contains two provisions on criminal copyright infringement. Until its amendment of 2020, the Criminal Code only regulated criminal liability for physical infringements such as unauthorized reproduction and distribution, provided that they were committed intentionally and generated an extraordinarily high infringer's profit, whereby it did not become clear from the wording of the old provision in Art.217 Criminal Code whether the distribution alone could be criminally prosecuted or only if committed in coincidence with the reproduction. An interpretation jointly issued by the SPC and the Supreme People's Procuratorate in 2004 was necessary to dissolve this ambiguity. It clarified that each act, reproduction and distribution, could be separately prosecuted.

Criminal internet transmission was not regulated until the 2020 amendment, but the SPC and the Supreme People's Procuratorate's mentioned Interpretation nevertheless subsumed such act under criminal "distribution" (Rule 11(3)). This broadened Criminal-Code interpretation of a copyright term with a clearly limited meaning, namely circulating physical copies, as also including the immaterial transmission (which is separately defined in Art. 10 Copyright Act) was highly questionable. Even if Art.104 of China's Legislation Act states that the various interpretations, provisions, etc. enacted by the highest judicial authorities shall be binding law, their *raison d'être* is to interpret the higher-ranking laws that passed the National People's Congress and not to formulate new rules that are not based on existing law. This is all the truer for criminal law, which is not for nothing governed by a ban on creating law by analogy. In spite of such concerns,¹⁰⁵ the Opinion on Several Questions regarding the Application of Law to the Handling of Criminal Intellectual Property Infringement of 11 January 2011¹⁰⁶ issued by the SPC, the Supreme People's Procuratorate and the Ministry of Public Security, went even further in acknowledging criminal internet "distribution", its Rule 13 determining several thresholds from which on internet copyright infringement became punishable, namely an illegal sales volume of RMB 50,000 or more, 500 or more transmitted work copies, 50,000 or more clicks on the illegally transmitted content or transmission to 1,000 or more subscribers. Criminal liability may also be established if none of these thresholds alone is fully met but more than half of at least two of them. The catalogue of thresholds is not even closed, but mentions other, unspecified serious circumstances under which criminal liability can be established. On this quite incomplete legal basis, courts have passed quite a number of criminal convictions for "online copyright crimes" in the past years. As mentioned, video game infringement is almost exclusively a matter of criminal enforcement. There are also several cases in which the accused parties were quite harshly convicted for acts that a civil court may not even have been found to be infringing.¹⁰⁷

¹⁰⁵ See Guobin Cui, 'Distribution of Copyrighted Works by Framed Links and Peer-to-Peer Service Constitutes a Crime of Copyright Infringement under Chinese Criminal Law', in Kung-Chung Liu (ed.), Kung-Chung Liu (ed.), Annotated Leading Copyright Cases in Major Asian Jurisdictions (City University of Hong Kong Press, 2019), 227 et seq., who also refers to the fact that the Criminal Code had been amended nine times between 1997, the year of its enactment, and 2000, so that there had been plenty of opportunities for the legislature to introduce criminal liability for online piracy if it really had intended to do so.

¹⁰⁶ <http://gongbao.court.gov.cn/Details/55559be2150804415cf7add7b4f0c8.html> (Chinese).

¹⁰⁷ Case examples quoted by Peter Ganea, Copyright, in: Peter Ganea/Danny Friedmann/Jyh-An Lee/Douglas Clark (edited by Christopher Heath), Intellectual Property Law in China, 2nd ed. 2021, Kluwer Law, 293 (401 et seq.)

Legal certainty with respect to criminal online copyright infringement was significantly heightened by the mentioned Criminal Code amendment of December 2020. Art.217, paragraphs (1) and (3) do now explicitly include the online transmission to the public of works, of performances and of phonograms as well as of audio-visual recordings (but not of other neighbouring rights - protected subject matter) in the enumeration of punishable acts, provided that the illegal revenue is especially high or if there are other serious circumstances. In such case, the infringer may be convicted imprisonment for up to three years and/or a fine. If the revenue is extraordinarily high or if there are other, very serious circumstances, the imprisonment may last between three and seven years *and* a fine has to be paid. With this most recent amendment, the legislature has retroactively given its blessing to the long-established judicial practice to subsume unauthorized online transmission under criminal “distribution”, the corresponding thresholds of “more than 50.000 clicks”, etc., now being put on a legal basis.

2.8.1.4 Administrative enforcement

In China, copyright infringement is not only a matter of civil or, in serious cases, criminal court litigation but can also be prosecuted by specialized administrations, the local copyright administrations under the supervision of NCAC. Administrative enforcement is a specialty of China, a cheaper and quicker alternative to civil copyright litigation in court and especially attractive for right holders who are first and foremost interested in a quick termination of ongoing infringement rather than damages. Damages cannot be determined by administrations, but they are competent to mediate in the damage question after infringement has been determined.

The third Copyright Act amendment significantly broadened the competencies of the local copyright administrations. When prosecuting infringement, they are now competent to question the parties, to inspect of locations and items, to inspect and to copy documents such as contracts and to seal and detain premises and items, whereby the parties are under the obligation to cooperate and to refrain from obstruction (Art. 55 Copyright Act). Art.53 Copyright Act regulates the administrative sanctions against a variety of administratively prosecutable acts that are exhaustively listed and include, inter alia, the infringement of the internet transmission right, the circumvention of technical protection measures and the manipulation of right holder information. Administrative sanctions comprise a “warning”, cessation orders, confiscation of illegal revenues, confiscation or destruction of illegal work copies as well as of materials, tools, devices, etc. that were used for infringement and fines of up to five times the illegal turnover of the infringer if the turnover is higher than 50.000 Yuan, or up to 250.000 Yuan if the turnover is lower than that amount or cannot be determined.

Local administrations enter into action upon a right holder`s complaint but they may also act *ex officio*, as their main task is to safeguard the public interest, not the right holder`s private interest. According to the above NCAC`s 2019 report, the NCAC as well as the local copyright browsed the internet for infringing content, remove infringing links, etc. Among the 33 warnings issued regarding the infringing making available of motion pictures, 11 were related to “imported works”. Even though not explicitly stipulated, it can be assumed that the cinematographic works were pirated after having passed censorship review and then been legally marketed in China. Whatever be the case, the endeavours of the NCAC and the local copyright administrations to suppress piracy at their own initiative should be of certain relevance for foreign and European right holders. Unfortunately, there are no current figures available on administrative proceedings carried out at a right holder`s request. The latest published ones reveal, however, that the majority or right holders prefer court over administrative proceedings and the NCAC`s report also confirms this.¹⁰⁸

3. Conclusion: recommendations to EU trade officers

The study has highlighted the recent improvements to substantive copyright and neighbouring rights brought about by the Copyright Act reform and newer case law, such as broader definition of what can be protected as work or a right of phonogram producers to be remunerated for the broadcast and public performance of their broadcasts. It also addressed further improvements to civil, criminal and administrative enforcement in a variety of areas, encompassing pre-trial and in-trial preliminary measures, evidence preservation, lessened formal requirements as to evidence, punitive damages and criminal enforcement.

Despite these positive developments, there is still room for further improvements from a European perspective, inter alia, to the liability of sharing platform providers and of e-commerce providers. These issues should be addressed by EU representatives in their coming consultations with Chinese authorities, wherever possible with reference to European model law. However, the explanations have also shown that not all of these issues can be supported by European model laws or best practices. It will therefore be necessary for European trade officers to also refer to those current practices in China that support their views.

a) Liability of online content sharing service providers

As explained, the Copyright Act itself is void of any internet service provider-specific provisions. These are regulated by secondary copyright-specific law enacted by the State Council and the SPC, which is actually good news for EU

¹⁰⁸ P. 13 of the report.

trade officers, because secondary law is more flexibly amendable than the statutes enacted by the National People's Congress.

The study has brought to light that those Chinese platforms, which conform to the definition of “online content sharing service providers” in Art.2 (6) DSM Directive, do play a certain role as hosts of infringing content and, as such, cause damage to European right holders especially in the music sector. However, these platforms are primarily catering to Chinese users, whereas worldwide perceivable infringement that has its origin in China is more targeted, specialized, technically sophisticated, aimed at reaping a direct profit from subscribers and clearly intentional. Those who commit it would be clearly prosecutable as direct infringers, not under the respective liability regimes that the EU and China regulate for content sharing platforms. However, as the responses to the mentioned EU consultations and to this study's survey revealed, these infringers do also frequently rely on infrastructures provided by others, for instance, as commercial clients (not as users) of dedicated server providers and others, who should also be under a certain duty of care to keep their facilities clean of infringing content and to expeditiously react to a right owner's notification under the current Network Interpretations and the State Council's Internet Regulations.

With regard to the online content sharing service providers in the meaning of the DSM Directive, it can be assumed that China will most likely not replace its current “notice and take down” regime by the stricter EU liability regime. However, as discussed, certain elements of the latter may be integrated in current Chinese secondary law in a manner that does not require fundamental changes.

First, European trade officers should convince Chinese representatives of the necessity of a stricter duty of platform operators to deploy content recognition technology on highest possible industrial standards. Hereby, they may refer to the NCAC's own statements made in its 2019 report on online copyright protection, according to which henceforth the profits as well as the technical and management capabilities. etc., of a provider shall be taken into stronger consideration when determining whether it has met its monitoring obligations. In this context, the NCAC's report even referred to the DSM Directive and the new obligation of sharing providers to, so the report's exact wording, “filter with help of content recognition technologies”¹⁰⁹ and recommended to correspondingly adjust the domestic “safe harbour” provider liability regime (but not to abandon it, not even with regard to specific online content sharing providers).

EU representatives may suggest that such stricter obligation be introduced, for instance, in Rule 8 of the SPC's Network Interpretations, which currently releases providers that have taken “appropriate and effective” measures to

¹⁰⁹ P.35 et seq. of the report.

keep their platforms free of infringing content from liability. A new, fourth paragraph to Rule 8 could henceforth oblige courts to consider whether the technical measures were indeed “appropriate and effective”, and that appropriateness and effectiveness shall be denied if technical measures on a higher industrial standard than the ones deployed by the alleged provider were available on the market and the provider, in the light of its market position, technical capability, etc., can actually be expected to have applied them.

Alternatively, it may be suggested that courts shall be obliged to consider a new factor, namely “the provider’s efforts in accordance with highest possible industry standards of professional diligence in the light of its organizational and financial capacities, to ensure the unavailability of infringing content on its premises” when determining whether the provider “should have known” about the infringement. This new factor could be added to the enumeration of factors in Rule 9 of the SPC’s Network Interpretations or even be merged with the first factor in this list, namely “the information management abilities that the provider has had in light of the nature and method of his services and their potential of generating infringement”.

As a third alternative, the addition of a new circumstance under which courts shall assume an especially strict provider’s duty of care to Rule 11 of the Interpretations is conceivable, for instance, “a strong market position of the provider and a correspondingly high capacity to deploy content recognition technologies of the latest state of art”. This third alternative may be the best solution, as courts would then have to consider the provider’s capacity to deploy content recognition technologies of the latest state of the art as a factor that aggravates its duty of care and could no longer merely weigh it against other factors, as required by Rule 9.

With such a new factor to be considered by courts, the Chinese legal framework would already regulate two of the three prerequisites in Art.17(4) DSM Directive for releasing online content sharing service provider from liability, namely “expeditious taking down” and “best efforts to ensure unavailability”, albeit systematically in a very different manner.

In a next step, the introduction of the third prerequisite of Art.17 (4) of the DSM Directive may be recommended, again in a manner that suits the current Chinese provider liability regime. As explained, the idea of lessening the liability of an infringer who has previously endeavoured to obtain the right owner’s authorization is not alien to the Chinese judiciary. With reference to the respective Karaoke and other music-related court decisions, Chinese authorities and the SPC may be convinced of an extension of this idea to situations in which not a single Karaoke establishment operator but a much larger online sharing service provider has spent best efforts to obtain the right holder’s authorization. Such “best efforts” may, again, be added to the Network Interpretations’s list of factors to be considered by courts when determining whether the alleged provider ought to have known about infringement (Rule 9),

based on the assumption that a provider who endeavoured to obtain authorization from a large number of right holders had less reason to know about unlicensed content that, in spite of all its efforts, still slipped through to its platform.

With the above, all three prerequisites a), b) and c) in Art.17 (4) DSM Directive would be regulated by Chinese secondary law, but not yet in a satisfying manner. They would still be mere factors to be alternatively and comprehensively considered by the courts, not firm prerequisites that have to be cumulatively met as under the DSM Directive. Moreover, especially the factor whether the provider has undertaken “best efforts to obtain authorization” may, if simply implemented in the above manner, turn out to be a double-edged sword. In the medium and long term it may have the positive effect that more service providers will endeavour to obtain authorization from as many right holders as possible to avoid liability and thereby also create more legal certainty for the uploading users. However, if a provider in a concrete dispute can demonstrate “best efforts to obtain authorization” from an individual right holder but failed to obtain it, such “best efforts” alone may suffice to release it from liability even if it has not browsed its platform for infringing content or expeditiously taken down the infringing content. A provider of audiovisual content like *Shipinku* in the above case study III could, for example, pro forma ask several film studios, among them *Fritz-Studios*, for authorization to have their cinematographic works uploaded, well knowing that it will never obtain authorization to upload newly released cinema movies, but nevertheless escape liability after having demonstrated its “best efforts”.

For the reasons explained above, namely reluctance to strangle homegrown internet industries, it is rather unlikely that the Chinese legislature and the judiciary will adopt the mechanism of Art.17(4) DSM Directive. It may therefore be a better idea to suggest that the factor “best efforts to obtain authorization” be limited to “best efforts to obtain authorization and proof of such authorization from a representative number of right holders pertaining to the same work category”. That is, only providers who can demonstrate that they have contracted with a large, representative number of right holders (mostly through CMOs), would be rewarded with lowered liability if, in spite of their “best efforts”, infringing content still slipped through to their platform. This interpretation of the “best efforts” requirement would be stricter than provided by the Commission’s Guidance on Art.17, according to which the provider shall also then be regarded as having spent “best efforts” if it approached an individual right owner but failed to obtain authorization.

The above-proposed liability regime would bring the Chinese secondary law closer to the gist of Art.17 but still remain beneath its very high standards as to liability. It would continue to centre on whether the provider has reacted expeditiously to a right holder’s notification and encourage courts to merely consider the provider’s efforts to keep its platform clean of infringing content and to obtain authorization from right holders as two among several other

factors to consider when assessing whether the provider “should have known about the infringement”/has conformed to his duty of care before receiving the right holder’s notification. That is, even if the court finds that a provider has not spent enough effort to keep its site free of infringing content or to seek the authorization of a representative number of right holders, it may still, after comprehensively considering all the other factors (“the popularity of the disseminated content and the corresponding apparentness of infringement”, “the degree of active involvement of the provider in selecting, editing, modifying or recommending, etc., the content uploaded on its platform”, etc.), arrive at the conclusion that the provider could not have possibly known about the infringement on its platform and therefore shall bear no liability.

b) Extended “notice and take down” liability of e-commerce platforms for hosting offers of devices that can be used for infringement

As explained, not only those who circumvent technical protection measures to enable access to protected content but also those who make or distribute devices that can be used for such circumvention violate Art.49(2) of the amended Copyright Act. Probably most of the set top boxes that enable access to encrypted broadcast signals and, according to European right holders and the NCAC, are circulated in China and worldwide, should pertain to such circumvention devices. Their manufacturers, who, as explained, are primarily located in China, do not seem to be correspondingly prosecuted, however. One reason for this insufficiency may be the lack of a definition of such devices that not only apparatus that can be used for no other purposes but circumventing technical protection measures shall be prohibited but also devices that may be used for non-infringing purposes but are fact primarily used for infringement.

Unfortunately, case law that deals with this question could not be found but that the NCAC in its 2019 report mentioned investigations of numerous makers of set top boxes that enable to view broadcasts through the internet and also of developers of corresponding apps implies that technical devices that facilitate web streaming of broadcast content is also a matter of concern for domestic right holders. A clear definition of prohibited devices modelled after Art.6.2 of the Infosoc Directive, which would include apparatus that can to a limited extent also be used for non-infringing purposes, could contribute to reducing the worldwide availability of such devices. A corresponding definition would be best accommodated in the coming State Council’s Internet Regulations, which will replace the current, now outdated Internet Regulations of 2013.

Another improvement in the context of anti-circumvention legislation would also be desirable from a European perspective, namely the introduction of a liability regime specifically targeted at e-commerce platforms, which tolerate the circulation of circumvention devices and other apparatus that can be used for infringing purposes on their platforms. In their responses to the EU

Consultation, several EU right holders have expressed their concerns about Chinese marketplaces primarily governed by *Alibaba*, on which such devices would be traded in China and worldwide.

Therefore, also e-commerce platforms should bear a general duty of monitoring their platforms for offers and advertisements of devices that can be used for infringement and a duty to expeditiously take such offers and advertisements down upon the request of a right holder who can initially prove that the further circulation of such products will increase the danger of substantial infringement of his rights.

Such specific e-commerce provider liability may, again, be introduced to the SPC's Network Interpretations and simultaneously in the coming Internet Regulations. A new provision may, for instance, clarify that the "public offering of devices and parts" pursuant to Art.49 (2) Copyright Act shall be treated as "infringement" under the notice and take down-provisions in the mentioned E-Commerce Act. E-commerce marketplaces would then also be under a certain duty of care to proactively remove offers of devices that can be used for infringement and would have to react expeditiously upon a right owner's request. Form and content of such request, the procedure of forwarding it to the e-commerce platform's client and further procedural matters would have to be regulated separately from the procedures that apply to a takedown request made to an online content sharing service provider, however. Requests to take down offers of products that can be used for infringing purposes from e-commerce platforms would have to meet distinct, very specific requirements, such as *prima facie* evidence that the requesting party's technical protection measures are indeed effective and that the incriminated devices can be used for their circumvention or are otherwise likely to entail substantial damage to the rights and interest of the requesting party.

Such secondary regulation would enable a larger number of copyright holders to resort to the "notice and take down"-procedure to quickly avert public circulation of circumvention devices upon their detection, before they can cause greater harm to them. Of course, a major problem in consultations with Chinese authorities could turn out to be that the EU itself does not yet have corresponding provisions in place. Such provisions may be contained in the coming Digital Services Act proposed by the EU Commission.¹¹⁰

3.3. Promotion of technical cooperation between service providers and right holders, with a special view on the prevention of unauthorized live streaming

¹¹⁰ More information at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en#what-is-the-impact-of-new-obligations.

As explained in the first part of this study, representatives from the sports event sector have brought up the idea of obliging dedicated server providers, streaming services, etc., to equip right holders with a “takedown tool”, which would enable them take streamed content down immediately upon detection, which would be of essence especially in the case of real-time streaming. Such tool at least in the hands of a Chinese licensee of a European sports broadcaster would certainly help to reduce the losses from unauthorized live streaming, which has been described as rampant by both European right holders and the NCAC in its 2019 report. As far as can be seen, however, neither EU law nor national law of member states provides for such a strong privilege of certain right holders to interfere in the services of others. EU trade officers may nevertheless try to convince Chinese representatives of the usefulness within the greater context of a stronger collaboration between right holders and internet service providers, partly on the basis of statements that the NCAC has made in its 2019 report.

Of course, a takedown tool to specifically protect the interests of live sports event organizers and sports broadcasters will only make sense if there is certainty that courts will continue to acknowledge sports live broadcasts as copyright protected subject matter. As explained, such certainty was non-existent until recently, and it cannot be said at this point of time whether the current case law on Higher People`s Court level that acknowledged such copyright will sustain the SPC`s final instance adjudication and future legislation. But even then, without a clear provision that live broadcasts pertain to copyright specific content, one cannot be entirely sure because China adheres to the statutory law tradition and precedents are not binding.

Advisable would therefore be a future-proof provision that does not specifically allow for tools to take down live streamed broadcasts but encompasses all kinds of copyright and neighbouring rights protected content, under the umbrella term “technical cooperation”. Moreover, such provision should not regulate an outright “obligation” of service providers to henceforth tolerate the intrusion of right holders in their services but offer them something, e.g., a lessened liability, in exchange for allowing right holders access to their premises.

The NCAC`s report and *Alibaba`s* response to the EU-Commission`s consultation reveal that such technical cooperation in China is already well advanced, *Alibaba* even allowing right holders privileged access to its platforms to monitor the progress of takedowns and other measures. These are encouraging signals.

Legislation-wise, an encouragement towards further technical cooperation may, again, be best accommodated in an SPC Interpretation, maybe even in the already existing Network Interpretation. As the explanations in the legal part of this study have demonstrated, the focus of these judicial interpretations is on providing lower courts with criteria to consider when determining whether a

provider “ought to have known”, whether the infringement is serious enough to be eligible for punitive damages, whether the circumstances are urgent enough to justify a preliminary measure, etc. It may therefore be a viable option to suggest the addition of another factor to consider by judges to determine whether the service provider “ought to have known” about an infringement or has complied with its duty of care, for instance “the extent of the provider’s technical cooperation with right holders to ascertain the non-availability of infringing content on its platform”. Alternatively, a more explicit provision may be: “If the service provider has equipped right owners of a certain category of works with technical means to ascertain the non-availability of such works at their own initiative, it shall bear a significantly lower duty of care with regard to that work category”. Such new provision may be antithetically accommodated before or after Rule 11 of the Network Interpretations, which, as explained, regulates the circumstances under which service providers bear an “especially high duty of care”. Whatever be the case, such a new provision would be technologically neutral enough to encompass the provision of right holders with a “takedown tool” but also other, currently not yet conceivable forms of concrete technical cooperation between right holders and service providers.

To further encourage service providers to engage in such technical cooperation and also as a clear signal to right holders to better not abuse their privilege to bustle around on other’s platforms, the Network Interpretations or similar, future interpretations could also include a clarification that the right holder alone shall bear all liability if it erroneously or maliciously took down legitimate content from a service provider’s premises, which would also correspond to Art. 1195 (3) Civil Code.

It is, finally, well-conceivable that a significant number of service providers will not be too unhappy about the possibility to outsource a good part of their monitoring tasks to right holders, in exchange for a lower risk of being held accountable for the remaining uses of their platforms.

ABSTRACT

This study aims at exploring the main challenges that the current Chinese copyright system poses for European copyright intensive industries. It identifies several types of infringement that are especially threatening to European right holders and analyses whether and in how far the recent, not yet tried and tested reforms to the copyright system are capable of handling these, in comparison with EU model legislation. After having extracted current copyright legislation that is in need of further improvement, in particular in the areas of online content sharing service provider liability, the circumvention of technical protection measures and increased technical cooperation between right holders and internet platforms, proposals will be made with regard to future consultations with between European

and Chinese representatives. Wherever possible, these proposals are based on EU model law.

ANNEX

Questionnaire