THE NEW RIGHT OF COMMUNICATION THROUGH THE INFORMATION NETWORK IN THE PEOPLE’S REPUBLIC OF CHINA

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INTRODUCTION
While China has not joined the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) or the WIPO Performances and Phonograms Treaty (WPPT), China amended its Copyright Law in 2001 in accordance with Article 8 of the WCT and Articles 10 and 14 of the WPPT. As a result, a new exclusive right of communication through the information network (hereafter referred to as the ‘right of network communication’) was introduced into the Copyright Law 1990 (amended 2001) for the benefit of copyright owners and performers and producers of sound and video recordings.

The adoption of the right of network communication has raised the level of copyright protection as required by Article 8 of the WCT and Articles 10 and 14 of the WPPT. Consequently, uploading a work or recording onto a website for unauthorised distribution through the Internet will infringe the copyright owner, producer and performer’s (if the recording embodies the performance) right of network communication, unless the distribution constitutes fair use.

However, since the provision on the right of network communication in the Copyright Law has a liberal application, more needs to be done to properly apply this right in complicated cases. In addition, the new technologies and business models appearing in China bring new challenges which call for clarification on the meaning of the network
communication right, and either creating or improving provisions in the
Copyright Law.

For example, when a website provides hyperlinks to infringing MP3
files, or ‘pirated’ sites containing a number of infringing files, will the
website operator be directly responsible for infringing the right of
network communication, or for indirectly contributing to the infringing
act done by the linked sites? Moreover, if the copyright owner sues the
website providing the hyperlinks, but does not give a written notice
warning it of the infringing nature of the linked files or sites in advance,
can the court determine that the website has actual knowledge of the
infringing act occurring on the linked site? There are no clear answers to
these questions in the Copyright Law.

To deal with these new challenges the State Council drafted the Regulation
on the Protection of the Right of Communication through the Information Network
(‘Communication Right Regulation’), and the Supreme Court is trying to give
interpretations on the right of network communication in specific cases.
Nevertheless there are still disputes over the application of this new
right. The competing interest groups, which include major record labels
and the Internet industry, have opposing views, which makes it difficult
for new legislation and judicial interpretation.

This paper explores the nature of the new right of network
communication in China and discusses its relationship with other
exclusive rights, in particular the right of reproduction and the right of
distribution. This paper also identifies the hotly debated questions in
relation to applying the right of network communication and attempts to
provide answers. In addition, the paper provides a proposal to introduce
specific provisions of indirect copyright infringement and insights on the
judicial test that should be applied by the courts in determining an act of
indirect infringement.

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1 Since this chapter was written, the State Council of PRC has promulgated the Regulation
on Protection of the Right of Communication via Information Networks on 18 May 2006 as Decree
No. 468, effective as of 1 July 2006.
THE BACKGROUND TO THE NETWORK COMMUNICATION RIGHT IN CHINA

The first Copyright Law in the People’s Republic of China was adopted in 1990. Unlike most Western copyright laws, it provides without any definitions an open list of exclusive economic rights:

Article 10: Copyright includes the following moral rights and property rights:

(5) The right of exploitation and the right to remuneration, that is, the right of exploiting work by means of reproduction, performance, broadcasting, exhibition distribution, making cinematographic film, television or video, adaptation, translation, annotation, compilation and the like, and the right of authorising others to exploit one's work through the above-mentioned means, and of receiving remuneration as a result.

When the Internet became a major means of disseminating work in China, the courts had to consider whether Article 10 granted copyright owners an exclusive right to control the act of uploading their works to a website for browsing or downloading. In 2000, Wang Men and five other well-known writers discovered that their novels could be freely downloaded from a website without their consent. The six writers sued the website and the case was referred to as ‘the first copyright case in the network environment’ (hereafter referred to as the ‘Six Writers’ case’).

It should be noted that the Copyright Law 1990 did not provide a general right of communication to the public. Furthermore, the broadcasting right provided in Article 10 does not cover on-demand transmission on a point-to-point basis through the Internet. This is because the Regulation for the Implementation of the Copyright Law issued by the State Council in 1991 (hereafter referred to as the ‘Copyright Implementation Regulation1991’) clearly states that:

Broadcasting is the communication of works through wireless radio waves and cable television system.²

Since the transmission occurred on the Internet it is technically different from wireless radio waves and the cable television system, which means that communicating works on-line is more than an act of broadcasting. Thereafter, it is practically impossible for the court to interpret the broadcasting right widely because of the strict wording in the Copyright Implementation Regulation1991.

Nevertheless it may be possible to treat the website’s act as a ‘distribution’ of work since the Copyright Implementation Regulation1991 defines ‘distribution’ as the:

provision of copies of a work to the public by means such as sale and rental etc, in so far as the number of copies satisfy the reasonable need of the public.3

Since the result of uploading a work onto an openly accessible website is to make copies of the work available to the public, it is arguable that uploading the work is an act of providing copies of the work by a new means, in addition to sale and rental.4 Moreover, the United States Information Infrastructure Task Force stressed that ‘the transmission results essentially in the distribution’, and supports the view that the existing right of distribution encompasses transmitting copies through the Internet.5

However the terms ‘sale’ and ‘rental’ have specific meanings, which are different to the meanings these terms have in common law countries such as the United States. It is well-established that ‘sale’ in legal terms involves the transfer of ownership of a real thing, while ‘rental’ is the delivery of a real thing to another.6 A ‘real thing’ in most cases indicates

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4 Even after the new network communication right was introduced into the Copyright Law in 2001, some people still argue that making works available through the Internet is an act of distribution that should be controlled by the right of distribution. See Gui Run, ‘Comment on Wang Men vs. Beijing OnLine’, China Intellectual Property Right Newspaper, 13 August 2003.
6 ‘Sale’ is defined by Contract Law as the transfer of ownership of an object, while ‘rental’ is defined as a delivery of an object for another’s use. See Contract Law (PRC) art 130 and art 212.
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a tangible thing, and intangible information embodied in a medium is not a ‘thing’. As a consequence, although network users can download a copy of a work from a website, this process does not involve the transferring of ownership, or delivery of any ‘real thing’. Most academics and judges find it strange that online-transmission, which does not lend itself to any physical movement of a real thing, can be combined with sale and rental as a form of distribution.

Uploading a work to the network server produces a new digital copy of the work and as a consequence this may involve the right of reproduction. The Copyright Implementation Regulation 1991 defines ‘reproduction’ as:

Reproduction is the act of making one or more copies of a work by means like printing, photocopying, copying by hand, rubbing, audio-recording, video-recording, re-recording or photographing etc.7

Unlike the definition of ‘reproduction’ in the United States and Australian copyright acts which describe a test to determine whether certain acts constitute a reproduction,8 the definition in the Copyright Implementation Regulation 1991 only lists various means of reproducing works. However there is no difficulty in interpreting the act of uploading as an act of reproduction because a new copy of the work is made and the list given in the definition is not closed. The most important consequence of uploading a work onto an open website is not that a new copy is created, but that the new copy is accessible by the public who are able to browse or download the copy. Thus, while the act of uploading a work does involve reproducing the work, it is not appropriate to say that the act only infringes the exclusive right of reproduction. The contrary conclusion will equate to the act of communicating a work through the Internet to the mere act of photocopying it.

Since none of the exclusive rights in Article 10 of the Copyright Law 1990 were applicable to the act of communicating works through the Internet,

8 17 USC 101; Copyright Act (Cth), s 31(1)(a)(i).
a new exclusive right would have to be inferred from the Article and invoked by the court.

In the *Six Writers’ case* judges were enlightened by Article 8 of the *WCT*. The judges formed the view that through judicial interpretation any new right may be added to the list of exclusive rights in Article 10, since the list is open to future development.9 The decision delivered by the Beijing Haidian District Court states that:

> The explicitly listed ways of exploiting works in Paragraph 5, Article 10 of the *Copyright Law 1990* does not close the possibility of other ways by which works might be exploited . . . Thus the communication of works through the Internet should be determined as a new way of exploiting works. The copyright owner has the right to decide whether or not to allow the work to be communicated via the Internet . . . Despite the differences that exist between the communication of works on the Internet and the publication, distribution, public performance and broadcasting of works, all of them in nature are for the purpose of realising communication (works) to the public and the exploitation of works, thus allowing the audience or viewers to have access to the content of works. The difference in the means of communications does not affect the right of copyright owners to control such communications.10

The court made the decision in favor of the six writers and this was confirmed by the Beijing Number 1 Intermediate Court. However only laws passed by the People’s Congress can create exclusive rights for the author of works, so the legal basis for the broad interpretation of Article 10 has been widely questioned.11 Under these circumstances new legislative action became the only solution to eliminate the doubts surrounding the application of copyright law to the Internet.

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10 Civil Judgment (1999) No 57, Intellectual Property Branch, First Instance, Beijing Haidian District Court. The wording of this judgement has been slightly modified.

THE NATURE OF THE RIGHT OF NETWORK COMMUNICATION IN CHINA

The right of network communication is a primary exclusive right in China

In 2001 the People’s Congress amended the Copyright Law 1990 and a new right of communication through the information network was explicitly granted to copyright owners, performers and producers of sound and video recordings. The relevant provisions are:

Article 10: Copyright includes the following moral rights and property rights:

(12) The right of communication through the information network, that is, the right to make a work available to the public by wire or by wireless means, so that people may have access to the work from a place and at a time individually chosen by them.

Article 37: The performer shall, in respect of his or her performance, enjoy the following rights:

(6) To authorise making his or her performance available to the public through the information network, and receive remuneration as a result.

Article 41: The producer of a sound recording or video recording shall enjoy the right to authorise . . . reproducing, distributing or renting the sound recording or video recording or making it available to the public through the information network and to receive remuneration as a result

It should be noted that although Articles 37 and 41 use the term the ‘right to authorise’, the two articles grant the performer and producer an exclusive primary right, rather than a secondary authorisation right in terms of the ‘right to approve, countenance or sanction’ as is provided in
common law jurisdictions. Unlike the United Kingdom, the United States and Australia, there is no general concept of a ‘secondary right’ in Chinese copyright law theory. ‘The right to authorise’ in the Copyright Law 1990 means that the owner has the right to do certain acts by him or herself and has the right to authorise others to do the same. As such, the right to authorise is actually a sub-right inherent to any exclusive right enjoyed by the copyright owner. The six rights granted to performers in Article 37 and the four rights granted to producers of sound and video recordings in Article 41 are defined as ‘the right to authorise others to do’ certain acts. Even seen from the perspective of the legislature in common law countries it is absurd that a copyright law would only create various secondary rights for performers and producers, without first creating a primary right.

The right of network communication is a new exclusive right in China

It is obvious that Article 10 of the Copyright Law 1990 (amended 2001) originates from Article 8 of the WCT. However Article 8 of the WCT is the result of a compromise between the competing positions of the United States and the European Union delegations on the wording of the right to control on-demand communication. Article 8 has been referred to as an ‘umbrella solution’ because it does not order member states to adopt a new right, but rather gives member states the power to decide which exclusive right should be used to cover the act of making works available through the Internet. In implementing Article 8 of the

12 US17 USC 106; Copyright Act C s 3(1); Copyright Act 1968 (Cth) s 13(2). See also Falcon v Famous Players Film Co [1926] 2 KB 474, Muzak Corp v Composers, Authors and Publishers Association of Canada Ltd [1953] 2 SCR 182, Moorhouse v University of New South Wales [1976] RPC 151.

13 For the same reason, Professor Andrew Christie and other commentators argue that Article 8 of the WCT embodies an exclusive primary right despite the fact that Article 8 grants an exclusive right of authorising communication to the public. See Andrew Christie and Eloise Dias, ‘The New Right of Communication in Australia’ (2005) 27 Sydney Law Review 237, 244.


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many member states chose to use one or more existing traditional rights to encompass the relevant acts of network transmission. For example, the United States did not add any new exclusive right in its *Copyright Act* after it ratified the *WCT*. Instead the combination of the right of distribution, reproduction, public performance and public display are applied by courts in the United States to control the act of network transmission.

In China the ‘umbrella’ itself became a single new exclusive right in the *Copyright Law 1990 (amended 2001)*. There are two reasons for this. Firstly, as indicated by the *Six Writers’ case*, judges have refused to apply traditional exclusive rights to the Internet environment. Secondly, there is no general right of communication in the *Copyright Law 1990* that can be appropriately expanded to cover on-line communication. As a result the legislature could choose to create a new right, and the easiest way to do so would be to make any new right an additional new right for Chinese copyright owners, pursuant to Article 8 of the *WCT*.

As a result the definition of the new right of network communication in Article 10 paragraph 12 of the *Copyright Law 1990 (amended 2001)* is virtually a verbatim translation of part of the second half of Article 8 of the *WCT*. This kind of borrowing allows the Chinese copyright legislation to be consistent with the *WCT*.

The application of the right of network communication in China

Since the *Copyright Law 1990 (amended 2001)* came into force anyone without authorisation who uploads copyrighted work onto an openly accessible Internet site infringes the right of network communication. Once the work is uploaded anybody can browse it online, or download it onto a computer connected to the Internet. Such an act falls within the definition of the right of network communication and is precisely what the new right is designed to cover.

In the first case involving the right of network communication *Chen Xingliang v National Digital Library Ltd*, the defendant without consent

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scanned three books written by the plaintiff and provided an on-line reading and downloading service to its registered users. The plaintiff sued for infringement on his right of network communication and was awarded a favourable judgement with damages. The Beijing Haidian District Court differentiated between the traditional paper-based library and the digital library that involves communication of digital work. The court stressed that communicating work through a network enlarges the scope of communication to such an extent that it goes beyond what the author would expect in publishing the work in the traditional way, and therefore such communication should be restricted by the right of network communication. The case is significant in that the defendant is a national and government-supported digital library under the direct control of the National Library of China. The decision also fully implemented the *Copyright Law 1990 (amended 2001)* without any undue influence by the defendant.

In *Zheng Chengsi v Sursen Digital Technology Inc* the defendant operated an online digital library that provided the plaintiff’s scanned books for registered users to read. Although the defendant employed measures preventing users from downloading its digital books and only allowed three users to read the same book at the same time, the Beijing Haidian District Court found against the defendant. The court declared that the technological restrictions did not change the nature of the defendant’s infringing acts in making the plaintiff’s works available for users’ through the Internet, without authorisation.

In *Warner Music v Rongshuxia Computer Inc* the defendant operated a popular, literature website which provided MP3s for on-line sampling. Ten of these MP3s came from CDs produced by the plaintiff. The defendant argued that its act was fair use since it was for personal use and the defendant did not charge any fee from its users. The Shanghai

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18 Zheng Chensi is a Professor and Director of the Intellectual Property Center in the Chinese Academy of Social Science. There are five other professors who brought a lawsuit on the same facts and legal grounds against Sursen Digital Technology Inc. The defendant lost all of these lawsuits both in the first and appellate court.

Number 2 Intermediate Court rejected the fair use defence by emphasising the potential harm the defendant caused on the plaintiff’s economic interests.\(^\text{20}\)

Since Article 8 of the \textit{WCT} does not specify what exactly constitutes the act of making a work available, the direct translation of this article without further clarification can lead to ambiguity and confusion.

THE NEW PROBLEMS WITH THE RIGHT OF NETWORK COMMUNICATION IN CHINA: WHEN DOES AN ISP INFRINGE THE RIGHT?

Background

At present, the most prominent question is: who makes the communication?\(^\text{21}\) As mentioned, the definition of the network communication right in \textit{Copyright Law 1990 (amended 2001)} is an exact translation of Article 8 of the \textit{WCT}. The latter does not shed light on who is the person making the communication, but does exclude the possibility that the provider of physical facilities that enable or creates a communication makes the communication.\(^\text{21}\)

It is evident from previous cases involving infringement on the right of network communication that uploading works onto an open Internet site is an act of communicating works.\(^\text{22}\) However it is unclear whether merely providing hyperlinks to works residing on other Internet sites amounts to a communication of that work.

The answer to this question is significant in that copyright owners are trying to sue hyperlink providers for infringing their rights of network


\(^{21}\) The Agreed statement concerning Article 8 of the \textit{WCT} states, ‘It is understood that the mere provision of physical facilities does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).’ See further \textit{<http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf>} at 15 January 2008.

\(^{22}\) See the above mentioned civil judgments.
communication. If the act of providing hyperlinks is not deemed communication then the provision of hyperlinks is not a direct infringement on the network communication right.

ISP’s liability of joint tortfeasar in China

In copyright theory a direct or primary copyright infringement is commonly understood as doing something that only the copyright owner has the right to do, without the consent of the copyright owner.23 In other words, if an act is explicitly restricted by an exclusive right, doing such an act without the copyright owner’s authorisation constitutes a direct or primary copyright infringement. If an act is not under the direct control of any exclusive right, it is not a direct or primary copyright infringement.

This does not mean that acts which are not directly restricted by exclusive rights cannot lead to a copyright infringement. If a person materially contributes to the infringing conduct of another, with knowledge of the infringing nature of the conduct, that person’s act may be considered a contributory infringement (or indirect or secondary infringement).24

In common law countries merely providing hyperlinks to infringing files stored on other sites is not a direct or primary copyright infringement.25 The Digital Millennium Copyright Act of 1998 (hereinafter referred as to the DMCA) provides a ‘safe harbor’ to service providers who link users to an online location containing infringing material, provided the service providers do not have actual knowledge of the infringing material, or are

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23 A typical example is the definition of ‘copyright infringement’ in the Copyright Act C s 27(1) which states, ‘It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.’

24 Gershwin Publishing Corp v Columbia Artists Management Inc, 443 F 2d 1159, 1162 (2nd Cir, 1971). It should be noted that the embodiment of the theory of indirect infringement in the United States is different from that in the United Kingdom, Canada and Australia. In the United States there is no explicit provision of indirect infringement in either the 1909 or 1976 Copyright Act and the US courts have developed the rule of contributory copyright over the years. In a contrast, the UK Copyright Act enumerates various secondary infringement acts: see Copyright Act (UK) ss 22-26.

unaware of the circumstances from which the infringing activity is apparent, and that they act expeditiously to disable access to the material after being notified or becoming aware of the infringement.26

The concept of ‘indirect copyright infringement’ does not appear in either the 1990 or 2001 Copyright Law of China. However the legal rule that a person should take liability for a third person under some circumstances, does exist in civil law. Article 130 of the General Principles of the Civil Law (hereafter referred to as the ‘Civil Law’) states that:

If two or more persons jointly infringe upon another person's rights and cause damage, they shall bear joint liability.

Furthermore the Supreme Court’s Interpretation of the Civil Law (hereafter referred to as ‘Civil Law Interpretation’) states that:

Any person who incites or assists another to commit a tort is the joint tortfeasor.

‘To assist’ has a similar meaning as that of ‘to contribute’, which makes it reasonable to claim that the concept of ‘contributory infringement’ exists in China. As a matter of fact, Article 130 of the Civil Law and its accompanying judicial interpretation is the legal ground on which the service provider’s liability is based. Article 4 of the Judicial Interpretation Regarding Various Issues on the Application of Laws While Adjudicating Disputes relating to Computer Networks Copyright (Networks Copyright Interpretation) provides that:

In case an Internet Server Provider participates in any other person's act of infringement on copyright through networks, or abets any other person to commit, or assists any other person in committing an act of copyright infringement, the court shall impose joint liability of the Internet Server Provider with the others directly committing the infringement act according to the provisions of Article 130 of the General Principles of the Civil Law.

26 17 USCS § 512(d). It should be noted that paragraph [2] also provides that the service provider ‘does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity’. This is the embodiment of the ‘vicarious liability’ theory, but not of ‘contributory infringement’.
Article 5 goes on to state that:

In the event that an Internet Server Provider in providing content services has actual knowledge of the internet users' acts of infringement on other people's copyright through networks, or who has been given warnings with good evidence by the owner of the copyright, but fails to take measures including removing the infringing content etc, to eliminate the infringement, the people's court shall, in accordance with the provisions of Article 130 of the General Principles of the Civil Law, impose joint liability on the Internet Server Provider and the Internet users.

Article 5 of the Networks Copyright Interpretation is a Chinese version of ‘notice and takedown’ and the second safe harbor as provided by Article 512, subsection (c) of the DMCA. However, two questions remain after the Supreme Court issued the Networks Copyright Interpretation. First, Article 5 only covers the activities of content service providers who store material on their network system at the direction of the users. The act of providing hyperlinks to material stored on other network systems is not included within the scope of the application of Article 5.

Second, Article 5 only imposes joint liability on those content service providers who ‘have actual knowledge’ of the users’ infringing activities, but it is silent on how to determine what constitutes ‘actual knowledge’. It is highly unlikely that when the service provider is served with good evidence through a notice of claimed infringement, that the service provider then has ‘actual knowledge’ of the possible infringement. But is the notification the only way to give the service provider actual knowledge of the existence of others’ infringement? In addition, should court make a determination that a service provider ‘should have known’ of others’ infringing activity, if it would be apparent to a reasonable person under the same circumstances?
Conflicting views amongst Chinese courts

*Universal Music Group v chinamp3.com*

The first question was first discussed in *Universal Music Group v chinamp3.com*. The defendant operated a professional music website, but did not store any music files on its web server. Instead, it created categories of music files on its site such as ‘Hong Kong and Taiwan Zone’ and ‘US and European Zone’, in which the names of artists were displayed by alphabetical order. When a user clicked the name of an artist, it displayed hyperlinks to the artist’s songs. By clicking those hyperlinks, a user could directly download music files stored on other Internet sites.

The plaintiff was the producer of sound recordings which were available to download through the defendant’s hyperlinks. The plaintiff had never authorised a website to provide a downloading service, and claimed that the thirty-five song titles linked by the defendant were infringing. The plaintiff sued the defendant for infringing its ‘legitimate right’ and requested the defendant to stop providing communication and downloading services through the network.

The cause of action was somewhat ambiguous since the plaintiff did not clarify whether it sued the defendant for directly infringing the network communication right, or for assisting the linked website to commit the direct infringement. The Beijing No1 Intermediate Court, in the judgement handed down in favour of the defendant, claimed that the focus of the dispute was ‘whether the act of communicating works to the public by means of providing hyperlink is an infringement of the plaintiff’s right’.

In its analysis the court first noted that the defendant not only searched other websites for music files, but also aggregated, arranged and organised hyperlinks to the selected and recommended files. Secondly, the court stressed the fact that users can directly search and download...

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27 Warner Music Co. and Sony BMG Music Entertainment (Hong Kong) Ltd also brought a lawsuit against the operator of <http://www.chinamp3.com> on the same legal grounds and similar factual backgrounds. All of the three lawsuits had the same outcomes both in the first and second instance.

28 See Beijing No 1 Intermediary Court, Civil Judgment (2004) *Yi Min Chu Zi* No 400.
songs by visiting the defendant’s website, rather than visiting the linked websites. In the court’s view the defendant’s website was in the position of communicating works from beginning to end, while the linked websites only functioned as ‘periphery storage’. The court determined that the defendant had a duty of care on the legality of its downloading service and was negligent for not screening the linked resources. The court declared that ‘the defendant’s act of providing hyperlinks did not provide a corridor’ to the works, but was rather ‘an act of communicating works to the public’.29

It is apparent that the court treated the defendant’s act of providing links to the infringing files as communicating works to the public, not assisting others to communicate works. This position is confirmed by the legal grounds on which the court based its conclusion. The court quoted Article 41 (the right of network information granted to producers of sound recordings) and Article 47 of the Copyright Law 1990 (amended 2001) (liability for infringement on the exclusive rights including the right of network information), but did not mention Article 130 of the Civil Law regarding joint tortfeasors.

On appeal the Beijing High Court overruled the judgement given by the district court. The High Court pointed out that (emphasis added):

‘The appellant (the defendant in the first instance) was not able to fully control the linked resources. If the linked website operator changes the URL address or employs a code to restrict access, then access to the linked resources will be denied. Therefore, in nature, the service provided by the appellant in the present case is still a service of providing a corridor. The appellant does not reproduce or communicate to the public the linked sound recordings. Nevertheless, the appellant’s act of creating links facilitates communication of the infringing sound recordings. By enabling users to download infringing sound recordings, the appellant causes infringing activities on the linked websites to be performed and extended. As a result, the appellant objectively participates in and assists the infringing activities that were

29 Beijing No. 1 Intermediary People’s Court, Civil Judgment (2004) Yi Zhong Min Chu Zi No. 400.
performed on the linked websites and thus harms the legitimate interests enjoyed by the respondent.\textsuperscript{30}

Clearly the High Court did not agree that providing links to infringing works constituted a communication of works. Instead the High Court held that the act contributed to the directly infringing activity which occurred on the linked websites. In addition, the High Court cited Article 130 of the \textit{Civil Law} and Article 4 of the \textit{Networks Copyright Interpretation} on ‘joint tortfeasor’ in determining the contributory infringing nature of the appellant’s act, and its subsequent liability.

The High Court also addressed the appellant’s knowledge of the infringing nature of the linked files. The appellant had argued that Article 5 of the \textit{Networks Copyright Interpretation} should be applied to the present case. In accordance with Article 5, only when the content service provider has ‘actual knowledge’ or notice of the claimed infringement, can the service provider’s failure to remove or disable access to the infringing materials be regarded as an act of assisting another’s infringing activity. In this sense, it could be argued that since Article 5 does not include the words ‘should have known’, even if the directly infringing activity performed by others would have been obvious to any reasonable person in that position, the service provider is not responsible for its act which contributed to the direct infringement, unless the copyright owner can prove the service provider had ‘actual knowledge’.

In that case, the respondent (the sound recording producers) did not serve a notice on the appellant before commencing proceedings. Therefore, if Article 5 was applied to the case, it is likely the appellant would have been successful due to the lack of evidence regarding its ‘actual knowledge’. However, the High Court was of the view that Article 5 was an inappropriate clause to resolve the dispute. The High Court stated (emphasis added):

\begin{quote}
‘(Article 5) does not apply to all kinds of service providers . . . It only applies to those service providers that cannot monitor the information (transmitted through the network) through a duty of care. Nevertheless, as far as the service provided by the appellant is concerned, the appellant selected the websites and
\end{quote}

\textsuperscript{30} See Beijing High People’s Court, Civil Judgment (2004) \textit{Gao Min Zhong Zi No. 713}. 
resources to be linked . . . It is apparent that the appellant is capable of scrutinising the legality of the linked files one by one. At the same time, since the appellant is a professional profit-making music website, it should have a higher duty of care placed on the legality of its service. Therefore, the above Article 5 cannot be applied to determine the appellant’s fault and liability . . . Should the duty of care of similar service providers be exempted, those service providers might ignore the right owners’ legitimate interests and indulge others’ infringing activity, and public interest will be harmed in the end’.

The High Court was of the opinion that the appellant should have known that the linked music files were infringing, since the appellant selected the music files to be linked, and had the chance to review whether those files were authorised to be communicated through the network.

**Universal Music Group v Jining’s Window Information Ltd**

The Beijing High Court’s position was not followed by the Supreme Court. In 2005 Universal Music Group sued Jining’s Window Information Ltd, a service provider that also provided links to sound recording files stored on other publicly available websites. The plaintiff did not notify the defendant of the claimed infringing nature of the linked music files before commencing the lawsuit.

The judges in the Jining Intermediate Court were divided over whether the defendant had infringed the plaintiff’s right of network communication. Some judges supported the views of the Beijing No 1 Intermediate Court in *Universal Music Group v chinamp3.com* in that providing links to infringing works was not merely providing a corridor to the works, but was a communication of the works. These judges believed that because the defendant was negligent in reviewing the legality of the linked resources, the defendant was therefore responsible

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31 Ibid.
for its act of communicating works to the public through the Internet.\textsuperscript{32} Other judges opposed the above view and stated that (emphasis added):

‘Providing links involves neither uploading music files (to a website server) nor communication (of works through the Internet). Since Internet websites are publicly accessible, interconnected and provide numerous types of information, it is impractical to request that the service provider identify and filter infringing files from among its linked resources. Thus the act of providing links itself is not an infringement of others’ copyright. However since the link providers are technically capable of controlling the linkage between its website and others’ websites, the link providers are obliged to take measures to disable the link immediately after becoming aware that the linked files are infringing. Only when the link provider does not disable the link in good time, and this results in the infringing files being further communicated, is the link provider liable for infringement. In the present case, the plaintiff did not warn the defendant in any manner, and the defendant disabled the links immediately after it was served by the claimant. In accordance with the Networks Copyright Interpretation, the defendant should not be liable for infringement.’\textsuperscript{33}

Since the judges were divided in the Jining Intermediate Court, they asked for instruction from the Shandong High Court, which in turn referred the inquiry to the Supreme Court. On 2 June, the Supreme Court made a reply to the Shandong High Court and then forwarded the reply to all the other courts. The reply states that (emphasis added):

‘When the Internet service provider has actual knowledge of the infringing activity (of others), or continues to provide links (to infringing files) after the copyright owner sent it a warning of claimed infringement with good evidence, (the courts) may

\textsuperscript{32} (Supreme Court’s) Instruction: Whether Jinning Window Information Ltd’s Act of Providing Links Infringes the Right of Network Communication Owned by the Sound Recording Producer and How to Calculate the Amount of Damages, Document No 7 (2005), Shandong High Court.

\textsuperscript{33} Ibid.
impose liability on the service provider in accordance with Article 4 of the Networks Copyright Interpretation.\(^{34}\)

The reply from the Supreme Court left alone the question of whether the act of providing links to works is an act of communicating works to the public. The reply did affirm that the service provider’s ‘actual knowledge’ of the infringing nature of the linked resources, which can only be proved by serving a notice in advance, is necessary to impose any liability on the service provider. In other words, even if the service provider is fully aware of the facts or circumstances from which the infringing nature of the linked resources is apparent, and the service provider ‘should have known’ or ‘must have known’ of the infringement, no liability can be imposed on the service provider unless the copyright owner issues a notice.

This position contradicts the Beijing High Court’s decision in Universal Music Group v chinamp3.com. However since the Supreme Court’s official reply is binding on the lower courts, the reply remains effective unless it is overruled by new legislation adopted by the National Peoples’ Congress or the State Council, or a new judicial interpretation is issued by the Supreme Court. Thus the only way to establish that the service provider has ‘actual knowledge’ of the infringing activity that occurs on the linked website is to send a notice to the service provider providing the linking service. Also damages can only be calculated from the date the service provider refused to disable the links to the infringing resources, no matter how obvious the infringing nature of the linked resources is, or how much profit the service provider made before receiving the notice.

The implication of the new question on linking service and P2P service

Since the key question of ‘who communicates works to the public through the network’ is not clearly answered by the Copyright Law 1990 (amended 2001) or the Supreme Court, the Chinese courts have a difficult task in deciding challenging cases.

\(^{34}\) Reply No 2, the Third Court of Civil Branch, Supreme Court (2005).
Push Sound Co v Baidu

Baidu.com is not only a NASDAQ-listed firm, but also the biggest web search engine in China. In addition to maintaining an ordinary search mechanism similar to Google and Yahoo, Baidu also provides an ‘MP3 search service’ (http://mp3.baidu.com). When a user types the titles of popular songs in the search box, a list of links to sound recording files with the same or similar titles is displayed, along with a description of the size, format (MP3, WMA or RM) and connection speed of the linked files. After clicking the link, the linked music files would be downloaded from the remote website on which they were stored onto the user’s computer.

Below the search box there are also music charts including New Singles Top 100, Singles Top 500, MP3 Chart and Chinese Singles Chart, as well as a catalogue of popular artists. After clicking on a chart a user would see a list of music files ranked in order of popularity. By clicking the artist’s name a user could then view music files arranged in alphabetical order by song title. By clicking a song title the user could begin downloading the linked music file onto their personal computer.

Push Sound - an EMI subsidy company - found that 46 songs from sound recordings it had produced could be downloaded through the links located on Baidu’s website. In June 2005 Push Sound sued Baidu for infringing its exclusive right to communicate sound recordings to the public through the Internet. As the factual background of this case is very similar to Universal Music Group v chinamp3.com, the court had the opportunity to clarify whether the link provider communicates the linked work to the public.

However the Beijing Hadian District Court's analysis of the case was ambiguous. On one hand, the court pointed out that ‘the act of providing links only involves the titles of songs and the names of artists, not the content of the song which should not be deemed an infringement’. On the other hand, the court emphasised that the defendant’s service was not ‘introducing the artistic value of the music files in question and providing information’, but for ‘making profit by exploiting MP3 files’, which ‘goes beyond what a search engine should do’. The court said that the defendant in providing the linking service did not confirm the legality of the MP3 file sources in advance or obtain
the plaintiff’s consent, and that since the service ‘impedes the plaintiff in communicating its sound recordings through the Internet’, the defendant’s act was infringing.\(^{35}\)

No clear legal grounds for the judgement can be inferred from the above reasoning, and the language used by the court could impose copyright liability on any search engine. For example, since Google’s ‘image search engine’ can ‘introduce the artistic value’ of an image and enable a user to locate and download the image file itself, Google could be considered to be ‘exploiting’ image files. It should be noted that Google does not seek the consent of the copyright owner of on-line images or confirm the legality of the on-line images in advance either. Should Google be liable for infringement of copyright in the images simply because it provides an image searching service and ‘impedes the plaintiff communicating its image through the Internet’?

It appears that the only possible basis for the judgement is the fact that when the music file begins to download, a pop-up window claims that the MP3 file comes from mp3.baidu.com. It is reasonable for the court to assume that the downloaded files are stored on the defendant’s server and that the defendant uploaded these infringing music files onto its server.\(^{36}\) If this were the case, the defendant would be held to have communicated sound recordings to the public through the Internet and would have thus violated the plaintiff’s copyright in the sound recordings.

On appeal it would be easy for Baidu to overthrow this assumption by proving that all the downloadable music files are stored on remote websites.\(^{37}\) Without first clarifying whether Baidu communicates music files to the public by providing links to the music files, it is nearly impossible for the court to give a sound judgement.

\(^{35}\) Beijing Haidian District People’s Court, Civil Judgment (2005) Hai Min Chu Zi No. 14665.

\(^{36}\) Regrettably, although the judgment mentioned this fact, it did not clarify its legal significance. Thus the real legal ground of the judgment is still questionable.

\(^{37}\) Baidu has already appealed the ruling of the first instance to Beijing No. Intermediate Court, but at the time of writing, no decision had been delivered.
Push Sound Co v Fashionow

The Fashionow Company is China’s version of Napster. Like Napster, Fashionow facilitates the transmission of MP3 files between its users through its free distribution of the P2P music share software ‘Kuro’. Any user who has installed Kuro and paid the service fee necessary for registration can search for and download MP3 music files stored on other users' computers through the Internet. After the user has downloaded the MP3 files, these files are then available for downloading by other Kuro users, provided the user is logged onto the Kuro system. Kuro appears to operate in a similar manner to Napster rather than Grokster, since it depends on Fashionow’s server to search for MP3 files. The trial court, Beijing No. 2 Intermediary People’s Court, held that the two defendants should be liable for copyright infringement because they were providing the ‘Kuro’ software and platform and making profits through the platform.

In what was the first case in China to involve copyright infringement of a P2P service provider, Push Sound claimed that Fashionow infringed its right of network communication. Interestingly the claim in this case is the same as that in Universal Music Group v chinamp3.com and Push Sound Co v Baidu, and the plaintiff did not allege that the defendant assisted or contributed to the users’ copyright infringement. As a result there still remains the question of whether the defendant communicates music to the public through the Internet. Here the defendant only facilitated communication by providing the Kuro software and ‘search index’ service through its server. There is no clear answer to the whether such facilitation is deemed communication.

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38 See Beijing No. 2 Intermediary People’s Court, Civil Judgement (2005) Er Zhong Min Chu Zi No. 13739.
39 This is disclosed by the criminal judgment delivered by Taiwan Taipei District Court, since the Kuro software distributed in Taiwan and Mainland China is the same. However, this conclusion has not been affirmed by the court in Mainland China. For more information, see the Taiwan Taipei District Court Criminal Judgement 92 Nian Du Su No. 2146.
40 See Beijing No. 2 Intermediary People’s Court, Civil Judgement (2005) Er Zhong Min Chu Zi No. 13739.
SUGGESTION ON APPROPRIATELY IMPLEMENTING THE WCT ARTICLE 8 IN CHINA

Only the uploader communicates works to the public through the network

One of the keys to resolving the above two cases and future cases involving Internet service providers liability is to determine whether and when a service provider communicates works to the public through the Internet. As mentioned, the Beijing No 1 Intermediate Court and some judges in the Jining Intermediate Court argued that when a service provider enables users to directly download music files by clicking links to these files, the service provider communicates the music to the public through the Internet.

This conclusion, which is wrong, is the result of misunderstanding the wording of ‘makes work available’ in Article 8 of the WCT. If the act of providing links was communication, then the act falls under the direct control of the right of network communication. It follows that anybody who provides a link to an infringing file is directly infringing the right of network communication, regardless of their intent.

The judge responsible for delivering the opinion for the Beijing No 1 Intermediate Court in Universal Music Group v chinamp3.com41 wrote a commentary in which he declared that ‘the defendant directly performed the infringing act’.42 If that was the case, the court’s discussion of negligence in concluding that the service provider (the defendant) infringed upon the copyright would be redundant, because the intent to infringe is not a condition necessary to constitute a direct infringement. Obviously, that conclusion is not only absurd, but also a disaster for search engines since it is impossible for search engines to avoid providing links to infringing works.

In my view, only the act of uploading or otherwise copying works onto a publicly accessible server or ‘shared directory’ on a personal computer hard drive, which the public can access at a place and time chosen by them, is the act of communicating works to the public. Any other acts which facilitate this act, including providing links to these works and distributing P2P software with a ‘search index’ service, would not fall within the category of communicating works to the public.

In the case of links, even if all of the users access the work stored on a remote website through the links provided, it is those responsible for uploading the works to the remote website that have communicated the works to the public through the Internet. Link providers only facilitate the existing communication; they do not make new communication.

In *Universal Music Group v chinamp3.com* the Beijing No 1 Intermediate Court made an analogy between a remote website to which links are provided and a ‘periphery storage’ (like a removable hard disk drive) to which a personal computer is connected. Just like the operator of the personal computer, who in choosing content from the removable hard disk to display on the computer is responsible for what the computer screen shows, the service provider in choosing specific files on the remote website and creating links to those files communicates them to the public.

The analogy for ‘periphery storage’ is flawed: but for the act of the personal computer operator, others would have no access to the content stored in the removable hard disk. In sharp contrast to this, even if the service provider removed or disabled all the links to the files stored on the remote website, users are still able to log on to the remote website and access those files. As the Beijing High Court noted in the *Universal Music Group v chinamp3.com* appeal, if the remote website employs a code to restrict access to the files or deletes the files, the links to these files will no longer enable users to get them.

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44 Beijing No 1 Intermediate Court does not say this specifically in *Universal Music Group v chinamp3.com*, however this is what the analogy means.
A new analogy might be useful to clarify who is the communicator of works. In the traditional paper environment, if a bookshop sells pirated books it distributes works to the public by selling pirated copies without the copyright owner's consent, and thereby infringes on the exclusive right of distribution. If another shop sells a map with the location of the ‘pirated bookshop’ clearly marked, or drives customers to the ‘pirated bookshop’, this shop does not directly infringe the right of distribution of the copyright owner. Provided the shop does not sell pirated books itself, the shop’s actions, including providing the map or sending customers over, only facilitates and contributes to the act of distribution performed by the pirated bookshop. It is only a contributory infringement of the right of distribution if the shop knows, or should have known that the other bookshop is infringing upon others copyright.

The Federal Court of Australia recently confirmed this reasoning in Universal Music Australia Pty Ltd v Cooper. Like the Chinese Copyright Law 1990 (amended 2001) the Australian Copyright Amendment (Digital Agenda) Act 2000 introduced a new ‘right to communicate the work to the public’. ‘Communicate’ is defined as including ‘(to) make available online a work or other subject matter’.

The factual background of this Australian case is very similar to that of Push Sound Co v Baidu, in that a music website provided highly structured links to music sound recording files stored on remote websites. The copyright owner claimed that the operator of the music website (Mr Cooper) directly infringed on the copyright in the music sound recordings by communicating these recordings to the public. In reply Judge Tamberlin stated that:

‘I am not satisfied that the Cooper website has "made available" the music sound recordings within the meaning of that expression. It is the remote websites which make available the sound recordings and

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45 Universal Music Australia Pty Ltd v Cooper [2005] FCA 972 [57].
46 Copyright Act (Cth) ss 31(1)(a)(iv), 31(1)(b)(iii). In relation to second recordings copyright, see s 85.
47 Copyright Act (Cth) s 10(1).
from which the digital music files are downloaded as a result of a request transmitted to the remote website.  

“The music sound recordings have initially been made available to the public by being placed on the remote websites . . . the digital music files to which links were provided on the Cooper website were also available to users through the Internet generally.”

There is no reason why the same conclusion cannot be reached by Chinese courts since the ‘right of network communication’ in China and the ‘right to communicate the work to the public’ in Australia both originate from Article 8 of the WCT.

‘Red flag’ test should be applied to determine ISP’s knowledge of infringement

Article 4 of the Networks Copyright Interpretation requires content service providers to have ‘actual knowledge’ of the infringement before imposing liability on the service provider as the joint tortfeasor. The reply given by the Supreme Court in Universal Music Group v Jining’s Window Information Ltd extends this rule to service providers who have created or maintained links to other websites. As a result, the copyright owner of the linked work cannot succeed in a lawsuit against the website operator who has provided the links, unless the copyright owner has already sent a warning to the website operator.

In my opinion, such interpretations do not strike a proper balance between the policy of protecting the interest of the copyright owner and promoting information technology. A notice sent by the copyright owner is not the only way to prove the service provider had actual knowledge of the infringing activities that occurred on remote websites. On many occasions, either the surrounding circumstances or common sense would cause a reasonable person in the same position to have known that infringing activities were taking place. When a service provider should have known of the infringing nature of the files stored on remote websites but has still created or maintained the links to these files, it is unfair to overlook the obvious fault of the service provider and

49 Ibid [63].
50 Ibid [64].
exempt its liability for contributory infringement, while allowing the service provider to make a profit from facilitating communication of the infringing files from the remote website.

In the United States Senate Report on the The Digital Millenium Copyright Act 1998 (DMCA),\(^{51}\) the so-called ‘red flag’ test is described as the ‘applicable knowledge standard’:

‘If the service provider becomes aware of a "red flag" from which infringing activity is apparent, it will lose the limitation of liability if it takes no action . . . in deciding whether those facts or circumstances constitute a "red flag" - in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances - an objective standard should be used.\(^{52}\)

The Report goes on to apply the red flag test to ‘information location tools’ including the directories or indexes of on-line sites or material (emphasis added):

‘A service provider would qualify for this safe harbor if, among other requirements, it "does not have actual knowledge that the material or activity is infringing" or, in the absence of such actual knowledge, it is "not aware of facts or circumstances from which infringing activity is apparent." Under this standard, a service provider would . . . not qualify for the safe harbor if it had turned a blind eye to "red flags" of obvious infringement.\(^{53}\)

‘The important intended objective of this standard is to exclude sophisticated "pirate" directories which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted from the safe harbor . . . Because the infringing nature of such sites

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\(^{53}\) Ibid 48.
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would be apparent from *even a brief and casual viewing*, safe harbor status for a provider that views such a site and then establishes a link to it would not be appropriate.\(^\text{54}\)

‘The common-sense result of this ‘red flag’ test is that . . . if, however, an Internet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a "red flag".\(^\text{55}\)

In a digital era where the standard of ‘knowledge’ or ‘fault’ of Internet service providers is highly harmonised across the world, if the Chinese legislature and courts were to deny the ‘red flag’ test this would not allow for the effective protection of copyright over the Internet.

Taking Baidu’s case as an example, Baidu manually created such categories as ‘list of artists’ and organised links to the sound recording files. When the name of an artist is clicked, all the song titles contained in the album will be displayed. Clicking a title will begin the process of downloading the sound recording file from a remote website. Since these artists are the most popular singers in China and work for major record labels it is highly unlikely that these record labels would consent to a website making their sound recordings freely available for downloading. Baidu, after having *a brief and casual viewing* of the artists’ names and song titles would have realised the infringing nature of the linked sound recording files. In other words, the artists’ names and song titles which were displayed in Baidu’s categories constitute ‘red flags’ which Baidu should have noticed. However, Baidu turned a blind eye to the ‘red flags’ of what was obviously linked, pirated sound recording files. As a result, Baidu should be held liable, because it was through providing or maintaining links that Baidu contributed to the direct infringement of the right of network communication that was performed by remote websites.

In contrast, the ‘search box’ provided by Baidu is specially designed to search audio files over the Internet and does not constitute an act of contributory infringement. Before a user types a keyword in the ‘search box’, the results of automatic searching remain unknown. The links

\(^{54}\) Ibid.
\(^{55}\) Ibid.
displayed might point to popular sound recording files which were uploaded onto remote websites without authorisation, but they might also refer the user to lawful audio files, such as sound clips of a speech given by President Bush. Without the copyright owner sending a notice stating that the URL is associated with allegedly infringing files, it is unjustified to assume that Baidu intended to facilitate the communication of infringing sound recordings. Apparently Baidu’s ‘audio files search box’ is just like a Sony Betamax VCR which is ‘capable of commercially significant non-infringing uses’. Without further evidence of Baidu’s intent to promote infringement occurring on remote websites, as Grokster and StreamCast Networks did, the court should not hold Baidu liable for copyright infringement.

Fortunately the Communication Right Regulation does not seem to base the liability of contributory infringement on ‘actual knowledge’ of the infringement. In Article 22 it provides (emphasis added):

‘A network service provider which provides an information storage space to a service recipient, thus enabling the service recipient to make available to the public through information network a work, performance, or sound or video recording, and which meets the following conditions, bears no liability for compensation:

…

(3) it does not know or has no reasonable grounds to know that the work, performance, or sound or video recording made available by the service recipient is an infringement;

…’

Article 23 further provides (emphasis added):

‘ A network service provider which provides searching or linking service to a service recipient and which, upon receiving a written notification of the right owner, disconnects the link to an infringing work, performance, or sound or video recording in accordance with the provisions of these Regulations bears no

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56 442, 78 L Ed 2d 574, 104 S Ct 774.
liability for compensation; however, if it knows or has reasonable grounds to know that the linked work, performance, or sound or video recording is an infringement, it shall bear the liability for contributory infringement.’

Compared to the Networks Copyright Interpretation and the Supreme Court’s reply in Universal Music Group v Jining’s Window Information Ltd, the Communication Right Regulation shifts the burden of proof to the service provider. In other words, when the website operated by the service provider provides infringing materials or links pointing to infringing materials, the service provider should bear the burden of proving that it does not know these materials are infringing. In addition, the copyright owner is able to prevail by proving that the service provider ‘has reasonable grounds to know’ the infringing materials and has failed to take down or disable access to the material. If the Regulation is adopted it would be a great step forward in protecting copyright in the digital environment. However, the standard of ‘should have known’ requires further clarification either through future judicial interpretation or specific cases.

CONCLUSION

As this chapter highlights, China has done much to meet international standards by introducing the network communication right. In the next few years, we will see the scope and meanings of this right further refined in China.