

Ladies and Gentlemen,

Good afternoon!

First, on behalf of Mr. Weng Cailin, my boss, I would like to express his apology for not being here because he is at court right now. In that case, I will give this speech on behalf Mr. Weng Cailin.

Thank IPLC to give me this opportunity to “teach fish how to swim”. I feel flattered to sit here to give this speech on behalf of Mr. Weng, Cailin. If you find any point interesting, that is my effort. Otherwise, it’s my boss’ fault.

I would like to start with a case decided 3 months ago in Shandong, China. Shandong TV sue China Unicom (Shandong) for unfair competition. Shandong TV claimed that Shandong Unicom have been pirating their 4 channels in the past few years. Shandong High people’s court ruled that Shandong Unicom constituted unfair competition and issued an injunction against Shandong Unicom, at the same time, issued 50 million RMB (7.5 million US Dollars) compensation for Shandong TV. This is the first case where a broadcaster wins a telecom company for signal piracy in their IPTV service. That is a remarkable success for broadcasters, at least in China.

The case gives rise to our topic today. How to protect broadcasters against online piracy? This problem comes along with the information revolution. Previously, information travels with analog signals through air and cable. That is the time when Rome Convention came out. Later, we have digital signals, so information travels through a cable what we call “a coaxial cable” and a STB. Now, almost all information travels through a network cable and Wi-Fi generated from a router. The way that information travels is challenging traditional broadcasting channels. There two scenarios, the first one is unlawful retransmission and the second one is unlawful interactive streaming.

First, unlawful retransmission. I believe this is the most headachy problem for all broadcasters. Normally, in China, there are two forms of retransmission. The first one is IPTV where a broadcaster will establish a “integrated broadcast and control system” and the system will collect

different signal sources all over China and then retransmit through information network operated by licensed telecom company. Most signals are encoded but the problem is that there is not a physical barrier in the world of network. Some unlicensed telecom companies and/or websites will pirate the broadcast and retransmit, simultaneously via network operated by itself after decoding the signals. It is obvious that live stream is vitally important for broadcasters, especially for those time-valued broadcasts, such as sports games, award ceremonies. Pirated webcasting will definitely divert TV subscribers to different websites and Apps. BBC once claimed that because of rampant unauthorized broadcasting, performers and sport event organizers do not even want to authorize BBC to broadcast their performance and sport events.

Another form of piracy is unlawful interactive streaming which is ubiquitous all over the world. Most major broadcasters, such as CCTV, operates websites and applications to webcast their own channels and programs, for example cctv.com and C-Box (app). At the same time, other websites may also have access to some of those broadcasts. Some websites have a license, but most of those don't.

However, in China, this problem fits nowhere under copyright law. First of all, according to Copyright Law of China, A radio/TV station is entitled to prohibit the act of rebroadcasting the radio or television which it has broadcasted if it is not be permitted. How to define rebroadcasting? According to Rome Convention, “‘rebroadcasting’ means the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.” In that connection, “rebroadcasting” shall mean that one radio/TV station broadcasts another radio/TV station's broadcast simultaneously. In that case, a telecom company is not even a proper defendant for infringement of right of broadcasters. What a ridiculous conclusion.

Secondly, there is a huge dispute on whether rebroadcast/retransmission shall extend to computer network. Right now, according to Rome Convention and other international treaties, rebroadcasting does not extend to computer network, which is ridiculous. It is difficult to understand that webcasting, a more widely communication method with more serious

infringement result and damage, comparing with traditional broadcasting, is not governed by any international treaty.

Thirdly, in China, there is a policy called “tri-network combination”, which is a combination of telecom network, cable TV network, and computer network. It is impossible to distinguish whether a TV signal, an internet signal, or a phone call comes through that cable. This makes the situation more complex.

So facing unprecedented challenges, how will a broadcaster fight against online piracy?

With respect to the identity of defendants, I have three arguments.

First of all, at the time Rome Convention was signed, there is only technology to broadcast is wireless broadcasting, not even cable broadcasting. Also, the entities who possess the tech are radio/TV stations. So at that time, member countries was not able to foresee that a kind of tech called internet would come out. On the other hand, whether an entity is a broadcaster is usually determined by its license issued by relative administrative department, such FCC in the U.S., or Ministry of Industry and Information Technology and SAPPRT in China. There is no reason for a legally licensed entity violating a civil code provision whereas an entity, without such license, not violating the same provision by acting the same conduct.

Secondly, Rome Convention offers a minimum protection for Broadcasters of Member States. It doesn't prevent domestic laws provide higher protection for Broadcasters. For example, in the U.S. and U.K., broadcast enjoys almost the same protection with copyrighted works. Article 21 of Rome Convention states that “the protection provided for in this Convention shall not prejudice any protection otherwise secured to performers, producers of phonograms and broadcasting organizations”. From my prospective, this article shows that Rome Convention encourages member states provide more comprehensive protections for broadcasters.

Last but not the least, in SCCR 27/2, *A Working Document for a Treaty on the Protection of Broadcasting Organizations*, the proposed definition of “retransmission” is “the transmission by

any means by any person other than the original broadcasting organization for reception by the public, whether simultaneous or delayed” or “the simultaneous transmission for the reception by the public of a broadcast or a cablecast by any other person than the original broadcasting organization; simultaneous transmission of a rebroadcast shall be understood as well to be a rebroadcast”. The identity expression of pirates has been abandoned because there is no reason to limit rebroadcasting with traditional broadcasters.

With respect to the connotation of rebroadcasting, I think

First of all, thank god someone is work on this. SCCR has been discussing a Treaty on the Protection of Broadcasting Organizations since 1998. The latest version is Working Document for a Treaty on the Protection of Broadcasting Organizations drafted in 2014 the countries have not reached consensus yet. All countries agree that broadcasters shall have exclusive right to authorize retransmitting their signals, however, the definition of retransmitting have not been determined. There is a long way to go to pass the treaty, but the expansion of connotation of “retransmission” is expectable.

Secondly, I would like share two cases with you. The first one is in the UK and the second one is in France.

ITV Broadcasting Ltd v TVCatchup Ltd. which involved the unauthorized streaming of broadcasts over the internet by a third party. TV Catchup (TVC) operates an online platform that retransmits intercepted terrestrial and satellite TV channels, enabling subscribers to watch "near-live" UK television on their computers, tablets, mobile phones and other devices. Several UK commercial broadcasters brought proceedings before the English High Court contending that the streaming of their broadcasts is an unauthorized “communication to the public” of their copyright works. The English High Court referred a question that, whether there was a “communication to the public” in the case where an organization such as TVC, in full knowledge of the consequences of its acts and in order to attract an audience to its own transmissions and advertisements, streams over the internet broadcasts to members of the public who would have been entitled to access the original broadcast signal using their own television sets or laptops in their own homes, to the European Court of Justice (ECJ).

ECJ answered the question as follows:

The concept of “communication to the public” must be interpreted as meaning that it covers a retransmission of the works included in a terrestrial television broadcast

- where the retransmission is made by an organization other than the original broadcaster,
- by means of an internet stream made available to the subscribers of that other organization who may receive that retransmission by logging on to its server.

ECJ explained that “author’s right of communication to the public covers any transmission or retransmission of a work to the public not present at the place where the communication originates, by wire or wireless means, including broadcasting.” “a given work is put to multiple use, the European Union legislature intended that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorized by the author of the work.” “Given that the making of works available through the retransmission of a terrestrial television broadcast over the internet uses a specific technical means different from that of the original communication, that retransmission must be considered to be a ‘communication.’”

As can be seen this case turned on the interpretation of Article 3(1) of the Information Society (Info Soc) Directive which relates to the rights of authors to authorize or prohibit the communication to the public of their works. That is because under the law of the UK, a broadcast is a copyright work and enjoys the rights of other copyright works. In other Member States the law relevant to this case is that contained in Article 3(2): the making available right, Member States shall provide for the exclusive right to authorize or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(d) for broadcasting organizations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

It would seem logical to conclude from this that the same reasoning would apply to the interpretation and application of the “making available” right granted to broadcasts in Article 3 (2) of the Info Soc Directive. This conclusion is also supported by certain provisions of the Preamble to the Info Soc Directive:

*(24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.*

*(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonized protection at Community level. It should be made clear that all rightholders recognized by this Directive should have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterized by the fact that members of the public may access them from a place and at a time individually chosen by them.*

The second one is France Television v. Playmedia

France Televisions is the broadcaster of France 2, France 3, France 4, France 5 and France O. It publishes its own programs and audiovisual works produced by third parties and benefits on all of its programs. Playmedia offered a service of direct diffusion, free and without subscription, of television channels accessible on Internet.

The court ruled that FT enjoyed related rights protection in all its programs as an audiovisual communications enterprise under Art. L 216-1 and the right of authorizing the broadcasting of its programs included the right to control direct retransmission on the Internet. Article L216-1 (of the French law) must be interpreted in the light of Article 3(2) of the Info Soc Directive.

Paragraph 24 of the Preamble to the Info Soc Directive provides that : “The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

It therefore follows from the (Info Soc) Directive that (in France) an audiovisual communications enterprise enjoys the right to authorize the making available its programs to the public on line and on demand.

The law in France has been extended by the Info Soc Directive Article 3 (1) so that even the related right for broadcasters in existing French law now gives French broadcasters the ability to control retransmission and rebroadcasting of their broadcasts. That is more than is required by the EU Directive itself so it is the combination of existing French law and the EU Directive which now provides the solution.

Finally, Semma told me that she wanted me to talk about a significant progress on the right of broadcasters in Chinese copyright law. As far as I can remember, China has been discussing to revise the copyright law for at least 5 years. The latest version is a draft of 2014 where broadcasters are provided with the right to “authorize or prohibit the making available to the public by wire or wireless means, in such a way that the public may access them from a place and at a time individually chosen by them”. This draft has not been approved by the NPC, the National People’s Congress of PRC, and there is no proposed bill to pass the latest version on the NPC of this year, which is underway last week and this week. In that case, will focus on the effecting version Copyright Law of PRC (2010). Let’s take a look at this flow chart, before the effecting version, there were two versions of Chinese Copyright Law, 1991 and 2001. In 1991 version, there is no right of information network dissemination because Internet came into commercial service in 1992. At that time, broadcasters in China have the right to authorize other broadcasters to broadcast its programs. In 2001, the right of information network dissemination came into copyright law and broadcasters have right to prohibit unauthorized rebroadcasting of their broadcasts. In 2010, internet became a vitally important way for information dissemination and the right of broadcasting organizations in Chinese Copyright Law had not been changed at all.

Now, please allow me to leave our topic for one minute and give you a brief introduction of a network company, CCTV.COM/CNTV.CN. This internet company is a full subsidiary of CCTV and they are focusing on, according to their bio, rebroadcasting CCTV channels and programs through information network.

Back to our topic, what I can refer from the fact is that internet retransmission/rebroadcast was ubiquitous no later than 2006. The effecting Copyright Law of China was revised in 2010 and it did not change a single word for Articles related to broadcaster. Does that mean that legislators imply that the “rebroadcast” in Article 45 includes the behavior of retransmission of broadcasts through information network? I have the reason to believe that the connotation of “rebroadcasting” shall include retransmission by information network.