

# Chinese Copyright System: Anglo-American or Continental European model?

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## I. Introduction

The current Copyright Law of the People's Republic of China, originally dated 7 September 1990<sup>1</sup>, has in the meantime been amended twice: the first Amendment Law is dated October 27, 2001<sup>2</sup>, the second and very recent Amendment of the Law is dated February 26, 2010<sup>3</sup>. We refer here to the text of the law as amended in 2001 and again in 2010, in which changes have been made twice in the numbering of the articles as compared with their respective previous text.<sup>4</sup>

The adoption of the original version of the Chinese Copyright Law as of 1990 was followed by the accession of China to the Berne Convention (Paris text) with effect from 15 October 1992. Shortly after the adoption of the first amendment of its Copyright Law in 2001, China also acceded to the World Trade Organization (WTO), which automatically also meant its accession to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)<sup>5</sup> with effect from 11 December 2001. In addition, with effect from 9 June 2007, China has also acceded to the WIPO Treaties, namely the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, with 20 December 1996 the date of international adoption of the WIPO Treaties.

Although the modern copyright laws around the world resemble each other in many respects, they are greatly different from each other in structural and, more importantly, in substantive nature. As is generally known, on the basis of a worldwide comparison of the copyright systems, we can distinguish today essentially between the copyright approach and the *droit d'auteur* or author's rights approach of copyright regulation. The copyright approach prevails in the Anglo-Saxon and other common law countries, in particular the United States of America and the United Kingdom. The *droit*

*d'auteur* or author's rights approach prevails in the Continental European countries, and in South American countries, as well. From that point of view it appears particularly interesting to ask what kind of approach is followed by the Chinese Copyright Law. Does it belong to the "copyright law or common law family" of copyright regulation, or rather to the "Continental European family", or is it simply a regulation of its own?

However, from the beginning, we would have to underline that placing a country's copyright legislation within one or the other system can never be made without reservations. Every country has its own legislative traditions and economic conditions, and, from that point of view, one will always find that the copyright regime, as in other fields, is a regulatory scheme that fits the needs of the country concerned as those needs are understood by the competent regulators and legislators.

Consequently, even within the group of the copyright countries and within the group of the *droit d'auteur* countries one can find sometimes more than only marginal differences in structure and content of copyright legislation. Let us give only some examples: both the U. S. A. and the U. K. are typical cases of a rather utilitarian, more producer-oriented and less author-oriented method of copyright legislation, but, still, there are important differences. The US Copyright Law<sup>6</sup> realises the shift from (flesh-and-blood) author protection to producer protection in a general way by using the famous "work-made-for-hire" rule, whereby in the numerous cases concerning that rule the producers are simply "considered" as "authors"<sup>7</sup>.

In contrast, the UK Copyright Law<sup>8</sup> addresses the author-producer conundrum in two different ways: first by a more narrowly construed clause on employed authors (Sec-

tion 11 (2) CDPA) in the traditional field of literary, dramatic, musical and artistic works whereby the employer is declared the first owner of copyright *ex lege* without being termed as author at the same time. Thus the true flesh-and-blood authors retain at least a minimum of their original status. Second, somewhat paradoxically, the UK law (Section 9(2) CDPA) extends, in other fields, the concept of “author” to a series of producers or makers (of sound recordings, films or broadcasts, etc.), who, under the Continental European law, are conceived as owners of neighbouring or related rights.

Finally, the UK law contains a whole chapter on moral rights<sup>9</sup>, which, in spite of certain critical provisions (such as the general waivability of moral rights<sup>10</sup>), has brought that law much nearer to the Continental European type of regulation, whereas the US law, apart from the relatively restricted field of artistic works<sup>11</sup>, regrettably until today has no systematic regulation of the moral rights<sup>12</sup>.

As far as the Continental European copyright regulation, which is more of an author-oriented human rights type and less producer-oriented type, is concerned, we sometimes can also find important differences from country to country. They concern, for example, the differentiation between the so-called “monistic” interpretation of copyright as prevailing in Germany and a number of other countries of Central Europe (such as Austria, Hungary, the Czech Republic and Slovakia) and the so-called dualistic interpretation as prevailing, in particular, in France and other Western European countries (such as Belgium, the Netherlands, and Italy). The main difference here lies in the manner in which moral rights and economic rights under the copyright are interpreted in relation to each other, with important consequences for alienability and its limits in the fields of both moral rights and economic rights.<sup>13</sup>

We will not go into detail here, but would simply state from the beginning that in all probability the Chinese system will not neatly fit into any of the systems found in the world today. As a result, we can only, according to a number of criteria, show certain tendencies which will perhaps allow us to range the Chinese copyright laws more within one camp rather than within the other.

Indeed, in the era of globalisation and worldwide commercial exploitation of protected works and for almost 125 years after the beginning of the international protection system<sup>14</sup>, no country constructs its copyright law from scratch. Normally, what other countries have achieved in the field, sometimes on the basis of very long legislative traditions<sup>15</sup>, is

taken into consideration. No wonder then that the Chinese Copyright Law in its original version of 1990 and in its amended versions of 2001 and 2010 was obviously influenced by many provisions and solutions already known from the laws of other different countries, not to forget that it had an early forerunner in the late Qing Copyright Act (or better Author's Rights Act) adopted in 1910<sup>16</sup>.

From that more historic point of view it seems again fully justifiable to compare the Chinese Copyright Law with the copyright laws of other countries, particularly of those countries the laws of which are typical of the two different basic approaches, such as, in a pronounced way, the United States' Copyright Act of 1976 (as amended)<sup>17</sup>, on the one hand, and the laws of the typical Continental European countries (*droit d'auteur* countries) such as France<sup>18</sup> or Germany<sup>19</sup>, on the other.

However, since in such a short presentation a systematic and in-depth comparison and analysis of the copyright laws of several countries is simply not possible, we will only use a number of criteria according to which we can possibly decide whether the Chinese law follows a common law (copyright law) pattern or a Continental European authors' rights law pattern.

Such criteria are:

- 1) the general structure and content of copyright regulation as a whole;
- 2) an all-inclusive concept of work and author or differentiation between the copyright (the author's rights) and the neighbouring or related rights;
- 3) the creator principle, i.e. the author being almost always the first owner of copyright, or recognition of legal persons, such as employers, producers, and other organisations as the first owners of copyright or even as constructive “authors”;
- 4) general recognition or denial of the moral rights of authors;
- 5) a decidedly author-protective regulation of the copyright contract rules or insistence on freedom of contract and regulation through the market;
- 6) a detailed regulation or absence of regulation of collecting societies.

## II. Some terminological remarks

Before we begin our comparative analysis, we should take a brief look at the most interesting terminological ques-

tion, namely what technical term the Chinese Copyright Law uses for its own designation. Already during the preparation of the original text of the law as of 1990, there was some dispute in the professional circles in China whether the Chinese correspondence to the English term of “copyright”, namely “*banquan*” (版權), or rather a correspondence to the Continental European term of “*droit d’auteur*”, namely “*zhuzuoquan*” (著作權), should be used. At first glance, the decision was made in favor of the latter term, since, in lieu of “*banquanfa*” (版權法) the law carries the official title of “*zhuzuoquanfa*” (著作權法), indeed. That term of “*zhuzuoquan*” (著作權) was used already in the late Qing Copyright (Author’s Rights) Act (大清著作權律<sup>20</sup>) as well as in other Asian legislations (such as in Japan, Korea, or also Taiwan), literally translated and meaning “right in work”<sup>21</sup>, whereas a term of “*zuozhequan*” (作者權), which would directly correspond to “*droit d’auteur*”, was not used. Still, it cannot be doubted that the term of “*zhuzuoquan*” (著作權) corresponds to the Continental European term; in addition, its use in the title of the law could already be seen as a principal option for the *droit d’auteur* approach.

However, such a terminological choice must not be overestimated since Art. 57 of the Amended Copyright Law (Art. 51 in its original text of 1990) contains a very pragmatic terminological compromise, according to which for the purposes of this law the term of “*zhuzuoquan*” (author’s right) simply is “*banquan*” (copyright) (“本法所稱的著作權即版權”). That assimilation has the consequence that use of both terms in legal literature and in contractual practice is not only allowed, but also very frequent indeed; even the Chinese name of the National Copyright Administration, namely “*Guojia Banquanju*” (國家版權局), officially uses the second of the two terms.

As a matter of consequence, if it cannot be demonstrated that the apparent option in favor of “*zhuzuoquan*” (著作權) throughout the Chinese Copyright Law finds an inner justification within the substantive provisions of that law, that terminological choice of the Chinese legislators would be rather irrelevant for our purpose. If, on the contrary, a structural and substantive proximity between the Continental European and the Chinese systems can be demonstrated, one could rightly state that the obvious preference for “*droit d’auteur*” (*zhuzuoquan*) was more than only an incidental decision, exclusively oriented at the historical Chinese and the East Asian terminological usage.

### III. The general structure and content of the law (five-pillar model)

Almost all the Continental European copyright regulations, in particular the most modern ones, are structurally organised according to what I call the “five-pillar model.”<sup>22</sup> Here copyright law is understood as a comprehensive system of regulation consisting of five pillars or sub-systems, namely: a) substantive copyright law (objects, owners and content of the copyright protection, as well as its duration and limitations); b) neighbouring or related rights; c) copyright contract law; d) law of collecting societies; and e) enforcement of rights. Such a structural model is intended to establish a balanced differentiation and interrelation between all interests connected with the copyright protection, interests being partly parallel, partly antagonistic to each other. This model is typical, for instance, of the German and the French copyright regulations<sup>23</sup>.

If we compare that five-pillar model with the inner structure of the US copyright law, we can conclude that three of the five pillars are almost absent there; first, there is no systematic regulation of neighbouring or related rights since, as already mentioned, the US copyright law is based on an all-inclusive concept of works, whereby sound recordings of performances, for example, are conceived as a special type of works whose authors are the performers and/or makers of the recordings. Second, apart from certain special rules that are by no means unimportant (such as the termination right<sup>24</sup>), there is no systematic, purposefully author-protective regulation of the law of copyright contracts; third, there is also no systematic regulation of collecting societies law<sup>25</sup>. Important differences between the two systems, copyright, on the one hand, and *droit d’auteur*, on the other, become immediately visible here, so far as the general structure and content of the laws are concerned.

If we then look at the Chinese copyright regulation from that structural point of view, we have to say that - and that is already an important result in itself - to a large extent it follows the Continental European approach. That is particularly the case with its revised version of 2001 (and 2010). In addition to the provisions on substantive copyright law (Chapter 2, Arts. 9-23), in its Chapter 4 (Arts. 30-46) under the subtitle “Publication, Performance, Sound Recording, Video Recording and Broadcasting” it contains a number of provisions on neighbouring or related rights<sup>26</sup>. The provisions on

the copyright contract law are concentrated in Chapter 3 of the Law (Arts. 24-29) carrying the subtitle “Copyright Licensing and Assignment Contracts”. In addition, we can also find provisions of a contractual nature in other chapters.<sup>27</sup> Finally, at least in the revised versions of 2001 and 2010 of the law, we can find now a rudimentary regulation of the law of collecting societies in its Art. 8, a regulation which was still absent in the original version of the law as of 1990, and which in the meantime was completed and implemented by the special Regulations on Collective Administration of Copyright, dated 22/28 December 2004<sup>28</sup>. Last, but by no means the least, Chapter 5 of the Law (Arts. 47-56) deals with “Legal Liabilities and Enforcement Measures”, provisions which, visibly under the influence of Arts. 41 *et seq.* of the TRIPS Agreement, contain a much better regulation of enforcement of copyright law in China now.<sup>29</sup>

In sum, the Continental European five-pillar model is clearly recognisable in the overall structure and content of the Chinese Copyright Law, but still, we have to ask whether such a model materialises also in the concrete regulation and provisions of the Chinese Copyright Law.

#### IV. Concept of work and differentiation between authors' rights and objects of neighbouring or related rights

A logical consequence of what has just been stated is that China, in the same way as in the typical Continental European copyright regulation, differentiates between protected works of authors in the traditional sense (as defined in Art. 3 of the Law) and protected objects of neighbouring or related rights. The latter objects are essentially regulated within Chapter IV of the Law; they concern the rights of publishers in publications, or, more concretely, according to Art. 36 of the Law, in format designs of published books or periodicals, and rights of performers in performances (Art. 38), rights of producers of sound recordings and video recordings in such recordings (Art. 42) and rights of radio and television stations in their broadcasts (Art. 45). Consequently, there is neither an all-inclusive concept of work as in the U. S. A., nor an extension of the concept of authors to owners of such objects of related rights as in the U. K..

By the way, the distinction between the authors' rights and the neighbouring or related rights is already made in the programmatically tuned Article 1 of the Chinese Copyright

Law, where the political purposes behind “protecting the copyright of authors in their literary, artistic and scientific works and rights related to the copyright” are expressed. Unfortunately that term is not used in the subtitle of the relevant Chapter IV of the Law, which, of course, does not hinder such related rights from being regulated essentially in that Chapter<sup>30</sup>.

As a result, the Chinese copyright law also strongly resembles the Continental European type of regulation according to our second criterion.

#### V. The “creator principle”

Much more difficult is the situation concerning our third criterion, the so-called “creator principle”. It no longer deals with structural or terminological questions, but with one of the core substantive elements of any copyright regulation. The question here is, in what measure Chinese copyright law realises the principle. In its pure form, as realised, e.g. in the German copyright law<sup>31</sup>, it recognises the natural creators of a work as the true and original authors of it, and consequently considers them as the first owners of copyright in all relevant cases. That principle is not fully realised when other persons, in particular legal persons, such as employers, producers or other organisations are considered as the first owners of copyright in specific cases or are even considered as the authors of certain works as in the US Law, as already mentioned<sup>32</sup>.

So far as the Chinese Copyright Law is concerned, it evidently starts from the creator principle as a general rule, since, according to its Art. 11 (1), copyright in a work shall belong to the author, whereby the author of a work is defined as the citizen who has created the work (Art. 11(2)). However, the provision in Art. 11 (1) applies “except where otherwise provided in this Law”, and, as it seems, such an exceptional provision immediately follows in Art. 11 (3). Here we suddenly find the same expression as used in the U. S. “work made for hire” rule, namely that a legal entity or organisation is considered the author<sup>33</sup>, “where a work is created according to the intention and under the supervision and responsibility” of such entity or organisation.

The provisions in Art. 11 must also be related to the definition of “copyright owners” in Art. 9, a term which includes (1) authors and (2) other citizens, legal entities or other organisations enjoying copyright under the law. Of course, Art. 11(3) of the Chinese Copyright Law must also be interpreted

against the backdrop of the special rules on service works as contained in Art. 16, which, at least to a certain extent, seems to contradict with that former provision.

Indeed, in the case of employed authors, Art. 16 of the Law distinguishes between two situations: the general rule (Art. 16(1)) and the exceptions to that rule (Art. 16(2), items 1 and 2). According to the general rule, in case of the so-called service works, the creator principle seems to be retained since, according to that provision, the copyright in the work shall be enjoyed by the author, but the legal entity or organisation as employer of the author shall have a priority right to exploit the work within the scope of its professional activities. In addition to that, during the first two years after the work is completed, the author may not grant a right of use to a competing third party. At first sight, therefore, the Chinese Copyright Law does not know a general “work made for hire” rule in the sense of Sec. 201(b) US Copyright Act<sup>34</sup>; that is true at least if we consider and interpret Art. 16 (1) independently of Art. 11 (3), a question to which we will come back in the later sections.

Conversely, the exceptions to the general rule, as regulated in Art 16(2), items 1 and 2, must also be taken into consideration. Less far-reaching seem to be the exceptions as provided for in the first item, according to which in certain specific cases of service works (such as drawings of engineering design and product design, maps and computer software), apart from the right of authorship belonging to the author himself<sup>35</sup> and a possible reward from the entity or organisation, the legal entity or other organisation shall directly enjoy the rights included in the copyright, if these service works are created mainly with the materials and technical resources of the entity or organisation or under its responsibility. Interestingly, the element of responsibility of the legal entity or organisation, as already seen in Art. 11 (3), reappears here, but combined with the element of material or technical support, whereas in Art. 11 (3) it is combined with the elements of intention and supervision. We should also note that Art. 16(2), item 1 only addresses special cases of works of a rather technical nature whereas Art. 11(3) seems to be a general rule for all categories of works. Consequently there is no identity between reach and content of Articles 11(3) and Art. 16(2) item 1 of the Chinese Copyright Law.

Still, the rather general reach of Art. 11 (3) seems to contrast sharply with the rather reticent author-protective rule for general service works in Art. 16 (1). The reason for that statement is that if a work which, according to the rule in Art.

16 (1), is created by a citizen fulfilling a task assigned to him by a legal entity or another organisation, that same work, in most cases, will be created to the intention and under the supervision and responsibility of such entity or organisation, too. Not much room seems to be left for independent application of Art. 16 (1). We would like to leave that intricate question of interpretation and interrelation between Art. 11(3) and Art. 16 of the Chinese Copyright Law open for discussion with the Chinese experts.

Let us only mention, in addition, that, according to Art. 16 (2) item 2 that exceptional rule also applies to other categories of service works the copyright of which, under laws or administrative regulations or as agreed in contract, is enjoyed by legal entities or organisations. The relative vagueness of that additional provision could be looked upon critically, if it would allow that by simple administrative regulation a rather important principle of the copyright law, namely the creator principle as retained for service works as a general rule in Art. 16(1), could be set aside by rules adopted not on law level.

Finally, the special regulation concerning cinematographic works in Art. 15 of the Chinese Copyright Law must be mentioned here. Clearly the original (first) owner of the copyright in a film as such seems to be the producer; still, the film authors (script writer, director, camera man, lyricist, and composer) enjoy at least the right of authorship (the right to be named as authors), and are, at least in principle, granted a right to receive remuneration. As a consequence, also here the deviation from the creator principle in favor of the film producer is somewhat mitigated by a residual element of the moral and pecuniary rights in favor of the film authors.

Therefore, in the field of film works the Chinese solution lies somewhere in between the American solution, where the film authors, as a rule<sup>36</sup>, have no copyright status at all, and the German solution where the film authors are still the first owners of copyright in the film, but where, on the basis of some rules on presumption of transfer of rights of use to the producer, the latter is entitled to exploit the exclusive rights in the film<sup>37</sup>. In economic terms, however, the Chinese and the German solutions are very near to each other since, also under the German law, the authors retain some moral rights and the rights of remuneration.

All in all, in the field of creation within legal entities and organisations, and in the field of certain service works and film works, the Chinese Copyright Law shows a strong tendency towards a producer-oriented or organisation-oriented



regulation. That is confirmed by the fact that in such cases, under Article 21 of the Chinese Copyright Law, a separate term of protection applies, namely 50 years after publication or, in case of lacking publication, after creation. However, at least in case of the service works proper (Art. 16 (1) of the Chinese Copyright Law) and in case of film works, the moral right of authorship and some rights of remuneration or reward are retained so that the authors have at least a minimal residual position. That minimal position is, however, lacking in the case where legal entities or organisations are considered the author under Article 11 (3). One would doubt whether that latter very far reaching regulation is really necessary, but it may also be a consequence of specific sociological and economic conditions in the People's Republic of China.

## VI. Extent of moral rights protection

As far as our forth criterion, i. e. the extent of moral rights protection, is concerned, the provisions of the Chinese Copyright Law correspond very much to Continental European concepts, and are in accordance with Art. 6bis of the Berne Convention. Moral rights, such as the right of publication, the right of authorship, the right of alteration, and the right of integrity of the work are clearly granted in Art. 10(1) items (1)-(4) of the Copyright Law. In addition, the provisions in Art. 10 (2) and (3) indirectly, namely by way of exclusion, confirm that such moral rights can neither be assigned, nor licensed to other persons. That does not prevent the right of alteration as granted in Art. 10(1) item (3) from being defined as the right to alter or authorise others to alter a work, so that an element of alienability of a moral right (authorisation of its execution) is foreseen here, which of course will never mean that moral rights are alienable as a whole.

Besides, Art. 19 of the Regulations for the Implementation of the Copyright Law as of 2 August 2002<sup>38</sup> makes it clear that moral rights, concretely the right to be named, are not totally immune to contractual agreements, since the obligation of the work user to indicate the name of the author is confirmed here, "except otherwise agreed between the interested parties". It seems therefore that the Chinese copyright legislators have introduced an element of mitigation of too rigorist an application of the principle of inalienability of moral rights. Such fears, by the way, are one of the reasons that the copyright industries in the United States are so much reserved as far as moral rights are concerned.<sup>39</sup>

To sum up, the moral rights protection has an important place in the Chinese Copyright Law; hence, proximity between the Continental European concepts of copyright thinking<sup>40</sup> and the Chinese Law cannot be doubted here.

## VII. Copyright contract law

Our fifth criterion concerns the question as to what extent author-protective rules exist as part of the regulation of copyright contracts. Indeed, an important question in the context of the reform debate in China leading to the first amendment of 2001 was whether copyright should be made transferable.<sup>41</sup> One could rightly argue that, according to the original text of the Chinese Copyright Law, copyright could not be assigned to a third party. This followed almost logically from the fact that, according to the initial formulation in Art. 10 of the previous text, "copyright" includes personality rights and property rights; since personality rights (moral rights), as already mentioned, are not alienable as a whole, a right comprising both kinds of rights must necessarily also be inalienable. That result has been confirmed by the fact that the previous text of the law was absolutely silent about copyright assignment. It only regulated licensing contracts (Art. 23 *et seq.* of the previous text).

Interestingly, the text of the Chinese Copyright Law as amended in 2001 (and in 2010) has retained the initial formulation of Art. 10, namely that copyright shall include personality rights and property rights. However, the revised law has two clarifying paragraphs (2) and (3) to Art. 10 of the Law, according to which a copyright owner may not only grant rights of use (which was already foreseen before), but may also assign in part or in whole the economic rights as listed in Art. 10(1) items (5) to (17) of the Copyright Law.

But these additional rules must still be interpreted in view of the initial formulation in Art. 10 (1) which, as mentioned above, has been retained. Therefore, if as a consequence of the amended regulation individual rights of use (Art. 10(1) items (5) to (17) of the Copyright Law) can now not only be licensed, but also be assigned to a third party, copyright as a whole, comprising the personality rights and property rights, cannot be assigned in its totality as before. As a matter of consequence, contractual clauses, such as "Herewith I assign my copyright", in my view, are still not possible under the Chinese Copyright Law. Insofar as it would not be correct to state, as can often be heard, that assignment of the copyright is now allowable in China. That

statement is correct only for economic rights (property rights) under copyright, e.g. assignment of individual rights of use.

The only remaining question here is whether it would be allowed to assign all rights of use under Art. 10(1) items (5) to (17) altogether in one and the same contract. If that would be allowed, that would more or less mean, in economic terms, transfer of the whole economic potential of copyright at the same time. But even that would not amount to assignment of the “copyright” as the term is defined in the initial formulation of Art. 10(1).

Additionally, there are a number of legal guarantees called upon to protect an author against unintended and too far-going transfers of rights. For instance, under Art. 25(2) of the Chinese Copyright Law, a contract of assignment shall include, among others, the “category and geographic area of the assigned right” and, under Art. 26, the contractual partner of the author shall not exercise any right that the copyright owner has not expressly assigned in the assignment contract. Such author-protective rules are, to a large extent, comparable with similar provisions of a contractual nature in the Continental European copyright laws.<sup>42</sup>

It is regrettable, however, that the contractual chapter of the Chinese Copyright Law (Art. 24 et seq.) is not detailed enough, so that a number of problematic aspects will have to be clarified by case law in the future. Perhaps standards of remuneration could be helpful here; according to Art. 28, such standards may be fixed by the interested parties or established by the Copyright Administration Department under the State Council.<sup>43</sup> It may be of interest to note that, according to Arts. 32(2) and 36 of the German Copyright Act (as amended by the Act of 22 March 2002), associations of authors and associations of work users are allowed to establish common standards of adequate remuneration for the grant of rights of use. That would confirm that in China as in Germany we could and should have such standards, otherwise authors as the normally weaker party of a contract would be exposed to unfair contractual stipulations.

Nevertheless, there certainly exists much proximity between the Chinese and the Continental European approaches in the field of copyright contract law.

## VIII. Collecting societies law

Our sixth criterion concerns the existence and extent of the regulation of the law of collecting societies, which repre-

sents a typical feature (one of the five pillars) of Continental European copyright legislation, be it in form of a special chapter of the Copyright Law itself or in form of a special legal instrument for example as is the case in Germany<sup>44</sup>. As already mentioned, a rudimentary regulation of that important subsystem of modern copyright law is contained now in Art. 8 of the Chinese Copyright Law as amended. In addition, on the basis of the legal authorisation as contained in Art. 8 (2) of the Law, special “Regulations on Collective Administration of Copyright”, dated 22 December 2004, have in the meantime been adopted<sup>45</sup>.

Of course, a detailed analysis of these important Regulations is not intended here<sup>46</sup>; however, already the fact that Art. 8 of the Chinese Copyright Law as amended in 2001 does indeed also regulate the law of collecting societies merits to be expressly noted here. Such regulation was still absent in the previous text of the Copyright Law as of 1990<sup>47</sup>, in spite of the fact that it was felt soon that authorisation and some supervision of future collecting societies appeared necessary.<sup>48</sup> That is certainly also the result of intense debate in China on the question of how the rights granted under the Copyright Law of 1990 can be effectively realised and controlled. Let us demonstrate that by a short quotation from an article written by Xu Chao<sup>49</sup>, who, within the National Copyright Administration of China, was directly involved in the preparation of the amendment 2001:

“The organisation of collective administration of copyright is very important in the system of copyright protection. In the copyright law of the civil law countries, either a separate chapter is devoted to or a separate law is enacted for the organisation for collective administration of copyright. However, no provision was set forth in the former Copyright Law concerning the organisation for collective administration of copyright. After ten years of practice, the legislators have come to realise that this is an issue of great importance and, as a matter of course, the Amendment has provided for the nature of the organisation for collective administration of copyright, their relationship with the rights holders, legal position, and, in particular, specified that an organisation for collective administration of copyright acts in its own name, in its normal operation and litigation. Moreover, the State Council is going to formulate separate regulations for the establishment and supervision of the organization of collective administration of copyright, and its collection and distribution of royalties.”

That quotation indeed gives a clear picture of what Art. 8

Copyright Law as amended in 2001 regulates, at least in rudimentary form. The necessary details are formulated, as also indicated by Xu Chao, in the Regulations of 22 December 2004. They correspond, to a large extent, to comparable regulations in Continental Europe, in particular the German Special Act<sup>50</sup>. Once again, in the field of collecting societies law a pronounced proximity between the Chinese regulation and that of Continental Europe can be stated as a result.

## IX. Copyright and the possible codification of IP laws

To my knowledge, in China, as in Germany<sup>51</sup>, a debate has been going on the possible codification of the intellectual property legislation as a whole (including copyright). Internationally, there exist various models of such a codification, such as those in France and recently also in the Russian Federation. The French and the Russian models differ insofar as the French Intellectual Property Code (*Code de la propriété intellectuelle*) of 1992<sup>52</sup>, as its name already indicates, is a codification exclusively of intellectual property alone; the Russian codification, by contrast, is incorporated as a complement (Part Four) to an already existing codification of Civil Law<sup>53</sup>. Since, however, Part Four of the Russian Civil Code consists entirely of provisions on intellectual property, it can in and of itself also be understood as a modern intellectual property codification. The French and the Russian models are comparable, indeed.

An important intrinsic difference between the French and the Russian codifications, however, lies in the way the copyright law is dealt with. The French IP Code left copyright and its inner structure intact, since it is exclusively regulated in the First Part (*Première partie*) of the Code, and there are no common rules for copyright and the other intellectual Property rights, so to say “before the brackets”. This is an important result since copyright, as contrasted to the industrial property rights (such as patents and trademarks) has particular features due to its strong human rights bias and moral touch.

The Russian codification, on the other hand, was ambitious enough to formulate “General Provisions”<sup>54</sup> placed before the individual regulations of all the intellectual property rights (including copyright), but methodologically that is not very convincing. As I have tried to demonstrate at another occasion<sup>55</sup>, such an approach tends to destroy the inner coherence of copyright with its five “pillars”<sup>56</sup> so that important

subsystems or “pillars” of modern copyright regulation, such as the neighbouring rights, copyright contract law and collecting societies law are very loosely interrelated, if at all. In addition, they tend to be influenced by the so-called “General Provisions”, which by their very nature are not so precise as to be smoothly applied in the field of copyright.

My recommendation therefore would be that China, when studying the feasibility of codification of intellectual property as a whole (including copyright law), should see to it that the inner structure and cohesion of the modern copyright law in its very totality is not disturbed or, worse still, destroyed.

## X. Concluding remarks

Precisely with the help of the five-pillar model we could hopefully demonstrate that the revised Chinese Copyright Law has many structural features in common with the Continental European *droit d'auteur* system. Analysis of the substantive provisions does not allow a similar general conclusion. Still, there are a number of important elements, such as the comprehensive grant of moral rights of the author, author-protective features of copyright contract law and the very modern regulation of collecting societies law, which would allow, indeed, to show a clear proximity between the Chinese and Continental European approaches again.

In other contexts, in particular concerning the ownership/authorship of copyright in case of certain works of employed authors or of creation in the name of legal entities or other organisations as well as in case of film works, Chinese Copyright Law seems not far from the US or UK solutions. Since even in such situations, often (but not always) residual positions in terms of moral rights and remuneration rights are granted to authors under the Chinese law, one could perhaps come to the conclusion that the balance between authors' and producers' protection has been maintained here. Of course, a problematic feature remains in the rather radical deviation from the creator principle as provided in Art. 11(3). But, all in all, I think, the Chinese Copyright Law is rather “zhuzuoquan” than “banquan”. ■

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<sup>1</sup> Published in the State Council Gazette, 1990 No. 20 p. 744; German translation published in GRUR Int. 1990, p. 940.

<sup>2</sup> Published in GWY GB 2001 No. 33 p. 4; see also republication of the amended Copyright Law *loc. cit.* at p. 10; English translation published in China Patents & Trademarks (CPT) 2002 No. 1 p. 83; German translation published in GRUR Int. 2002, p. 23.

<sup>3</sup> Published in the Gazette of Standing Committee of the National People's Congress, 2010 No. 2 p. 158; see also the republication of the amended Copyright Law *loc. cit.* at p. 159.

<sup>4</sup> As far as the last amendment of 2010 is concerned, from the newly introduced Article 26 onward one unit each time was added to the number of the following articles so that Article 26 of the 2001 text of the law has become Article 27 and so forth.

<sup>5</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights of 15 April 1994.

<sup>6</sup> See the US Copyright Act 1976 (as amended) and related legislation, 17 United States Code, Sections 101-1332.

<sup>7</sup> Section 201 (b) US Copyright Act reads: "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright"; emphases added.

<sup>8</sup> See Copyright, Designs, and Patents Act (CDPA) 1988 (as amended).

<sup>9</sup> See Chapter IV, Sec. 77 et seq. CDPA.

<sup>10</sup> See Sec. 87 CDPA.

<sup>11</sup> See the Visual Artists Rights Act of 1990 (VARA).

<sup>12</sup> For a general discussion of the opportunity to introduce a general regime of moral rights protection see R. Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States*, Stanford 2010 (with numerous further references).

<sup>13</sup> See, in particular, A. Dietz, *Legal Principles of Moral Rights* (Civil Law). General report, in: ALAI (ed.), *Le droit moral de l'auteur/The moral right of the author*, Congress of Antwerp (1993), Paris 1994, p. 54, p. 60 et seq.

<sup>14</sup> The original version of the Berne Convention for the Protection of Literary and Artistic Works dates from 1886.

<sup>15</sup> The oldest copyright statute of the world, namely the so-called Statute of Anne of the United Kingdom dates back to 1709/1710; the oldest French copyright decrees of 1791 and 1793 stem from the time of the French Revolution.

<sup>16</sup> Text republished in: SHEN Rengan (Ed.), *A Practical Collection on Copyright*, p. 976.

<sup>17</sup> Supra note 6.

<sup>18</sup> Intellectual Property Code of 1992 as amended, Part I, Arts. L.111-1 - L.343-4.

<sup>19</sup> Act on Author's Rights and Neighboring Rights (Copyright Act) of Sept. 9, 1965 (as amended through Dec. 17, 2008).

<sup>20</sup> See supra note 16.

<sup>21</sup> See Zheng Chengsi, *The Future Chinese Copyright System and Its Context*, IIC 1984, 141, 166 f. as well as more recently the same, *Looking into the Revision of the Trade Mark and Copyright Laws from the Perspective of China's Accession to WTO*, EIPR 2002, 313, 317.

<sup>22</sup> See Dietz, *The Five Pillars of Modern European Copyright* (Authors' Rights) Protection, in: *European Writers' Congress* (ed.), *Forum Europa III. Literature Today and Tomorrow* (Budapest 2002), Munich 2003, p. 25 ff.

<sup>23</sup> See supra notes 18 and 19.

<sup>24</sup> See Sec. 203 US Copyright Act.

<sup>25</sup> Collecting societies operate under consent decrees resulting from antitrust proceedings brought against them already long ago; for details see P. Goldstein, *Copyright: Principles, Law and Practice*, 1989, p. 693 et seq.

<sup>26</sup> Those provisions are, not always very convincingly, mixed up with provisions of a contractual nature in view of the situations where the existence of neighbouring rights presupposes contracts with owners of copyright. As to the very term of "related rights" not used here see infra note 30.

<sup>27</sup> See, in particular, Art. 10 paragraphs 2 and 3; see also preceding footnote.

<sup>28</sup> Published in the State Council Gazette No. 7, 2005, P. 6; English translation in CPT 2005 No. 2 p. 94; German translation in GRUR Int. 2005, p. 472.

<sup>29</sup> See, in particular, the provisions on provisional measures (Art. 50) as well as on preservation of evidence (Art. 51) of the Chinese Copyright Law.

<sup>30</sup> Apart from Art. 1, a variant of the term of "related rights", is also used in other contexts of the Law such as in the enforcement Chapter V of the Law (Art. 47 et seq.).

<sup>31</sup> See Sec. 7 of the German Copyright Act, according to which "author is the creator of the work" ("*Urheber ist der Schöpfer des Werkes*"); there is no exception throughout the law, even not in case of computer programs (see infra note 35).

<sup>32</sup> See supra note 7.

<sup>33</sup> This is a clear and radical deviation of the creator principle, since it seems to leave nothing to the flesh-and-blood author, not even his moral rights; that rule corresponds to sec. 201 (b) of US Copyright Law. See supra note 7.

<sup>34</sup> See supra note 7.

<sup>35</sup> Insofar as the creator principle is retained even here, since the author does not totally lose his legal status. That solution, by the way, strongly

resembles the corresponding rule in the EU law as far as computer programs are concerned; see Art. 2 (3) of the EU Computer Program Directive (Directive 91/250/EEC of May 14, 1991) as implemented by all EU Member States. The corresponding German provision is Sec. 69b of the German Copyright Act; German theory interprets that solution as a case of "cessio legis" which means that there was transfer of rights ex lege, so that the author, still for a logical second, is the original owner of the copyright and thus fully retains his moral rights.

<sup>36</sup> "... unless the parties have expressly agreed otherwise in a written instrument signed by them"; see Sec. 201(b) US Copyright Act, *supra* note 7.

<sup>37</sup> See Sections 88 and 89 of the German Copyright Act.

<sup>38</sup> Published in the State Council Gazette No. 26, 2002, p. 12; English translation in CPT 2002 No. 4 p. 95; German translation in GRUR Int. 2003, p. 1008; the new Regulations replaced the preceding Regulations of May 24/30, 1991.

<sup>39</sup> See *supra* note 12.

<sup>40</sup> Here also UK legislation can be included; see *supra* note 9.

<sup>41</sup> See e.g. Xu Chao, An Overview of the Amendment of the Copyright Law in China, CPT 2002 No. 1 p. 52 *et seq.*, p. 55, and more generally, Dietz, Draft Report on the Amendment of Chinese Copyright Law, in the Intellectual Property Studies No. 10, Beijing 2000, nos. 45 and 88 *et seq.*

<sup>42</sup> See, e.g., Art. 31 (5) of the German Copyright Act (interpretation of copyright licenses according to the purpose of the contract) or Art. L. 131-3 Para. 1 of the French Intellectual Property Code (principle of specification of the rights transferred).

<sup>43</sup> I do not know, whether such standards have already been formulated after adoption of the revised law.

<sup>44</sup> See the German Act on the Administration of Copyrights and Neighboring Rights (Copyright Administration Act) of September 9, 1965.

<sup>45</sup> See *supra* note 28.

<sup>46</sup> For more details from a comparative view, see A. Dietz, Zur Neuregelung des Rechts der Verwertungsgesellschaften in China (On the New Regulation of the Law of Collecting Societies in China), in: D. Beier *et al.* (Eds.), Festschrift für Jochen Pagenberg, Cologne etc., Germany 2006, p. 399 *et seq.*

<sup>47</sup> See text at note 28 *supra*.

<sup>48</sup> On the basis of Art. 7 item 3 of the original Regulations for the Implementation of the Copyright Law of May 24/30, 1991 (see *supra* note 38) the National Copyright Administration of China (Guojia Banquanju) could indeed already grant authorizations for the establishment of collecting societies; the first such authorization was granted to "The Music Copyright Society of China".

<sup>49</sup> *Loc.cit.* (*supra* note 41), p. 54.

<sup>50</sup> See *supra* note 44; see generally also A. Dietz, Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe, Journal of the Copyright Society of the USA Vol. 49 no. 4 (Summer 2002), p. 897 *et seq.*

<sup>51</sup> See only H.-J. Ahlers, Brauchen wir einen Allgemeinen Teil der Rechte des Geistigen Eigentums? (Do We Need a General Part of Intellectual Property Rights?), GRUR 2006, p. 617 (with further references) and A. Ohly, Geistiges Eigentum? (Intellectual Property?), Juristenzeitung 2003 p. 545.

<sup>52</sup> See *supra* note 18.

<sup>53</sup> See Part Four of the Civil Code of the Russian Federation (Graždanskij kodeks Rossijskoj Federacii - Čast' četvertaja), Federal Law No. 230-FZ of December 18, 2006, Rossijskaja Gazeta No. 289 (4255) of Dec. 22, 2006 = Sobranie zakonodatel'stva RF (SZ RF) No. 52 (Part I) of Dec. 25, 2006, Item 5496, p.14803.

<sup>54</sup> See Chapter 69, Articles 1225 through 1254 of Part Four of the Russian Civil Code.

<sup>55</sup> See A. Dietz, Regulation of Copyright Law in the New Part IV of the Russian Civil Code "C An Important, but Partly Problematic Piece of Legislation, Revue internationale du droit d'auteur (RIDA) No. 216 (April 2008), p. 123 *et seq.*; originally published in: Bakardjieva-Engelbrekt/Nordell (Eds.), Festschrift Marianne Levin, Stockholm 2008, p. 213 *et seq.*

<sup>56</sup> See *supra* under III.