

**HOW SHOULD CHINA RESPOND TO ONLINE PIRACY OF LIVE SPORTS
TELECASTS? A COMPARATIVE STUDY OF CHINESE COPYRIGHT
LEGISLATION TO U.S. AND EUROPEAN LEGISLATION**

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I. INTRODUCTION

China won worldwide acclaim for its efforts in combating unauthorized retransmission of sports telecasts over the Internet during the 2008 Summer Beijing Olympic Games.¹ Despite the success that China has achieved in this battle against online piracy, the issue of whether the Chinese copyright regime affords legal protection for live sports telecasts over the Internet still remains to be clarified.² The fact that the Chinese government adopted a set of *sui generis* regulations,³ rather than actual copyright law, to stop online piracy of those events creates uncertainty in the interpretations of law. This article argues that existing Chinese copyright law should and does provide such protection where there is sufficient originality in the sports telecast. I further argue that affording protection to sports telecasts not only brings China in line with the general practice of other jurisdictions but also will eventually promote the sports industry and local economy.

Part II of this article briefly summarizes the problem of online piracy of sports telecasts around the world and how American and European courts have responded to that problem. Part III reviews the different interpretations of Chinese copyright law among scholars with reference to the protection afforded to sports telecasts. It also explains the legal basis that the Beijing Olympic Games Committee (BOCOG) and the National Copyright Administration (NCAC) adopted to prevent unauthorized retransmission of sports telecasts during the 2008 Summer Olympic Games (Games). Parts IV and V discuss why it is important for China to afford protection for sports telecasts over the internet and propose several methods that the Chinese government might adopt to ensure such protection.

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¹Euro. Broad. Union, *Beijing 2008: The Digital Games*, http://www.ebu.ch/en/union/news/2008/tcm_6-62839.php (last updated Jan. 9, 2008).

² For purposes of this article, "China" refers to the specific jurisdiction of "mainland China" only and does not include Hong Kong, Macao, or Taiwan. Also, all mentioning of Chinese copyright law is in reference to "the PRC Copyright Law" only. The same is true for other Chinese laws discussed in this article.

³ Since 2002, China has issued a series of *sui generis* regulations to protect all IP assets related to the 2008 Summer Olympic Games. *See infra* Part III(B).

II. ONLINE PIRACY OF LIVE SPORTS TELECASTS WORLDWIDE AND HOW OTHER COUNTRIES RESPOND TO SUCH PROBLEMS

A. Background on the Unauthorized Retransmission of Live Sports Telecasts over the Internet

There are three main ways that pirated versions of sports are consumed through the internet: (1) live streams, i.e. re-broadcast via peer-to-peer television services or streamed directly from a web server; (2) recorded versions of events uploaded to file-sharing networks such as bittorrent or eDonkey; and (3) highlights placed on user-generated-content (UGC) sites like YouTube or uploaded to file-sharing networks.⁴ This article primarily focuses on the first of these, live streams, as this piracy tool is perhaps the most pervasive and problematic in the sports context.

Two primary technologies are used in the unauthorized retransmission of live sports telecasts over the internet, both of which enable real-time retransmission of live sports telecasts to a worldwide audience: (1) unicast streaming, and (2) streaming over peer-to-peer networks (P2P).⁵

As explained in the *Background Report on Digital Piracy of Sporting Events* (2008), prepared by Envisional Ltd. and NetResult Ltd in response to the *OECD Phase II Study on Digital Piracy*, unicast services send a video stream directly from the server to a viewer. No special software other than a typical media player (such as Windows Media Player, RealPlayer, or VLC) is required to view the stream.⁶ P2P-based streaming services work differently. The initial broadcast is sent from one server to a few viewers in small parts or chunks, which are then redistributed to more viewers. In this way, the viewers are connected to a network of viewers, all of whom are both downloading and uploading the same parts to others.⁷

The technology required for streaming and rebroadcasting via unicast and P2P-based sites is quite straightforward. Most streaming channels begin with a standard home computer attached to a typical residential broadband connection. Any computer with a television tuner card installed, today a rather standard piece of hardware on many home computers, can re-broadcast a stream.⁸ Unicast streaming usually requires a paid subscription fee because its operation costs could be quite high due to its huge demand of bandwidth and processing power.⁹ Unlike unicast streaming, P2P-based streaming services are usually free online. Therefore, P2P has become a more popular technology for online piracy of live television programming, including live sports telecasts, in recent years.¹⁰ Online Piracy using P2P technologies has been especially rampant in Canada,

⁴ See ENVISIONAL LTD. & NETRESULT LTD, BACKGROUND REPORT ON DIGITAL PIRACY OF SPORTING EVENTS 11 (2008).

⁵ See *id.* at 20.

⁶ *Id.*

⁷ *Id.*

⁸ See *id.*

⁹ *Id.*

¹⁰ NetResult's figure shows that the P2P service Sopcast is the most popular streaming technology used for unauthorized streaming of live sports telecasts. *Id.* at 25.

China, South Korea, Sweden, Spain and Russia among others.¹¹ The servers located in these countries regularly make television programming available worldwide in real time over the internet.

The range of sports games affected by online piracy is quite extensive. They not only include popular global games such as soccer and basketball but also those more centered in a specific region, such as American football.¹² The number of people watching the unauthorized retransmission of sports telecasts can also be huge. As described in the *Background Report on Digital Piracy of Sporting Events*, “[a] single stream of a [National Basketball Association] game in December 2007 was viewed by over one million people with around three-quarters of the viewers believed to be located in China.”¹³

During the 2006 FIFA World Cup, thousands of end-users downloaded the telecasts online due to unauthorized retransmission of soccer games adopting P2P technologies.¹⁴ In China, a dozen unicast and P2P-based websites were retransmitting the World Cup matches online without authorization by simply capturing the signals they received from local broadcasters. Shanghai Media & Entertainment Company, the sole authorized broadcaster of the FIFA World Cup in the territory of China, threatened to sue these infringing websites, however, the lawsuit was never filed because related government agencies advised that there is some uncertainty over whether sports telecasts are protected by existing Chinese copyright law.¹⁵

Outside China, sports leagues have already started bringing lawsuits to crack down on online piracy.¹⁶ What is interesting is that instead of suing direct infringers, that is, the individual end-users watching the sport event, sports leagues and broadcasting organizations usually sue service providers or distributors. As Mike Mellis commented in his article *Piracy of Live Sports Telecasts*, this might be caused by the “impracticability or futility of copyright owners suing a multitude of individual infringers.”¹⁷ The following sections will review a number of cases decided in the United States and Europe regarding their enforcement against online piracy of live sports events.

¹¹ See OFFICE OF THE U.S. TRADE REP., 2008 SPECIAL 301 REPORT 10 (2008).

¹² See ENVISIONAL LTD & NETRESULT LTD., *supra* note 4, at 10.

¹³ See *id.* at 11.

¹⁴ FIFA itself recorded 3,300 cases that year, almost double the 2002 World Cup total of 1,884, which in turn is more than double the 1998 World Cup total of 773. FIFA, *About FIFA: The rights stuff* (Sept. 19, 2009), <http://www.fifa.com/aboutfifa/federation/news/newsid=1105906.html>.

¹⁵ See XinHua News, *Chinese Internet Service Provider's Combat Against Online Piracy During the 2006 FIFA Games*, XINHUA.COM (June 2, 2006), http://news.xinhuanet.com/newmedia/2006-06/02/content_4635712.htm.

¹⁶ The Premier League, the Australian Football League, the Union of European Football Association and Cricket Australia, among others, have been active in taking legal actions against infringing websites or services, which facilitated piracy services. See ENVISIONAL LTD. & NETRESULT LTD., *supra* note 4, at 16-17.

¹⁷ See Michael J. Mellis, *Internet Piracy of Live Sports Telecasts*, 18 MARQ. SPORTS L. REV. 259, 265 (citing *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003)).

B. U.S. Copyright Law

1. Copyrightability of Sports Telecasts in the U.S.

Under the U.S. Copyright Act, a sports event is not subject to copyright protection. However, the telecast of that event is protected as long as the telecast is recorded simultaneously with its transmission, i.e. fixed in a tangible form such as a tape, film or disc.¹⁸ U.S. law recognizes that the broadcaster exercises sufficient creativity and originality in deciding how to televise the game or event. House Report 94-1976 states that “[w]hen a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and director are doing constitutes ‘authorship.’”¹⁹

2. Lawsuits Brought Against Infringing Websites in the U.S.

Sports leagues and their representatives have been successful in bringing lawsuits against infringers who provide unauthorized online retransmission of live sports telecasts. Such litigations involve both the direct liability of unicast service providers and the secondary liability of P2P providers.

In *iCrave TV*, a Canadian-based website provided internet users with real-time access to U.S. broadcasts of live television programs.²⁰ The suits were filed first by a coalition of television networks and studios in the United States²¹, then by the National Basketball Association (NBA) and the National Football League (NFL).²² The plaintiffs claimed direct and/or indirect infringement of their exclusive rights under the Copyright Act, as well as infringement of their trademarks and trade names or otherwise making false designations of origin or false representation. The federal district court in Pennsylvania consolidated the two cases and ruled that the plaintiffs were likely to prevail on their copyright and trademark infringement claims. Thus the court temporarily enjoined *iCrave TV*'s transmission of copyrighted programming in the U.S. in February 2000.²³

As Mike Mellis noted in his article *Piracy of Live Sports Telecasts, iCraveTV* establishes an important precedent with reference to “forum shopping” for content owners in copyright infringement litigation. U.S. copyright law is quite strict and the

¹⁸ See House Report 94-1476 at 52 (1976); see also *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 668 (7th Cir. 1986); *Nat’l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

¹⁹ See House Report 94-1476, *supra* note 18.

²⁰ See Michael A. Geist, *iCrave TV and the New Rules of Internet Broadcasting*, 23 U. ARK. LITTLE ROCK L. REV. 223, 225 (2000).

²¹ *Twentieth Century Fox Film Co. v. iCraveTV*, 2000 U.S. Dist. Lexis 1091 (W.D. Pa. Jan. 21, 2000).

²² See *Nat’l Football League v. iCraveTV*, No. Civ. A. 00-120, 2000 WL 64016397 (W.D. Pa. Jan. 21, 2000).

²³ See *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ. A. 00-121, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000).

court here ruled that the U.S. is a possible jurisdiction if some of the infringement occurred there, i.e., piracy services are available to American end-users.²⁴ This case therefore might provide helpful guidance for content owners who want to sue infringing websites in the U.S. and not in a country with more permissive copyright laws.

With regard to secondary liability claims, unauthorized P2P movie and music file-sharing services have generally been held liable for copyright infringement under secondary liability theories, including contributory, vicarious and inducement theories. As a result, the same theories might be useful in sports-related piracy lawsuits.

In *MGM v. Grokster*, the U.S. Supreme Court ruled that providers of software designed to enable “file-sharing” of copyrighted works may be held liable for the copyright infringement occurring on the network.²⁵ The Court did not address the contributory and vicarious liability issues originally argued by the plaintiffs, but rather sent those questions back to the lower courts to address.

Nonetheless, the Supreme Court found that there was sufficient evidence of inducement to justify a trial, and thus reversed the lower court’s decision. The Court defines inducement liability as “[o]ne who distributes a device *with the object of* promoting its use to infringe copyright, as shown by *clear expression or other affirmative steps* taken to foster infringement, is liable for the resulting acts of infringement by third parties” (emphasis added).²⁶ Inducement thus requires both “intent” and an “affirmative act” on the defendant’s part to be liable for copyright infringement. The Court cited three facts it believed might constitute an “affirmative act” of the defendant for inducement purposes: advertisements aimed at attracting users of a former P2P, Napster, to use the Grokster P2P; a newsletter containing links to articles that discussed infringing uses of the software, and active customer support to users who had trouble locating or downloading copyrighted materials. As to the question of “intent,” the Court ruled that the defendant’s internal discussion, business model, advertisement and failure to install filtering technology all indicated its purpose of boosting infringement. As a result, the Court reversed the lower court and concluded that there was enough evidence to allow the plaintiffs to go forward with the case.

The inducement theory developed in *Grokster* and traditional secondary liability theories (contributory liability and vicarious liability) decided in other cases²⁷ will likely allow sports leagues and their representatives to sue those providers of P2P technologies, because those providers typically have knowledge of the infringing activities of their end-users, have the rights and ability to prevent infringements from happening, and have

²⁴ See Mellis, *supra* note 17, at 268 (citing Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 44 (2000)) (summarizing that the court found sufficient nexus to the United States to apply the U.S. Copyright Act and Lanham Act to the defendants’ activities; the court held that the plaintiffs exclusive public performance rights, codified in 17 U.S.C. § 106(4), were infringed by unauthorized “inbound” streaming of the live sports telecasts from Canada to U.S. end users).

²⁵ See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

²⁶ See *id.* at 919.

²⁷ In *Napster*, the Court imposed liability under both contributory and vicarious liability theories. *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001). *Aimster* was decided on the contributory theory. In *Re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

derived direct benefits from assisting their clients to access the P2P software to infringe the contented materials.

C. European Copyright Laws

Although there seems to be no harmonized laws regarding the protection of sports telecasts throughout Europe,²⁸ a number of European countries do recognize sports broadcasting rights in various ways, either by legislation²⁹ or by court orders.³⁰

In a recent copyright infringement case decided by a U.K court, *Union of European Football Association (UEFA) v. Briscomb*, the plaintiffs, UEFA together with its licensed broadcasters “British Sky Broadcasting Group PLC” (BskyB) and “British Sky Broadcasting Limited,” sued three individuals for infringing UEFA’s copyright in the broadcasts of a UEFA Champions League match made by BskyB. The defendants allegedly made copies of such broadcasts, retransmitted them or authorizing their retransmission to the public, and possessed in the course of business an article that is known or should have been known to contain an infringing copy of the broadcasts.³¹

Justice Lindsay held that plaintiffs “own the copyright not only in the live broadcasts but in the ancillary works.”³² She defined “ancillary works” as “creative elements including all broadcasts of UEFA Champions League matches throughout the world contain[ing] uniform branding through the use of video sequences, onscreen graphics, logos and specially composed music...,[and ancillary works] consist[ing] of a programme content roll, short film clips called break bumpers, the UEFA starball logo and specially composed accompanying music, the UCL music.”³³ After examining a “substantial body of evidence,” which showed how various ancillary works were created and included within the live broadcasts,³⁴ Justice Lindsay ruled that the defendants were liable for copyright infringement.

The secondary liability theory adopted by most European courts is widely based on E-Commerce Directive 2000/31/EC, Article 14,³⁵ which seems similar to the approach

²⁸ France seems to be an exception among European jurisdictions in that it designated by law the National Football Federation (Art. 17/18 of the Law No. 84-610 of July 16, 1984, as amended in 1992) as the sole authority for exploiting the broadcasting rights to the matches of the official competitions. See WERNER RUMPHORST, SPORTS BROADCASTING RIGHTS AND EC COMPETITION LAW 5 (Euro. Broad. Union July 25, 2001), available at http://www.ebu.ch/CMSimages/en/leg_p_sports_rights_wr_tcm6-4406.pdf.

²⁹ See *id.* at 5.

³⁰ For a detailed discussion of football television rights in Europe, including France, the Netherlands, Germany, Spain, Italy and the United Kingdom, see RUMPHORST, *supra* note 28, at 5-8; see also David Harbord, Angel Hernando & Georg Von Gravenitz, *Market Definition in European Sports Broadcasting and Competition for Sports Broadcasting Rights -- A Study For DGIV of the European Commission*, MARKET ANALYSIS LTD. (Oct. 20, 1999), <http://www.market-analysis.co.uk/PDF/Reports/dgivreport final.pdf>.

³¹ *Union of Euro. Football Ass’n v. Briscomb*, [2006] EWHC (Ch) 1268 [6] (Eng.), 2006 WL 1635072.

³² *Id.*

³³ *Id.* at 4.

³⁴ *Id.* at 6.

³⁵ Article 14 of EUROPEAN E-COMMERCE DIRECTIVE 2000/31/EC (July 17, 2003), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:NOT>.

of U.S. courts. Basically, the mere operation of a P2P service might not be sufficient to constitute copyright infringement liability. However, where the service provider has actual knowledge of the illegal activity or information, and fails to act expeditiously to remove or to disable access to the information, the provider will be found liable for copyright infringement.

Among a number of secondary liability related cases decided in recent years,³⁶ in 2003 Premier Fernsehen GmbH & Co. KG has sued Cybersky, a German P2P software developer and distributor, for copyright infringement.³⁷ In late 2004 a German court issued an injunction prohibiting distribution of Cybersky's software, which enabled P2P re-streaming of encrypted content from pay television providers.³⁸ Although the Hamburg Germany High Regional Court reversed the first-instance court's injunction order on the appeal and ruled that a ban on the software was not warranted, it nonetheless stated that the defendant was liable for copyright infringement because the software and service were *advertised* as a way to end-run plaintiff's pay programming.³⁹

III. PROTECTION OF LIVE SPORTS TELECASTS IN CHINA

A. Existing PRC Copyright Law

During the 2008 Summer Olympic Games held in Beijing ("Games"), the International Olympic Committee (IOC) expressed a high degree of satisfaction with respect to the Chinese government's combat against online piracy of Games telecasts.⁴⁰ The fact that the legal basis adopted by the BOCOG and the NCAC is related to the *sui generis* Olympic regulations, however, rather than Chinese copyright law, still creates uncertainty for sports organizations over whether similar success will be replicated in future enforcement against online piracy of sports telecasts. Before describing the special regulations enacted in preparation for the Games, this section summarizes the uncertain status of sports telecasts under generally applicable Chinese copyright law.

³⁶ In Finland, the Turku Court of Appeal decided on June 19, 2008 that the defendant, administrators of P2P site Finreactor, had actively participated in the reproduction of copies and were thus liable for copyright infringement. See Roschier, Attorneys Ltd., *Finreactor P2P Network Ruled Illegal by Court of Appeals*, LexUniversal (July 7, 2008), available at <http://www.lexuniversal.com/en/news/5855>. In France, the Court of First Instance in Paris found Daily Motion, a video sharing service, liable for copyright infringement of a movie posted by its users. See Meryem Marzouki, *French ruling against video-sharing platform DailyMotion*, EURO. DIGITAL RIGHTS (July 28, 2007), available at <http://www.edri.org/edriagram/number5.14/dailymotion-decision>.

³⁷ See Germany: *Software to Re-stream TV Programs Infringes Copyrights, Court Says*, BNA WORLD INTELL. PROP. REP. (Apr. 1, 2006).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Timo Lumme, IOC Director of Television and Marketing Services, said "the exclusive rights of official Olympic new media platforms were protected by a P2Phisticated anti-piracy regime, overseen by the IOC, which successfully contained online piracy of Beijing 2008 footage to minimal levels." Euro. Broad. Union, *supra* note 1.

1. *Sports Events are Currently Not Copyrightable Works*

The People's Republic of China (PRC) Copyright Law is silent on whether sports events are copyrightable works. However, because most live events, including sports events, do not fall in the definition of Article 3 of Chinese Copyright Law, it is widely agreed that sports events are *not* copyrightable subject matter.⁴¹ The prevailing notion is that a sports event is an occurrence of facts in reality. It is neither literary or dramatic work nor has a creator or author and thus does not fall into any of the "copyrightable subject matters" as listed in Article 3 of the PRC Copyright Law.⁴²

2. *Sports Telecasts: Copyright Protection or Neighboring Rights Protection?*

There are conflicting views among Chinese scholars as to whether sports telecasts are subject to "copyright protection"⁴³ or "neighboring right protection"⁴⁴ under existing Chinese copyright law. Unlike the United States, China differentiates "copyrights" from "neighboring rights" as most civil law jurisdictions do. Generally speaking, neighboring rights protect those who assist intellectual creators in promoting and disseminating the creator's works to the public at large. Copyright laws can provide protection for four specific kinds of neighboring rights: 1) the rights of performing artists in their performances, 2) the rights of producers of phonograms in their phonograms, and 3) the rights of broadcasting organizations in their radio and television programs, and 4) the rights of publishers.

One view is that sports telecasts are "video recordings"⁴⁵ rather than "video productions/cinematographic works,"⁴⁶ the latter of which falls into copyrightable subject

⁴¹ Article 3 of the PRC Copyright Law, first adopted in 1990 and revised in 2001, sets out a detailed list of copyrightable subject matters under the law, which includes (1) written works; (2) oral works; (3) musical, dramatic, quyi and choreographic works; (4) works of fine art and photographic works; (5) cinematographic, television and video-graphic works; (6) drawings of engineering designs and product designs, and descriptions thereof; (7) maps, sketches and other graphic works; (8) computer software; and (9) other works as provided for in law and administrative rules and regulations. COPYRIGHT LAW P.R.C. (promulgated by the Standing Comm. Nat'l People's Cong. Sept. 1990, effective Oct. 27, 2001) Art 3, available at http://www.chinaipr.gov.cn/lawsarticle/laws/lawsar/copyright/200608/232720_1.html.

⁴² This view is shared by a majority of scholars and legislators in China. See WEI ZHI & ZHU ZUO FA YUAN LI, PRINCIPLES OF COPYRIGHT LAW 16 (Beijing Univ. Pub'n House 1998); WU HANDONG & ZHI SHI CHAN QUAN FA, THE INTELLECTUAL PROPERTY LAW 80 (China Politics and L. Univ. Publ'g Co. 2002); Shen Li & Ti Yu Jing Sai Yu Ban Quan Bao Hu, *Sports Events and Copyright Protection*, 12(2) THE SPORTS J. (CHINA) 13-16 (2005).

⁴³ Unlike the broader term "copyright law" discussed in this paper, here the concept of "copyright" is much narrower and only includes literary and artistic works such as novels, poems and plays, films, musical works, drawings, paintings, photographs and sculptures, computer software, databases, and architectural designs. Its counterpart is "neighboring rights." See Jiang Zhipei, *Judicial Protection of IPR in China* (May 23, 1998), <http://www.chinaiprlaw.com/english/forum/forum1.htm>.

⁴⁴ Neighboring rights, also referred to as "related rights," are the counterparts of copyrights in a narrow sense. It includes the rights of performing artists in their performances, producers of sound recordings in their sound recordings, and those of broadcasters in their radio and television broadcasts. *Id.*

⁴⁵ COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 5 (defining the term "video recordings" as "fixations of a connected series of related images or pictures, with or without accompanying sounds, other than

matters under Article 3 of the PRC Copyright Law.⁴⁷ Those holding this view seem to believe there is not sufficient originality in the telecasting of sports events, thus such telecasts are not original or creative enough to qualify as “video productions/cinematographic works.”⁴⁸ As a result, interested parties might only claim “neighboring rights protection”⁴⁹ for sports telecasts either as “video recordings”⁵⁰ or as “broadcasting rights”⁵¹ under Chinese copyright law.

As far as video recordings rights are concerned, although Article 41 of the PRC Copyright Law grants the owner of video recordings “the right to authorize others to reproduce, distribute, rent and communicate [the video recordings to] the public on an information network,”⁵² nonetheless, because the value of sports broadcasting rights lies in its “live” feature,⁵³ the neighboring rights protection granted to “video recordings” (e.g. VCDs, DVDs, video tapes, etc.) will not help sports organizations or their representatives to stop real-time retransmission of live sports telecasts over the internet.

Another remedy available to stop online piracy of live sports telecasts may be based on broadcasting organizations’ neighboring rights, granted under Article 44 of the PRC Copyright Law. Unfortunately, the definition of “rights to broadcast”⁵⁴ set forth in

cinematographic works and works created by a process analogous to cinematography;” in practice, they generally refer to CDs, DVDs, tapes, etc.).

⁴⁶ Cinematographic works, also known as “video productions,” refer to works “created by a process analogous to cinematography . . . recorded on some materials, consisting of a series of images, with or without accompanying sound, and which can be projected with the aid of suitable devices or communicated by other means.” See COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 4.

⁴⁷ See COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 3(5).

⁴⁸ See YU Zhenfeng, *Woguo zhiye lanqiu liansai dianshi zhuanboquande kaifa ji xiangguan lifa wenti (The Exploitation of Television Broadcasting Rights in the Chinese National Basketball Games and Related Legislation)*. SPORTS J. 10(5), 14-16 (2003). See also WENG Biao, *Ru He Tuisuan Tiyubisai dianshizhuanboquan de zhuanrangjiage (How to Define a pricing for Sports Broadcasting Rights)* SPORTS J. 6, 39-41 (1999).

⁴⁹ Chapter IV of the PRC Copyright Law provides various neighboring rights protection to: (1) publishing industry; (2) performers; (3) owners of sound recordings and video recordings (phonographic recordings), and (4) broadcasting organizations. COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 29-45.

⁵⁰ Chapter IV, Section 3 of the PRC Copyright Law, provides certain rights (neighboring rights) to owners of sound recordings and video recordings, including “a right to authorize others to reproduce, distribute, rent and *communicate to the public on an information network.*” See COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 41.

⁵¹ Chapter IV, Section 4 of the PRC Copyright Law provides another set of neighboring rights to broadcasting organizations, which include “(1) to rebroadcast its broadcast radio or television program; and (2) to fix its broadcast radio or television program on a sound recording or video recording carrier and to reproduce the sound recording or video recording carrier.” COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 44.

⁵² See COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 41.

⁵³ RUMPHORST, *supra* note 28, at 3 (noting that “sports broadcasting rights have certain aspects which make them unique; each sports event is characterized by its particular “live” value, which will (almost) completely diminish as soon as the event is over.”).

⁵⁴ COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 10 (11) (stating that “the right to broadcast” refers to “the right to publicly broadcast or communicate to the public a work *by wireless means*, to disseminate broadcast works to the public *by wired dissemination or rebroadcast*, and to disseminate broadcast works to the public by a loudspeaker or by any other analogous tool used to transmit symbols, sounds or picture.”) (emphasis added).

the Copyright Law, which includes “wireless broadcasting” and “wired re-broadcasting of signals from a wireless broadcast,” has been interpreted very narrowly by some scholars. One of the prevailing interpretations held by Chinese scholars seem to suggest that the concept of “wired,” under Article 10(11), only refers to “cable television”⁵⁵ and does not include the new media “internet.” In other words, broadcasting organizations might stop infringers from retransmitting the content from radio retransmission (wireless) or television retransmission (wired re-broadcasting), but have no rights to stop infringing websites from retransmitting the signals over the internet.⁵⁶

The unfortunate result of this approach of classifying sports telecasts as “video recordings” and denying broadcasting organizations’ neighboring rights over internet media is the absence of any legal basis for preventing unauthorized retransmission of live sports telecasts over the internet in China. Due to this concern, the Beijing Olympic Games (BOCOG) and National Copyright Office (NCAC) adopted Olympic-related regulations as a separate legal basis for combating online piracy of live sports telecasts during the 2008 Summer Games instead of existing Chinese copyright law.

B. China’s Strategy During the 2008 Beijing Olympic Games To Combat Online Piracy of Live Sports Telecasts

Apparently believing that existing Chinese copyright law may not protect pirated online sports telecasts over, the BOCOG and NCAC adopted particular regulations aimed at prohibiting the unauthorized retransmission of live Games telecasts during the Beijing Summer Games. Regardless of whether P2P websites providing unauthorized online retransmission of live sports telecasts were liable for copyright infringement, they could be held liable for violations of the Olympic-related regulations.

1. Legal Basis of Combat Against Online Piracy of Live Sports Telecasts

Since 2002, China has issued a series of Games-specific intellectual property decrees and regulations, including *Regulations on the Protection of Olympic Symbols*,⁵⁷ the *Beijing Regulation on the Intellectual Property Protection of Olympics-related Intellectual Property Rights* (“Beijing Regulation”),⁵⁸ and *Customs Clearance Notice for*

⁵⁵ *Id.*

⁵⁶ Of course, when the infringing content are copyrightable works, such as music, TV episodes and movies, broadcasting organizations, which might also be copyright holders of such copyrighted works, can certainly bring lawsuits against infringing websites alleging violations of their copyrights, but not neighboring rights. Based on this author’s experience, during the past two years music industries and studios across the world have been very aggressive suing infringing websites in China for copyright infringement.

⁵⁷ Regulations on the Protection of Olympic Symbols (adopted at the 54th Exec. Meeting of the State Council on January 30, 2002, promulgated by Decree No. 345 of the State Council of the People’s Republic of China on February 4, 2002, and effective Apr. 1, 2002), available at <http://en.beijing2008.cn/bocog/ipr/> (last visited Nov. 1, 2010).

⁵⁸ *China affords comprehensive protection to the IP rights of the Beijing Olympic Committee*, SCIENCE NET, Apr. 17, 2008, <http://news.sciencenet.cn/sbhtmlnews/2008417231125601205432.html?id=205432> (Chinese only).

*Beijing Olympic Materials*⁵⁹ to comply with the IOC's requirements and to protect the Olympics' respective IP rights. The Beijing Regulation, a comprehensive catch-all provision often relied on by the BGCOC, was drafted so broadly that any unauthorized use, copy, production, sale, advertisement, promotion, public display and derivative use of trademarks, logos, designs, slogans and contents related to the Games are likely to violate the Beijing Regulation.⁶⁰

2. BOCOG's Strategy to Combat Online Piracy of Live Sports Telecast

BOCOG worked with CCTV.COM, the exclusive licensee of the rights to broadcast the Games over the internet, and designed a license scheme authorizing nine prominent Chinese websites to retransmit Olympic-related content online.⁶¹

Meanwhile, a Joint-Working Group of Combating Olympic Infringement and Piracy was established in August 2008 to safeguard all IP rights related to the Games by establishing an efficient coordination mechanism between various Chinese agencies.⁶² The Joint-Working Group consists of the NCAC, the State Administration of Film, Radio and Television (SARFT), the Public Security Bureau and the Ministry of Information Industry (MII), and it is headed by the NCAC.⁶³ The Joint-Working Group issued a number of "Action Plans" to combat against online piracy of sports events during the Games. For instance, one of such plans set out a four-month period (between June and October 2008) to crack down on unauthorized retransmission of Olympic related telecasts online. The Working Group also set up a hotline to receive and handle complaint calls reporting instances of Olympic piracy from copyright holders and the public.⁶⁴ Apparently, the efforts made by the Chinese government to deter Olympic piracy were successful. Based on the automatic monitoring system of the IOC, "more than 90 percent of illegal broadcasting took place abroad and domestic violations have been cracked down rapidly and effectively."⁶⁵

⁵⁹ China Customs, *Customs Clearance Notice for Beijing Olympic Materials* (July 29, 2008), <http://english.customs.gov.cn/publish/portal191/tab28300/module60424/info121218.htm>.

⁶⁰ These provisions are located in Article 8 of the Beijing Regulation. *See supra* note 58.

⁶¹ The list of nine authorized websites include shanghai media group, sohu, sina, tencent, netease, ku6, PPlive, PPstream, and UUsee. *See* http://news.xinhuanet.com/newscenter/2008-08/07/content_9021338.htm (Chinese only) (last visited Nov. 2, 2010).

⁶² *See* State Intellectual Property Office of the P.R.C., *Joint Working Group of Combating Olympic Infringement and Piracy established* (Aug. 26, 2008), http://www.sipo.gov.cn/sipo_English/news/iprspecial/200904/t20090417_453165.html.

⁶³ *See id.*

⁶⁴ Xinming Xu, *Gov't to stop illegal broadcasts of Games*, CHINA INTELL. PROP. LAW. (July 9, 2008), <http://www.ciplawyer.com/en/article.asp?articleid=877>.

⁶⁵ Xinming Xu, *IOC speaks highly of China's anti-piracy work*, CHINA INTELL. PROP. LAW. (Aug. 22, 2008), <http://www.ciplawyer.com/en/article.asp?articleid=930>.

IV. LOOKING BEYOND THE BEIJING OLYMPIC GAMES: WHY IT IS IMPORTANT FOR CHINA TO PROTECT LIVE SPORTS TELECASTS

Despite the success China achieved in safeguarding Games-related IP rights, it is unclear whether such success can be replicated in future prevention of online piracy of sports telecasts. The fact that the BOCOG and NCAC adopted the Olympic-related regulations, rather than existing Chinese copyright law, to stop online piracy creates a certain degree of uncertainty for rights holders. Before we turn into a technical discussion on how to protect sports telecasts, one preliminary question that we probably should ask is: should China protect sports telecasts at all?

U.S. and European protection of sports telecasts notwithstanding, there remain objections to or skepticism surrounding such protection. One concern is that using copyright law to protect sports telecasts might hurt consumer welfare. In his book *Free Culture- How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, Lawrence Lessig advocates the concept of “free culture” and argues that “the war to rid the world of internet ‘pirates’ will also rid our culture of values that have been integrated to our tradition from the start.”⁶⁶ When Werner Rumphorst was addressing the balance of different interest groups in his article *Sports Broadcasting Rights and EC Competition Law*, he also raised the question “why should the public be forced to pay more and more for viewing sports events which are part of their own cultural environment?”⁶⁷ Nonetheless, to allow the public to watch sports telecasts at a reasonable price is different from allowing P2P websites to “free-ride”⁶⁸ on the efforts of sports leagues in organizing the sports events or to take advantage of the investment made by official broadcasters in broadcasting such events. The following analyzes, primarily from an economic standpoint, why China should protect sports telecasts.

To understand professional sport, it is important to recognize that sport is not just games, it is business.⁶⁹ Revenues earned by professional teams typically come from media revenues, game receipts, luxury seating, advertising and membership fees. During the past ten years, media revenues—revenue generated by business licenses with over-the-air broadcasters, cable channels and pay-per-view programmers—have increased significantly and now have become a huge proportion of the sports leagues’ revenues.⁷⁰

In the case of the 2008 Olympic Games, TV rights accounted for approximately one-third of the total income, followed by sponsorship, ticketing and merchandising in

⁶⁶ See LAWRENCE LESSIG, *FREE CULTURE- HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 19 (2004).

⁶⁷ See RUMPHORST, *supra* note 28, at 12.

⁶⁸ For a detailed discussion of the free-rider problem in the context of copyright law, see Williams M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328-33 (1989), available at <http://cyber.law.harvard.edu/IPCoop/89landl.html>.

⁶⁹ See Soonhwan Lee and Hyosung Chun, *Economic Values of Professional Sport Franchises in the United States*, 2002 SPORT J. 4, at 2, available at <http://thesportjournal.org/article/economic-values-professional-sport-franchises-united-states> (last visited Nov. 4, 2010).

⁷⁰ See *id.*

the order of magnitude.⁷¹ In 1992, NBC paid USD 410 million for the U.S. broadcasting right of the Barcelona Olympic Games.⁷² When it comes to the 2012 London Olympic Games, the payment for an exclusive U.S. broadcasting right has increased to USD 1.181 billion.⁷³ In the case of 1990 Football World Cup, sales of television rights were estimated to be USD 65.7 million (41%), sales of tickets were USD 54.8 million (34%) and sales of advertising rights were USD 40.2 million (25%).⁷⁴ Twelve years later, in the 2002 and 2006 Football World Cup finals, the world TV rights (excluding the U.S.) were sold for USD 1.97 billion.⁷⁵

Unlike other types of entertainment over electronic media such as TV episodes, movies, education programs and documentaries, sports events have a unique “live” characteristic. Sports fans who watch live sports telecasts not only care about the final results or the box scores of the games, but also the progression of a game. They are generally less interested in watching previous games with known results.⁷⁶ As a result, the availability of P2P cast technologies and unauthorized online retransmission of live sports telecasts has posed a big threat to the interests of official broadcasters and sports leagues.

Typically broadcasters pay a large license fee to bid for the exclusive broadcasting right with the hope to recoup their investment by attracting a considerable amount of viewers. In addition, they need to invest resources, efforts and capital in telecasting/broadcasting the sports events. The failure to protect the “exclusivity” of broadcasters in broadcasting live sports events will likely adversely impact the interests of official broadcasters and reduce their willingness in future bidding. For instance, the cricket broadcast market in the United States has been declining primarily because of the availability and scale of unauthorized retransmission of matches on the internet. One of the two main broadcasters now seems less interested in bidding for cricket broadcast rights.⁷⁷

As a result, the interests of sports leagues will also be damaged, whose profitability for selling broadcasting rights depends upon how effectively they can ensure the interests and rights of official broadcasters, i.e. to stop the online piracy of live sports telecasts. In other words, to allow the “free-riding” of P2P websites will hurt both the interests of the official broadcasters and the rights of sports leagues. More importantly, the failure to protect sports telecasts will reduce the incentives of sports organizations in organizing and hosting big scale events, thus eventually hurt the interests of consumers.

As identified in the White Paper of EU in 2007, “[s]port is a dynamic and fast-growing sector with an underestimated macro-economic impact, and can contribute to the

⁷¹ See JOHN HORNE, *SPORT IN CONSUMER CULTURE* 52 (Palgrave Macmillan 2006) (citing MAURICE ROCHE, *MEGA –EVENTS & MODERNITY* 168 (Routledge 2000)).

⁷² *See id.* at 53.

⁷³ *Id.*

⁷⁴ *Id.* at 52.

⁷⁵ *Id.*

⁷⁶ See Chia-heng Seetoo, *Can Peer-to-Peer Internet Broadcast Technology Give Fans Another Chance? Peer to Peer Streaming Technology and its Impact*, 2 U. ILL. J.L. TECH. & POL’Y. 369 (2007), available at <http://www.jltp.uiuc.edu/archives/seetoo.pdf> (last visited Nov. 4, 2010).

⁷⁷ *See ENVISIONAL LTD. & NETRESULT LTD.*, *supra* note 4, at 9.

Lisbon objectives of growth and job creation.”⁷⁸ The Commission points out in this White Paper that sports can serve as a tool for local and regional development, urban regeneration, rural development, and can also stimulate the development of local tourism and upgrading of local infrastructure.⁷⁹ Therefore, when the legitimate interests of sports leagues (including the IPR rights which bring a big proportion of the economic value of sports) are sufficiently protected, the beneficiaries are no longer restricted to the sports leagues who organize the events, the broadcasters who transmit the events, or the spectators who watch the events, but also the overall local industry and public who could benefit from this dynamic economy.⁸⁰

V. RECOMMENDATIONS ON HOW TO PROTECT SPORTS TELECASTS IN CHINA

In view of the significance of protecting live sports telecasts in China, I propose the following methods: interpreting or amending the law, adopting technology measures and encouraging international cooperation to provide protection for live sports telecasts in China.

A. *Protect Sports Telecasts Through the PRC Copyright Law*

The first step will be to provide protection to live sports telecasts by clarifying or amending the existing Chinese copyright regime. This could be achieved by the following measures: 1) to recognize sports telecasts that contain sufficient originality as copyrightable works, and 2) to extend the rights of broadcasters to the internet media.

1. *Recognize Creative Sports Telecasts as Cinematographic Works*

Most agree that the playing of a sports event is not itself copyrightable subject matter because, as discussed earlier, a sports event is usually considered an occurrence of facts in reality. The basic rule in copyright law is that facts and information in themselves are not protected; therefore, the prevailing opinion is that sports events shall not be protected by copyright law. Copyright, nonetheless, might arise where the sports events are produced, staged or photographed, especially where there is sufficient originality in the creation of telecasts.⁸¹ In other words, sports telecasts that contain original elements in the telecasting process should be categorized as “video productions/cinematographic works” rather than “video recordings,” the former of which is subject to copyright

⁷⁸ EURO. COMM’N, WHITE PAPER ON SPORT 10 (Nov. 7, 2007), available at http://ec.europa.eu/sport/white-paper/index_en.htm.

⁷⁹ *Id.*

⁸⁰ *Id.* at 11 (citing a study conducted during the Austrian Presidency in 2006, which suggested that sports in a broader sense generated value-added of 407 billion euros in 2004, accounting for 3.7% of EU GDP, and employment for 15 million people or 5.4% of the labor force).

⁸¹ See Yuval Karniel, *Broadcasting Sporting Events on the Foreign Cable Channels - Is Copyright Black Out Really Necessary?*, 6 ALEI MISHPAT 259, 259 (2007).

protection. There are a number of cases decided in other jurisdictions on how this interpretation can be made.

In *Briscomb*, Judge Lindsay recognized the original elements, which she called as “ancillary works”, in the telecasts of sports events.⁸² Having examined how the various ancillary works, which the Judge referred to as “the use of video sequences, onscreen graphics... a program content roll, short film clips called break bumpers, the UEFA starball logo and specially composed accompanying music, [and] the UCL music,”⁸³ are included and created within the live broadcasts, the Judge ruled that the plaintiff UEFA owns the copyright not only in the live broadcasts but in the ancillary works,⁸⁴ and found the defendant liable for copyright infringement.

Moreover, in *Interbox Promotion Corporation v. Quebec Inc. (Hippo Club)*, where the official broadcaster of the Canadian Middleweight Championship sued Quebec-based licensing establishments for presenting the televised event to the clientele without authorization on the grounds of signal piracy and copyright infringement, Justice Martineau also recognized the creativity and originality of sports telecasts.⁸⁵ Justice Martineau first acknowledged that a sports event is difficult to categorize as a “work” within the meaning of the Canadian Copyright Act⁸⁶, but he argued that “[n]evertheless, the television reproduction of the event (whether or not accompanied by audio commentary) is comparable to a ‘cinematographic work’ as set out in section 2 of the Act.”⁸⁷ He then cited McKeown’s *Fox Canadian Law of Copyright and Industrial Designs*⁸⁸ and concluded that the unpredictability of the television production of a sporting event gives an element of originality, thus can subject sports telecasts to copyright protection.⁸⁹

Both *Briscomb* and *Interbox* provide good examples of where courts distinguished “video recordings” from “video productions/cinematographic works.” Where the telecasting is a mere *mechanical* recording of an occurrence of facts in reality, then it likely does not possess enough originality to be qualified as a “video production”; rather it is only a “video recording.” A typical example of such video recording would be a security surveillance video camera installed inside banks, supermarkets or office buildings. Although there might be slow routine movements of the video cameras (rotating within 360 degrees), the video recording process does not possess enough “originality input” by human beings, thus shall not be categorized as “video productions.” However, where the telecasting process involves sufficient creative activities, such as “the use of video sequences, logos, music and graphics --ancillary works” identified by Judge Lindsay in *Briscomb*, such telecasts should be considered “video productions” or “cinematographic works,” which are protectable.

⁸² See *Briscomb*, [2006] EWHC (Ch) 1268, at 4.

⁸³ *Id.*

⁸⁴ *Id.* at 6.

⁸⁵ See *Interbox Promotion Corp. v. Quebec Inc. (Hippo Club)*, [2003] F.C. 1254 (Can. Que.).

⁸⁶ *Id.* at 4.

⁸⁷ *Id.*

⁸⁸ See JOHN S. MCKEOWN, *FOX CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS* 174-75 (Scarborough Carswell, 3d ed. 2000).

⁸⁹ See *Interbox*, [2003] F.C. at 4.

A number of recent Chinese copyright cases outside the scope of sports telecasts also address distinctions between video recordings and video productions, and thus might provide a good analogy for sports telecasts cases. In *Guangzhou Jingangyuan Karaoke Club Ltd v. Warner Music Hong Kong Limited*,⁹⁰ Warner Music sued a karaoke bar for the unauthorized display of its music videos in the bar. The defendant admitted the facts but argued that the music television videos (MTVs) they were playing were not copyrightable works because they were not “cinematographic” in nature.⁹¹

One of the issues the court addressed was whether three disputed MTVs produced in a similar manner to cinematographic works were “cinematographic works” or merely “video recordings.”⁹² Warner Music argued that the threshold for “cinematographic works” under existing Chinese copyright law only requires the creativity and duplicability.⁹³ Because a production of MTVs usually requires creative input from director, performers, cameraman, editors, fashion designers, etc., MTVs should be categorized as “cinematographic works” and should be distinguished from “mechanical video recordings.”⁹⁴ The court agreed, holding that the disputed music videos satisfied the “creativity threshold” of cinematographic works required by the copyright law and thus should be protected as copyrightable works.⁹⁵ This decision has been reinforced by other courts.⁹⁶

The reasoning in *Jingangyuan* and other MTV infringement cases is certainly a good analogy in the sports telecasts infringement cases. As with *Jingangyuan* (China 2006), *Briscomb* (UK 2006) and *Interbox* (Canada 2003), Chinese courts should distinguish “video recordings” from “video productions/cinematographic works” when evaluating the copyrightability of live sports telecasts. For sports telecasts that contain sufficient creative activities, i.e. creative input from directors, cameramen, commentators, etc., and possess enough “original elements” such as “logos, graphics, music, etc.,” they should be recognized as “video productions/cinematographic works” subject to copyright protection. This is especially true for modern sports telecasts produced by professional sports leagues or broadcasting organizations, which is an enormous undertaking involving immense creative inputs from directors, producers and talents on down to the camera people, sound technicians, graphics operators, etc.

When live sports telecasts that contain sufficient creativity are protected as copyrightable works, i.e. “cinematographic works,” sports leagues can then take actions as owners of copyrightable works based on Article 10 of the PRC Copyright Law to enforce against infringing websites.⁹⁷

⁹⁰ Guangdong High Court 2005-Yuegaofa minsan zhongzi No. 357.

⁹¹ See *Jingangyuan*, 2005 Yuegaofa minsan zhongzi No. 357, at 3.

⁹² *Id.* at 3.

⁹³ *Id.* at 4.

⁹⁴ *Id.*

⁹⁵ See *id.* at 5.

⁹⁶ (See *Shanghai Kylin Mansion Culture & Entmn’t Co. v. Go East Entmn’t Co.*, Shanghai High Court 2005-Hugao minsan zhizhongzi No. 98; and *Shanghai Haoledi Music Entmn’t Ltd. v. Sony Music Entertainment HK Ltd.*, Shanghai High Court 2005- Hugao minsan zhizhongzi No. 115.).

⁹⁷ Under Article 10, copyright owners have the following rights: (1) the right of publication; (2) the right of authorship; (3) the right of alteration; (4) the right of integrity; (5) the right of reproduction; (6) the right of

2. *Expanding Rights of Broadcasters to Include Internet Media*

Also, as far as the rights of broadcasters are concerned, China should amend its current PRC Copyright Law to expand the interpretation of “broadcasting”⁹⁸ from traditional media of “radios, televisions, cables etc.” to new media such as online content.⁹⁹ After all, the neighboring rights that broadcasters enjoy under the copyright law regime should not be restricted or discriminated against only because of the different medium that is used to carry the content.

B. Adopt Counter Technologies to Combat Against Online Piracy

New technologies such as fingerprinting, watermarking, filtering and automated take-down tools, etc. might make it possible to prevent piracy content from the internet. For instance, TVU, developers of the TVUBroadcast software and the TVU BD1000 Broadcast Appliance, claimed a few years ago that it had developed a new product that provides a solution specifically designed for live broadcast events such as the 2008 Beijing Olympic Games.¹⁰⁰ Based on TVU, the VideoDNA Live service offers broadcasters and rights holders real-time digital fingerprinting, fully automated identification, and tracking and monetization of live media content on the web.¹⁰¹ The new technology will allow content owners, broadcasters and content distributors (including P2P websites) to identify and track unauthorized uploads of broadcast content within minutes of the event taking place.¹⁰²

At present, there is ongoing debate in China as to whether content service providers (CSPs) and/or internet service providers (ISPs) should be required to install “filtering” technology before they can enjoy the “safe harbor” rule provided by the *Regulation on the Protection of Rights of Communication through the Information Network* (Information Network Regulation).¹⁰³ Based on the current Information Network

distribution; (7) the right of rental; (8) the right of exhibition; (9) the right of performance; (10) the right of showing; (11) the right of broadcast; (12) the right of communication on the information networks; (13) the right of making cinematographic works; (14) the right of adoption; (15) the right of translation; (16) the right of compilation; and (17) any other rights to which copyright owners are entitled. COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 10 Here, sports leagues might base their claims on the specific provisions (5), (11), (12) and (17) to enforce their rights.

⁹⁸ COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 44.

⁹⁹ Of course if China agrees to sign the WIPO Broadcasting Treaty, a draft of which is not yet available, rights of broadcasters will also be extended to the internet. However, since key members of WIPO fail to agree on key terms of such a treaty, it is unclear when the draft of the WIPO Broadcasting Treaty will be finalized.

¹⁰⁰ See Mika Saitoh, *TVU and Vobile Announce First Commercial Deployment of Digital Fingerprinting for Live Event Producers and Content Owners*, REUTERS (May 19, 2008), <http://www.reuters.com/article/pressRelease/idUS127078+19-May-2008+PRN20080519>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Regulation on Protection of the Right to Network Dissemination of Information (promulgated by the State Council on May 10, 2006, effective July 1, 2006), art. 14), <http://www.chinaitlaw.org/?p1=>

Regulation and a number of recent ISP liability cases, take-down notices are usually required before alleging the secondary liability of ISPs.¹⁰⁴ Although the requirement of sending take-down notices is generally considered a good solution to balance the rights of content owners and the obligations of ISPs and might have proved efficient in resolving other copyright infringement cases such as online piracy of movies and music, it is not helpful in resolving the current issue of online piracy of live sports telecasts.

Because of the unique “live” characteristics of sports telecasts, to require the proprietors to send P2P websites a take-down notice to remove the infringing content is mostly, if not always, unrealistic and meaningless. As it takes at least a few hours, if not days, to go through the “take-down” and “counter take-down” notice process, it will be far too late when P2P websites eventually agree to remove the infringing content. Therefore, to require the CSP and ISP websites (including P2P and streaming sites) to install filtering technology and/or provide automated take-down tools before they can claim “safe-harbor” rule protection would be a good solution to solve the online piracy of live sports telecasts.

One possible objection that websites might raise against the idea of mandatory installation of filtering technology might be the costs. However, because most P2P or UGC websites might have already installed similar filtering technology/software to comply with local laws and regulations,¹⁰⁵ the argument that installing filtering technology might bring additional economic burden should not stand.

C. Harmonization of International Laws

Online piracy of live sports telecasts is a global problem. Pirate servers are usually located in multiple countries, such as Canada, the Netherlands, China, Korea, Sweden, the U.S. and the U.K.¹⁰⁶ They engage in “intellectual property arbitrage” by exploiting variances in countries’ laws and enforcement mechanisms to avoid enforcement.¹⁰⁷ As Professor Pamela Samuelson explains in her article, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, IP arbitrage can arise where courts in one country cannot enforce a judgment against a foreign P2P in the absence of domestic assets; furthermore, enjoining the foreign P2P websites will fail to stop domestic users from accessing the technology available from foreign sites via the

print&p2=060717003346 (addressing the rights of content industries and providers in the digital environment and, as with the Digital Millennium Copyright Act (DMCA), providing a number of “safe harbor” provisions for ISPs to avoid infringement liability, one of which is the receipt of a “take-down” notice).

¹⁰⁴ See Seagull Haiyan Song, *Why Were There Different Outcomes in Two Chinese ISP cases?*, 25 *THE COMPUTER & INTERNET LAW*, 6 (Sept. 2008) (providing a more detailed discussion of the liability of ISPs and the necessity of take-down notices).

¹⁰⁵ For instance, Chinese website operators are required by local laws to filter phonographic content, violent pictures and other sensitive information.

¹⁰⁶ See Mellis, *supra* note 17, at 261.

¹⁰⁷ *Id.* at 260 (quoting Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 *U. CHI. L. REV.* 223, 223 (2004)).

internet.¹⁰⁸ A consequence of the arbitrage is that the stringent laws of one jurisdiction might be weakened by the lower-protection rules in another jurisdiction.¹⁰⁹ Therefore, to effectively prevent online piracy, harmonization of national laws should be encouraged.

VI. CONCLUSION

Online piracy of live sports telecasts is a growing problem that has drawn growing attention from sports organizations, broadcasters and others in the digital environment. The increasing use of P2P technology has made sports telecasts vulnerable to copyright abuses and infringement. Unlike the United States and most European countries, where sports telecasts are protected either through its domestic legislation or the established precedents, questions remain as to whether the current Chinese legal regime protects these telecasts.

It is the belief of this author that sports telecasts satisfying the originality requirements of copyright law are and should be protected as cinematographic works subject to copyright protection. Furthermore, to allow P2P websites to free-ride on the efforts of sports organizations and official broadcasters in organizing and broadcasting the sports events will eventually hurt the consumer welfare and the local industry to a larger extent. In short, providing legal protection for live sports telecasts serves China's own purposes and interests in 1) being consistent with international practice, and 2) supporting local sports and broadcasting industries and boosting the local economy in the long term.

To respond effectively against the online piracy of live sports telecasts, China must recognize the copyrightability of sports telecasts and extend rights of broadcasters to include new media formats such as online content. Also, China might consider mandatory filtering requirements for ISPs before they can enjoy the safe harbor protection. Last, but not least, international collaboration, e.g. harmonization of international laws, will be important to avoid P2P intellectual property arbitrage.

¹⁰⁸ See Samuelson, *supra* note 107, at 230.

¹⁰⁹ *Id.* at 223.